PART FIVE

PARENTAL RELATIONS
CHAPTER 15

Parent and Child

I. PRELIMINARY OBSERVATIONS

1. Subject Matter

AFTER dealing with marriage and divorce rules, American case books on conflict law and the Restatement finish the chapter on family or status law with the four topics of legitimacy, adoption, custodianship of parents, and guardianship. We shall see, as we have seen in considering the subject of marriage relations, that the relationships created by legitimate birth, legitimation, and adoption have a broader scope in the civil than in the common law. For instance, under the civil law, support is an important incident of legitimate as well as of illegitimate relationship and is governed in principle by the personal law, while in the Restatement it is treated separately and left to the law of the forum. To do justice to all legislations, we have to divide the matter into smaller topics, viz., in the first place, (i) legitimate birth, (ii) legitimation, (iii) rights and duties of legitimate parents, (iv) adoption, and (v) illegitimacy. On the other hand, custodianship, which in the common law is the inclusive and essentially homogeneous repository of all rules concerning infants, must, for the purposes of our survey, be subdivided into two different parts. Family

1 Among the special articles on the subject reference will be made more particularly to RAPE, "Rapports juridiques entre parents et enfants," 50 Recueil 1934 IV 405, and to TAINTOR, "Legitimation, Legitimacy, and Recognition in the Conflict of Laws," 18 Can. Bar Rev. (1940) 589, 691.

For a comparative survey of the municipal laws, see VEITH, Kindschaftsrecht, 4 Rechtsvergl. Handwörterb. 770; for materials, vols. 1 and 2 of BERGMANN'S work.

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law principles are embodied in the rules that determine the rights and duties of parents as such, while the constitution of other guardians and the management and supervision of the estate of a child or any other ward may be better treated in connection with the administration of other estates. Our discussion, therefore, will be limited to the matters more closely allied with the special consideration of family law.

The existing written conflict rules differ, as in other respects, also with respect to their subject matter. While, for instance, the recent Italian code contains one provision on the relationship between parent and child, the German Introductory Law has different provisions relating to (1) legitimacy as the origin of legitimate relationships, (2) the relationship between parents and a legitimate child, (3) the relationship between an illegitimate child and his mother, (4) the duties of support of the illegitimate father, (5) legitimation and adoption, and (6) custodianship of all kinds. And, whereas Germany treats legitimation and adoption together, Poland joins legitimation and recognition, Switzerland legitimation, recognition, and adoption, and the Código Bustamante, as well as the recent Greek code, have one rule on legitimation alone.

2. Institutions Involving an Act of a Party

(a) In some statutes of this country, the term adoption is given to the institution otherwise known as legitimation by voluntary declaration. Moreover, legitimation in the proper sense is often confused with the qualified recognition

3 EG. arts. 18–23.
4 EG. art. 22.
6 NAG. art. 8.
7 Arts. 60–62.
8 C. C. (1940) art. 22.
by a parent through which an illegitimate child obtains an ameliorated position, although remaining illegitimate. Also, in some other countries, the terminology oscillates. In fact, there are in this field many institutions of mixed character existing in the world. For the purpose of the law of conflicts, however, it is of primary importance to distinguish the following groups of institutions:

(i) Acts through which an illegitimate child receives the full status of legitimacy (legitimation in the ordinary sense).

(ii) Acknowledgment of paternity or maternity whereby (as by certain other circumstances) an illegitimate child may receive an improved position without reaching the full position of a legitimate child. This group includes very different degrees of position. The child may be assimilated to a legitimate child in most respects, or it may, on the contrary, be granted only particular prerogatives, as under those numerous statutes of the United States which confer nothing but rights of inheritance upon a recognized child. 9

(iii) Recognition as a condition for any effect of illegitimate filiation as required in the French and in the other legislations following the French system.

