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Illegitimate Children and Conflict of Laws

John W. Ester
University of Maryland Law School

ILLEGITIMATE CHILDREN AND CONFLICT OF LAWS

JOHN W. ESTER†

Although there are many areas in which rules of law reflect current feelings of moral and social policy, few justiciable controversies call for the determination of such factors as directly as does a case involving the legal status and rights of an illegitimate child. This is particularly true where one state is called upon to determine the status of an illegitimate who was born or has been domiciled in another state prior to migration to the forum. In such situations the policy of the forum might conflict sharply with that of the state in which the parents attempted to "legitimate" the child. And in making a choice as to which law should properly be applied, the court's decision will determine not only the legal rights of the child, but to a significant degree will also affect the child's social status and his own personal feelings in regard to the stigma placed upon him by his parents.

The early common law treatment of the illegitimate child showed a marked disregard for these social implications. Based on the refusal of the Earls and Barons in 1235 to provide for legitimation of a child born out of wedlock,[1] Lord Chief Justice Tindal was able to state in *Birtwhistle v. Vardill*[2] that ". . . the rule of descent to English land is, that the heir must be born after actual marriage of his father and mother . . . and . . . this is a rule of a positive inflexible nature, applying to and inherent in the land itself which is the subject of descent. . . ." The fact that the claimant had acquired a status of legitimacy according to the laws of Scotland was held to be wholly immaterial. Under the law of England, one seeking rights of inheritance *must* have been born during lawful wedlock, and his status in another country was of no consequence. This unyielding refusal on the part of the early common law courts to give any legal recognition to an illegitimate was succinctly described by Blackstone when he wrote that such a child's ". . . rights are very few, being only such as he can acquire, for he can inherit nothing, being looked upon as the son of nobody, and sometimes called filius nullius, sometimes

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† Assistant Professor, University of Maryland Law School.

1. "He is a Bastard that is born before the Marriage of his parents." 20 Hen. 3, ch. 9, 1 Stat. at Large 31 (1235). In the "Statute of Merton," it was also noted that ". . . all the Earls and Barons with one voice answered, that they would not change the Laws of the Realm, which hitherto have been used and approved."

2. 7 C. & F. 895, 934, 7 Eng. Rep. 1308, 1322 (1840).

filius populi."[3] In fact, children born out of wedlock continued to be regarded in England as bastards for life until the Legitimacy Act of 1926 finally made provision for legitimation by the subsequent intermarriage of the child's parents.[4]

While England was slow to recognize a potential in an illegitimate child to acquire a status of full legitimacy, the American law developed with greater rapidity, and only a few instances of adherence to the strict common law principle may be cited. For example, in 1895 the Florida Supreme Court declared that ". . . legitimation in a foreign country does not make lawful heirs, in other countries, where the common law or the statute of Merton is now in force, of those who were born out of lawful marriage."[5] And in *Smith v. Derr's Adm'rs,*[6] the Pennsylvania Supreme Court refused to depart from common law precedents, stating that "so far as our law is concerned, legitimation by the subsequent marriage of the parents abroad, by act of a foreign legislature or by judicial decree abroad, are all fruitless." Fortunately, such cancerous doctrines did not become malignant, and all fifty states have recognized the inequity of an indelible status of illegitimacy by providing for some form of legitimation after birth.

1. STATUTORY BACKGROUND

The usual conflict of laws case involving an illegitimate child arises as follows: An illegitimate child is born in State A, and while domiciled in that state, or in State B, the parents do an act which would have the effect of legitimating the child according to the law of that jurisdiction. The parents then move to the forum where the father eventually dies, or perhaps they are domiciled in another state at the time of his death, and he leaves real or personal property in the forum. Claiming a right of inheritance from or through his father, the child proves that he has been legitimated according to the law of another state, and alleges that the foreign created status of legitimacy should be recognized and given full effect in the forum. The "conflict" in such a case is generally due to the fact that the legitimation statute of the forum is different than that of State A or State B. This section will attempt to point out the lack of uniformity in statutory provisions which gives rise to such conflict of laws cases.

3. BLACKSTONE, COMMENTARIES 458.
4. 16 & 17 Geo. 5, ch. 60 (1926).
5. Williams v. Kimball, 35 Fla. 49, 54, 16 So. 783, 784 (1895).
6. 34 Pa. St. 126 (1859), rejected as authority in Moretti's Estate, 16 D. & C. 715 (1932). For a similar case in Illinois, see Stoltz v. Doering, 112 Ill. 234, 239-40 (1885).

Although not properly classified as "legitimation" statutes, the provisions in Arizona and Oregon deserve special attention due to the sweeping nature of their application.

ARIZ. REV. STAT. ANN. § 14-206 (1956):

> Legitimacy of children; power to inherit
>
> A. *Every* child is the *legitimate child* of its natural parents and is entitled to support and education as if born in lawful wedlock, except that he is not entitled to the right to dwell or reside with the family of his father, if the father is married.
>
> B. *Every* child *shall inherit from its natural parents and from their kindred heir,* lineal and collateral, in the same manner as children born in lawful wedlock.
>
> C. This section shall apply although the natural father of such child is married to a woman other than the mother of the child, as well as when he is single. (Emphasis added.)

ORE. REV. STAT. § 109.060 (1959):

> Legal status and legal relationships where parents not married.
>
> The legal status and legal relationships and the rights and obligations between a person and his descendants, and between a person and his parents, their descendants and kindred, are the same for all persons, *whether or not the parents have been married.* (Emphasis added.)

As can be seen from the face of these statutes, the only act necessary to make a child legitimate in relation to his natural parents and their collaterals is the *act of birth itself.* These states stand alone in requiring nothing other than birth to make a child legitimate.

A far more common statutory provision may be found in those states which have adopted the civil law concept of legitimation *per subsequens matrimonium.* With the exception of Kansas (and Arizona and Oregon where such a statute is unnecessary), all fifty states have such a statute, and these enactments may be categorized according to the presence or absence of the requirement of acknowledgment; some providing for legitimation by subsequent marriage alone,[7] others requiring

7. ALASKA COMP. LAWS. ANN. § 21-3-3 (Supp. 1957); ARK. STAT. ANN. § 61-103 (1947); CAL. CIV. CODE § 230; CAL. PROB. CODE § 256; CONN. GEN. STAT. REV. § 45-274 (1958); FLA. STAT. ANN. § 742.091 (Supp. 1957); HAWAII REV. LAWS. § 57-24 (1955); IDAHO CODE ANN. § 32-1006 (1947); IOWA CODE ANN. § 595.18 (1950); ME. REV. STAT.

marriage plus acknowledgment of paternity.[8] The Wisconsin legislation is illustrative of the former, and the Illinois statute of the latter.

WIS. STAT. ANN. § 245.36 (1957):

> In any and every case where the father and mother of an illegitimate child or children shall lawfully intermarry . . . such child or children shall thereby become legitimated and enjoy all the rights and privileges of legitimacy as if they had been born during the wedlock of their parents. . . .

