LEGITIMATION, LEGITIMACY AND RECOGNITION IN THE CONFLICT OF LAWS*

PART II

RECOGNITION OF FOREIGN-CREATED STATUS

There is considerable talk in the cases about refusal to recognize a foreign-created status. A good example is found in the opinion of Prentice J. in *Moore* v. *Saxton*,[164] where he said :

> The matter of personal status lawfully acquired in one jurisdiction is a thing which, especially as between the states of this country, ought not to be lightly interfered with or ignored. . . . A policy of non-recognition in matters of legitimacy, save for grave and weighty reasons, would . . . . . lead to unfortunate inequalities and positive injustice. Legitimacy and the right of inheritance . . . . would be subject to fluctuation according as the person or a decedent chanced to be domiciled in this or that place. . . . In respect to these matters uniformity of status following the person wherever one is, is of prime importance.

This sort of language usually appears in cases in which the court refuses to enforce some right, nearly always inheritance, claimed by a person to flow from his status.[165] The courts of New York, even after having been shown the better path by the United States Supreme Court,[166] have quite uniformly indulged in this method of expressing the results which they have reached. Thus, children born of foreign marriages which are void, either because of remarriage without divorce or because of remarriage after divorce which was invalid for lack of jurisdiction, are denied inheritance in New York by refusal to recognize legitimation by subsequent marriage which is deemed valid at the domicile,[167] or by bigamous marriage while

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[164] 90 Conn. 164, 96 Atl. 960, 962, Ann. Cas. 1917C, 534 (1916).

[165] See *Lingen* v. *Lingen*, 45 Ala. 410, 414 (1871); *Barnum* v. *Barnum*, 42 Md. 251, 307 (1875); *Cole* v. *Taylor*, 132 Tenn. 92, 106, 177 S.W. 61 (1915).

The same sort of talk appears, also, in a few cases which enforce the claimed right. See *Moore* v. *Saxton*, 90 Conn. 164, 96 Atl. 960, 962, Ann. Cas. 1917C, 534 (1916); *McNamara* v. *McNamara*, 303 Ill. 191, 135 N.E. 410, 412 (1922); *cert. denied* 260 U.S. 734, 43 S. Ct. 95, 67 L. ed. 487 (1922), noted (1923) 36 Harv. L.R. 83, (1922) 32 Y.L.J. 86.

[166] In *Olmsted* v. *Olmsted*, 216 U.S. 386, 30 S. Ct. 292, 54 L. ed. 530 (1910).

[167] See *Olmsted* v. *Olmsted*, 190 N.Y. 458, 467, 83 N.E. 659 (1908), *affd.* 216 U.S. 386, 30 S. Ct. 292, 54 L. ed. 530 (1910), noted (1907) 20 Harv. L.R. 400 (1910) 58 U. of Pa. L.R. 558; *In re Thomann's Estate*, 144 Misc. 497, 498, 258 N.Y.S. 838 (Surr. Ct., 1932). Compare *Re Hall*,

domiciled in a state whose laws legitimate children born of any ceremonial marriage.[168]

The opinions in other cases make it clear that denial of a right claimed to flow from status need not include refusal to recognize the existence of the status, but that denial of the right constitutes refusal to lend the aid of the domestic law to enforce an incident of the status which is attributed to it by the dispositive law of the state which created it, but not by that of the state in which the attempt to vindicate the right is made. The opinion in *Olmsted* v. *Olmsted*,[169] in the Supreme Court of the United States, when contrasted with the opinion of the New York Court of Appeals in the same case,[170] and the interpretation of the case in later cases in the inferior courts of New York,[171] shows what is really done in these cases. In *Olmsted* v. *Olmsted* the Supreme Court directed its attention solely to the question of the power of the State of New York to control devolution of real estate within its boundaries. There is no discussion of the power of New York to refuse to recognize the foreign creation of a status.[172] The process is clearly shown in the leading case, *Birtwhistle* v. *Vardill*,[173] in which Lord Brougham pointed out that a person can be legitimated under foreign law and yet be incapable of taking English land by descent.

The form of language found in some of the cases—'a child is, or is not, legitimate for purposes of descent'[174]—comes nearer to expressing the actual process of the courts. It does not, however, clarify the process sufficiently. There still remains a danger that some courts will think that they are determining

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61 App. Div. 266, 70 N.Y.S. 406, 414 (1901), where, with respect to a claim of legitimacy based upon such a marriage, it was said that: "Public policy has never led the courts of our state to a denial of the status of legitimacy to the issue of the marriage, when legitimate where born."

[168] See *In re Bruington's Estate*, 160 Misc. 34, 289 N.Y.S. 725, 729 (Surr. Ct., 1936), noted (1937) 46 Y.L.J. 1049.

[169] 216 U.S. 386, 30 S. Ct. 292, 54 L. ed. 530 (1910).

[170] See 190 N.Y. 458, 467, 83 N.E. 569 (1908).

[171] In these later cases the inferior courts added talk about the power of the state to control devolution of real property within its borders. See *In re Bruington's Estate*, 160 Misc. 34, 289 N.Y.S. 725, 730 (Surr. Ct., 1936); *In re Thomann's Estate*, 144 Misc. 497, 498, 258 N.Y.S. 838 (Surr. Ct., 1932).

[172] The Supreme Court of Alabama recognized, in *Brown* v. *Finley*, 157 Ala. 424, 47 So. 517, 21 L.R.A. (N.S.) 679 (1908), that the question was heritability, not status.

[173] 7 Cl. & F. 895, 954–955 (H. of L., 1840).

[174] See *Re W.*, [1925] 2 D.L.R. 1177, 1178, 56 Ont. L.R. 611, and *Fenton* v. *Livingstone*, 3 Macq. 497, 537, 551, 557 (H. of L., Sc. 1859), in which all of the Lords who gave opinions examined the law of the situs of the land in order to determine whether the claimant was legitimate.

the question of status *vel non*. The Chief Justice of the Nevada court saw this lack of clarity and, in *In re Forney's Estate*,[175] vividly portrayed the danger which might arise from the use of this form of expression. He said :

> A child's status cannot be made to turn upon the existence or nonexistence of an estate. There are things more sacred to us than property, and one of them should be a personal status as to legitimacy.
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> The logic of counsel's argument is to make the status of the child turn upon the fact that Forney left personal property in this state. It seems to us that they have put the cart before the horse. The right to inherit depends upon the child's status, and not its status upon the existence of an estate in Nevada.
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> And further if counsel's theory is correct, a father having once legitimated a child in Nevada, where the law as to legitimating a bastard is not so rigid as in California, and being unable to obviate the force and effect of such legitimation in this state, but being desirous of accomplishing the same result and of depriving the child of its right to inherit . . . . the facts not being such as to constitute a legitimating in California, would simply have to transfer his property to California.

Starke[176] offers, as a solution for the confusion which he sees, a distinction between

> (a) The personal status, the *status 'in abstracto'*, corresponding to Professor Allen's definition as a condition of belonging to a particular class of persons subject to peculiar legal capacities and/or incapacities;[177] and
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> (b) The positive status, the *status 'in concreto'*; extending to the particular rights, duties, capacities, or incapacities which a person has by virtue of this abstract relation.

He suggests that a clear distinction between these two forms of status is particularly helpful in "a truly scientific branch of law like private international law" which has need of "precision of terminology and of clarity of concepts."

One cannot disagree with Starke's opinion that the Conflict of Laws requires both precision of terminology and clarity of concepts. There is, however, considerable danger that the use of the same noun, coupled with two or more modifying words or phrases to express different ideas, will lead to confusion

[175] 43 Nev. 227, 184 Pac. 206, 186 Pac. 678, 679, 24 A.L.R. 553 (1919).
[176] *A Note on Status* (1938), 54 L.Q.R. 400, 401.
[177] See Allen, *Status and Capacity* (1930), 46 L.Q.R. 277, 292.

between the ideas.[178] Is it not wiser and safer to employ the method of expression of Beale and Cheshire, the former of whom speaks of "status" and of "effect" of status,[179] and the latter of "status" and of "legal consequences", "abilities and disabilities" attached to status?[180] What term is used to express the idea of effects, or legal consequences flowing from the status is unimportant. The writer suggests the use of the word "incidents", which was used by Beale in his classes.

The *status* of a child is to be taken, not to include but to be identified by certain factual relations between the child and parent plus the content of the incidents attributed to it by the state which has jurisdiction of the creation of status. A legitimate child is born into a group of incidents which include usually the child's right to the name of the father, to support, protection and education, and to rights of inheritance from and through the parents; and the parent's right to custody, services and inheritance.[181] The legal relationship is founded upon birth and community of blood. To the legitimated is attributed in general the same group of incidents, sometimes less comprehensive.[182] The status is founded upon community of blood but the law operates not upon birth but upon some event occurring after birth. To the recognized natural child, also, there is attributed the same general group of incidents, usually somewhat less comprehensive than the group attributed to the legitimated child.[183] This status is also

[178] Consider, for instance, the confusion which may arise from the use of the word "capacity". An especially vivid example appears in Barbey's treatment of capacity in matters of contract. He finds in the English law a general rule of capacity of persons to make contracts and an exception thereto in cases of mercantile contracts; whereas it seems that, in the common law, capacity in fact attaches to the transaction rather than to the person and that the categories are *capacity to marry, capacity to make mercantile contracts, etc.* See BARBEY, LE CONFLIT DES LOIS EN MATIÈRE DE CONTRATS DANS LE DROIT DES ÉTATS-UNIS D'AMÉRIQUE ET LE DROIT ANGLAIS COMPARÉS AU DROIT FRANÇAIS (1938) 58–76, inc., and my *Universality in the Conflict of Laws*, 1 Louisiana L. Rev. 695, 707 (1939).