(iv) Institutions of a still more restricted nature such as the faculty of the husband to give his name to an illegitimate child of his wife under Austrian and German laws. 10

(b) The broad distinction between legitimate and illegitimate children is considered fundamental, legally as well as socially, except in a few countries. It would seem natural, therefore, that the same conflicts rules should govern legitimacy by birth, legitimation, and adoption, insofar as by these institutions the full degree of legitimacy is reached.


10 Austria: Allg. BGB. § 165 par. 2; Germany: BGB. § 1706 par. 2; see infra p. 656, n. 11.
On the other hand, we can understand that conflict rules with respect to illegitimacy are different from those governing legitimacy by birth. However, existing rules do not altogether agree with these simple distinctions.

(c) Recognition of foreign institutions has been strongly influenced by some aprioristic doctrines:

(i) The influential English doctrine that a status unknown to the forum cannot be recognized has considerably impeded the progress of reciprocal recognition of institutions regarding parent and child. As stated in our general discussion in Chapter 5, the hope is justified that this doctrine may be considered overruled.\(^{11}\)

(ii) American courts are inclined to recognize foreign acts but to give them the same effect as ascribed to the most nearly related domestic institutions. This doctrine is preferable to the English rule just mentioned, but it too is unsatisfactory. By such an approach, e.g., a child, illegitimate abroad, has been treated as legitimate at the forum for purposes of inheritance.

(iii) The idea mentioned under (ii), inexact in application to illegitimacy, is perfectly right with respect to legitimacy. In the various countries, the status of legitimate children, though qualified by different minor features, is regulated in an essentially similar manner so far as the personal relations between parent and child are concerned. Hence, recognition of a foreign created legitimacy means that a child born or legitimated or adopted in one country will be treated as legitimate in another, with the incidents determined by the law of the forum. This means also that, if the domicil or the nationality determinative of personal status is changed, the rights of legitimate parents and children are transformed accordingly. This mutability of parental rela-

\(^{11}\) Supra pp. 188-193.
tions is a phenomenon that has only begun to attract some attention.\textsuperscript{12}

3. Liberal Trends

Recently, some well-meaning courts and writers have tried to counteract the narrowness of traditional doctrines. Thus, it has been postulated that the personal law of the child should govern rather than that of the parent,\textsuperscript{13} or that public policy should override any conflicts rule referring to a foreign law less favorable to legitimacy than the domestic law.\textsuperscript{14} But the advantage of the child can only be secured by a conflicts rule that directly refers to that law most favorable to the child in each particular case. Conflicts rules formulated in this manner\textsuperscript{15} have proved to be of difficult application in German law.\textsuperscript{16} Moreover, consideration of family policy should be left to substantive legislation, except in a very restricted domain of public policy, where courts consider foreign bastardy statutes as plainly backward and a disgrace to the law.

II. Legitimate Birth

A. Rules

1. Personal Law of the Parent

Common law and civil law agree in submitting the question of birth in lawful wedlock to the personal law of the parent. The tests are domicil or nationality respectively. American law, however, disagrees with all others by the distinctly proclaimed principle of determining the child's

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{12}] RAAPE 464 III 1. Application to English law has been attempted by MANN, "Legitimation and Adoption in Private International Law," 57 Law Q. Rev. (1941) 112, 126.
\item[\textsuperscript{13}] See infra p. 604.
\item[\textsuperscript{14}] TANTOR, 18 Can. Bar Rev. (1940) at 700, 701, supra n. 1; cf. ibid. 715.
\item[\textsuperscript{15}] Poland: Law of 1926 on international private law, art. 21 par. 2.
\item[\textsuperscript{16}] See RAAPE 211 ff., 359 ff. on EG. arts. 12, 16, par. 2.
\end{enumerate}
\end{footnotesize}
legitimate relationship to each parent separately. In fact, such an equal position of men and women, although apt to create complicated situations with respect to the child, may be considered fair to all parties. In other countries, however, the law of the male parent is applied to determine the legitimate relationship also between mother and child in order to maintain the unity of the family and particularly in view of the consequences for the nationality of the issue.