ILL. REV. STAT. ch. 3, § 163 (1959):

> An illegitimate child whose parents intermarry and who is acknowledged by the father as the father's child shall be considered legitimate.

Included in the second category, requiring marriage plus acknowledgment, the Louisiana act provides that the acknowledgment must be before a notary and witnesses,[9] and in Delaware[10] and Massachusetts[11] acknowledgment is not required if paternity is established by adjudication. It should also be noted that only Pennsylvania requires marriage plus cohabitation,[12] while in the District of Columbia the only subsequent marriage provision appears in the chapter on vital statistics.[13]

The second most common statutory provision is one enabling the child to inherit from or through his father, or granting full legitimacy, if the father has acknowledged paternity. While such a statute appears in one form or another in twenty of the fifty states, the requirements of

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ANN. ch. 170, § 3 (1954); MICH. STAT. ANN. § 27.3178 (153) (Supp. 1957); MINN. STAT. ANN. § 517.19 (1959); MONT. REV. CODES ANN. § 61-123 (1947); NEB. REV. STAT. § 13-109 (1954); NEV. REV. STAT. §§ 122.140, 134.170 (1) (1959); N. M. STAT. ANN. § 29-1-20 (1953); N.Y. DOM. REL. LAW § 24; N.C. GEN. STAT. § 49-12 (Supp. 1959); N.D. CENTURY CODE § 14-09-02 (1960); OKLA. STAT. ANN. tit. 10, § 2 (1951); PA. STAT. ANN., tit. 20, §§ 1.7 (b), 301.14 (1950), 180.14 (7) (Supp. 1958); S.C. CODE § 15-1384 (1952); S.D. CODE § 14.0301 (1939); TENN. CODE ANN. § 36-307 (1955); TEX. PROB. CODE § 42 (1956); UTAH CODE ANN. § 77-60-14 (1953); WASH. REV. CODE § 26.04.060 (1951); W. VA. CODE ANN. § 4085 (1955); WIS. STAT. ANN. § 245.36 (1957).

8. ALA. CODE tit. 27, § 10 (1958); COLO. REV. STAT. ANN. § 152-2-8 (1953); GA. CODE ANN. § 74-101 (1948); ILL. REV. STAT. ch. 3, § 163 (1959); IND. ANN. STAT. § 6-207 (b) (2) (Burns 1953); KY. REV. STAT. § 391.090 (3) (1959); LA. CIV. CODE ANN. art. 198 (West 1952); MD. ANN. CODE art. 46, § 6 (1957); MISS. CODE ANN. § 474 (1957); MO. ANN. STAT. § 474.070 (1949); N.H. REV. STAT. ANN. § 457:42 (1955); N.J. STAT. ANN. § 9:15-1 (1960), § 3A:4-7 (1953); OHIO REV. CODE ANN. § 2105.18 (Page 1953); R.I. GEN. LAWS ANN. §§ 15-8-21, 33-1-8 (1956); VT. STAT. ANN. tit. 14, § 554 (1959); VA. CODE ANN. § 64-6 (1950); WYO. STAT. ANN. § 2-44 (1957).

9. LA. REV. STAT. § 9:391 (1950).

10. DEL. CODE ANN. tit. 13, § 1301 (1953).

11. MASS. ANN. LAWS ch. 190, § 7 (1955).

12. PA. STAT. ANN. tit. 48, § 167 (Supp. 1958).

13. D.C. CODE ANN. § 11-963 (Supp. 1959).

such statutes are far from uniform, and only one of the several differing provisions may be quoted as illustrative of even a small number of states.

CAL. PROB. CODE § 255:

> Illegitimate children; inheritance rights; limitations
>
> Every illegitimate child is an *heir* . . . of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father by inheriting any part of the estate of his father's kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child is deemed legitimate for all *purposes of succession.* (Emphasis added.)

While similar provisions have been enacted in nine other states,[14] this is the only statute dealing with acknowledgment where there is even this degree of uniformity. For the sake of convenience, the remaining provisions will be listed without quotation.

1. Acknowledgment is sufficient.[15] (1 state)
2. Open and notorious acknowledgment.[16] (3 states)
3. Acknowledgment in writing.[17] (3 states)
4. Written acknowledgment required, but the illegitimate still does not inherit from his father.[18] (1 state)
5. In writing before witnesses.[19] (1 state)
6. In writing and before witnesses, but the child still does not inherit through his parents.[20] (1 state)

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14. FLA. STAT. ANN. § 731.29 (Supp. 1960); IDAHO CODE ANN. § 14-104 (1947); MONT. REV. CODES ANN. § 91-404 (1947); N.D. CENTURY CODE § 56-01-05 (1960); OKLA. STAT. ANN. tit. 84, § 215 (1951); S.D. CODE § 56.0105 (1939); WASH. REV. CODE § 11.04.080 (1951); WIS. STAT. ANN. § 237.06 (Supp. 1960). In Nebraska, the statute is similar to that in California, except for the additional requirement that the parents have other children. NEB. REV. STAT. § 30-109 (1956).
15. UTAH CODE ANN. § 74-4-10 (1953).
16. IOWA CODE ANN. § 636.46 (1950); KAN. GEN. STAT. ANN. § 59-501 (1949); NEB. REV. STAT. § 13-109 (1954).
17. IOWA CODE ANN. § 636.46 (1950); KAN. GEN. STAT. ANN. § 59-501 (1949); NEB. REV. STAT. § 13-109 (1954).
18. DEL. CODE ANN. tit. 13, § 1304 (1953).
19. NEV. REV. STAT. § 134.170(1) (1959).
20. MINN. STAT. ANN. § 525.172 (1947).

7. Written acknowledgment executed before the court or filed with the court.[21] (1 state)
8. Executed before a notary or justice of the peace.[22] (1 state)
9. Filed with the court and executed with the formalities of a deed.[23] (1 state)
10. Execution before an officer entitles the child to support.[24] (1 state)

In addition to the two methods of legitimation discussed above, several miscellaneous provisions need to be mentioned in order to complete the picture. In several states legitimacy may be established by means of an expressly authorized judicial proceeding.[25] In Louisiana a notarial act before two witnesses is sufficient,[26] and in Wisconsin an admission of paternity in open court will have the same effect.[27] Finally, in seven states a father may "adopt" his illegitimate child and thereby legitimate him as of the time of birth.[28] The latter provision in regard to "adoption" of an illegitimate child is of particular importance, and the Oklahoma legislation may be given as illustrative of the almost identical provisions in the other six states.[29]

OKLA. STAT. ANN. tit. 10, § 55 (1951):

> The father of an illegitimate child by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, *thereby adopts* it as such, and such child is thereupon deemed for all purposes legitimate from the time of its birth. (Emphasis added.)