[179] BEALE, sec. 120.1, p. 651.

[180] CHESHIRE, p. 209. See also HUBER, DE CONFLICTU LEGUM, sec. 12 (as translated by Davies, (1937) B.Y.I.L. 49, 74.1.

[181] This list does not purport to be complete.

[182] Children legitimated by the slave-marriage statute do not inherit collaterally. *Cole* v. *Taylor*, 132 Tenn. 92, 177 S.W. 61 (1915).

[183] In Italy recognized natural children do not inherit collaterally, their rights of inheritance are diminished if legitimate or legitimated children are in existence, and the reciprocal rights of alimentation do not extend to the more remote relatives. *Codice Civile*, Arts. 737, 744–749, inc.

Similarly restricted rights exist in other civil law states. Chile, *Código Civil*, Arts. 983–993, inc; France, *Code Civil*, Arts. 756–762, inc.; Germany, *B.G.B.*, Arts. 1736, 1737; Switzerland, *Code Genevois*, Arts. 756–760, inc.; Portugal, *Código Civil*, Arts. 1989–1992, inc.; Spain, *Código Civil*, Arts. 840–844, inc.

founded upon community of blood and is to be distinguished from the status of legitimation by the fact that it is predicated, in those states which create it, upon recognition of parenthood by the parent rather than upon intermarriage of the parents subsequent to birth, or upon some other act made effective to legitimate by statute.

In order to determine whether a status has been created by a foreign state in a particular child, examination of the legal results flowing, under the foreign law, from the facts must be made. If the legal result is the attribution of a group of incidents, which will be attributed to other children upon the same type-group of facts, a status is created. For example: A child is born, having been begotten by a man upon the body of woman who is not the man's wife; the man recognizes that he is the father of the child and does so by an attested instrument. Upon these facts the domicile will confer upon each certain rights and duties. A status has been created.

There is no need to consider what name the creating state gives to the status, the significant elements are the fact-group and the nature and extent of the attributed incidents. Since the status of children in civilized countries varies little it has been common, however, to identify foreign status by names which are in general currency in similar forms in the various languages—legitimacy, legitimation.[184] In cases of illegitimacy, legitimacy or legitimation little harm is done by this identification, because the creation is upon similar facts in all states.

In cases of recognized natural children there may ensue, from this custom of using a general nomenclature, an unfortunate result. It is possible that this caused the decision in *Atkinson* v. *Anderson*,[185] in which children recognized in Italy were compelled to pay a succession tax as "strangers to the blood". It appears from the printed arguments of counsel that mention was made only of the rights of inheritance given by the Italian law. If counsel had considered that there was a status which, under the law of Italy, gave to the children rights and duties *inter vivos*, as well as rights of inheritance, which differed only in detail from the rights and duties of legitimated and legitimate children, the court might have been willing to consider these children "lineal issue" of their father. The suggestion is that counsel failed to argue the *inter vivos* incidents because

[184] Even in German the Latin root is used in the nouns, *Legitimation* and *Legitimatät*, and the verb, *legitimieren*.
[185] 21 Ch. D. 100 (1882).

the children could not be brought within either category, legitimate or legitimated,[186] and that inability to identify the status of the recognized natural child with either of the well known terms caused counsel to disregard the great similarity.

After determination that a status was created in the child by a state it becomes necessary to decide how that child is to be treated when it claims rights in another state. It is submitted that the method of reaching this decision is to consider the fact-group upon which the foreign state predicated the aggregate of incidents and the nature and extent of that aggregate.

If the child, or the parent, claims a right under the dispositive law of a foreign state in which certain events occurred the forum determines whether the foreign state created a status, whether that state attributed the claimed incident to that status, and, if so, enforces the right;[187] unless the enforcement is contrary to the public policy of the forum.[188] In this case the process by which the foreign law determines the existence of the right in the claimant is of interest to the forum only for purposes of the doctrine of public policy. In order to decide whether the foreign state whose law is to be applied does or does not attribute the right to the claimant, it is necessary to answer only the simple question: Does the law of *X* give this claimant the right claimed? Inquiry into the reasons why the law of *X* gives the right is made because the technique of courts does not permit of asking an expert in the law of *X* the simple question suggested above, and in order to create an opportunity for the application of the public policy of the forum.

On the other hand, if a right is claimed under the dispositive laws of any state other than that which, the party alleges, created a status it will be necessary for the forum to decide :— First: Was a status created? Second: What are the consequences of that status? Suppose that certain events occurred

[186] Of course it is possible that the English court would have considered that marriage of the parents was essential in order to take the children out of the category of "strangers to the blood" for purposes of English legacy tax. Subsequent marriage did so in *Skottowe* v. *Young*, L.R. 11 Eq. 474 (1871). Compare the attitude of the court in Pennsylvania in *Moretti's Estate*, 16 D. & C. 715 (Pa., 1929).

[187] *Sneed* v. *Ewing*, 5 J. J. Marsh. 460, 22 Am. Dec. 41 (Ky., 1831); *In re Forney's Estate*, 43 Nev. 227, 184 Pac. 206, 186 Pac. 678, 24 A.L.R. 553 (1919); Oberlandesgericht, Karlsruhe, March 3, 1931, 8 Jahrbuch freiw. Gerichtsbarkeit 116, I P R Spr. 1931, 184. Accord: *Moretti's Estate*, 16 D. & C. 715 (Pa., 1929).

See BEALE sec. 120.1, p. 652.

[188] Accord: *de Brimont* v. *Penniman*, 10 Blatchf. 436 (C.C.S.D.N.Y., 1873).

in state X; that upon those events X created a status; and that, relying upon that status, the claimant asserts rights under the law of the forum. The inquiry of the forum is: Postulating that a status exists, do we, under our dispositive laws, attribute any incidents thereto and, if so, do we attribute the particular incident claimed? In order to answer this question the court must determine into which of two categories the status falls, (a) a status existing at the forum, or (b) a status unknown at the forum.

There is one status of children known in all common and civil law states. It is usually created upon birth in lawful wedlock[189]—legitimacy. The status of legitimation is now created by all the civil law states and by a great majority of common law states. The great difference between legitimation and legitimacy is that the former is created by some event occurring after the illegitimate birth of the child. In all states which create it, marriage of the parents after the child's birth is one event which is effective. In a considerable number of these states recognition by the parent is another method. In most of the civil law states the recognized natural child is given a status, while in the common law states which treat recognition as a mode of creating a status the new status is indistinguishable from legitimation except that there is no marriage of the parents.

In cases of legitimacy from birth in wedlock no difficulties arise. All courts know legitimacy thus created and recognize the status, wherever created. Legitimacy created by statute upon birth from a marriage deemed null in law has, as yet, come into question only in American courts.[190] In all the cases but two the creation of legitimacy has been recognized.[191] Of

[189] Legitimacy may also be created by the action of a statute upon birth in putative marriage, in marriage null in law and, in two States, upon birth alone.

[190] Legitimacy arising from putative marriage is known in all civil law states and, arising as it does from birth in marriage null in law, will undoubtedly receive the treatment which that statutory legitimacy here receives. *Semble: In re Hall*, 61 App. Div. 266, 70 N.Y.S. 406 (3d Dept. 1901).

[191] *Mund* v. *Rehaume*, 51 Colo. 129, 117 Pac. 159, Ann. Cas. 1913A, 1243 (1912); *Moore* v. *Saxton*, 90 Conn. 164, 96 Atl. 960, Ann. Cas. 1917C, 534 (1916); *Green* v. *Kelly*, 228 Mass. 602, 118 N.E. 235 (1917); *Harding* v. *Townsend*, 280 Mass. 369 (1932); *semble*, *McMillan* v. *Greer*, 85 Cal. App. 558, 259 Pac. 995 (1927). *Contra: In re Bruington's Estate*, 160 Misc. 34, 289 N.Y.S. 725 (Surr. Ct., 1936); *Greenhow* v. *James*, 80 Va. 636, 56 Am. Rep. 603 (1885). *Seedat's Execrs.* v. *The Master* (*Natal*), [1917] App. Div. 302 (So. Africa), *Hyde* v. *Hyde*, L.R. 1 P. & D. 130 (1866) and *Fenton* v. *Livingston*, 3 Macq. 499 (H. L. Sc. 1859) make it appear that the British courts would follow the American majority rule. See text *supra* p. 594, at notes 31–33 inc.

those two, one came under the influence of the southern abhorrence of miscegenous marriages,[192] and the other was decided in New York whose courts have espoused the peculiar doctrine that a legitimate status is effectively created by marriage only if the marriage is valid according to New York ideas.[193] While no case concerning legitimacy created by the statutes of Arizona[194] or North Dakota[195], which declare that all children are the legitimate children of both parents, has come before the courts, no reason why the results should be different is seen. In such cases the difficulty of showing paternity will probably be greater, but, if paternity is shown or if maternity is in question, the difference between no marriage and a void marriage seems too slight to justify a different result.

The situation with respect to legitimation is nearly the same. All the civil law states create the status as do most of the common law states.[196] The differences in the mode of legitimation have as yet caused no differences in result. Legitimation, however created by a foreign state, has been everywhere recognized in the courts of this country, whether the method was by special statute operating upon the particular parent and child,[197] or under a general statute providing for legitimation by subsequent marriage of the parents,[198] by judicial decree,[199] or by acknowledgment and adoption.[200] It appears that American courts consider the criterion of legitimation to be some event subsequent to birth which creates a status between parent and child[200A] and that the emphasis is to be put upon similarity of attributed incidents rather than upon similarity of event.