The head of the family whose law governs legitimacy is, in the German law, correctly characterized as "the husband of the mother." To say that legitimacy is predicated on the personal law of the "child's father" is a tautology that has caused confusion to English writers. Hence, under American law, if the parents are domiciled in different states at the time of the birth of the child, the law of each party's domicil decides his relationship to the child. Where, for instance, the marriage of the parents is recognized as valid in Iowa and considered invalid in New York, the child is legitimate as to the mother, domiciled in the first state, and illegitimate as to the father, domiciled in the second state. Under English law, the child would be illegitimate with regard to both parents.

Contacts: domicil or nationality. The domicil of the father or mother is the test in the United States. The domicil of the father, as head of the family, is the test in England and the other countries generally following the domiciliary principle.

17 Restatement § 137, cf. ibid. § 138.
18 CHESHIRE (ed. 2) 380, caught in that tautology which he believes to be a "theory," feels compelled to state that "practicability must not be sacrificed to theory"; see now CHESHIRE 395.
Argentina: 2 VICO no. 140.
Denmark: BORUM and MEYER, 6 Répért. 220 no. 52; BORUM 125. Østre Landsret (June 14, 1949) 20 Z.ausl.PR. (1955) 514.
Nicaragua: C. C. Tit. Prel. art. VI (9).
The Treaty of Montevideo on international civil law starts pronouncing
Nationality of the mother's husband is decisive almost everywhere in the rest of the world. The personal law has to govern because the stability of the family, the honor of the married woman, and her marital rights stand upon this matter. An exorbitant exception in favor of the *lex fori* is made by a National Socialist law of 1938 that extends the application of the German laws to the contestation of legitimacy in the case where only the mother is of German nationality at a certain date.

Renvoi is applied according to general rules.

in art. 16, unchanged by the text of 1940, art. 20, that "the law that governs the celebration of the marriage determines legitimate birth and the legitimation by subsequent marriage." However, the next section (art. 17, text of 1940: art. 21) submits "the questions of legitimacy other than those concerning the validity or nullity of the marriage" to the domiciliary law. This means probably that art. 16 is corrected by art. 17; the special rule on marriage, as in the other countries, governs only the question whether the marriage, or subsequent marriage, is valid. This seems to be the opinion of 2 VICO, no. 174. But why has art. 16 not been cancelled at least in 1940?

20 Austria: Decree of Oct. 15, 1941, § 9; Walker 782 n. 11 (the Austrian law of parent and child has stayed in force).
Belgium: Poulett 461 no. 387.
Belgian Congo: C. C. (1895) book 1, art. 12.
Czechoslovakia: Law of March 11, 1948, s. 20.
Germany: EG. art. 18.
Greece: C. C. (1940) art. 17 par. 1.
Hungary: Decree-Law no. 23/1952, § 17 (with reservation in favor of children with Hungarian domicil or nationality).
Switzerland: NAG. arts 8 and 32 (for Swiss domiciliaries).
China: Law of 1918, art. 12.
Japan: Law of 1898, art. 17.
Siam: Law of March 10, 1939, on private international law, § 29.
Poland: Law of 1926 on international private law, art. 18.
21 LereBours-PigeonnIëre 375 no. 346.
22 Cf. E.G. art. 18 par. 2, added by art. 2 § 8 of the Law of April 12, 1938, to modify and complete family law provisions and on the condition of apar­trides (RGBI. I, 380).
23 Germany: RAAPE 487 whose illustration however is questionable; M. WolFF, IPR. 216 no. 6.
2. Personal Law of the Child

The personal law of the child has been advocated by a few writers, although sparsely applied in actual laws. According to this opinion, it would be material in this country whether the child's domicil at birth is with the father or the mother. In a country following the principle of nationality, the child's national law cannot be found without knowing whether it is legitimate; thus nationality would depend upon legitimacy, and this again upon nationality. Such a vicious circle, it is true, may be avoided by legislation on nationality whereby the child acquires a nationality of its own on the ground of *jus soli* or a temporary nationality which may suffice for provisional legal situations. It must be conceded, furthermore, that the traditional system based on nationality is weakened to the extent that separate nationality of wife and child has been recognized. But the idea of applying the child's law instead of that of the parent seems to come simply from the desire to employ in the forum of the child once more the law of the forum. It is still the dominant opinion that the child's domicil or nationality is perfectly immaterial, the reason still proclaimed being that the existence and unity of the family is at stake.

