June 1925

The Statute of Legitimization and Adoption

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INTRODUCTION

Legitimation and adoption are institutions unknown to the common law. They are purely creatures of statutes, borrowed from the civil and canon law, in those jurisdictions where the common law prevails. Statutes, providing for the legitimation and adoption of children, however, have become common in the United States, and these Civil Law institutions have been woven into the fabric of common law notions. The development has been especially interesting in the field which we know as the Conflict of Laws. It is the purpose of this paper to examine these institutions with a view to determine under what circumstances, and to what extent the status of persons, fixed in accordance with these statutes, will be recognized and made effective outside the territory by the law of which the same was created.

At the threshold we meet the question of jurisdiction. It is the state or country where a person resides and makes his home that is most vitally interested in the relation or condition of such person with reference to the community and to other individuals. It is, therefore, a universally accepted principle in common law countries that the law of that state or country should fix the status or condition of such person. Using the common law term, then, the law of the domicil of a person is the proper law to determine and fix his civil status.

The controlling principle underlying jurisdiction for the creation of a status, then, is easily stated, but sometimes difficult of application, in connection with the legitimation and adoption of children, where the domicil of more than one person is involved.

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1 See Wharton, Conflict of Laws, § 240; Minor, Conflict of Laws, § 99.
While the problems connected with the legitimation of children are essentially the same as those involved in adoption, still there are considerations which are peculiar to each. Legitimation involves the creation of the legal relation of parent and child where the natural relation exists, while adoption is the creation of the legal relation between strangers in blood. Therefore, we shall consider the two institutions separately in this discussion.

I. LEGITIMATION

A. JURISDICTION FOR CREATION OF THE STATUS

1. English View

The English courts have had to deal with the question of the legitimation of children because of the proximity of England to civil law countries, where the doctrine of *legitimation per subsequens matrimonium* is a part of the law. It is now settled, in England, that the status of persons legitimated, according to the law of the domicil of the parties, by the subsequent marriage of the parents will be recognized for most purposes aside from the inheritance of land. The English courts, however, have been reluctant in extending the benefits of legitimate children to such persons, and have insisted strictly upon the requirements as to jurisdiction for the creation of the status. Where the domicil of all the parties is the same no difficulty arises, but, where the unmarried father and mother of the child have separate domicils, interesting questions are raised.

The rule is everywhere accepted that the domicil of an illegitimate child is that of the mother, but its legitimation depends upon the law of the domicil of the putative father. The place of birth or marriage is not considered material. If the domicil of the father is in England, or in some country the laws of which do not provide for legitimation at the time of the birth and subsequent marriage, it appears that the stain of illegitimacy is indelible.

Where the domicil of the father has been changed after the birth of the child, and before the subsequent marriage, it is necessary that the law of the domicil at both times concur in effecting the change in status. The law of the domicil of the father at the time of birth apparently gives to the child the capacity to become legitimated by a subsequent marriage of the parents, while the

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2 In re Andros, L. R. 24 Ch. Div. 637, (1883), overruling Boyes v. Bodale, 1 Hem. & Mill. 765, (1863); In re Goodman's Trust, L. R. 17 Ch. Div. 266, (1881); Shattowa v. Young, L. R. 11 Eq. 474, (1871); Louderdale Peerage Case, 10 A. C. 682 (1885).
3 See WHARTON, CONFLICT OF LAWS, § 37.
4 Munro v. Munro, 7 Ch. & F. 842, (1846).
5 Louderdale Peerage Case, supra; Munro v. Munro, supra.
6 In re Wright's Trust, 2 K. & J. 595, (1856); Munro v. Sanders, 6 Blights 468, (1832); Sheddon v. Patrick, 1 Macq. H. L. 612, (1854).
law of his domicil at the time of the marriage must effect the legitimation. This conclusion was reached after elaborate argument and discussion in the House of Lords in the case of In re Grove.\(^7\) The position of such a child was aptly expressed by Fry, L. J., in the course of his opinion in that case, in these words:

"At birth the child took the domicil of its mother and it took the status of illegitimacy, according to the law of the domicil of its mother, and it took also the capacity to change that status of illegitimacy, provided that, according to the law of the domicil of the father, the subsequent marriage would work legitimation. The position of such child, therefore, is curious, taking domicil and status from the mother, but taking the potentiality of changing its status from the putative father."

No case has arisen where the English courts have recognized any other form of legitimation than that created by the subsequent marriage of the parents.

In Shaw v. Gould\(^8\) a domiciled Scotchman married, in Scotland, a woman who had been divorced, from an English marriage, by the decree of a court of Scotland. The House of Lords held that the Scotch court had no power to dissolve an English marriage, and that, therefore, the children of the marriage were not the "lawfully begotten" children of the mother so as to fill such description in the will of an English testator.

The House of Lords, apparently, refused to hold the children legitimate according to the rule of the canon law, adopted in Scotland, which recognizes the legitimacy of children born of a putative marriage, even though they would be considered as legitimate in Scotland. In this connection Lord Chelmsford said,

"But if a constructive legitimacy of this kind would, under the circumstances, have arisen in Scotland, I cannot think that we could be bound to recognize it so far as to qualify the offspring of a void marriage to take under the description of 'children' in an English will."