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[192] *Greenhow* v. *James*, 80 Va. 636, 56 Am. Rep. 603 (1885).

[193] *In re Bruington's Estate*, 160 Misc. 34, 289 N.Y.S. 725 (Surr. Ct., 1936).

[194] Rev. Code (1928), sec. 273.

[195] Sess. Laws (1917), c. 70.

[196] Of the United States only Colorado, Kansas, Maine and Wyoming do not have legitimation statutes.

[197] *Scott* v. *Key*, 11 La. Ann. 232 (1856).

[198] *Succession of Caballero*, 24 La. Ann. 573 (1872); *Bates* v. *Virolet*, 33 App. Div. 436, 53 N.Y.S. 893 (1898); *In re McCausland's Estate*, 213 Pa. 189, 62 Atl. 780, 110 Am. St. Rep. 540 (1906); *DeWolfe* v. *Middleton*, 18 R.I. 810, 26 Atl. 44, 31 Atl. 271, 31 L.R.A. 146 (1893); *Valley* v. *Lambuth*, 1 Tenn. App. 547 (1925); *Udny* v. *Udny*, 1 Sc. App. 441 (H. of L., 1869); *In re Askew*, [1930] 2 Ch. 259.

[199] *Smith* v. *Derr's Admrs.*, 34 Pa. 126, 75 Am. Dec. 641 (1859).

[200] *McNamara* v. *McNamara*, 303 Ill. 191, 135 N.E. 410 (1922), *cert. denied* 260 U.S. 734, 43 S. Ct. 95, 67 L. ed 487 (1922), noted (1923) 36 Harv. L.R. 83, (1922) 32 Y.L.J. 86. It is to be noted that acknowledgment and adoption of a child of the blood of the adopter is "legitimation by adoption", not "adoption" *simpliciter*. The latter is typically the creation of the status of parent and child between persons of different blood.

[200A] *McNamara* v. *McNamara*, 303 Ill. 696, 135 N.E. 410 (1922) *cert. denied*, 260 U.S. 374.

In England, before the effective date of the Legitimacy Act of 1926, the courts purported to recognize a foreign *legitimation* as *legitimacy*,[201] and to see no difference between the two *status*. It is possible that this position was taken because the cases of legitimation which came before them were all cases in which the status was created under the law of some state which, following the civil law, predicated legitimation only upon subsequent marriage of the parents. The status which they had to characterize was one which differed from legitimacy only in the temporal feature. It is however, doubtful whether these courts actually assimilated legitimation to legitimacy.

One way to explain the leading case of *Doe dem. Birtwhistle* v. *Vardill*,[202] is that which was employed by Lord Brougham to explain the denial of inheritability of English land in a foreign legitimated child :[203]

> The land . . . . . is impressed with a particular quality. The English Common Law says, "Let the land not go to the antenatus." . . . The learned Judges . . . appear plainly to admit that a person may be legitimate for all other purposes and yet incapable of taking land by descent—that we ought not to say "a man's eldest lawful son is his heir" but "a man's eldest lawful son if born in lawful wedlock".

Another way to explain the result is to say that the English courts recognized legitimation as a status different from legitimacy, so closely analogous to the latter that most of the incidents would be identical, but that certain of the incidents of legitimacy, inheritance of land, nationality,[204] and nobility[205] would not flow therefrom.

It may seem that these two explanations constitute an example of a distinction without a difference. The results flowing from the difference, however, may differ for psychological reasons. If the second method of expression is chosen—if the courts think of the foreign status as one which bears a name different from that of any which is created domestically—there is danger that they will see the difference more vividly than the similarities, and refuse to recognize its local existence. This

[201] See *Doe dem. Birtwhistle* v. *Vardill*, 7 Cl. & F. 895, 954–955 (1840); *Skottowe* v. *Young*, L.R. 11 Eq. 474, 477 (1871); *In re Andros*, 24 Ch. D. 637, 640 (1883).

[202] 7 Cl. & F. 895 (1840).

[203] *Ibid.*, at pp. 954–955.

[204] *Sheddon* v. *Patrick*, 1 Macq. 535 (H. of L., 1854).

[205] *Semble The Strathmore Peerage Case*, 4 Wils. & S. (Sc.) Appendix, p. 80 (H. of L., 1821); but *cf. The Lauderdale Peerage Case*, 10 App. Cas. 692 (H. of L., Sc. 1885).

danger is exemplified by Beale's treatment of the problems arising from the civilian status of the "recognized natural child". He says :[206]

> Thus, the status of "recognized natural child", to be distinguished from a child legitimated by recognition, exists by the law of several European states. There being no such status created by the common law, a foreign child having such a status will be treated in a state in which the common law prevails no differently from an illegitimate child, even though the existence of the status is recognized; the state provides by its laws no different treatment for persons having this status than for other persons.

If, on the other hand, the court's thought is directed to the creation of a status by some foreign state—not of a named status but of *a* status—the chances that the similarities will be given weight is increased.

Let us take the recognized natural child as an example. If the court gives his status a name before it considers the incidents it is likely to emphasize the fact that there was no marriage between the parents and that the rights of such children are more restricted than those of children born in wedlock. But, if the court considers first the events and the incidents and finds that a status was created, it is more likely to see that the child's rights are of the same kind as those of the legitimate or legitimated child, even though somewhat more restricted. It is more likely to emphasize the common blood, the reciprocal rights of support, of services and education, and the rights of inheritance and to minimize the fact that there was no marriage.[207]

The advisability of the suggested approach is based upon the hereinbefore unexpressed premise that there is a generally accepted modern public policy in favour of giving to children all the advantages possible. This modern policy finds expression in England in the limitations which the courts have attached to the rule in *Doe dem. Birtwhistle* v. *Vardill* which, by a series of cases beginning in 1862, was confined to inherit-

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[206] BEALE, sec. 120.1, pp.651–652.

[207] See *Moretti's Estate*, 16 D. & C. 715, 718 (Pa., 1929). Compare *Burnfiel* v. *Burnfiel*, 20 Sask. L.R. 407, [1926] 1 W.W.R. 657, with *Forbes* v. *Bailey*, 14 E.L.R. 514 (P.E.I., C.A. in Eq., 1914). The Saskatchewan court refused to recognize the existence of a foreign adoption in that Province because no status of adoption was there created. In Prince Edward Island, on the other hand, under the same conditions the opposite result was reached by consideration of the similarities of adoption and legitimation.

ance of land.[208] This policy appears to be strong in this country except in Alabama where the effective existence of no statutorily created foreign status is recognized,[209] and in Florida where a foreign-adopted child is, by statute, denied inheritance unless it becomes a citizen of the State.[210] The modern policy appears in Portugal where a foreign-adopted child is recognized to have an effective status although adoption is not there created.[211]

This approach will bring local public policy into the question at the proper stage—at the stage of deciding whether the differences in events and incidents are so great that policy demands refusal of a particular incident.

If the status which is created abroad is essentially unlike any local status, the question is not whether its existence shall be recognized, but whether any effects or a particular effect shall be given to it locally. Let us again take the recognized natural child as an example and suppose that the absence of marriage between the parents or of any act of the parent which is equivalent to adopting the child as his own is considered to constitute such great dissimilarity from legitimacy or legitimation that there cannot be assimilation thereto. One possible method of treatment is that put forth by Beale:[213] "The state provides by its law no different treatment for persons having this status than for other persons." Another possible method is that suggested by Cheshire :[214]

> Jurists have affirmed that all institutions unknown to English law must be completely ignored. It has been said for instance, that 'a status of a kind not recognized by English law will not be recognized as such in England'.[215] We will recognize, for instance, the status of lunacy but not that of prodigality. The status of the parties to

[208] This series of cases established the recognition of the effectiveness of foreign legitimation to put the child in the class of "children" under a bequest of personalty [*Goodman* v. *Goodman*, 3 Giff. 643 (Ch., 1862)]; to take the child out of the class of "strangers to the blood" for tax purposes (*Skottowe* v. *Young*, L.R. 11 Eq. 474 (1871)]; to put it in the class of "next of kin" for inheritance of personalty [*In re Goodman's Trusts*, 17 Ch. D. 266 (C.A., 1881)]; and in the class of "children" under a devise of realty [*In re Grey's Trusts*, [1892] 2 Ch. 88)].

[209] *Lingen* v. *Lingen*, 45 Ala. 410 (1871) (*legitimation*); *Brown* v. *Finley*, 157 Ala. 424, 47 So. 577, 21 L.R.A. (N.S.) 577 (1908) (*adoption*).

[210] *Tankersley* v. *Davis*, 128 Fla. 507, 175 So. 501 (1937) (applying Fla. Comp. Gen. L. (1927) sec. 5488).

[211] *Figueiredo* v. *Guimarais*, Trib. Sup. Lisbon, May 15, 1934, 2 Nouv. rev. de dr. int. pub. 424 (1935).

[212] This should be true of the other approach but, as suggested above, the danger is that public policy will come in at the stage of deciding whether to recognize the status.

[213] Sec. 120.1, p. 652.

[214] Pp. 144–146, inc.

[215] Sec. 6 HALSBURY'S LAWS OF ENGLAND 198 (f). See also FOOTE, p. 543.