Indeed, if the state of the child's domicil is said to have a

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24 France: Weiss, 4 Traité 27; Audinet no. 625, see contra: Surville 447 no. 305; Duguit, Clunet, 1885, 353, 359; Champcommunal, Revue 1910, 57, 61.
Belgium: see Rolin, 2 Principes 137 no. 613; Novelles Belges, 2 D. Civ. 618 no. 581.

25 Código Bustamante art. 57. Art. 8 sentence 2 of the French law of July 24, 1921 concerning the conflicts law of Alsace-Lorraine, refers to the law of the child the "proof of filiation," whatever that means. Two decisions of the court of Bucharest to this effect, conflicting with others, are cited by Plastara, 7 Répert. 68 no. 198.

26 Taintor, 18 Can. Bar Rev. (1940) at 597, supra n. 1; cf. ibid. 602.

27 See, e.g., Lerebours-Pigeonnier 378 no. 349 (B).

28 Germany: unanimous opinion, see Raape 447; Bay. ObLG. (March 22, 1924) 23 Bay. ObLGZ. 56.

Switzerland: BG. (June 29, 1928) 54 BGE. I 230.

29 Diena, 2 Princ. 179; Raape 447.
concurrent interest in its status,\textsuperscript{30} this interest is negligible compared with the interest of the family. Moreover, the interests of the child are not, and certainly should not be, more protected by the court of his domicil than by any other. And the law of his domicil may as well be unfavorable to the child as favorable.

3. Time Governing Ascertainment of Applicable Law

The decisive and natural time for determining the applicable law is considered to be the moment when the child is born. In the German and other enactments, it is added that, if the child is born after the death of the mother’s husband, the personal law of the husband at the time of his death governs;\textsuperscript{31} in a generalized version, the same rule applies in the case of any dissolution of the marriage occurring before birth.\textsuperscript{32}

It follows that the law determining whether a child is legitimate is immutable; no change of status of parent or child after this date alters the result. This is in sharp contrast to the fact that a voluntary change of status elected by the husband before the child’s birth may influence its legitimacy.

Precisely in view of this liberty of the father, occasionally the decisive time has been assumed to be that of the conception rather than that of the birth,\textsuperscript{33} a solution generally held

\textsuperscript{30} Taintor, 18 Can. Bar Rev. (1940) at 603, supra n. 1.
\textsuperscript{31} Germany: EG. art. 18.
Poland: Law of 1926 on international private law, art. 18 par. 2.
China: Law of 1918, art. 12, 2nd sentence.
Japan: Law of 1898, art. 17, 2nd sentence.
Siam: Law of 1939 on private international law, § 29 par. 2.
Treaties: see the provisions cited supra n. 20.

\textsuperscript{32} Greece: C. C. (1940) art. 17 par. 2, in agreement with the German interpretation of EG. art. 18; cf. Raape 449.
\textsuperscript{33} Denmark: App. Copenhagen (July 17, 1916) 2 Z.ausl.PR. (1928) 866 no. 7. Survilllle 447 no. 305 advocates a fiction of earlier birth where it would be more favorable to the child; Raape 448 would like an exception to the rule in the case of a fraudulent change of nationality.
impractical, because birth can be ascertained much more easily than conception. But an American author has recently suggested that "the rule should be stated in terms of the creation of legitimacy by the law of the domicile of the parents either at conception or birth of the child." He thinks that the writers and the courts have been wrong in regarding only the time of birth or have overlooked the possibility of the parents' change of domicil between conception and birth of the child. Yet, no mistake has occurred in the formation of the rules. The purpose of conflicts law is not the same as that of substantive private laws. These may consider a child born during the time of wedlock as legitimate (as common law does) or declare a child *en ventre sa mère* as already born inasmuch as this fiction is advantageous to the child (as Roman law does). Conflicts law refers to one legislation and leaves it to this legislation whether to go back from birth to conception. The suggested terms would essentially modify the rule; this seems inadvisable, if for no other reason than because of the wide uniformity already reached. Moreover, the law of the time of birth has been adopted in the different legislations, because this is a fact that can be ascertained without any fiction.