The case however, can be explained on the ground that legitimacy is not an absolute, but a relative status, and that a child may be legitimate with reference to one parent and illegitimate with reference to the other. In this case the children were claiming the property in question as the children lawfully begotten to the mother. The testator was domiciled in England, therefore, English law applied. According to the English law there was no valid marriage and the domicil of the mother remained that of her English husband. The children, then, with reference to her were

\(^7\) L. R. 40 Ch. Div. 216, (1888).
\(^8\) L. R. 3 Eng. & Irish Appeals 55, (1868), affirming re Wilsons Trust's, L. R. 1 Eq. 247.
illegitimate according to the law of England and could not take under the English will.\textsuperscript{9}

Dicey discusses the effect, according to English law, of a person being legitimated by the authority of a foreign sovereign. He expresses the opinion that the effect of such a decree would, like legitimation by subsequent marriage, depend upon the law of the domicile of the father at the time of birth, and at the time when the decree was rendered.\textsuperscript{10} It seems, therefore, that the status of legitimation will not be recognized in England, except when created in conformity with the principles set out above.\textsuperscript{11}

2. American View

In America the courts have shown greater liberality in recognizing the rights of legitimated children, and have likewise not been so strict in their insistence upon the requirements for jurisdiction. The difficulty here, also, is that different domiciliary laws are often involved.

Where the domicile of the parties to the status are different it is generally held that the law of the domicile of the father controls the question of legitimation.\textsuperscript{12} There are dicta to the effect that the law of the father's domicile at the time of the birth of the child is the proper law to create the status,\textsuperscript{13} but it seems clear that the law of the father's domicile at the time of marriage, must allow the legitimation in order to make it effective.

The state of the domicile of the father at the time of marriage is interested in not having a status thrust upon one of its residents not warranted by its law or public policy. On the other hand, where the law of the domicile of the putative father, at the time of the subsequent marriage, does, while the law of his domicile at the time of birth does not permit legitimation, the tendency in this country seems to be away from the English view. The Supreme Court of Louisiana dealt specifically with this point in the case of the Succession of Caballero.\textsuperscript{14}

In that case the question was whether illegitimate children born to parents domiciled in Louisiana, but who were, according to the law of that state, incapable of legitimation by the subsequent marriage of the parents, because of a law forbidding the inter-marriage of white and colored persons, were capable of being legitimated by the marriage of their parents after the parents

\textsuperscript{9} See Beale, Summary of Conflict of Laws, page 525.
\textsuperscript{10} Dicey, Conflict of Laws, (3rd ed.), page 490.
\textsuperscript{13} See Blythe v. Ayres, 96 Cal. 522, (1892).
\textsuperscript{14} 24 La. Ann. 573, (1872).
had abandoned their domicil in Louisiana. The court held that such subsequent marriage, valid where celebrated, effected the legitimation of the children, and impliedly revoked the will of the father. The case goes very far indeed, since the marriage was contrary to the laws and public policy of Louisiana, as indicated by Wyly, J. in his dissenting opinion. Justice Wyly also argued, on the basis of the English doctrine, that the children did not have the capacity to become legitimate by subsequent marriage since that capacity was not given by the law of the domicil at the time of birth.

This question involves a consideration of the principles which underlie legitimation by subsequent marriage. Does it, by a fiction of law, operate retrospective so as to make the children legitimate from birth, or does the law operate, ex *propria vigore*, to legitimate the children at the time of the marriage? The latter, it seems, is the more satisfactory view. Assuming that this position is sound, it appears that the law of the domicil of the father at the time of the subsequent marriage has sufficient jurisdiction over the subject matter to create the new status. In a decision in a lower court of New York the surrogate apparently assumed that the law of the domicil of the parties at the time of the subsequent marriage could effect the legitimation of their previously born children. 

It is to be noted that the mother, and, therefore, the illegitimate child, by the marriage, *ipso facto*, acquire the domicil of the father. Since the state of the domicil of the parties is primarily interested in their civil status, it is clear upon reason and authority that the place of marriage assuming it to be valid, or the place of birth, are not material in this connection.

In many states of this country, however, legitimation of children may be accomplished in other ways than by the marriage of the parents. The great weight of authority is to the effect that when a child is legitimated, in accordance with the proper law, that legitimation is valid for all purposes and everywhere. But it was decided in *Barnum v. Barnum* that a special statute, passed by the legislature of the territory of the domicil of the father and child legitimating the child could have no extraterritorial effect.

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27 In re Grande's Estate, 30 Misc. 450, 10 Mills 257, 141 N. Y. S. 535, (1913).
31 42 Md. 261, (1875).
The case was put upon the general ground that the legitimating statute gave, to the child, only a right to inherit in the state where it was enacted, and did not confer upon him a status. Alvey, J., in delivering the opinion of the court said,

"As we have seen, the act makes no reference to any marriage, and in no sense could operate to confirm any defective or imperfect marriage. Its operation does not even depend upon the fact that John R. Barnum was the child of Richard Barnum. It simply, by force of the law itself, and not of the circumstances of birth or relationship, gave to John R. Barnum a personal status, with capacity to inherit from Richard Barnum as heir. This act could have no extraterritorial operation whatever, except as to any rights that may have been acquired under it, in the state of Arkansas. As to such rights they would be respected everywhere. But as to capacity to acquire property beyond the state passing the act, by virtue of the particular status given the party, the legislature could not confer." 22