> a foreign adoption would be disregarded before 1927, but would be recognized after the proceeding had been statutorily introduced into England. *Such statements are obviously unacceptable.* England is not the arbiter of the wisdom of foreign customs, and the courts would scarcely increase the esteem in which they are now held if they were to stigmatize a foreign institution as unworthy of recognition merely because it formed no part of English law . . . . *This is indeed to give unbounded licence to the doctrine of distinctive policy.*[216]

The last sentence of the above quotation was said with particular reference to the refusal of the English courts to recognize the disqualifications imposed upon a French prodigal by reason of his French status. It seems, however, to be equally applicable to Cheshire's earlier mention of adoption and to the other foreign status of children. No valid reason appears for distinction between capacities, and incapacities, attributed by the foreign state to a status there created. If this suggestion be followed the result will be that the wisdom of enforcing the particular incident demanded will be considered in the light of public policy. In the case of the recognized natural child the court might decide that the incident of inheritance from the parent should be allowed, but that the absence of legitimation should entitle the sovereign to the higher legacy duty imposed upon strangers to the blood.

This was the approach of the French Court of Cassation and of the Supreme Court of Argentina in two recent cases. In the French case[217] the facts were that a grandfather adopted his grandchild under the laws of India at a time when he had a child living. The effect of adoption in India, like that of French adoption was to remove the adopted child from its own parents' family and transfer it to its adoptive family. In France adoption by a person who has living children is not permitted. The Court of Cassation recognized the status created in India and its effectiveness to remove the child from its parents' family, but applied French public policy to refuse to allow it to inherit land in French Indo-China as the child of the

[216] The italics in this quotation are supplied by the present writer. And see especially *In re Luck*, [1940] Ch. 323, 330, [1940] 1 All E. R. 375, 382, per Farwell J.: "That may appear to some minds to be a most undesirable state of affairs in which to permit the child of the irregular union to be legitimated, but that is the law of the domicil, and in my judgment it would be wrong for me to say that that law was not to be applied."

[217] *Pounnoucannamalle* v. *Nadimoutoupoulle*, Cass. Req. April 21, 1931, S. 1931. 1. 377.

adopter.[218] In the latter case,[219] the Argentine court, by whose legal system adoption is not created, appeared ready to decide the question of the death duty rate independently of that of the right of an Italian-adopted child to inherit.

In order to decide whether a right asserted by a claimant should be treated as one which flows from status, if at all, or as one which is given irrespective of the existence or non-existence of status it may be necessary to examine both the foreign and the domestic laws. This technique need be and will be used only if the dispositive laws of the forum confer the right only as an incident of status. Thus, if, by the dispositive rules of the forum, a particular right is given to all children who have been recognized by the father as his, the forum will not inquire into the creation of a status by the domiciliary state. If, on the other hand, the right is given to "children" the claimant must show that he has the status of "child".

The simplest case is that in which the statute of the state which creates the right provides that the illegitimate child of a female, or the illegitimate child of a father who recognizes it as his, "shall inherit"[220] or "is an heir"[221] of the parent. No inquiry will be made to determine whether the law of the domiciliary state created a statutory status of a type which would give rights of inheritance in that state.

In some states the policy of protecting children is so strong that a statute which appears to be one which creates legitimacy or legitimation is, nevertheless, held to be a statute of descent in so far as property which is to descend or be distributed under their laws is concerned. A statute which provides that: "The issue also in marriage deemed null in law, shall, nevertheless, be deemed legitimate" may be construed as a statute

[218] It is immaterial for present purposes that the decision was probably wrong, the error arising from failure to apply public policy both ways. If French public policy will not allow a child adopted under these conditions to be transferred to the family of the adoptive parent, neither will it allow it to be removed from its own family. The child, therefore, though it could not inherit as the adopted child of the grandfather, should have been allowed to inherit as his grandchild.

[219] *Marchini's Case*, Buenos Aires, Dec. 10, 1926, 23 Jurisprudencia Argentina 856 (1926).

[220] *Brewer* v. *Blougher*, 14 Pet. 178, 10 L. ed. 408 (1840); *In re Jones' Estate*, 192 Ia. 78, 182 N.W. 227, 16 A.L.R. 1286 (1921); *Smith* v. *Smith*, 105 Kan. 294, 182 Pac. 538 (1919); *McLean* v. *McLean*, 92 Kan. 326, 140 Pac. 847 (1914).

[221] *In re Wehr's Estate*, 96 Mont. 245, 29 Pac. (2d) 836 (1934); *Moen* v. *Moen*, 16 S.D. 210, 92 N.W. 13 (1902). Partly upon the ground that the Greek Indians had no word for "legitimate", sec. 258 of the Creek statute providing that no person not recognized as a child should be entitled to any share in its parent's estate, was characterized as a statute of inheritance. *Green* v. *Wilson*, 112 Okla. 228, 240 Pac. 1051 (1925).

of descent,[222] as may one which provides that "Where the father and mother of an illegitimate child shall enter into the bonds of lawful wedlock . . . ., such child shall thereby become legitimated and enjoy all the rights as if born during the wedlock."[223] It is easier for the court so to construe such a statute if it appears in the Statute of Descents,[224] but the court of Pennsylvania reached the result by construction of Pennsylvania Act of May 14, 1857[225] which was entitled "An Act to legitimate children born out of lawful wedlock".[226] The more usual technique, however, is to characterize statutes of this nature as statutes creating status,[227] even if this characterization means depriving the child of the beneficial incident claimed by it.[228] The North Dakota court was apparently reluctant to reach this result but felt compelled thereto by the terms of the statute and its position in the statute book. Young J.

[222] *McMillan* v. *Greer*, 85 Cal. App. 558, 259 Pac. 995 (1927). *Hearing* denied by Cal. Supr. Ct., 259 Pac. 998; noted (1928) 1 Calif. L.R. 270. *Sneed* v. *Ewing*, 5 J. J. Marsh. 460, 22 Am. Dec. 41 (Ky., 1831) (Ky. Stat. 1796, sec. 19); *Morris* v. *Williams*, 39 Ohio St. 554 (1883) (Ohio Acts of 1805 sec. 13).

[223] *Wilson* v. *Storthz*, 117 Ark. 418, 175 S.W. 45 (1915) (Arkansas Acts 1866–67, sec. 3); *Hall* v. *Gobbert*, 213 Ill. 208, 72 N.E. 806 (1904) (Ill. Rev. Stats. (1895) c. 39, sec. 3—originally enacted in the Statute of Wills, Rev. Stats. 1845, c. 109, sec. 52); *Harvey* v. *Ball*, 32 Ind. 98 (1869) (Ind. Stats. (1843) c. 28, Art. 5, sec. 108); *In re Estate of Oliver*, 180 Pa. 306, 39 Atl. 72 (1898) (Pa. Act of May 14, 1857—P.L.P. 597).

[224] In *Hall* v. *Gabbert*, 213 Ill. 208, 216, 72 N.E. 806 (1904), Mr. Chief Justice Riggs said of Ill. Rev. Stats. (1895) c. 39, sec. 3, which appears in the Act in regard to the Descent of Property: "This section placed as it is, cannot be construed as merely fixing the status of the appellee, but it is a rule of descent." See also *Sneed* v. *Ewing*, 5 J. J. Marsh. 460, 465, 22 Am. Dec. 41 (Ky., 1831); *Harvey* v. *Ball*, 32 Ind. 98, 101 (1869).

[225] Pa. P.L. 1857, P. 507.

[226] *In re Estate of Oliver*, 184 Pa. 306, 39 Atl. 72 (1898).

[227] *Meekins* v. *Meekins*, 169 Ark. 265, 275 S.W. 337 (1925) noted (1925). 24 Mich. L.R. 650; *Blythe* v. *Ayres*, 96 Cal. 522, 31 Pac. 915, 19 L.R.A. 940 (1892); *Mund* v. *Rehaume*, 51 Colo. 129, 117 Pac. 159 (1912); *Moore* v. *Saxton*, 90 Conn. 164, 96 Atl. 960, Ann. Cas. 1917C, 534 (1916); *McNamara* v. *McNamara*, 303 Ill. 191, 135 N.E. 410 (1922), *cert.* denied 260 U.S. 734, 43 S. Ct. 95, 67 L. ed. 487 (1922), noted (1923) 36 Harv. L. Rev. 83, (1922) 32 Yale L.J. 86; *Scott* v. *Key*, 11 La. Ann. 232 (1856); *Holloway* v. *Safe Deposit and Trust Co.*, 151 Md. 321, 134 Atl. 497 (1926), noted (1927) 27 Colum. L.R. 91; (1925) 25 Mich. L.R. 189; *Loring* v. *Thorndike*, 5 Allen 257 (Mass., 1862); *Smith* v. *Kelly*, 23 Miss. 167, 55 Am. Dec. 87 (1851); *Lincecum* v. *Lincecum*, 3 Mo. 310 (1834); *In re Wray's Estate*, 93 Mont. 525, 19 Pac. (2d) 1051 (1932); *In re Forney's Estate*, 43 Nev. 227, 184 Pac. 206, 186 Pac. 678, 24 A.L.R. 553 (1919); *Miller* v. *Miller*, 91 N.Y. 315, 43 Am. Rep. 669 (1883); *Eddie* v. *Eddie*, 8 N.D. 376, 79 N.W. 856, 73 Am. St. Rep. 765 (1891); *In re Presley's Estate*, 113 Okla. 160, 240 Pac. 89 (1924); *Cole* v. *Taylor*, 132 Tenn. 92, 177 S.W. 61 (1915); *In re Adoption and Change of Name of a Minor*, 191 Wash. 452, 71 Pac. (2d) 385 (1937); *Re W.*, [1925] 2 D.L.R. 1177, 56 Ont. L.R. 611.