4. Soviet Russia and Other Socialist Countries

The law of Soviet Russia and other socialist countries knows only one category of parent-child relations: it does not admit any difference between legitimate and illegitimate children. How, therefore, ought we to classify in a Western court children whose parents were domiciled in or nationals of these countries? Are they to be regarded without distinc-

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34 Schnitzer 430, concerning Swiss law.
35 TaIntOr, 18 Can. Bar Rev. (1940) at 597, supra n. 1.
tion as legitimate or illegitimate? The second answer is absurd, and, since these laws intend to abolish the category of illegitimate children, the solution must be the same as in the case of the statute of Arizona which declares all children the legitimate offspring of their natural parents. In the latter case, indeed, there is no doubt regarding the effects in a foreign court.

B. SCOPE OF THE RULES

1. Validity of Marriage as Condition

The first condition for legitimacy by birth is normally a valid marriage between the mother and the man alleged to be the father. Validity of the marriage, therefore, is a "preliminary question" in examining legitimacy according to the law governing lawful birth. But this law does not extend to the validity of the marriage. It is universally agreed that the law governing the formal and the intrinsic validity of marriage according to the rules discussed above in Chapters 7 and 8 are applicable also to this question. Even the writers who regularly assign preliminary questions to the law governing the principal question agree that marriage is always, without exception, tested according to its own particular rule of conflicts.

A remarkable consequence occurs where a foreign marriage is regarded as valid under the main conflicts rule of the forum. Children born of such a marriage are considered legitimate, even if the personal law of the parents at the time of the birth considers the marriage invalid. For illustration,

37 The question has been discussed with reference to legitimation by the writers cited infra p. 621, ns. 113, 114.
39 Melchior 259 § 173; Wengler, 8 Z.ausl.PR. (1934) 148, 206 (with different explanations).
40 Wengler, 8 Z.ausl.PR. (1934) 148, 214.
if two Greeks, being of Orthodox faith and domiciled in Greece at the birth of a child, had gone through a temporal marriage ceremony in Paris, the marriage, though considered invalid in Greece, is recognized as valid in most countries; in the latter countries, the children must, therefore, be considered legitimate, provided that they would be so under Greek family law if the marriage had been celebrated by a Greek Orthodox priest.

There are complications also on the opposite side of the problem. The forum may regard a marriage as invalid either in accordance with the law governing marriage, for instance because formalities are lacking, or despite this law for reasons of public policy respecting polygamy, incest, or adultery. We might well question the wisdom of holding a Chinese marriage of Chinese domiciled persons invalid for local purposes as being polygamous; but if we do so, the marriage cannot be regarded as valid for the purpose of personal relations. Even if the law governing legitimacy (for instance the law of the parent’s domicil at the time of the birth) recognizes such a marriage, the special conflict rules on marriage prevail.

The situation is different, of course, where the law governing the problem of legitimacy accords legitimacy without a valid marriage. This situation will be considered later.

41 A religious ceremony without civil marriage is non-existent in Germany, under EG. art. 13 par. 3. Is the father’s national law recognizing the marriage applicable to the parental relations? No: OLG. München (March 10, 1921) 42 ROLG. 98; Yes: KG. (July 9, 1937) HRR. 1937 no. 1446.

41a Contra numerous cases:

England: In re Bischoffsheim [1948] Ch. 79, 92 (legitimacy of child governed by the law of the domicil of his parents at his birth irrespective of the original invalidity of their marriage).


Germany: see infra n. 117.