Of all the statutes investigated, only two reflected a policy of giving

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21. ALA. CODE tit. 27, § 11 (1940).
22. ME. REV. STAT. ANN. ch. 170, § 3 (1954).
23. MICH. STAT. ANN. § 27.3178 (153) (Supp. 1957).
24. HAWAII REV. LAWS § 330-12 (1955).
25. ALASKA COMP. LAWS. ANN. § 21-3-2 (1957); GA. CODE ANN. § 74-103 (1948); IND. ANN. STAT. §§ 6-207 (b) (1) (Burns 1953), 44-109 (Burns 1952); IOWA CODE ANN. § 636.46 (1950); KAN. GEN. STAT. ANN. § 59-501 (1949); MISS. CODE ANN. § 1269-01 (1956); N.M. STAT. ANN. § 12-4-12 (1953); N.C. GEN. STAT. § 49-10 (1950); OHIO REV. CODE ANN. § 2105.18 (Page 1953); S.C. CODE § 15-1384 (1952); TENN. CODE ANN. §§ 36-301, -303, -306 (1955); WIS. STAT. ANN. § 237.06 (Supp. 1960).
26. LA. CIV. CODE ANN. art. 200 (West 1952).
27. WIS. STAT. ANN. § 237.06 (Supp. 1960).
28. CAL. CIV. CODE § 230; IDAHO CODE ANN. § 16-1510 (1947); MONT. REV. CODES ANN. § 61-136 (1947); N.D. CENTURY CODE § 14-11-15 (1960); OKLA. STAT. ANN. tit. 10, § 55 (1951); S.D. CODE ANN. § 14.0408 (1939); UTAH CODE ANN. § 78-30-12 (1953).
29. The "thereby adopts" statute in Montana was among those sections mentioned as repealed by the Uniform Adoption Act, but the editors of the statutes seemed to indicate that it might still be effective.

full recognition to a status of legitimacy created in another state. Section 29—18 of the North Carolina General Statutes (Supp. 1959), provides that where a child has been legitimated by the laws of that state, or ". . . in accordance with the applicable law of any other jurisdiction . . .," he shall be entitled to inherit from and through his parents, and his parents from and through him, as though born in lawful wedlock. In Oregon, section 111.231 of the Revised Statutes (1959), suggests the same result by providing that "in applying the laws of descent and distribution of this state, full effect shall be given to *all* relationships as described in ORS 109.060."[30] In view of the pervasiveness of legislation on the subject of illegitimacy and legitimation, it is strange, and perhaps unfortunate, that only two states have provided by statute for the recognition of a status of legitimacy acquired under the laws of another state.

2. JUDICIAL DEVELOPMENTS

Before attempting to deal with the more important conflict of laws problems arising out of the multifarious statutory methods for legitimation, it is necessary to indicate those areas which will not be discussed. First, legitimation by judicial proceeding and by special legislative act have rarely been presented in a conflict of laws context, and will not be considered. Second, our inquiry will be confined to the problems presented where a child is admittedly illegitimate, and we will not delve into the issue as to whether or not a child is legitimate at the time of birth. Third, the rule stated in section 139 of the Restatement of Conflicts has become obsolete and may be disposed of in summary fashion. According to the Restatement, and Professor Beale,[31] an act performed after the birth of an illegitimate child will not relate back to the time of birth and make the child legitimate *ab initio* unless the law of ". . . the state of domicil of that parent at the time of the child's birth and the law of the parent's domicil at the time of the legitimating act so provide."[32] No recent case can be found supporting such a requirement, and this writer joins Professor Rabel in his suggestion that it is an artificial doctrine based on a "preconceived idea" unsupported by any ". . . American decision of actual importance. . . ."[33]

30. ORE. REV. STAT. § 109.060 (1959) was quoted in full in section 1 of this article.
31. 2 BEALE, CONFLICT OF LAWS 707 (1935).
32. RESTATEMENT, CONFLICT OF LAWS § 139 (1934).
33. 1 RABEL, CONFLICT OF LAWS: A COMPARATIVE STUDY 614 (2d ed. 1958). See also, STUMBERG, CONFLICT OF LAWS 334 (2d ed. 1951). One of the few cases seeming to support the Restatement view is Fowler v. Fowler, 131 N.C. 169, 42 S.E. 563 (1902). However, both elements were present in this case (birth and legitimation in Illinois),

Turning to those areas which are of greater importance today, it would seem proper to briefly outline the general principles involved before applying them to specific problems arising out of statutory provisions.

(1) The status of a child may fall within any one of five classifications; legitimate, illegitimate, illegitimate but capable of inheriting from one or both parents, legitimated, or recognized as a natural child under civil law concepts. Of these five, it is most important to keep in mind the distinction between an illegitimate child who has been fully legitimated and one who has acquired only a right to inherit from or through his parents.

(2) The law of the domicil of a decedent governs the question of those entitled to distribution of his personal property, and the law of the situs controls in regard to real property.[34]

(3) An illegitimate child fully legitimated by the law of the domicil of the parent whose relationship to the child is in question, is generally regarded as legitimate everywhere.[35] To this general rule must be tacked the caveat that the forum might not recognize a foreign legitimation which is contrary to its own concepts of public policy.[36]

(4) If the child has been fully legitimated according to the law of the domicil of his parent, it is immaterial that the law of the child's own domicil would not have this effect.[37]

(5) An act done which is sufficient to legitimate under the laws of the state where performed, will not legitimate where such act is not sufficient under the laws of the domicil of any of the parties involved.[38] It is also doubtful whether an attempted act of legitimation will be given effect in a foreign jurisdiction where such act is sufficient only in the state of the child's domicil.[39]

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and it does not lend as much support as would a case where one element was lacking and the child was not permitted to inherit for this reason.

34. Jones v. Jones, 234 U.S. 615 (1914); Lopes v. Downey, 334 Mass. 161, 134 N.E.2d 131 (1956); Matter of Crabbe's Estate, 158 N.Y.S.2d 551 (Surr. Ct. 1957); Napier v. Church, 132 Tenn. 111, 177 S.W. 56 (1915).

35. Ross v. Ross, 129 Mass. 243 (1880); *In re* Craven's Estate, 268 P.2d 236 (Okla. 1954); RESTATEMENT, CONFLICT OF LAWS §§ 137, 140 (1934).

36. Fuhrhop v. Austin, 385 Ill. 149, 52 N.E.2d 267 (1943), *cert. denied* 321 U.S. 796 (1944); Cole v. Taylor, 132 Tenn. 92, 177 S.W. 61 (1915); 2 BEALE, CONFLICT OF LAWS 712 (1935).

37. 2 BEALE, CONFLICT OF LAWS 711-12 (1935); STUMBERG, CONFLICT OF LAWS 332 (2d ed. 1951).

38. GOODRICH, CONFLICT OF LAWS 435 (3d ed. 1949). *Contra,* Smith v. Mitchell, 185 Tenn. 57, 202 S.W.2d 979 (1947).

39. Irving v. Ford, 183 Mass. 448, 67 N.E. 366 (1903); RESTATEMENT, CONFLICT OF LAWS § 137, caveat (1934). In Moretti's Estate, 16 D. & C. 715, 719 (Pa. 1932), the Pennsylvania court held that ". . . the status of Pietro was determined by the law of *his* domicile, and he is, therefore, entitled to his father's estate." (Emphasis added.)