[228] *Pfeifer* v. *Wright*, 41 Fed. (2d) 464, 73 A.L.R. 932 (1930); *Meekins* v. *Meekins*, 169 Ark. 265, 275 S.W. 337 (1925); *Smith* v. *Kelly*, 23 Miss. 167, 55 Am. Dec. 87 (1851); *Eddie* v. *Eddie*, 8 N.D. 376, 79 N.W. 856, 73 Am. St. Rep. 765 (1891); *In re Presley's Estate*, 113 Okla. 160, 240 Pac. 89 (1924); *Cole* v. *Taylor*, 132 Tenn. 92, 177 S.W. 61 (1915).

pointed out in *Eddie* v. *Eddie*,[229] that the section upon which reliance was placed was to be found in the chapter of which all the other sections applied to, and fixed the status of, adopted children and that a section of the chapter governing descents provided a right of inheritance for illegitimate children under circumstances not found in the case.

It seems that the statutes which are in the form of "shall be deemed to be legitimate" or "shall become thereby legitimated", and which have been characterized as statutes of descent in order to give illegitimate children rights of inheritance, are to be given a double characterization and be characterized also as statutes creating status. The California statute has been held to give rights of inheritance in that state to Alabama children born of a void marriage;[230] and to create legitimacy from which rights of inheritance flowed in Connecticut.[231] The Pennsylvania statute has been characterized by the courts of that state as one of inheritance,[232] and as one creating status,[233] and by other states as of the latter class.[234] The Kentucky legitimacy statute was characterized in that state as one of inheritance.[235] This statute was repealed by later enactment[236] and enacted as a section of the chapter governing marriage.[237] The Kentucky adoption statute, which appears as did the legitimacy act in the chapter governing descent, has, however, been characterized by the Indiana Appellate Court as a statute creating the status.[238] The courts of Arkansas,[239] Illinois,[240]

[229] 8 N.D. 376, 79 N.W. 856, 858, 73 Am. St. Rep. 765 (1891) noted (1926), 24 Mich. L.R. 850; (1930), 29 Mich. L.R. 258.

[230] *McMillen* v. *Greer*, 85 Cal. App. 558, 259 Pac. 995 (1927).

[231] *Moore* v. *Saxton*, 90 Conn. 164, 96 Atl. 960, Ann. Cas. 1917c, 534 (1916).

[232] *In re Estate of Oliver*, 184 Pa. 306, 39 Atl. 72 (1898).

[233] *In re McCausland's Estate*, 213 Pa. 189, 62 Atl. 780, 110 Am. St. Rep. 540 (1906).

[234] *Dayton* v. *Adkisson*, 45 N.J. Eq. 603, 17 Atl. 964, 4 L.R.A. 488 (1889); *Miller* v. *Miller*, 91 N.Y. 315, 43 Am. Rep. 669 (1883).

[235] *Sneed* v. *Ewing*, 5 J.J. Marsh. 460, 22 Am. Dec. 41 (Ky., 1831).

[236] Dig. Stat. Law of Ky., 1842.

[237] Carroll's Ky. Stats. (Baldwin, 1930) [c. 66, Art. 1, secs. 3, 4] secs. 2098, 2099.

[238] See *Franklin* v. *Lee*, 30 Ind. App. 31, 62 N.E. 78 (1902). *Semble* accord: *Leonard* v. *Braswell*, 99 Ky. 528, 36 S.W. 684 (1896).

[239] See *Wilson* v. *Storthz*, 117 Ark. 418, 424, 175 S.W. 45 (1915).

[240] See *Hall* v. *Gabbert*, 213 Ill. 208, 216, 72 N.E. 806 (1904), wherein it was said: "This section placed as it is [in an Act in Regard to the Descent of Property], cannot be construed as merely fixing the status of the appellee, but it is a rule of descent."

Indiana,[241] Ohio,[242] and Ontario[243] have spoken of their respective statutes in words which lead to the conclusion that they would give them the double characterization.

In Kansas the statutes are in terms of inheritance alone,[244] but the courts appear to have erected upon them and upon the doctrine of natural rights, a status which is somewhat similar to that of legitimation. Although the statute is in terms of direct inheritance, the right of inheritance from collaterals of the parents has been given,[245] and a non-statutory duty of support enforced.[246] No right of inheritance from the father is given unless the child is recognized, but the duty of support is independent of recognition. Thus an unrecognized illegitimate child is given one right which arises from birth alone. An illegitimate child which has been recognized by its father is given that right and rights of inheritance similar to those which are given in other states to legitimated children.

McDermott C.J., speaking in dissent in *Pfeifer* v. *Wright*,[247] expressed an opinion that the recognition of an illegitimate child constitutes, in Kansas, legitimation,[248] that the Kansas court takes that position,[249] and that the child could, therefore, inherit in Oklahoma as legitimated. He derived this opinion from the fact that the Kansas court says that the state has gone over to the civil law in matters of legitimation and adoption and from the fact that no right which is normally attributed to the status of legitimation by other states has been denied to an illegitimate child recognized by its father at a time when Kansas was the domiciliary state. If it be true that Kansas will deny no incident of legitimation, he is clearly right.

It is submitted that McDermott C.J.'s attention is directed too exclusively to the incidents which are beneficial to the child. There seems to be justifiable reason to doubt that the

[241] See *Harvey* v. *Ball*, 32 Ind. App. 98, 101 (1869), wherein it was said: "The effect of it is not merely or primarily to declare the personal status of the individual, but to bestow upon him the capacities of an heir."

[242] See *Morris* v. *Williams*, 39 Ohio St. 554, 557 (1883), wherein it was said: "The act should be held to embrace all cases fairly within its terms if they are also within its reason and spirit."

[243] See *Re W.*, [1925] 2 D.L.R. 1177, 1178, 56 Ont. L.R. 611.

[244] Kans. Stats. (1935) secs. 22–122, –123, –124.

[245] *Smith* v. *Smith*, 105 Kans. 294, 182 Pac. 538 (1919).

[246] *Doughty* v. *Engler*, 112 Kans. 583, 211 Pac. 619, 30 A.L.R. 1065 (1923).

[247] 41 Fed. (2d) 464, 73 A.L.R. 932 (1930).

[248] *Ibid.*, 41 Fed. (2d) at 470.

[249] *Ibid.*, at 469 (quoting *In re Rieman's Estate*, 124 Kans. 539, 262 Pac. 16 (1927).

incidents which are beneficial to the father will be attributed to a statute created upon his act of recognition. By statute, the father's reciprocal right of inheritance arises only if the recognition is mutual.[250] It appears that, at the least, mutual recognition, which may be said, parenthetically, to mean very little at the more youthful ages of the child, will be required in order that the father may become entitled to the services of the child, to recover for loss of such services from a tort-feasor, or be *prima facie* entitled to custody as against strangers. The foregoing considerations lead to the conclusion that Kansas has probably not gone over to the civil law, even to the extent of creating the status of recognized natural child since incidents beneficial to the father exist in that status as well. The question to be determined is whether the status actually created is sufficiently similar to legitimation to demand similar treatment in other states. If the recognition is mutual the status more nearly approaches legitimation, but, in the absence thereof, it seems that the majority of the Circuit Court of Appeals, Tenth Circuit, reached the correct result in *Pfeifer* v. *Wright* when they refused to treat the child as legitimated and to give it the right of inheritance attributed to legitimation by the State of Oklahoma.

If Kansas had, by statutes scattered about the statute book,[251] even though those statutes had been enacted at different times, given to recognized natural children all of the incidents of legitimation, both beneficial and onerous it would seem immaterial that the legislature had nowhere declared that the intention was to create a status: the status of legitimation would nevertheless, have been created. A status does not depend upon a name, but upon certain events creating a factual relationship to which the law attributes incidents, and upon the existence of the incidents.

If a status were created in this manner, and if a foreign child claimed enforcement of one of the incidents upon which the status was created it seems that he would get the claimed enforcement if he could bring himself within the events, whether or not the state which controlled his status had created in him one similar to that created at the forum.

Why should the converse not obtain, and a statute creating a status be construed distributively? When a state enacts a statute which purports to create a status in child, it ascribes

[250] Kans. Stats. (1935) secs. 22–123.
[251] Or by statutes plus decision of the courts.

to him the particular rights which are attributed to the status just as clearly as if it had given them to him by a series of disconnected statutes. It may be said that the enactment of a statute which gives rights of inheritance to a child who is recognized by his father expresses the public policy of the state with respect to children to whom such things have happened. A statute which legitimates such a child may be considered an expression of public policy to the effect that all children who are recognized by their fathers should be entitled to the right actually claimed and that the rest of the aggregate of rights is immaterial. There seem to be two answers, one theoretical, the other practical. The theoretical answer is: The enactment of a statute which purports to legitimate a child is an expression of public opinion with respect to children to whom, by the law of their own state, are attributed both beneficial and onerous incidents, both of which will be enforceable at the forum; and, the forum cannot properly attribute onerous incidents unless the domiciliary state did so. The practical answer is: Courts and jurists, both of the common and the civil law, have from time immemorial thought in terms of status when they have come into contact with the purported creation thereof. It is natural, therefore, that a statute which is cast in terms of status should be exclusively so treated unless the particular conferment of some one incident, independently of status, can be construed from the position of the statute in, *e.g.*, the statute of descents and distributions.[252]

Effects of Foreign Created Status

Once it has been determined that a status was created by a foreign state, it becomes necessary to decide what incidents will be attributed thereto by the state in which a right claimed to flow therefrom is asserted. In the usual case the forum is in the state whose dispositive laws govern the right. In such cases the forum determines whether a status was created, the assimilation of the status to some local status or its essential dissimilarity from all local status, and the local public policy applicable to the claimed right. If, however, the indicative rules of the forum point to the dispositive rules of some other state, the forum determines the assimilation or the dissimilarity

[252] See cases cited in notes 222, 223, and the quotations from cases cited in notes 224, 240–242, inc.

by the law of the latter and applies its policy.[253] Thus if a child claims to inherit the personal property of a California decedent, some of whose property is in Nevada, the court of the latter state will determine that the child was legitimated and that legitimated children inherit under the law of California.[254]

In cases of legitimacy arising from birth in lawful, monogamous marriage the incidents which will be attributed by the forum are those which will be attributed to the status of a child whose legitimacy was created by its law.[255] When it is asserted that such a child is the subject of rights and duties governed by the law of any state the only rules consulted are the dispositive rules of that state. No inquiry is made as to the similarity or dissimilarity of the aggregate of incidents attributed to the child by the rules of the state which created the status.