42 For this reason only, the criticism by 1 FRANKENSTEIN 236 on the decision of OLG. München (supra n. 41) is justified.

43 See infra pp. 610 ff.
2. Presumptions of Legitimacy

The well-known presumptions for establishing birth in lawful wedlock, which form the main body of the municipal regulations of legitimacy, are not mere rules of evidence; they are substantive law. This may safely be alleged with respect to any present legislation and seems to be acknowledged almost everywhere. Hence, the law applicable to legitimacy governs the questions at what time, and under what circumstances, the presumption of legitimate birth arises, on what ground the presumption may be rebutted, within what period, by whom, and against whom, legitimacy may be contested or action for a declaratory statement denying legitimacy may be brought; what events terminate the right to disown the child, whether alleged recognition of paternity may be revoked, under what conditions and in what time, and similar problems. In particular, European courts apply the provision of a foreign personal law to determine the time within which an action for contesting paternity must be brought; for instance, an Austrian or a Swiss husband is given a period of three months for this action.

44 France: Weiss, 4 Traité 25; Lerebours-Pigeonnier 375 no. 347; Batifol, 8 Répert. 412 no. 52.
Germany: Raape 460; 4 Frankenstein 22.
Quebec: Lefebvre v. Digman (1894) 3 Rev. de Jur. 194 and others; see 1 Johnson 339.
45 E.g., OLG. München (May 15, 1933) 29 Z.Rechtspflge Bayern (1933) 278; 5 Giur. Comp. DIP. 135 no. 48 (the Austrian law of father allows proof of the impossibility of cohabitation, even though he was at the same place as the mother).
46 E.g., Swiss BG. (June 20, 1923) 49 BGE. II 317 (children born in Switzerland during the formal existence of their mother's marriage with a German are not entitled to contest their legitimacy, according to the German law of the time).
47 One year in Germany (BGB. § 1594 par. 1); one or two months in Louisiana (Rev. Civ. C. Ann. (1932) art. 191); one month in Turkey (C. C. of Feb. 17, 1926, art. 242); etc.
48 Austria: Allg. BGB. § 158; RG. (Jan. 12, 1939) HRR. 1939, no. 376 (4); OLG. Naumburg (Dec. 3, 1936) HRR. 1937, no. 1146.
49 Swiss C. C. art. 253; LG. Mainz (June 6, 1926) 41 Z.int.R. (1929) 415, IPRspr. 1929, no. 80. See also KG. (Feb. 28, 1931) JW. 1932, 2296, IPRspr.
3. Public Policy

Public policy is not interested in regard to the problems just mentioned.

However, as usual, French courts reserve many provisions of their code for imperative application, irrespective of the nationality of the parties. This is done, for instance, with that French rule, which exists also in Louisiana,\(^5\) that a husband is not allowed to disown a child by alleging and proving his own impotence; such a source of scandal must be closed, the French courts think.\(^5\)

C. CHILDREN OF INVALID MARRIAGES

(a) United States: general rule. Many statutes in the United States legitimize the issue of certain or of all prohibited marriages.\(^5\) Marriage, in this case, is not a condition precedent to legitimacy. The comments on these statutory provisions have made it perfectly clear that legitimacy is not an incident of marriage, but an independent subject. Hence, the law of the domicile of the parents, whose relationship to the child is in question at the time of birth, determines legitimacy or illegitimacy.\(^5\) It is the same conflicts rule as though the marriage were valid.


\(^{51}\) Even in France: WEISS, 4 Traité 23; POULLET 460 no. 386. Many French decisions deal with the form necessary for foreign documents of birth, see J. DONNEDIEU DE VABRES 385.

\(^{52}\) See 1 VERNIER § 48, 4 VERNIER § 247.


As to polygamy see TAINTOR, 18 Can. Bar Rev. (1940) at 594, 711 supra n. 1.
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Sometimes this conflicts solution has been explained as due to the policy of favoring the innocent issue,\(^{54}\) which naturally forms the reason of the statutory provisions. This is an erroneous transplantation of social purposes from the substantive law into international private law. The law of the domicil of the parents applicable under our rule may be decidedly more favorable to the child than the law governing the marriage.