(6) Where the act of a parent in a foreign jurisdiction did not fully legitimate the child in that state or country, but only resulted in a right to inherit from that parent, such act will generally be disregarded in other jurisdictions.[40]

(7) If the forum characterizes its own legitimation statute as one of succession, an illegitimate may be permitted to inherit local property, both real and personal, without consideration of the law of the parent's domicil at the time of the alleged legitimating act.[41]

(8) The United States is unique in holding that "a legitimate relationship may exist between a child and one parent although its relationship to the other parent is an illegitimate one."[42]

This outline of basic conflict of laws rules applied in cases invloving illegitimate children is necessarily general, and admittedly too sweeping and all inclusive. The many qualifications and exceptions will be dealt with in the sections to follow.

A. *Legitimation per Subsequens Matrimonim*

". . . manna to the bastards of the world"?[43]

Of the several methods whereby an illegitimate child may become legitimate, that of legitimation *per subsequens matrimonim* is most common, existing in all but one state.[44] Due possibly to the fact that such a statute is usually present both at the forum and at the domicil of the parents at the time of their marriage, there has been little deviation from the general principles listed above. Thus, if the parents subsequently marry, and according to the law of their domicil at that time, the ceremony has the effect of legitimating the child, he will generally be deemed legitimate wherever he might go.[45] Should either of his parents die intestate leaving realty or personalty in another jurisdiction, he will be

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This is apparently the only case specifically holding that legitimation under the law of the child's domicil is sufficient although the law of the father's domicil was not satisfied.

40. GOODRICH, CONFLICT OF LAWS 445 (3d ed. 1949); 1 WHARTON, CONFLICT OF LAWS 552-54 (3d ed. 1905).

41. *In re* Lund's Estate, 26 Cal. 2d 472, 159 P.2d 643 (1945); STUMBERG, CONFLICT OF LAWS 333 (2d ed. 1951).

42. 1 RABEL, CONFLICT OF LAWS: A COMPARATIVE STUDY 601-02 (2d ed. 1958); RESTATEMENT, CONFLICT OF LAWS § 137, comment *a* (1934).

43. This quaint aphorism was coined by the California court to describe its subsequent marriage statute. Blythe v. Ayres, 96 Cal. 532, 563, 31 Pac. 915, 917 (1892).

44. See statutes cited notes 7-13 *supra*.

45. Milton v. Escue, *rev'd on other grounds*, 201 Md. 190, 93 A.2d 258 (1952); Doty v. Vensel, 190 Okla. 461, 124 P.2d 982 (1942); Pilgrim v. Griffin, 237 S.W.2d 448 (Tex. Civ. App. 1950); 1 RABEL, CONFLICT OF LAWS: A COMPARATIVE STUDY 617 (2d ed. 1958).

entitled to inherit as a legitimate heir.[46] And even though his father may die domiciled in a state other than that where legitimation by subsequent marriage occurred, he will nevertheless be entitled to recover under his father's life insurance policy.[47] In addition, the rule recognizing such a foreign legitimation applies in favor of the parents as well as the child. Thus, it is unnecessary for the parents to institute judicial proceedings to establish legitimacy, because a legitimate child cannot be legitimated, and the forum will recognize the status acquired in the state of the parent's former domicil.[48] Another situation in which the forum might extend such recognition to the parents is illustrated in the rather unusual case of *Skeadas v. Sklaroff*.[49] After giving birth to an illegitimate child in Rhode Island, the mother consented to a proposed adoption by defendants and gave them custody of the child. More than four years later the defendants filed a petition in Rhode Island to adopt the child, whereupon the natural parents immediately went through a marriage ceremony in Massachusetts (the state of their domicil). Before the words of the preacher had faded away, they filed suit in Rhode Island to obtain custody of their child, alleging that he had been legitimated due to the Massachusetts marriage, and any adoption in Rhode Island would be of no effect without the consent of the legitimate father. Applying the same conflict of laws rule which enables a legitimated child to inherit in the forum, the court held that the natural parents were entitled to custody because the child had been legitimated.

However, it would be misleading to say that a subsequent marriage which legitimates according to the law of the parent's domicil always has the same effect in another state. While it is of no consequence that the forum does not have a subsequent marriage statute,[50] the legitimated child must always contend with the general rules in regard to choice of law where inheritance to movables or immovables is involved. In addition, he might be met with the argument that the foreign legitimation is contrary to the public policy of the forum and should not be recognized. Where the latter contention is upheld, it is interesting to note that the courts place particular emphasis on the former—the law of the situs of

46. Dayton v. Adkisson, 45 N.J. Eq. 603, 17 Atl. 964 (1889); Bates v. Virolet, 33 App. Div. 436, 53 N.Y. Supp. 893 (1898); Miller v. Miller, 91 N.Y. 315 (1883); Matter of Crabbe's Estate, 158 N.Y.S.2d 551 (Surr. Ct. 1957).

47. *In re* Clark's Estate, 177 Misc. 397, 30 N.Y.S.2d 751 (Surr. Ct. 1941).

48. Fowler v. Fowler, 131 N.C. 169, 42 S.E. 563 (1902).

49. 84 R.I. 206, 122 A.2d 444 (1956), *stay granted,* 351 U.S. 171, *cert. denied,* 351 U.S. 988 (1956).

50. Fowler v. Fowler, 131 N.C. 169, 42 S.E. 563 (1902); Valley v. Lambuth, 1 Tenn. App. 547 (1925).

land determines who may inherit, and the domicil of the decedent controls in regard to personalty. Two Illinois cases are representative of a forum's possible attitude where such an issue is raised. In *Peirce v. Peirce,*[51] the illegitimate children of a bigamous marriage claimed a right to inherit from an Illinois decedent. To support an allegation of legitimation, the children proved that their father had obtained a divorce from his first wife after they were born to the second, and according to the law of Nevada where all parties were then domiciled, a common law marriage arose from the ashes of the Nevada divorce. Looking to the law of that state, the children pointed out that a subsequent common law marriage is effective to legitimate previously born illegitimate children. Although common law marriages are not recognized in Illinois, the court permitted the children to inherit, stating that "it is not against the public policy of this State to recognize legitimacy conferred by the law of Nevada, although the method whereby legitimacy is there obtained is not available in Illinois."[52] The court then stressed the point that the question involved was the legitimacy of the children, and not the validity of the common law marriage.

The second Illinois case of importance in regard to the issue of the forum's public policy is that of *Fuhrhop v. Austin.*[53] In this case the child was also the issue of a bigamous marriage, but the father did not attempt to divorce one of his wives and the child could not establish a valid common law marriage. However, in Arkansas a child born of a bigamous marriage is deemed legitimate, and the claimant argued that he should be regarded as legitimate in Illinois due to his status under the law of Arkansas where his parents were domiciled at the time of the bigamous marriage. His claim was rejected; the court pointing out that the descent of real property is governed by the law of the situs, and it is against the public policy of Illinois to permit the issue of a bigamous marriage to succeed to Illinois land. Although the decision of the court was supported by the few cases directly in point,[54] an early Louisiana case

51. 379 Ill. 185, 39 N.E.2d 990 (1942).