Where legitimacy is created upon some event other than birth in lawful wedlock, the result is the same. The child is legitimate whether the status was created by statute upon a marriage null in law, upon a marriage which is considered valid by the legitimizing state because of a peculiar idea as to the validity of a prior divorce without jurisdiction, or upon a polygamous marriage which is valid by the law of the legitimating state but is for all purposes invalid at the forum. A child so legitimized inherits, under the law of the state governing the inheritance, personal property as the next of kin of its parent,[256] or land as heir of the parent,[257] or personal property as next of kin of collateral relatives.[258] A child so

[253] It seems that the public policy of the forum, *qua forum*, should not be considered, except, perhaps, in extreme cases.

Suppose that State *X* creates a status of concubinage, which arises from extra-marital relations of a married man and a woman, and attributes to that status a right in the concubine to inheritance of a specified portion of the man's personal property; and that the man dies domiciled in *X*. It is possible that an American court would be justified in applying its policy and refusing to enforce the right with respect to personal property under its jurisdiction, and it is probable that an American court would do so. See *Greenwood* v. *Curtis*, 6 Mass. 358, 378 (1810).

See also RESTATEMENT, sec. 612: "No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum." Nutting emphasizes the inclusion of the word "strong" in the final draft of the Restatement. Nutting, *Suggested Limitations of the Public Policy Doctrine*, (1934) 19 Minn. L.R. 196. See also CHESHIRE, quoted *supra*, p. 40.

[254] *In re Forney's Estate*, 43 Nev. 227, 184 Pac. 206, 186 Pac. 678, 24 A.L.R. 553 (1919).

[255] RESTATEMENT, sec. 141; BEALE, sec. 141.1, p. 712.

[256] *Lincecum* v. *Lincecum*, 3 Mo. 310 (1834).

[257] See *McDeed* v. *McDeed*, 67 Ill. 545, 550 (1873).

[258] *Moore* v. *Saxton*, 90 Conn. 164, 96 Atl. 960, Ann. Cas. 1917C, 534, (1916); *Eubanks* v. *Banks*, 34 Ga. 407 (1866); *Harding* v. *Townsend*, 280 Mass. 256, 182 N.E. 369 (1932).

legitimized in Indiana is a "lineal descendant" of its father's father within the meaning of the will of a Massachusetts domiciliary,[259] and the legitimizing parent is a "parent" within the meaning of a fraternal benefit policy.[260] Such a child is a "lineal descendant" of its father within the meaning of a succession tax statute, although its mother is not his "surviving spouse".[261]

In New York it appears that no rights are given to children who are born of void marriages of parents domiciled in states which legitimize children so born,[262] nor to children born of marriages deemed valid by the domiciliary law because of a peculiar belief in the validity of a prior divorce.[263] This doctrine stems from *Olmsted* v. *Olmsted*[264] which was affirmed by the Supreme Court of the United States upon the ground that New York could properly apply her public policy to protect local interests in matters of descent. The lower courts of that state have taken the doctrine expressed by the Court of Appeals of New York in *Olmsted* v. *Olmsted* as a mandate to refuse recognition to the foreign status. In the two cases which follow the *Olmsted Case* there is language to this effect.[265] It cannot be said with certainty that these courts will apply the doctrine to a case in which they are not in fact protecting the interests of New York domiciliaries. In both cases the father of the children married bigamously and the children were born while he was domiciled in a state which legitimized them. In both cases the father and his first wife had been domiciled in New York before the bigamous marriage and the wife had retained her domicile there. In both cases the opposing claimants to inherit were the children of the bigamous marriage and the first wife or relatives of the decedent who were New York domiciliaries. It is to be hoped that New York will confine her application of public policy to the protection of local interests or, better, that she will recede from her present posi-

[259] *Green* v. *Kelly*, 228 Mass. 602, 118 N.E. 235 (1917).

[260] *Mund* v. *Rehaume*, 51 Colo. 129, 117 Pac. 159, Ann. Cas. 1913A, 1243, (1912).

[261] *Seedat's Execrs.* v. *The Master* (*Natal*), [1912] App. Div. 302 (S. Ct. So. Afr.).

[262] *In re Bruington's Estate*, 160 Misc. 34, 289 N.Y.S. 725 (Surr. Ct., 1936).

[263] *In re Thomann's Estate*, 144 Misc. 497, 258 N.Y.S. 838 (Surr. Ct., 1932).

[264] 190 N.Y. 458, 83 N.E. 569, 123 Am. St. Rep. 585 (1908) *affd.* 216 U.S. 386, 30 S. Ct. 292, 54 L. ed. 530 (1910); noted (1908) 20 H.L.R. 400, (1910) 58 U. of Pa. L.R. 558.

[265] See *In re Bruington's Estate*, 160 Misc. 34, 289 N.Y.S. 725, 729–730 (Surr. Ct., 1936); *In re Thomann's Estate*, 144 Misc. 497, 258 N.Y.S. 838 (Surr. Ct. 1932).

tion and give to such children all the rights which are given in that state to legitimate children.

In the matter of nationality it seems that the federal courts will refuse to recognize that children born of a polygamous Chinese marriage to an American father, who is domiciled in China at the time of their birth, are American citizens. Two of the cases,[266] may be justified upon the ground that the father was domiciled in the United States at the time of the marriage and the birth and that, therefore, legitimacy was to be determined by the validity of the marriages which, by American law, were void; or even if the marriages were valid,[267] the effect thereof to legitimize the child was to be determined by American law which will not create legitimacy in the offspring of a polygamous union.[268] This justification is not available, however, for *Ng Suey Hi* v. *Weedin*[269] in which it appears that the father and mother were both domiciled in China at the time of their marriage and the birth of the child. Rudkin C.J. treated the marriage in the same way that the court of the Cape of Good Hope treated the Indian polygamous marriage in *Seedat's Execrs.* v. *The Master (Natal.)* He said: "The marriage of the father to the mother of the appellant was a polygamous one and cannot be recognized by the courts of this country." He failed to take the further step which the South African court did not fail to take. The latter recognized the fact that by the law of India, the domicile of the parents at the time of the marriage and of the birth of the child, the marriage was valid and the children, therefore, legitimate. In *Ng Suey Hi's Case,* after speaking as above set out, Rudkin C.J. continued: "She was therefore illegitimate, and her citizenship must be determined by reference to that status." If that approach be taken at face value it will mean that rights of inheritance will be denied to children of valid polygamous marriages, that they will not be entitled to support from their parents if they come here—in short that they will be denied all rights attributed to legitimacy. The approach of Clemons J. in *Matter of Look Wong*[270] is preferable. He dealt with the question as one of public policy with respect to the incidents

[266] *Mason ex rel. Chin. Suey* v. *Tillinghast,* 26 Fed. (2d) 588 (C.C.A. 1st, 1928); *Matter of Look Wong,* 4 U.S. Dist. Hawaii 568 (1915).

[267] See BEALE, 132.5, p. 693.

[268] This seems to be Beale's doctrine. See BEALE, sec. 141.1, p. 713. Cheshire appears to doubt the doctrine. See CHESHIRE, pp. 382–383.

[269] 21 Fed. (2d) 801 (C.C.A. 9th, 1927) noted (1927) 16 Cal. L.R. 158; (1928) 12 Minn. L.R. 288; (1927) 14 Va. L.R. 311.

[270] 4 U.S. Dist. Hawaii 568, 574 (1915).

normally attributed to a status, thus leaving open all questions not necessarily before the court in a case of a claim of nationality.

In cases of legitimation the problems fall into two categories: (a) the effects of legitimation if that status is not created at the forum and is thus "unknown at the forum"; and (b) the effects of legitimation when that status is created at the forum and is thus there known.

In the first situation—legitimation unknown at the forum—the tendency has been to assimilate the legitimated to the legitimate child. That is what the English courts purported to do before 1927.[270A] The assimilation was not complete, however as these courts proceeded to deny to legitimated children the right to inherit land because of some special quality in English land which required that the heir be "a man's eldest son born in lawful wedlock", as was said by Lord Brougham in the famous case of *Doe dem. Birtwhistle* v. *Vardill*,[271] in the House of Lords in 1840. The next incident demanded by a legitimated child was that of succession to the rank of Peer. While the actual decision was that the claimant had not been legitimated it seems from Lord Eldon's language that admittance to the English peerage must be based upon birth in wedlock.[272] English or British nationality arising from legitimation was never claimed prior to 1927, but it seems clear that it would have been denied.[273] The Legitimacy Act of 1926 has not changed the rule with respect to Nobility and Nationality. The former is excepted from the operation of the act,[274] and the latter result has been obtained by reference to the fact that the Act operates only from the date of the Act or of the parents' subsequent marriage, whichever is the later.[275]

The doctrine of *Doe dem. Birtwhistle* v. *Vardill* rests upon the existence of the so-called Statute of Merton.[276] This statute is treated as if it had provided that no rights of inheritance should be given to persons born before the marriage of their parents. It appears in the statute that what actually happened was that the Bishops said to the Lords that they would consent to

[270A] This is apparently what was done in *In re Luck*, [1940] Ch. 323, [1940] 1 All Eng. L.R. 375, in which the status was created before 1927.