In Scott v. Key, 22 a suit founded upon a similar act of the same legislature under substantially the same conditions as presented in Barnum v. Barnum, supra, the Supreme Court of Louisiana decided, (Merrick, C. J., dissenting) that the status created by the law of the domicile goes with the child everywhere. The court distinguished between personal and real laws, and concluded that the statute in question was personal, effecting the condition, or status of the parties. The current of judicial opinion in America apparently is in accord with the Louisiana case. In a comparatively recent case in Illinois 23 the question, whether the status of legitimization fixed by the proper foreign law in accordance with a method unknown to the lex fori would be recognized, was fully considered. In that case the putative father was domiciled in California. He acknowledged his illegitimate child in such manner that the child was deemed legitimate in California. She claimed her father's share in the estate of the testator situated in Illinois. The statutes of Illinois did not provide for legitimation by acknowledgment. However, the Supreme Court of Illinois (Farmer, J., dissenting) held that, since the plaintiff had been legitimated in the manner provided by the law of her domicile, she carried that status into Illinois, and was there capable of inheriting as the legitimate child of her father. Cartwright, speaking for the majority of the court says,

"The legislatures of California and this state, declaring public policy, have provided that a father may make his illegitimate

22 See, also, Williams v. Kimball, 35 Ill. 49, 16 So. 783, (1895); Stoltz v. Dooring, 112 Ill. 234, (1885); Smith v. Derr's Adm'r's, 34 Pa. St. 128, (1859).
23 Supra, note 19.
24 McNamara v. McNamara, supra.
child legitimate, and the method, whether by marrying the mother, or as provided in the California statute, is of no importance.\textsuperscript{24}

Some complex problems of jurisdiction are raised in connection with the legitimation of children when acts other than the marriage of the parents effect the change of status, such as the acknowledgment, by the putative father, that he is the father of the illegitimate child. The authorities are agreed that the law of the domicile of the person making the acknowledgment must produce the change in status.\textsuperscript{25} Where the domicile of the parent making the acknowledgment and the child is the same, no difficulty arises, but where the domicile of the mother and child is different from that of the putative father, the question becomes more complex. This was the situation in the famous case of Blythe v. Ayres.\textsuperscript{26}

In that case the plaintiff was the illegitimate issue of the intestate, who was domiciled in California, and a domiciled Englishwoman. The plaintiff was begotten while the intestate was sojourn ing in England, and was born there after the intestate returned to California. The plaintiff remained in England, with her mother, until after the death of the intestate in California, when she came to that state and claimed to be the sole heir and distributee of the intestate's property there situated. The intestate was never married. A statute in California provided that, where the putative father of an illegitimate child recognized it as his own in a prescribed manner, "such child is thereupon deemed for all purposes legitimate from the time of its birth." The court found that there had been sufficient acknowledgment to satisfy the requirements of this statute. Extensive property interests were involved, and the case underwent careful examination. The conclusion was reached by the court that, at all times during the life of the father, the plaintiff had capacity to become his legitimate child according to the law of the father's domicile and that the acknowledgment by him in California entitled her to the same benefits as a child born to the intestate in lawful wedlock.

The decision was put upon the general ground that the law of the father's domicile rather than that of the mother and child determines the question of legitimation by the father's acknowledgment in the same manner as in the case of subsequent marriage. But it is to be noted that a different question is presented. As already been observed, by a subsequent marriage the domicile

\textsuperscript{24} Estate of McNamara, 181 Cal. 82, 183 Pac. 552, (1919).
\textsuperscript{25} Blythe v. Ayres, 96 Cal. 532, (1892); In re Forney Estate, 43 Nev. 227, 186 Pac. 676, (1920); Eddie v. Eddie, 8 N. D. 376, (1899); Richmond v. Taylor, 151 Wis. 633, 139 N. W. 435, (1913).
\textsuperscript{26} Supra, note 25.
of the mother, likewise that of the child, ipso facto becomes that of the husband and father. Such is not true when other acts are relied on to effect the change in status. Thus the question is presented whether the law of the father’s domicil shall prevail over that of the domicil of the mother and child which may be in a different state or country. The doctrine of Blythe v. Ayres in this respect is open to objection. For example if the father were claiming under the child’s estate the doctrine of this case would permit the law of the father’s domicil to govern in the devolution of the property of the child who may reside in another state or country. The law of the father’s domicil would thus be permitted to change the status of the child without action on his part or the concurrence of his domiciliary law.27 This case, however, is extreme, and would seldom, if ever, arise. The status of legitimacy is beneficial to the child. It does not often occur that the father is benefitted by the change. The law of the domicil of the child, then, it would seem, out of tenderness to the child, and regard for its welfare and betterment should recognize, by comity, the beneficial change made by the law of the father’s domicil.

There is a social interest in the legitimation of children. The state wherein the child is domiciled has an interest in having that child recognized and cared for by the putative father. There is no immorality in permitting an offending parent to clear the stain of illegitimacy from his bastard child, therefore, the law of the child’s domicil might well yield and permit the law of the domicil of the father to invest it with a more desirable status. It may be argued, however, that the status so created, should not be recognized by the law of the domicil of the child to the extent that the change would work to the detriment of the interests of the child or his relatives therein residing.28

It follows, from this line of reasoning, that the law of the domicil of the child is not the proper law to effect its legitimation by acts subsequent to its birth, and that a change of status declared by such law will not be recognized beyond the territorial limits of the state or country in which such law applies. This apparently is the result of Irving v. Ford.29 In that case a law enacted by the legislature of Virginia legitimated the children, born of slave parents, who were acknowledged under certain conditions by the father. At the time the act was passed, however, the father

27 See Irving v. Ford, 95 L. R. A. 177 Note at 183.
28 See MINOR, CONFLICT OF LAWS, § 106.
of the child had acquired a domicil in Massachusetts. The court held that the Virginia statute could not affect the status of the father who was domicilled in Massachusetts.