52. Peirce v. Peirce, *supra* note 51, at 189, 39 N.E.2d at 992. The position taken in the Peirce case was recently reaffirmed in Jambrone v. David, 16 Ill. 2d 32, 156 N.E.2d 569 (1959). *Accord,* Milton v. Escue, 201 Md. 190, 93 A.2d 258 (1952); McArthur v. Hall, 169 S.W.2d 724 (Tex. Civ. App. 1943).

53. 385 Ill. 149, 52 N.E.2d 267 (1943), *cert. denied,* 321 U.S. 796 (1944).

54. Olmsted v. Olmsted, 216 U.S. 386 (1910), *affirming,* 190 N.Y. 458 (1908); *In re* Bruington's Estate, 160 Misc. 34, 289 N.Y. Supp. 725 (Surr. Ct. 1936). *Contra,* George Estate, 4 Pa. D. & C.2d 334, 338 (1955), wherein the court reasoned that ". . . a recognition of the status of a child born of a bigamous union does not involve a recognition of the lawfulness of the conduct of the parents. The statute concerns itself simply and exclusively with the rights of the innocent children."

apparently rejected the public policy qualification to the general rule. In *Caballero v. The Executor,*[55] a negro woman and a caucasian man had an illegitimate child in Louisiana. The parents then acquired a domicil in Havana and were later married. Although miscegenation was clearly against the public policy of Louisiana in 1872, the child was permitted to inherit in that state because of the legitimation in the country where the parents were domiciled when married. While this case should not be overlooked merely because of its date, it seems to have little weight today due to the pervasive view that the policy of the forum will control where a case revolves around a claim of right to inherit local property.[56] Thus, it is possible that the forum might recognize a status of legitimacy acquired due to the subsequent marriage of the parents in another jurisdiction, but at the same time refuse to permit the legitimated child to inherit local property due to domestic concepts of "public policy."[57]

The case of *Smith v. Mitchell*[58] deserves special mention because it falls within neither the general rule looking to the domicil of the parents or the public policy qualification just discussed. In the *Mitchell* case an illegitimate child was born in Tennessee prior to the marriage of his parents in Alabama. In 1947 Tennessee had no subsequent marriage statute, although Alabama did. Despite the fact that *all* parties, father, mother and illegitimate child, were domiciled in Tennessee at the time of birth, at the time of the subsequent marriage, and when the father died, the illegitimate child was permitted to inherit in Tennessee due to the marriage of his parents in Alabama.[59] The court reached this result by reasoning as follows: (1) It is not necessary to be domiciled in the state where a marriage is performed in order for the marriage to be valid in that state and recognized in Tennessee. (2) Since the marriage is valid in Alabama, and recognized as such in this state, we should look to the law of Alabama to determine the effect of the marriage. (3) In Alabama, the marriage had the effect of legitimating previously born illegitimate children. (4) A child legitimated by the laws of another state should be permitted to inherit in any state, provided that the law of the foreign state is not inconsistent with, or opposed to, the policy of the forum. (5) Since there was no conflict with Tenneccee policy, the court concluded that

55. 24 La. Ann. 573 (1872).

56. *Compare* Smith v. Mitchell, 185 Tenn. 57, 202 S.W.2d 979 (1947); *with* Cole v. Taylor, 132 Tenn. 92, 177 S.W. 61 (1915). Note also cases cited *supra* note 54.

57. After stating the general rule that the forum may refuse to recognize a foreign legitimation as contrary to its public policy, Professor Beale suggested that "[o]n sound principle there seems no reason for so refusing." 2 BEALE, CONFLICT OF LAWS 712 (1935).

58. 185 Tenn. 57, 202 S.W.2d 979 (1947).

59. *Accord,* Munro v. Munro, 1 Scots App. (Rob.) 492 (H.L. 1840).

". . . a child born out of wedlock and legitimated by virtue of the law of a foreign state is permitted to inherit property in Tennessee . . ."[60] While this case has been criticized for its departure from firmly entrenched principles of conflict of laws, and for the court's obvious participation in judicial legislation,[61] its result is not shocking nor its reasoning without merit. If the parents of an illegitimate child wish to remove the stigma they have placed on their offspring, why should their attempt be thwarted merely because it was necessary to leave their domicil and be married in another state? A recognition of the child as legitimate under such circumstances is consistent with the general conflicts rule that a marriage valid where celebrated is valid everywhere;[62] full effect is given to the intention of the parents to ameliorate the results of their illicit conduct; and the child is not punished for the wrong of his parents. While it might be argued that a state lacks "jurisdiction" to legitimate where its only contact with the parties is the marriage ceremony,[63] that state certainly has the power to create a status of husband and wife, and this status will generally be recognized in other states. Why, then, should it lack power to create a status of legitimacy based on a marriage in the state? It is both illogical and inconsistent to recognize one status under the law of another state and disregard the other, when both were created by a single act.

Before concluding this section on legitimation by subsequent marriage, it must be pointed out that an illegitimate child might be permitted

60. Smith v. Mitchell, *supra* note 58, at 71, 202 S.W.2d at 985.

61. Note, 20 TENN. L. REV. 202 (1948).

62. The courts are not in complete accord as to which state should determine the status arising out of a foreign marriage ceremony; the law of the place of marriage, or that of the state where the parties intend to live as husband and wife. Taintor, *What Law Governs the Ceremony, Incidents & Status of Marriage,* 19 B.U.L. REV. 353 (1939), in SELECTED READINGS ON CONFLICT OF LAWS (1956). If the former theory should be adopted (which was the case in Smith v. Mitchell), there would seem to be no obstacle to the position taken by the Tennessee court that the law of the place of the ceremony should determine whether that act also created a status of legitimacy between the parents and their child. However, if the court had applied the second theory, and looked to its own law to determine the marital status (since the parties were at all times domiciled in that state), it must be admitted that a decision in favor of legitimacy would be more difficult to rationalize. By applying the intended place of domicil theory, Tennessee would look to its own law to determine the marital status created, and it would be inconsistent to then apply the law of Alabama to determine the question of legitimacy. However, since Tennessee did look to the law of Alabama to determine the validity of the marriage, this writer can see no serious objection to applying the law of the latter state to determine legitimacy as well.