[271] 7 Cl. & F. 895 (H. of L., 1840). This rule was logically extended in 1857 to deny inheritance of his son's land to the legitimating father. *Re Don's Estate*, 4 Drewry 194 (Ch., 1857).

[272] *The Strathmore Peerage Case*, 4 Wils. & S. Appendix P., 89, 95 (1821).

[273] *Sheddon* v. *Patrick*, 1 Macq. 535 (H. of L., 1854).

[274] 16 & 17 Geo. V, c. 60, sec. 10 (1) (1926).

[275] *Abraham* v. *Atty. Genl.*, [1934] p. 17.

[276] 20 Hen. III, c. 9 (1235).

inheritance by such persons "forsomuch as the Church accepteth such for legitimate. And all the Earls and Barons with one voice answered, that they would not change the Laws of the Realm, which hitherto had been used and approved."[277]

It thus appears that this statute was simply declaratory of the common law of the inheritance of persons not born in wedlock. This doctrine was reflected in a case in 1863 in which the Vice Chancellor construed the will of an English domiciliary. The will contained a bequest of personalty to "the children of my nephew", and Page Wood V.C., in *Boyes* v. *Bedale*,[278] said that the words must be taken to mean such persons as would be deemed the children of the nephew according to English law and held that a child of the nephew who had been legitimated by French law could not take.

The first departure from the doctrine was in 1871, when it was held that legitimated children were not "strangers to the blood" within the meaning of the English Legacy Duty Act.[279] The next step was to allow, ten years later, inheritance by legitimated children as next of kin.[280] In 1883, twenty years after *Boyes* v. *Bedale*, that case was overruled upon the ground that the rule of construction of a will has fulfilled its function when "child" is construed to mean "legitimate child", and that a bastard becomes legitimate upon legitimation, and can take the bequest of an English domiciliary as a "child" of its father.[281] The last step was taken in 1892 when it was held that a legitimated child takes a devise of English land made to the "children" of its father.[282]

These cases cut the English common law as inferred from the Statute of Merton down to application of the requirement

[277] *Ibid.*

[278] 1 Hem. & M. 798 (Ch., 1863). The earlier case of *Goodman* v. *Goodman*, 3 Griff. 643 (Ch. 1862) is not contrary, as the testator in that case was domiciled in Holland.

[279] *Skottowe* v. *Young*, L.R. 11 Eq. 474 (1871).

[280] *In re Goodman's Trusts*, 17 Ch. D. 266 (C.A. 1871). In the court below, Jessel M.R. had followed the dictum in *Boyes* v. *Bedale* and held that a legitimated child could not take. *In re Goodman's Trusts*, 14 Ch. D. 619, 622 (Ch., 1880). In the Court of Appeal, Lush J. preferred to follow *Doe dem. Birtwhistle* v. *Vardill*, but the other judges reversed Jessel. See 17 Ch. D. at 292 and 296. Cotton and James L. JJ. agreed that "child" meant "legitimate child", but recognized the effects of the change of status.

[281] *In re Andros*, 24 Ch. D. 637 (1883).

[282] *In re Grey's Trusts*, [1892] 3 Ch. 88. The result was foreshadowed by *Skottowe* v. *Young*, L.R. 11 Eq. 474 (1871), *supra* note 279, in which a devise to trustees to sell English land and pay the proceeds to the "*children of A*" was assumed to include legitimated children as the beneficiaries. It is to be noted that the rents and profits accruing before sale were given to the same beneficiaries.

of birth in wedlock to intestate inheritance of land. This rule is still further cut down by the Administration of Estates Act[283] which abolishes heirship in fee simple and provides for sale of intestate land and distribution among the relatives of the intestate.[284] The importance today of the English cases prior to 1927 lies in the light they may throw upon the public policy applicable to legitimation by some method which does not include marriage of parents. The Legitimacy Act in express terms provides for recognition of foreign legitimation by subsequent marriage.[285] It is to be hoped that the policy shown in the cases limiting the application of the rule in the *Birtwhistle* Case will lead to giving effect to foreign legitimation however created.[285A]

In those states in which legitimation is created—and is, therefore, known — foreign-legitimated children are given the rights which are attributed to the local status.[286]

In the United States a distinction between inheritance of land and of personal property has been made only in Pennsylvania and Florida. This result was reached in the former under a statute which gave inheritance of land only to those born in lawful wedlock.[287] The effect of this statute as a declaration of public policy with respect to local land was repealed by the enactment of another which provided that "persons whose parents intermarry shall thereby become legitimate and have all rights as if born in lawful wedlock".[288] The rule in Florida arose from the existence of a statute which declared the common and general statute laws in England, down to the fourth

[283] 15 Geo. V, c. 23, secs. 45(1), 46.

[284] This leaves to the common law rule limitations formerly caught by the rule in Shelley's case [now repealed by the Law of Property Act, 15 Geo. V, c. 20, sec. 131 (1925)] and limitations to the heir of a deceased person. See CHESHIRE, p. 394, n. 2.

[285] Sec. 8 (1).

[285A] This hope has been realized through the decision in *In Re Luck* [1940] Ch. 323, [1940] 1 All E. R. 375, decided since this article was written. [This judgment was reversed in [1940] Ch. 864.—ED.]

[286] (Next of kin) *Re W.*, [1925] 2 D.L.R. 1177, 56 Ont. L.R. 611; *In re Hagerbaum*, [1933] I.R. 198: (appointee of movables as child of *A*) *In re Askew*, [1930] 2 Ch. 259: (heir) *Fenton* v. *Livingstone*, 3 Macq. 497 (H. of L., Sc. 1859): (heir of entail) *Udny* v. *Udny*, 1 Sc. App. 441 (H. of L., 1869): (nobility) *Lauderdale Peerage Case*, 10 A.C. 692 (H. of L., Sc., 1885): (succession to movables and immovables) Oberlandesgericht, Karlsruhe, March 3, 1931, 8 Jahrbuch freiw. Gerichtsbarkeit 116, I.P.R. spr. 1931, 184; *semble* Conty du Quesnois, Guessière, Journ. des princ. aud. des parl., Vol. II, Bk. VII, c. 7 (1668).

[287] *Smith* v. *Derr's Admrs.*, 34 Pa. 126, 75 Am. Dec. 641 (1859).

[288] 1857 P.L., p. 207. It appears, from the opinion in *In re McCausland's Estate*, 213 Pa. 189, 62 Atl. 780, 110 Am. St. Rep. 540 (1908), that a legitimated child inherits Pennsylvania land as heir of an ancestor who died subsequent to the enactment of the statute.

of July, 1776, to be in force in Florida. It was held to follow therefrom that the Statute of Merton was in force and a foreign-legitimated child could not inherit Florida land.[289] It seems that this declaration of policy is not affected by the existence of a section in the statutes on bastardy which provided that upon the marriage of the parents the child should be deemed legitimate and the father's bond, given in bastardy proceedings, void.[290] It appears, however, that the enactment of a status type of statute in the statute of descents[291] will have the effect of repealing the declaration of policy, and that foreign-legitimated children can now be heirs in Florida. There is at least room for doubt as to the effect in Pennsylvania and Florida of legitimation created by any mode except subsequent marriage. To that extent the Statute of Merton may still be in force in those States.

Two other States have denied rights of inheritance to children legitimated elsewhere. Alabama has denied, and does deny, all effect to foreign legitimation. Her courts purport to recognize the existence of the status and to recognize the incidents attached thereto but to refuse any extraterritoriality to the incidents.[292] The same attitude appeared in Maryland with respect to legitimation by any mode other than subsequent marriage of the parents.[293] The case which enunciated this doctrine was expressly overruled, however, in *Holloway* v. *Safe Deposit & Trust Co.*,[294] in 1926.

It is clearly the American doctrine, with the exceptions just set forth, that the status of legitimation will be given the effects which will be given to the local status most similar thereto. In practically all of the States legitimation creates a status which has the same incidents as those of legitimacy dating from the time of the legitimation. In a few States the incidents of legitimation or of a particular type of legitimation differ from those attributed to legitimacy or legitimation created upon a different legitimating act. In such cases the local effect of foreign legitimation will be that of the analogous local status. Foreign legitimated ex-slave children will be given rights of direct inheritance only, even though white children who have

[289] *Williams* v. *Kimball*, 35 Fla. 49, 16 So. 783, 26 L.R.A. 764 (1895) (applying Fla. Stats. (McClelland's Digest, 1881) sec. 7, p. 708).
[290] Fla. Comp. Gen. Laws (1927) sec. 5580.
[291] *Ibid.*, Sec. 5480 (7).
[292] *Lingen* v. *Lingen*, 45 Ala. 410 (1871); *Brown* v. *Finley*, 157 Ala. 424, 47 So. 577, 21 L.R.A. (N.S.) 679 (1908).
[293] *Barnum* v. *Barnum*, 42 Md. 25 (1875).
[294] See 151 Md. 321, 134 Atl. 497, 500 (1926).

been legitimated will have rights of collateral inheritance as well.[295] Children legitimated by recognition in foreign states will be given the same rights as those so legitimated locally.[296] Foreign-legitimated children will be given the rights of local legitimated, as distinguished from legitimate, children.[297]

American courts, still with the exceptions set forth above, will give to legitimated children, no matter where or how legitimated, rights of inheritance to real and personal intestate property,[298] will include them in the class of "children" for purposes of bequests of personal property[299] and in the class of "children",[300] or "heirs"[301] for purposes of devises of land, and will give them the settlement of the legitimating parent.[302]

In the matter of the conferment of nationality through legitimation it cannot be said definitely whether this effect will be denied by the federal courts. In the two cases which have dealt with the matter the father was domiciled in the United States at the time of the alleged legitimation. In both cases legitimation was postulated upon promotion of a secondary Chinese wife to principal wife—in fact to only wife—by the death of,[303] or by divorce from[304] the primary wife. In the latter there was an intimation that legitimation by valid marriage would confer nationality: the argument that the divorce was that: "On principle it would seem that the appellant was

[295] *Cole* v. *Taylor*, 132 Tenn. 92, 177 S.W. 61 (1915).