Now, is it material where the acknowledgment or other acts take place? *Dicta* may be found, in the cases, for example in *Eddie v. Eddie*,\(^{30}\) to the effect that the acts constituting the acknowledgment must take place in the state or country by the law of which the status is created.

In *Eddie v. Eddie* the intestate, the putative father of the claimants, was domiciled, at the time of the acts relied on as constituting the acknowledgment, in the Kingdom of Norway. The record did not disclose whether or not the law of Norway provided for such legitimation. Under these circumstances the claimants must show that they were legitimated, if at all, according to the *lex fori*. But this could not be since the *lex domicilii* of the father as we have seen, was the proper law to create the status of legitimation. Since it did not appear that, at any time, acts were done which, according to the law of the father's domicil, at that time, operated to legitimize the claimants, they could not claim as the legitimated children of the intestate. It, therefore, appears that the question was not involved in the decision of that case. It is submitted that the place of acknowledgment is not material unless the particular legitimating statute requires the acts to be done within the territorial bounds of the state or country. The same rule should apply with reference to legitimation by acknowledgment and other acts, as applies with reference to *legitimation per subsequens matrimonium*, and this seems to follow from the decision in *Loring v. Thorndike*,\(^{31}\) where subsequent marriage and acknowledgment were required to satisfy the Massachusetts law, both of which took place at Frankfort on the Main. Yet the court held that, since the testator was domiciled in Massachusetts, the acknowledgment in Germany satisfied the requirement of the Massachusetts statute, and that his children, properly acknowledged in Germany after marriage, were his lawful heirs in Massachusetts.

As has already been indicated, the law of the father's domicil at the time of the marriage, acknowledgment, or other acts, must operate to create the status of legitimation, and that when it is fixed by the proper law it attaches to the person and follows him wherever he may go.\(^{32}\) On the other hand when by the proper

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\(^{30}\) 8 N. D. 376, (1869).

\(^{31}\) 5 Allen (Mass.) 357, (1862).

\(^{32}\) Fowler v. Fowler, 131 N. C. 169, 42 S. E. 568, (1902).
law the child is illegitimate a change of domicil by the parents will not remove the stain from the child even though the law of the new domicil provides for legitimation under conditions fulfilled before the change. Smith v. Kelley's Heirs\(^2\) is authority for this proposition. In that case the plaintiff was born in South Carolina before the marriage of her parents, who were domiciled in that state both at the time of the plaintiff's birth and at the time of their subsequent marriage. Plaintiff's father afterwards moved to Mississippi where he acquired real and personal property, and died intestate. The plaintiff claimed an interest in his estate relying on a statute in Mississippi providing for legitimation by subsequent marriage. No such statute existed at the time in South Carolina. The High Court of Errors and Appeals of Mississippi held that the status of the plaintiff was fixed by the law of South Carolina and that she could not inherit as the legitimate child of the intestate.

B. INCIDENTS OF THE STATUS

1. In England

We shall now turn to a consideration of the extent to which the status of legitimation will be recognized beyond the territorial limits of the state or country creating the same, for the purpose of creating and enforcing rights.

This problem was before the House of Lords in the celebrated case of Doe dem. Birtwhistle v. Vardill.\(^3\) The case was twice argued, at each of which times the judges attended and delivered opinions. The facts in the case are simple. The plaintiff was the son of a domiciled Scotchman. He had been legitimated, by the subsequent marriage of his parents, according to the law of that country. He claimed land in England as the heir of his father. The House of Lords decided against his claim upon the ground that a quality that inhered in English land was that the heir must be born in lawful wedlock, and that a child born before the marriage of his parents, even though legitimated by the law of their domicil by subsequent marriage, could not satisfy the English law of inheritance. The decision rested upon the ground that, admitting that the plaintiff must be deemed to be the legitimate son of his father, yet, by the statute of Merton,\(^4\) the Parliament of England expressly refused to adopt the rule of the civil and canon law, which provided for the legitimation of children per subsequens matrimonium. The practice, under that statute, of

\(^{2}\) 23 Miss. 167, (1851).

\(^{3}\) 5 B. & C. 438, 7 Cl. & F. 895.

\(^{4}\) 29 Hen. III, Ch. 8.
forming the writ so as to present the issue whether the person claiming to be heir was born in lawful wedlock or not, seems to have influenced the decision. In stating the grounds for the decision Chief Justice Tindal used these words:36

"The grounds and foundation upon which our opinion rests are briefly these: That we hold it to be a rule or maxim of the law of England with respect to the descent of land in England from father to son, that the son must be born after actual marriage between his father and mother; that this is a rule juris positivi, as are all the laws which regulate secession to real property, this particular rule having been framed for the direct purpose of excluding, in the descent of land in England, the application of the rule of the civil and canon law, by which the subsequent marriage between the father and mother was held to make the son born before marriage legitimate; and that this rule of descent, being a rule of positive law annexed to the land itself, cannot be allowed to be broken in upon or disturbed by the law of the country where the claimant was born, and which may be allowed to govern his personal status as to legitimacy, upon the supposed ground of the comity of nations."

In Boyes v. Bedale37 the doctrine of Doe v. Vardill was extended so as not to include, in the description of children, in the will of an English testator, persons legitimated by the subsequent marriage of their parents according to the law of France where they and their parents were domiciled. But this case was disapproved, and practically overruled in a later case in the Chancery Division,38 where the daughter of the deceased brother of the intestate, legitimated in Holland by the intermarriage of her parents, who were domiciled there at the time of her birth and the subsequent marriage, was allowed to share in the personal estate of the intestate.