63. Although the cases generally speak in terms of the law of that state which is "proper" to create a status of legitimacy, the Restatement speaks in terms of "jurisdiction." RESTATEMENT, CONFLICT OF LAWS § 141 (1934). While the use of this term would undoubtedly be proper where a status of legitimacy is created pursuant to a judicial proceeding, in non-judicial instances of legitimation it would seem that the question is not properly one of "jurisdiction."

to inherit in the forum without consideration of the law of the state of the parent's domicil at the time of marriage. Buttressed by the general conflicts rules in regard to distribution of personalty and succession to realty, several courts have characterized the subsequent marriage statute in their state as one of succession, and have applied it with little or no thought of any other law which might also be applicable.[64] By making such a characterization, the Supreme Court of Illinois, in *Hall v. Gabbert,*[65] permitted inheritance of Illinois land under the following circumstances: Daisy was born illegitimate in Ohio, and her father and mother were married in that state shortly after bastardy proceedings were instituted. Having done his duty, the father left Ohio immediately after the wedding, eventually dying domiciled in California and leaving realty in Illinois. While in Indiana and California, the father acknowledged paternity, so that the provisions of the Illinois statute requiring marriage plus acknowledgment were both met, although not in the same state. After characterizing the Illinois statute as one of succession, and concluding that it should be applied in regard to inheritance of local land, the court stated that ". . . it is immaterial what the laws of Indiana or Ohio, or any other country, are or were. We look to our own law, and read it as it is written; then 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."[66] A similar result was reached in Maine in the case of *In Re Crowell's Estate.*[67] After the birth of an illegitimate in Nova Scotia, the parents married and adopted the child while domiciled in that country. Unfortunately, neither act was of any legal significance in Nova Scotia. The father later moved to Maine, and upon his death the child claimed a right of inheritance. According to the general rule, a child legitimated under the law of his parent's domicil is legitimate everywhere. And the Maine court felt that the converse might also be true—if not legitimated by the laws of the parent's domicil, the child should not be deemed legitimate elsewhere. Accepting this as the proper

64. Wolf v. Gall, 32 Cal. App. 286, 163 Pac. 346 (1917); *In re* Estate of Engelhardt, 272 Wis. 275, 75 N.W.2d 631 (1956). *Semble,* Franklin v. Lee, 30 Ind. App. 31, 62 N.E. 78 (1901); Pilgrim v. Griffin, 237 S.W.2d 448 (Tex. Civ. App. 1950). In Wolf v. Gall, the Supreme Court of California denied an application for rehearing, stating that ". . . we are not entirely in accord with all the reasoning by which that conclusion is reached by that court." 32 Cal. App. 286, 296, 163 Pac. 350, 351 (1917). However, the court gave no reasons for its refusal to fully concur.

65. 213 Ill. 208, 72 N.E. 806 (1904). ILL. REV. STAT. ch. 39, § 3 (1903), was the same in 1904 as the present ILL. REV. STAT. ch. 3, § 163 (1959), except for unimportant differences in wording.

66. Hall v. Gabbert, *supra* note 65, at 216, 72 N.E. at 809.

67. 124 Me. 71, 126 Atl. 178 (1924).

rule to be applied, and refusing to recognize the child as legitimate, the court nevertheless permitted him to inherit. Although this result might seem strained in view of the court's refusal to recognize a status of legitimacy, the reasoning used was consistent with generally accepted conflicts rules. The forum's law was held to be determinative in regard to distribution of the personal estate of the domiciliary decedent. Maine's subsequent marriage statute was then characterized as one of succession as well as legitimation, and since the conditions of that statute were met, the child was permitted to inherit although he ". . . remains an illigitimate."[68] Obviously such cases as *Hall v. Gabbert* and *In Re Crowell's Estate* reflect a tolerant attitude toward the plight of an illegitimate child. But such an attitude is to be encouraged, particularly where it is consistent with the policy of the forum and may be effectuated by means of settled conflicts rules permitting the forum to characterize its own statutes which touch upon inheritance of local property.

B. *Legitimation by Acts Other than Marriage*

(1) *Subsequent acknowledgment of paternity.* Where a father has attempted to legitimate his child by acknowledging paternity, a sister state will generally give this effect to his act if it was sufficient to legitimate according to the law of his domicil at the time he acted;[69] and this is so even though the forum may have no such statute.[70] The real problem involved where legitimation is claimed under such a provision is one of characterization—is the statute one of legitimation, giving the child a status of full legitimacy, or one of succession, giving him only a right to inherit from his father? The prevailing view seems to be in favor of succession rather than legitimation.[71] *Moen v. Moen*[72] is illustrative of this point. While domiciled in Norway, father Moen executed a written document acknowledging paternity of his illegitimate child. The law of Norway attached no legal significance to this act, but the South Dakota court characterized its own acknowledgment statute

68. *In re* Crowell's Estate, *supra* note 67, at 73, 126 Atl. at 179.

69. Pfeifer v. Wright, 41 F.2d 464, 466 (10th Cir. 1930); Irving v. Ford, 183 Mass. 448, 67 N.E. 366 (1903); *In re* Slater's Estate, 195 Misc. 713, 90 N.Y.S.2d 546 (Surr. Ct. 1949).

70. *In re* Slater's Estate, *supra* note 69.

71. Pfeifer v. Wright, 41 F.2d 464 (10th Cir. 1930); *In re* Lloyd's Estate, 170 Cal. 85, 148 Pac. 522 (1915); Blythe v. Ayres, 96 Cal. 532, 31 Pac. 915 (1892); Van Horn v. Van Horn, 107 Iowa 247, 77 N.W. 846 (1899); *In re* Wehr's Estate, 96 Mont. 245, 29 P.2d 836 (1934). *Semble,* Doty v. Vensel, 190 Okla. 461, 124 P.2d 982 (1942); *In re* Beckman's Estate, 160 Wash. 669, 295 Pac. 942 (1931). *Contra, In re* Slater's Estate, 195 Misc. 713, 90 N.Y.S.2d 546 (Surr. Ct. 1949) (Forum characterizing statute of a sister state).

72. 16 S.D. 210, 92 N.W. 13 (1902).

as one of succession and permitted the child to inherit local realty. In so holding, the court made this rather interesting statement:

> It may be conceded that he [father Moen] neither knew nor intended that its execution would confer upon the child the right to inherit his property in any jurisdiction. Nevertheless, it had the effect of furnishing the proof required by the laws of this jurisdiction to establish the fact that he was the father of the child, and such fact being thus established makes her an heir of her deceased father, and entitled to the land in controversy.[73]

To the same effect is the case of *Blythe v. Ayres*,[74] where the California court characterized its acknowledgment statute as one of succession "pure and simple," holding that ". . . the plaintiff is entitled to all the benefits of it, regardless of domicile, *status* or extraterritorial operation of state laws."[75]

It should be noted that in both *Moen v. Moen* and *Blythe v. Ayres*, the forum had a statute providing for legitimation by acknowledgment, while the foreign jurisdiction involved did not. If we should reverse the facts, placing the only acknowledgment provision in the foreign jurisdiction, the child might be denied the right to inherit in the forum. For example: If a father acknowledges paternity while domiciled in State A, and according to that state's construction of its statute it is one of succession only, the forum will probably accept this characterization and conclude that the child has acquired only a right of inheritance. Since he has not been fully legitimated by the law of the state where his father was domiciled when acknowledgment occurred, the forum may refuse to recognize any right to inherit local property.[76] Due to the possibility of such a decision, it might be suggested to those courts truly interested in the elimination of an indelible status of illegitimacy, that the acknowledgment provision in their particular state be characterized as one of legitimation *as well as* succession. If such a characterization is made, a domiciliary illegitimate litigating in another state the question of the legal effect of his father's acknowledgment, will be able to prove a status