[296] *Wolf* v. *Gall*, 32 Cal. App. 286, 163 Pac. 346 (1917).

[297] *Olmsted* v. *Olmsted*, 190 N.Y. 458, 83 N.E. 569, 123 Am. St. Rep. 585 (1908) *affd.* 212 U.S. 386, 30 S. Ct. 292, 54 L. ed 530 (1910); *Valley* v. *Lambuth*, 1 Tenn. App. 547 (1925).

[298] (*Real Property*) *Lewis* v. *King*, 180 Ill. 259, 54 N.E. 330 (1899); *McNamara* v. *McNamara*, 303 Ill. 191, 135 N.E. 410 (1922) *cert. denied* 260 U.S. 734, 43 S. Ct. 95, 67 L. ed. 487 (1922), noted (1923) Harv. L. Rev. 83; (1922) 32 Yale L.J. 86; *Franklin* v. *Lee*, 30 Ind. App. 31, 62 N.E. 78 (1902); *Marzette* v. *Cronk*, 141 La. 437, 75 So. 107 (1917); *Scott* v. *Key*, 11 La. Ann. 232 (1856); *In re Wray's Estate*, 93 Mont. 525, 19 Pac. (2d) 1051 (1932); *Dayton* v. *Adkisson*, 45 N.J. Eq. 603, 17 Atl. 964, 4 L.R.A. 488 (1889); *Miller* v. *Miller*, 91 N.Y. 315, 43 Am. Rep. 669 (1883); *Bates* v. *Virolet*, 33 App. Div. 436, 53 N.Y.S. 893 (1898); *Simpson* v. *Simpson*, 9 Ohio C.C. (N.S.) 137 (1906): (*personal property*) *Blythe* v. *Ayres*, 96 Cal. 522, 31 Pac. 915, 19 L.R.A. 940 (1892); *Wolf* v. *Gall*, 32 Cal. App. 286, 163 Pac. 346 (1917); *In re Forney's Estate*, 43 Nev. 227, 184 Pac. 206, 186 Pac. 678, 24 A.L.R. 553 (1919); *Valley* v. *Lambuth*, 1 Tenn. App. 457 (1925).

[299] *Holloway* v. *Safe Deposit & Trust Co.*, 151 Md. 321, 134 Atl. 497 (1926).

[300] *In re McCausland's Estate*, 213 Pa. 189, 62 Alt. 780, 110 Am. St. Rep. 540 (1908).

[301] *Loring* v. *Thorndike*, 5 Allen 257 (Mass., 1862); *Dayton* v. *Atkisson*, 45 N.J. Eq. 603, 17 Atl. 964, 4 L.R.A. 488 (1889); *DeWolfe* v. *Middleton*, 18 R.I. 810, 26 Atl. 44, 31 Atl. 271, 31 L.R.A. 146 (1893).

[302] *Monson* v. *Palmer*, 8 Allen 551 (Mass., 1864).

[303] *Mason ex rel. Chin Suey* v. *Tillinghast*, 25 Fed. (2d) 588 (C.C.A. 1st (1928).

[304] *Matter of Look Wong*, 4 U.S. Dist. Hawaii 588 (1915).

returned the husband to the unmarried state, thus allowing recognition of the secondary marriage, was rejected. In the former, Rudkin C.J. doubted the correctness of the opinion of C. B. Ames, Acting Attorney General of the United States, that no consideration of public policy prevented the attribution of nationality to legitimation.[305] Chief Justice Rudkin's opinion a citizen of the United States at birth or not at all." It will be interesting to see whether the policy which he was protecting extends to legitimated children who are not of Asiatic extraction. Ames' opinion, that the prevalence of legitimation statutes and the fact that for purposes of inheritance the States were giving effect to foreign legitimations, even though they created no such status themselves, showed that there was no public policy adverse to recognizing that legitimation conferred all the rights of legitimacy, is persuasive. It seems that the fact that there are but two cases in which nationality was claimed by Asiatics who asserted that they had been legitimated shows that there is no great danger of opening the country to hordes of unwanted legitimated children if this effect is given to the status of legitimation.

Only two cases have come before American courts in which children who had the status of recognized natural child claimed rights flowing therefrom. In Louisiana, which creates the status, it was held[306] that a child upon whom the status was conferred abroad has the same rights that Louisiana recognized natural children have under the inheritance provisions of the Code.[307] In Pennsylvania an Italian recognized natural child was treated as if it had the status of legitimation.[308] It was recognized that the status was not that of legitimation or adoption, but that a status was created by Italian law which attributed to it the same rights of inheritance that were attributed to legitimation; and the child was allowed to inherit from its father, a Pennsylvania domiciliary. It is not true that Italy attributes the same rights of inheritance to legitimated children and to recognized children; the rights of the latter do not extend to inheritance from collaterals and if there are also legitimate or legitimated children the rights of recognized natural children are diminished.[309] Inasmuch as the Auditing Judge appears to have believed that recognition makes the

[305] 32 Opp. Attys. Genl. 162 (1929).
[306] *Petit's Succession*, 49 La. Ann. 625, 21 So. 717, 62 Am. St. Rep. 659 (1897).
[307] La. Civ. Code Art. 913.
[308] *Moretti's Estate*, 16 D. & C. 715 (Pa., 1929).
[309] Italy, Codice Civile, Arts. 737, 744–749, inc.

recognized child legitimate according to the Italian law, this case may represent the acceptance in Pennsylvania of the doctrine that the mode of foreign legitimation is immaterial,[310] at least in cases which do not concern descent of land. On the other hand, Gest J., in dismissing exceptions to the adjudication, recognized that the status was not that of legitimation, and was primarily interested in the fact that the status gave rights of inheritance from the father.

Whichever the case stands for — full recognition of the foreign creation of a status in a child and assimilation to the most similar local status, or recognition of the creation of an unknown status and examination of local public policy in order to discover that no such policy opposes giving effect to the foreign-ascribed incident — it represents the desirable modern attitude toward complete extra-territorial recognition of the status of children.

Conclusion

The tendency of modern courts is to assist in the amelioration of the condition of children who are so unfortunate as to be born of a woman who is not validly married to the father. In furtherance of this desirable social end the courts are prepared to examine the events upon which it is claimed a status, beneficial to the child, is created; to examine the incidents attributed to that status by the foreign state; to assimilate the foreign status to the local status which is most similar; and to give the effects which are given to the local status. Public policy is not deemed to demand a refusal to give full local effects to a foreign status merely because the foreign state will create it upon events, *e.g.*, void marriage, or recognition, upon which the local law will not create a beneficial status. Bastardy is hard upon children and no policy is served by refusing to recognize a foreign amelioration of the condition of any child.

The concept of status—Starke's "abstract status"— is at least, a useful tool in clarifying the problems involved. Its employment provides a better opportunity for the courts to focus their consideration of local public policy upon the real questions of policy involved. These questions are: Will the local morale be injuriously affected if we give this child a beneficial right? Will local interests be properly protected if we give the right?

The answer to the first question is found in those opinions which recognize the fact that the conferment of rights upon

[310] Pennsylvania legitimates only by subsequent marriage.

children who are born out of wedlock will not tend to encourage illicit relations between potential future parents. The answer to the second question is found in those opinions which recognize that in the great majority of cases, cases of claims for inheritance, the local persons who claim protection are as much donees as the child, and which see no reason for preferring other children, lawful wives, or other distributees of the estate of the deceased parent, to the child who claims inheritance from that parent by reasons of some foreign-created legal relationship to him.

It is proper that courts characterize statutes which purport to create a status,— *e.g.*, in the form: "shall become legitimated,"— as declarations of public policy of protection of children to whom "a complex aggregate of rights and duties" has been attributed by the domiciliary state, rather than as declarations of a local policy of ascribing local rights to all children in whose lives certain events have occurred. There is a difference between the policy manifested by a statute which provides that: "If the parents of illegitimate children shall intermarry such children shall become the lawful children of their parents as if born in lawful wedlock", and one which provides: "If the parents of illegitimate children shall intermarry such children shall inherit as if born in lawful wedlock." If attention is directed solely to the wording of these two types of statutes the characterization of each is obvious. The first type is a statute of status, the second a statute of inheritance.

The title of the statute or its position in the statute books may show that the choice of verbiage was accidental. If a statute of the first, the "status", type is entitled: "An Act to Regulate the Descent of Property", or it is enacted as a section of the Statute of Descents and Distributions, the declared policy seems to be directed to the protection of all children whose parents intermarry subsequent to their birth. Modern broad construction in favour of the interests of children may properly lead to its characterization as a declaration of public policy directed also to the amelioration of the condition of all children in whom the state can create a beneficial status. If a statute of the second, the "inheritance", type is entitled: "An Act to Legitimate Certain Children," or if it is enacted as a section of the Statute of Adoptions or of the Statute of Husband and Wife the declared policy seems to be directed to the condition of children in whom the state can create a beneficial status.

As in the case of the first type, however, modern broad construction may properly lead to the same double characterization.

But, if a statute of the second type appears in the Statute of Descents, or one of the first type in the Statute of Adoptions, a considerable strain must be put upon the doctrine of broad construction in order to arrive at other than the obvious characterization in each case.

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