It would seem in the light of the later cases that the doctrine of Doe v. Vardill is confined to the specific case of inheritance of land in England,39 and that for other purposes, persons legitimated by the proper law in the manner recognized by the law of England, will be treated as the legitimate children of their parents.40

2. In America

The statute of Merton and the doctrine of Doe v. Vardill have not greatly influenced the development of American law. The Supreme Court of Pennsylvania under substantially similar facts, except that the legitimation was by a duly rendered decree of a

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36 7 Ch. & Fin. 395 at 395.
37 1 Hom. & Mill. 798, (1883).
38 In re Goodman's Trust, L. R. 17 Ch. Div. 266, (1881).
39 See re Don's Estate, 4 Drewry 194, (1867).
40 In re Andros, L. R. 24 Ch. Div. 637, (1883); Skattowe v. Young, L. R. 11 Eq. 474, (1871).
proper court of the state of the domicil of the legitimating father, followed without question the doctrine of the English case. However, the statute of Merton was in force in Pennsylvania at the time that decision was rendered. The doctrine no longer prevails in that state, it having been abolished by statute.41

In Florida the doctrine is retained in so far as it is not superseded by the statute law of that state. In Williams v. Kimball,42 the plaintiff, who was born a slave, had been legitimated according to the law of Georgia. He claimed the land of which the son of his sister died seized. The statute in Florida allowed a bastard to inherit only in so far as the mother was concerned. The court held that in other respects the statute of Merton prevailed, and denied recovery.

Alabama has not only followed the Vardell case, but it apparently has extended it so as to give no extraterritorial effect whatever, to a legitimating statute. The decision of the court in Lingen v. Lingen43 is rested upon that doctrine, however, the case could have been decided upon another ground. It appeared that the appellant was the illegitimate son of the intestate, begotten in Alabama, and born in France where his mother resided. While the intestate, who was domiciled in Alabama, was in France he recognized the appellant as his child. According to the law of France the appellant became the legitimated son of the intestate. The Alabama court refused to recognize the appellant as such. The case could be explained on the ground that the proper law to create the status of legitimation is that of the father's domicil. It is intimated in the opinion of the court that legislation would be necessary in order to enable the court to recognize such foreign legitimation. The case was followed in Brown v. Finley,44 where a proceeding under an adoption statute was involved. It was laid down, in the latter case, that a foreign adoption would not be recognized in Alabama, even though the court suggested that if the child had been adopted under the Alabama statute he may inherit real property in that state. The Alabama doctrine is exceptional, and inconsistent with generally accepted doctrines of the comity of nations.

A leading case on this subject in America is Ross v. Ross.45 In that case the demandant was adopted by the intestate, according to a statute of Pennsylvania, where the parties were then domi-
The adopting statute gave the adopted child full power to inherit as a legitimate child of the adopting parent. A similar statute existed in Massachusetts. The intestate later became domiciled in Massachusetts, where he died leaving real estate for which the demandant brought a writ of entry, relying upon his right of inheritance under the adoption proceedings in Pennsylvania. The court held that he was entitled to the land.

Even though that was a case growing out of an adoption proceeding, Chief Justice Gray made a learned and exhaustive review of all the authorities, up to that time, bearing the question, both of adoption and legitimation, and announced the principle, which has greatly influenced American judicial opinion upon those questions in later cases, in the following words:

"It is a general principle, that the status or condition of a person, the relation in which he stands to another person, and by which he is qualified or made capable to take certain rights in that other's property, is fixed by the law of the domicile; and that this status and capacity are to be recognized and upheld in every other state so far as they are not inconsistent with its own laws and policy. Subject to this limitation, upon the death of any man, the status of those who claim succession or inheritance in his estate is to be ascertained by the law under which that status was acquired; his personal property is indeed to be distributed according to the law of his domicile at the time of his death, and his real estate descends according to the law of the place in which it is situated; but, in either case, it is according to those provisions of that law which regulate the succession or the inheritance of persons having such a status."

The Chief Justice commented elaborately upon the case of Doe v. Vardill, supra, and came to the conclusion that the decision in that case "does not rest upon general principles of jurisprudence, but upon historical, political and constitutional reasons peculiar to England," which had no application in Massachusetts. The demandant whose status was fixed by the proper law was given the same rights in Massachusetts as if the status had been created by the law of Massachusetts while the parties were domiciled there. The same rule applies to legitimated children, and is the rule generally followed in the United States.46

The Court of Appeals of New York in Miller v. Miller,47 quoted as a leading case, laid down similar broad and general principles. There the court found that the plaintiff had been legitimated,


47 Supra, note 46.
either in Wurtenburg or Pennsylvania, before her parents became domiciled in New York where her father died intestate. The court decided that the plaintiff was the legitimate heir of the intestate in New York and entitled to succeed to a share of his property, both real and personal.

It appears, however, that the status of legitimation, created by the proper law, will not be recognized in New York if such status is opposed to the public policy, or accepted notions of morality, of the state. Thus, in Olmstead v. Olmstead, the court refused to extend the benefit of the doctrine of Miller v. Miller to children of a putative marriage, made legitimate by the law of the father's domicil. In the former case the appellant's father was married in New York. He abandoned his New York wife, went through a form of marriage with the appellant's mother in New Jersey whom he took with him to Michigan. He obtained a divorce in Michigan from his New York wife without personal service, and remarried the appellants' mother. By the law of Michigan they became his legitimate children. The court held, however, that the Michigan divorce was void and that appellants were not the lawful issue of their father. In speaking of legitimating statutes Haight, J., said, "But the statutes to which we refer, both in this state and in Michigan, only relate to such marriages between parents as may be lawfully made, not to those which are polygamous, incestuous, or prohibited by law."