73. Moen v. Moen, *supra* note 72, at 218, 92 N.W. at 16.
74. 96 Cal. 532, 31 Pac. 915 (1892).
75. Blythe v. Ayres, *supra* note 74, at 582, 31 Pac. at 924.
76. Pfeifer v. Wright, 41 F.2d 464 (10th Cir. 1930). Professor Goodrich has stated this rule as follows: "If the law governing the inheritance gives no rights to the illegitimate unless there is actual legitimation, he will gain nothing from the fact that the law of the place of recognition does allow inheritance, even though at that time the parties were domiciled there." GOODRICH, CONFLICT OF LAWS 445 (3d ed. 1949).

of full legitimacy which will be given due recognition and effect.[77]

(2) *Legitimation by "adoption."* Although only seven states have statutes providing for legitimation by "adoption,"[78] several of the leading conflict of laws cases have been based on a claim of legitimation under such provisions. One such case is that of *In Re Presley's Estate*.[79] While domiciled in Tennessee, father Presley acknowledged paternity, accepted his illegitimate child into his family with the consent of his wife, and treated the child in all respects as though legitimate. According to the law of Tennessee, these acts were of no legal consequence, but under the law of Oklahoma where Presley Sr. died a domiciliary, they were sufficient to legitimate. In holding that Presley Jr. could *not* inherit from his father in Oklahoma, the court applied the general rule looking to the law of the father's domicil at the time of his alleged legitimating acts, and found that a status of legitimacy had not been created in Tennessee. The court then indicated that where a child has not been legitimated according to the law of the father's domicil, the act of moving to another state will not create such a status, regardless of the fact that the child would be deemed legitimate had the acts occurred in the latter state.[80]

As authority for its position that the law of the father's domicil is determinative in regard to legitimation, the court in the *Presley* case cited *Blythe v. Ayres,* [81] perhaps the most important single case dealing with conflict of laws and illegitimate children. In this early California case, father Blythe sired an illegitimate daughter while in England. At the time of birth, and at all times up to and including the time of his death, Blythe was domiciled in California. Although he had never married, and his daughter did not come to California until after his death, she claimed a right to his rather large estate by reason of alleged acts sufficient to meet the requirements of section 230 of California's Civil Code.[82] In holding that all of the requirements of this section were satisfied, thus legitimating the daughter and entitling her to all of her father's estate, the court had several rather difficult hurdles to jump.

77. In Pfeifer v. Wright, *supra* note 76, the Kansas cases had characterized the acknowledgment statute of that state as one of succession, and the Circuit Court in Oklahoma refused to allow inheritance in the latter state. On the other hand, in *In re* Slater's Estate, 195 Misc. 713, 90 N.Y.S.2d 546 (Surr. Ct. 1949), the New York court permitted inheritance due to a characterization of the Louisiana statute as one of legitimation.

78. See note 28 *supra.*

79. 113 Okla. 160, 240 Pac. 89 (1925).

80. See also, 2 BEALE, CONFLICT OF LAWS 711 (1935).

81. 96 Cal. 532, 31 Pac. 915 (1892).

82. The California statute is the same as the Oklahoma provision quoted in full in section 1 *supra.*

First, the statute states that the father "thereby adopts" his illegitimate child. As a matter of statutory construction, the court reasoned that "adoption, properly considered, refers to persons who are strangers in blood; legitimation, to persons where the blood relation exists."[83] Thus, the court concluded, "adopts" means "legitimates." Second, the statute requires that the father "receive" the child into his "family." Although Blythe died a bachelor and his daughter did not come to California until after his death, the court held that he had a constructive family into which he might constructively receive his English daughter.[84] Hurdle number three—does the statute apply in favor of a non-resident illegitimate? Although the court was unable to find any authority dealing with legitimation by subsequent "adoption," it applied and promulgated the now black-letter rule that legitimation depends upon the law of the father's domicil at the time of the alleged acts of legitimation.[85] In answer to the English doctrine of "indelibility of bastardy," the court pointedly stated:

> Legitimation is the creature of legislation. Its existence is solely dependent upon the law and policy of each particular sovereignty. The law and policy of this state authorize and encourage it, and there is no principle upon which California law and policy, when invoked in California courts, shall be made to surrender to the antagonistic law and policy of Great Britain.[86]

Thus, although the claimant had no direct contact with California, and although that state had no particular interest which would be advanced by the application of its own law rather than that of England, "oceans furnish[ed] no obstruction to the effect of [California's] wise and beneficent provisions."[87]

Fifty-three years after Florence Blythe was recognized as legitimate in California, the Supreme Court of that state was again called upon to determine whether the "beneficent" provisions of its "thereby adopts" statute would be applied in favor of a non-resident illegitimate. In the case of *In Re Lund's Estate*,[88] the requirements of section 230 of the

83. Blythe v. Ayres, *supra* note 81, at 559, 31 Pac. at 916.
84. Blythe v. Ayres, *supra* note 81, at 577-80, 31 Pac. at 922-23.
85. This rule has been applied although the forum has no statute providing for legitimation by adoption. McNamara v. McNamara, 303 Ill. 191, 135 N.E. 410 (1922); Holloway v. Safe Deposit & Trust Co., 151 Md. 321, 134 Atl. 497 (1926); Riddle v. Peters Trust Co., 147 Neb. 578, 24 N.W.2d 434 (1946).
86. Blythe v. Ayres, *supra* note 81, at 575, 31 Pac. at 927.
87. Blythe v. Ayres, *supra* note 81, at 563, 31 Pac. at 917.
88. 26 Cal. 2d 472, 159 P.2d 643 (1945).

Civil Code had been met while all parties were domiciled in Minnesota and New Mexico. Since the father was not domiciled in California when the acts of "adoption" occurred, *Blythe v. Ayres* was of no help,[89] and a new theory was needed. But rather than stop with just one new theory, the court applied two. Number one: Although section 230 is primarily a law governing status, it is also a statute of succession. Therefore, it is applicable to determine who is entitled to inherit property in California.[90] While there was a similar case holding exactly to the contrary on the issue of characterization of North Dakota's "thereby adopts" statute,[91] there can be little quarrel with the California court's decision to characterize its own statute as one of succession as well as legitimation. Number two: Even though the father had apparently done nothing in California which would result in legitimation under section 230, his prior acts in Minnesota and New Mexico were sufficient and *continued unrevoked in California.* A *de facto* status was said to be created while the parties were domiciled in these sister states, and this status matured in California due to the silence of the father after his arrival.[92] The second theory was clearly unnecessary due to the court's characterization of section 230 as a statute of both legitimation and succession, and it is doubtful whether "legitimation by silence" will escape from the smog in which it was created.[93] In fact, the only real value in citing this theory at all is to illustrate the point that California's legitimation statutes are indeed "manna to the bastards of the world."