The case has been criticized, however, and it is clearly out of harmony with American judicial opinion.

The case was carried to the Supreme Court where it was decided that a refusal on the part of a state to recognize the status of legitimation conferred by the law of the foreign domicil was not a violation of the "full faith and credit" clause of the Federal Constitution. Therefore the recognition of the status depends entirely upon the comity of nations.

C. Statutes of Distribution Distinguished

It is to be observed that a distinction is made between those cases, where the statutes involved are statutes of descent and distribution, and the cases in which the statutes purport to create a status. Hall v. Gabbert affords an illustration. In that case it was said:

"We look to our own law and read it as it is written; then

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48 190 N. Y. 458, (1908).
49 See 38 U. OF PA. LAW REVIEW 558.
52 213 Ill. 208, 72 N. E. 806, (1904).
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to the facts, and if the facts bring the claimant within our law then he is entitled to its benefits whatever may be his status elsewhere. We do not find in our law the requirements that the father shall acknowledge the child during the life time of the mother nor do we find that in order to make an acknowledgement such as will legitimize the child, the law of the domicile of the father at the time of the birth of the child must have recognized such form of legitimation. In a republic consisting of as many independent commonwealths as does ours, with each commonwealth invested with the power of determining the rules of descent and heirship within its borders, and with the people constantly changing from one to the other, if we shall be called upon to determine the rights of descent of real estate in our own state by the legal status of claimants as affected by the laws of other states, any rule that we might attempt to adopt would be both unsettled and uncertain."

Where a statute of descent is involved it is a matter of satisfying the law of the forum, and no question of the conflict of laws enters into the decision. The rights if any, are acquired by force of the statute of descent and not because of the status of the particular individual.53

II. ADOPTION

A. JURISDICTION FOR CREATION OF THE STATUS

The principles underlying the question of jurisdiction for adoption are much the same as in legitimation. However, the situation may be more complex, and involved, since there are two sets of parents interested in the adoption proceedings.

Adoption like legitimation is a status, and it appears that in order to effect that status the court should have jurisdiction over the subject matter—that is the parties should all be domiciled within the territorial jurisdiction of the court. But it often happens that the parties affected have different domiciles.

It is hardly possible to explain some of the cases dealing with this subject upon general principles of jurisprudence. Let us then look to the cases to see what they have decided.

It was early decided, in Massachusetts, that where residents of Massachusetts adopted a child, domiciled in New Hampshire under a statute providing for adoption at the residence of the child, or of the adopting parents, the adoption was void.54 The decision, however, was put upon the ground that there was no presumption that the New Hampshire statute was intended to apply to a case where the adopting parents were domiciled outside

the state. The court declined to consider the effect of the adoption if it had appeared that the New Hampshire law was intended to apply to non-residents.

A similar statute exists in Massachusetts, under which the adoption of a child, domiciled in Massachusetts, by residents of New Hampshire, was held valid.

The validity of an adoption under such statutes came before the Supreme Court of Louisiana in *succession of Caldwell,* which was a suit for the annulment of the adoption, in Massachusetts, of an adult there domiciled, by the intestate who, at the time of the adoption, was a resident of Louisiana where he continued to reside until his death. The adoption was regular, and the Louisiana court held that the Massachusetts court had jurisdiction by reason of the domicile of the adopted "child" and the voluntary appearance of the adopting father.

In *Van Meter v. Sanky* the defendant was adopted under a Pennsylvania statute. The plaintiff was domiciled in that state at the time, but the adoptive father had only a temporary residence. The Supreme Court of Illinois held that the temporary residence of the adopting father in Pennsylvania, was sufficient to give the court there jurisdiction over the subject matter so that the decree was final upon the status created.

It is clear, then, upon the authority of the decided cases, that it is not necessary for the adopting parents to be domiciled within the state or country where the adoption takes place.

It is true that the law of the domicile is primarily interested in the status of individuals, but, in these cases, that law apparently yields in favor of the law having jurisdiction over the child. While it is difficult to explain the decisions upon logical grounds, still, because of the necessity of the situation, the result, it would seem, is desirable. The adopting parents are interested in the change of status, and voluntarily submit themselves to the jurisdiction of the law of the domicile of the child. There is no objection from their point of view. The difficulty arises from the maxim that the laws of one country cannot change the status of persons domiciled in another. It is submitted that the adoption of a child, by a person, does not normally militate against the laws of that person's domicile.

It may be suggested that to allow the adoption at the domicile of the child would permit that state to unload the burden of its

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55 114 La. 195, 38 So. 140, (1905).
56 148 Ill. 536, 36 N. E. 628, (1893).
57 See Appeal of Wolf, 13 Atl. 760, (Pa. 1888).
58 See, also, Brewer v. Browning, 115 Miss. 358, 76 So. 267, (1917).
pauper children upon the state of the domicil of the adopting parents. In this connection it is to be observed that the status of adoption is usually created by the decree of a court, or by a contract such as with a charitable institution, given by its charter, power to make such contracts with adopting parents. It can hardly be said that a court or charitable institution in the performance of its duties toward children, would sanction their adoption to irresponsible persons. It is to be assumed that the interests of the children will be controlling considerations in proceedings for their adoption. Further we can hardly expect that courts or benevolent institutions will be influenced by selfish motives to such an extent that they would purposely impose their just burdens upon their sister states. It seems that the contrary should be presumed. In view of these considerations it is submitted that this difficulty is more apparent than real, and that there is little danger from this source. It, therefore, appears that there is no serious objection in saying that where a court has jurisdiction over the child by reason of its domicil, and over the person of the adopting parent by reason of voluntary appearance, it has sufficient jurisdiction over the subject matter to create the status of adoption.

A case is presented with similar difficulties when the adoption proceedings are had under the law of the domicil of the adopting parent and the child is domiciled in another state or country. Some statutes require jurisdiction over the natural parent of the child in order to effect the change in status,59 while other statutes provide for adoption at the domicil of either the adopting parent or the child.

In Stearns v. Allen60 the Supreme Judicial Court of Massachusetts held that the presence of a child within the state gave the courts of that state jurisdiction to decree an adoption of such child. In that case the natural mother of the adopted child lived in Massachusetts. The father, who was a domiciled Scotchman, married the mother, and soon after abandoned her. The mother turned the child which was born to the marriage, over to a children’s home from which it was adopted. Knowlton, C. J., in delivering the opinion of the court said,

"In many of these cases the state may exercise and ought to exercise jurisdiction over the child. If the child is actually dwelling in the state, although his father’s domicile is elsewhere, the state may as well provide for his adoption as to provide for

60 183 Mass. 494, 67 N. E. 349, (1903).
him in other ways. Although the status of the natural parent in reference to the child is effected by the adoption, the jurisdiction which gives the right to decree adoption is jurisdiction over the adopted parents and the child, who are the parties whose status is directly decreed. The incidental effects upon the status of the natural parents is only in regard to certain rights of property and the right of control. From the necessity of the case, in as much as it has not always been possible to find all the interested parties in the same state, it is enough to establish jurisdiction which is binding upon the natural parent if he is given reasonable notice of the pendency of the proceedings, and an opportunity to be heard, Parsons v. Parsons, 101 Wis. 76. We are of opinion that if the child is an inhabitant of the Commonwealth, especially if his father has abandoned him and his mother also lives here, the mere fact that his father's domicile is in another state or country does not deprive the court of jurisdiction under our statute.781

While Stearns v. Allen did not involve a decree of a foreign court, still it was followed in a later case where adoption proceedings under similar circumstances were held valid by a foreign court. Woodward's Appeal82 furnishes the example. In that case the child was left with the adopted parents who were domiciled in Wisconsin. It appeared that the natural parents abandoned the child, there, and had gone to parts unknown. The child was adopted under the Wisconsin statute which provided for adoption “upon a petition duly instituted by domiciled inhabitants” of that state. The child claimed as heir to the estate of the adopted father who died domiciled in Connecticut. The court found in favor of her claim.

These cases may be explained on the ground that the children were abandoned in the state, and that the state “may provide for them if they fall into distress, and may exercise such control over them as is necessary for their protection, if they are unable to take care of themselves.” But it seems hard to justify the adoption of a non-resident child when the natural parent is present, objecting to the decree.83 It is submitted that such adoption should not be recognized outside the state in which the decree is rendered.84

When a valid decree of adoption is rendered the domicil of the adopted parent is acquired by the adopted child.85 But if the adopting parents are citizens of a foreign country the citizenship

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61 Accord, Cabrillos v. Angel et ux., 278 Fed. 174, (1922); In re Williams, 102 Colo. 70, 26 Pac. 407, (1894).
62 Woodward's Appeal, 81 Conn. 152, 70 Atl. 453, (1908).
65 Washburn v. White, 140 Mass. 568, 5 N. E. 813, (1886); Waldoborough v. Friendship, 87 Me. 211, 32 Atl. 880, (1895).
of the child is not affected, or its privileges and immunities abridged.\textsuperscript{65} By changing his domicile, in good faith, the adopted parent may also change the domicile of the child so long as it remains a minor.\textsuperscript{66}

B. METHOD OF PROCEEDING

Having determined the proper law for the creation of the status of adoption, the method employed by that law does not matter. It if appears that the adoption was regular, and created the status according to the law having jurisdiction over the subject matter, that status goes with the parties everywhere.\textsuperscript{67} An interesting illustration of this proposition is to be found in \textit{Brewer v. Brown-\textsuperscript{ing}}\textsuperscript{68} where the adoption was by contract between the adopting parents and the Louisville Baptist Orphan's Home, which was incorporated by a special act of the legislature of Kentucky giving the corporation, thus created, power to adopt children in this manner. On a former appeal\textsuperscript{69} the Mississippi court had held that, since the method of adoption in Kentucky was inconsistent with that in Mississippi which required a decree of court, such adoption would not be recognized in the latter state. The court, in the second case however, admitted that the doctrine, announced in the former appeal, was wrong, and proceeded to correct the error by holding that the adoption, by contract, in Kentucky gave the child the same rights in Mississippi as a natural child.

One case has gone so far as to recognize a person as the adopted child of the intestate by virtue of an agreement, between the intestate and the adopted child, made in a state, while the parties were domiciled there, whose laws did not provide for adoption.\textsuperscript{70} The decision was influenced by cases where trusts have been fastened upon property because of executed agreements to adopt children.\textsuperscript{71} From the standpoint of the Conflict of Laws however, the case hangs on a slender thread.