C. *The Recognized Natural Child*

The civil law concept providing for the status of a recognized natural child is unknown to the common law, falling within neither the category of illegitimate or legitimated. Although there is a lack of uniformity in civil law jurisdictions as to what is necessary in order to acquire such a status,[94] for our purposes it may be explained as follows: Even though the parents of an illegitimate child have never married, the child may acquire certain rights of inheritance if his parents were capable of marriage at the time he was born, and if they subsequently recognize him as their child according to the procedure required by the civil code. Having

89. The Lower California court held that the illegitimate could not recover, applying Blythe v. Ayres, *supra* note 81, at face value.

90. *In re* Lund's Estate, *supra* note 88.

91. Eddie v. Eddie, 8 N.D. 376, 79 N.W. 856 (1899).

92. *In re* Lund's Estate, *supra* note 88, at 494-96, 159 P.2d at 655-56.

93. *In re* Presley's Estate, 113 Okla. 160, 240 Pac. 89 (1925) clearly rejects the doctrine applied in the Lund case. See also 2 BEALE, CONFLICT OF LAWS 711 (1935).

94. *Compare* P. R. LAWS ANN. tit. 31 §§ 504, 506, 2431, 2661 (1954), *with* LA. CIV. CODE ANN. arts. 202-09 (West 1952). And see Note, 15 LA. L. REV. 221 (1954).

acquired such a status, if it later becomes necessary for him to seek recognition of his inheritance rights in a common law jurisdiction, he is faced with the rather difficult task of convincing the court that he should not be regarded as illegitimate, but should be treated as though he had been fully legitimated under common law concepts. Unfortunately, his chances of success are very slim.

The attitude of the American courts toward a claim by a recognized natural child that his foreign status should be given effect, may be capsulized by quoting from Professor Beale: "There is no corresponding status at common law; and in a common-law state therefore this status has no legal effect."[95] Several reasons have been given for such a harsh rule. First, the civil law of a foreign country can have no extraterritorial effect upon the devolution of property located in the forum.[96] Second, if recognition is to be given at all, it is because of international comity only, and should not be extended where contrary to the policy of the forum or where enforcement would prejudice the rights or interests of citizens of the forum.[97] Third, "the natural child does not obtain, by the act of recognition, a status of a legitimate but is merely permitted to inherit as a 'natural child'."[98] Therefore, since not fully legitimated, he can claim no right to inherit in any country other than that where the right was granted.[99] Underlying each of these reasons is one obvious factor. The law under which the child is claiming to have acquired a status of partial legitimacy does not fit within any of the pigeonholes developed by the common law, and a new one will not be created. A much more reasonable position is that taken by Judge Clark in *Robles v. Folsom*.[100]

> Since civil law jurisdictions have three categories of children and New York has only two, the 'acknowledged natural child' must be likened to either New York 'legitimates' or New York 'bastards.' The chief similarity to the New York bastard, for purposes of intestate succession, is a mere semantic identity—neither is labeled 'legitimate.' On the other hand, the acknowledged child is one whom the father claimed as his own with knowledge that the act would confer on it rights of inheritance and greater social status.

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95. 2 BEALE, CONFLICT OF LAWS 712 (1935).
96. Lopes v. Downey, 334 Mass. 161, 134 N.E.2d 131 (1956).
97. Succession of Petit, 49 La. Ann. 625, 21 So. 717 (1897).
98. *In re* Vincent's Estate, 189 Misc. 489, 494, 71 N.Y.S.2d 165, 170 (Surr. Ct. 1947).
99. *In re* Tomacelli-Filomarino's Estate, 189 Misc. 410, 73 N.Y.S.2d 297 (Surr. Ct. 1947).
100. 239 F.2d 562, 567 (2d Cir. 1956) (dissenting opinion).

Judge Clark then concluded that common law courts should regard the acknowledged natural child as though he had been legitimated in accordance with common law principles. By so doing, the court would be stressing the similarities which exist between the two concepts rather than enlarging upon differences in terminology, and would be giving effect to the obviously beneficent intent of the parent.

Conclusion

No better example can be given of the adaptability of the common law to fluctuating mores and concepts of social policy, than the progressively more tolerant treatment afforded by common law courts and legislatures to those children unfortunate enough to be born out of wedlock. Recognizing the inequity of an indelible status of illegitimacy, and realizing that punishment of the illegitimate in no way deters illicit cohabitation, American legislatures have unanimously rejected the archaic doctrine embodied in the Statute of Merton. Despite such early common law precedents branding illegitimates as bastards for life, modern courts and legislatures have refused to disregard the social environment in which they function, and have recognized in each illegitimate child a potential of acquiring a legal status of full legitimacy. In furtherance of this desirable social end, courts have also endeavored to apply conflict of laws principles in such a way as to ameliorate the effects of a status of illegitimacy which attached to a child born out of wedlock in another state or country. Thus, the courts will recognize and give full effect to acts of legitimation effective according to the domicil of the parent, regardless of whether the subsequently created status of legitimacy arose due to the marriage of the parents, acknowledgment of paternity, or "adoption" of the child. In fact, there are only three frequently recurring instances where a foreign born illegitimate might not receive favorable treatment in the forum; where some "policy" of the forum is contrary to the law of the jurisdiction in which the child acquired a status of legitimacy, where the foreign law resulted in the creation of only a right to inherit and not a status of full legitimacy, and where the child has become a recognized natural child in a civil law jurisdiction.

There would seem to be little justification for even these few instances where a forum might act unfavorably in response to a child's attempt to establish legitimacy. In regard to the first, it is doubtful whether any court today can accurately say that there is a policy in the forum which would justifiably warrant the nonrecognition of a status of legitimacy acquired in another jurisdiction. But conceding that such a position has been taken by several courts, it may still be argued that there

is no sound principle supporting such nonrecognition merely because the status of legitimacy was created under a conflicting foreign law, and indeed, none has been suggested. The second instance of unfavorable treatment can be avoided, in the usual case, if the forum will characterize its own legitimation statute as one of succession as well as status, thus entitling the forum to apply its own statute where inheritance of local property is involved. Legitimation results in the creation of a status which involves a number of legal rights and obligations between a parent and his child, and one of those rights is that of inheritance. Thus, if we look to the parts as well as the whole, it is reasonable to conclude that a statute of legitimation is not one of status only, but also one dealing with rights of succession. Such reasoning has been applied in regard to legitimation by subsequent marriage,[101] by acknowledgment of paternity,[102] and by "adoption,"[103] thus making it unnecessary for the child to establish complete legitimation according to the law of some other jurisdiction. In regard to the third area of possible unfavorable treatment in the forum, that of the recognized natural child, the difficulty is based on the failure of the courts to properly assimilate this civil law concept into the established common law pattern. Admittedly, such a child is neither illegitimate nor has he been legitimated. But the status which he has acquired is most closely akin to the common law concept of the legitimated child, and he should be granted the rights of such a child when before the courts of this country.

101. Hall v. Gabbert, 213 Ill. 208, 72 N.E. 806 (1904).
102. Moen v. Moen, 16 S.D. 210, 92 N.W. 13 (1902).
103. *In re* Lund's Estate, 26 Cal. 2d 472, 159 P.2d 643 (1945).

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