C. INCIDENTS OF THE STATUS

Finally, when the status of adoption has been validly created by the proper law, let us consider its effects outside the state or country creating the same. The recognition of the rights of such persons depends entirely upon the principles of the comity of

\textsuperscript{65} Cabrillo v. Angel et al., supra.
\textsuperscript{66} Woodward v. Woodward, 27 Tenn. 644, 11 S. W. 892, (1889).
\textsuperscript{67} Gray v. Holmes, 57 Kan. 217, 45 Pac. 596, (1886); Brewer v. Browning, 115 Miss. 358, 76 So. 267, (1917); McCalpin v. McCalpin's Estate, 79 S. W. 824, re-hearing denied, 77 S. W. 235, (Tex. 1903); James v. James, 35 Wash. 655, 77 Pac. 1052, (1904).
\textsuperscript{68} Supra, note 68.
\textsuperscript{69} Fisher v. Browning, 107 Miss. 729, 66 So. 122, (1914).
\textsuperscript{70} Fiske v. Lowton, 124 Minn. 85, 144 N. W. 455, (1913).
\textsuperscript{71} See 6 Pomroy, Equity Jurisdiction, § 746.
nations, such recognition not being required by the "full faith and credit" clause of the Federal Constitution.\(^7\) Also, a state may require a record of foreign adoption proceedings to be filed, in that state in a manner prescribed, precedent to the enforcement of rights owing from the status created by such foreign proceedings.\(^7\)

An adoption is intended to create the legal relation of parent and child between persons who are strangers in blood. So far as domestic relations are concerned that relation is created and recognized at least in all those states that provide for adoption.\(^5\) But the laws of many states qualify the rights of adopted children as to descent and distribution. The difference in the laws of various states in this respect, has brought about some troublesome questions upon which the decisions of courts are not in agreement. Where the rights of adopted children are practically the same under the law that created the status, and under the law that is being administered it is clear that full effect should be given to the status, and its incidents.\(^7\) However, where the status was created under a law which gives parties to an adoption more extensive rights than are accorded to such persons by the law that is applicable, the rights of the parties are limited by the latter law.\(^7\) That is the incidents of the status, once it has been created by the proper law, are determined by the *lex fori*.

There is a difference of opinion as to whether the local laws should determine the incidents of the status when they bestow greater rights upon the parties to the adoption than does the law where the adoption proceedings were had.

In the *State of Sunderland*\(^7\) the appellant was adopted by a special act of the legislature of Louisiana which made the appellant heir to the adopting parents. The *lex fori* permitted an adopted child to inherit by right of representation. The court held that the adopted child could not inherit through the adopting parent. The decision is rested upon a strict construction of the statute which, according to the court, fixed the rights of the parties. It would seem that such strict construction of a statute of this kind is not warranted, and indeed, while not overruled, the soundness

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\(^7\) Hood v. McGeehee, 237 U. S. 611, (1915).

\(^7\) Markover v. Krauss, 152 Ind. 294, 31 N. E. 1047, (1892).


\(^7\) Keegan v. Garaghan et al., 101 Ill. 26, (1881); Finley v. Brown, supra, (sem-

\(^7\) 60 Iowa 732, 13 N. W. 655, (1883).
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of this decision was doubted by the same court in Shick v. Howe. In the latter case, however, the New York law, under which the adoption took place, gave substantially the same rights to adopted children as the Iowa law, under which the case arose, and the point was not decided.

Boaz v. Swinney is a similar case except that the adoption proceeding was under a general statute. The Supreme Court of Kansas held that the extent of the rights of the defendant was to be determined by the Illinois statute under which she had been adopted.

In Calhoun v. Bryant an adoption proceeding under the same Illinois statute was involved, and the Supreme Court of South Dakota came to an opposite conclusion, holding that an adoption in a foreign state or country creates a status which will be recognized in other states, but that the incidents of that status should be determined by the lex rei sitae in the case of real property, and that the right of an adopting parent to inherit real property from the adopted child was one of the incidents of the status of adoption recognized and enforced in South Dakota, even though it is not so created by the law where the adoption took place.

The same question was presented in Anderson v. French. There the appellant was adopted under a Massachusetts statute which excepted, from the rights conferred upon persons adopted thereunder, inheritance from lineal or collateral kindred of the adopting parents by right or representation. The New Hampshire statute of adoption made no such exception. After reviewing the decided cases upon the question the court concluded that, while the legality of the adoption was to be determined by the law under which the proceedings were had, still the rights incident to such status "should be determined in the case of personality by the lex domicilii of the owner at the time of his decease, and real estate by the lex rei sitae."

It was suggested in the dissenting opinion of Parsons, C. J., that the statute of Massachusetts placed a restriction upon the status created rather than upon the rights of adopted children, and that such status could not be enlarged by the law of another state. The Estate of Sunderland and Boaz v. Swinney, discussed above, are cases which were apparently decided upon this distinction.

79 Supra, note 76.
81 28 S. D. 266, 133 N. W. 266, (1911).
82 77 N. H. 506, 92 A.1. 1042, (1915).
While there is perhaps a distinction, it is submitted that it is a narrow one. Such a distinction is sure to cause confusion. This was exemplified in Boaz v. Swinney, supra, where the terms of the statute, under which the adoption proceedings were had, were ambiguous, and the statute had not been construed with reference to the rights of adopted children under it. It would seem that, when the status of adoption is created, the law creating it should withdraw and leave the determination of the rights flowing from the status to the law under which its benefits are sought to be enforced.

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Polydore v. Prince, Ware (U. S.) 402, (1837); See Beale, Treatise on the Conflict of Laws, Part I, 182, 183; See also Beale, Progress of the Law, 1918-19, 33 Harv. L. Rev. 1 at 14.