(b) **England.** The rule is the same in England with the exception that the House of Lords' decision in *Shaw v. Gould* \(^{55}\) has disturbed the problem in the case where a child is born to a marriage not recognized in England, because a previous divorce of one parent is not recognized there. In the case mentioned, the child was declared illegitimate, although the father was domiciled in Scotland at the time of the birth and Scotch law had no objection to legitimacy. This decision has been sharply disapproved by recent English writers. In their opinion, the court should have recognized the legitimacy of the children under Scotch law, while appropriately refusing to recognize the validity of the marriage. Cheshire \(^{56}\) suggests that the case should be overruled, while Foster \(^{57}\) thinks a statutory enactment is necessary. Against this criticism, American writers have emphasized the interest of the English law in the matter because of the English domicil of the mother.\(^ {58}\) But under English as well as generally under Continental conflicts rules, the child's relations to both parents are governed by the personal law of the father alone, that of the mother being entirely immaterial.


\(^{56}\) Cheshire (ed. 2) 387.


\(^{58}\) 2 Beale 706; Taintor, 18 Can. Bar Rev. (1940) at 600, *supra* n. 1.
Also, New York courts have declined to recognize legitimacy under similar circumstances, viz., when, according to the New York "special rule," a foreign divorce and, in consequence thereof, a remarriage was invalid and the child was born during the second marriage. This evidently must be taken as a part of the general policy of New York courts against marriages that are "polygamous, incestuous, or prohibited by law," the New York courts resolving for themselves what marriages are to be so qualified. In the leading case, *Olmsted v. Olmsted*, the Supreme Court of the United States decided that by such an attitude the Full Faith and Credit Clause was not violated, but it remains uncertain whether the independence of state doctrines would likewise be maintained in cases other than those where inheritance of real estate or a remainder under a will is at issue and only immovables in the state are involved. However this may be, the peculiar policy of the courts of New York has been severely and convincingly criticized, in particular with respect to a repetition of the doctrine in the *Bruington* case of 1936 after the legislature of New York had begun to follow the trend of courts and statutes benevolent to children.

(c) Germany. The prevailing American rule has its exact counterpart in the German practice. The national law of

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59 *Olmsted v. Olmsted* (1908) 190 N. Y. 458, 467, 83 N. E. 569, 571, aff'd 216 U. S. 386, see *infra* n. 61 (bigamous subsequent marriage with following divorce from first wife); *In re Thomann's Estate* (1932) 144 N. Y. Misc. 497, 258 N. Y. Supp. 838 (divorce not recognized in New York for lack of personal service, remarriage in Russia).

60 See *In re Bruington's Estate* (1936) 160 N. Y. Misc. 34 at 37, 289 N. Y. Supp. 725 at 729 (children of bigamous marriage).

61 (1910) 216 U. S. 386.


63 *Supra* n. 60.


65 RG. (Nov. 11, 1937) JW. 1938, 108; KG. (Dec. 9, 1921) 42 ROLG. 97; KG. (Feb. 27, 1931) IPRspr. 1931, no. 83; KG. (July 9, 1937) JW. 1937, 2526, Clunet 1938, 341.
the pseudo-husband is applied in determining legitimacy, whether this law acknowledges legitimacy irrespective of the good faith of the parties or conditionally upon the good faith of one party (putative marriage). The Reichsgericht has expressly rejected the theory that the law governing the nullity of the marriage should determine also whether or not the children are to be considered legitimate.

(d) Other countries. The policy practiced in other countries probably runs along similar lines. French writers, it is true, advocate again the exclusion of children born in adultery, from any recognized legitimacy, but even this restriction is not certain.

III. LEGITIMATION BY SUBSEQUENT MARRIAGE

An old institution of civil law but unknown to the British common law and expressly rejected by the Statute of Merton, legitimation by the marriage of the child's natural parents, has been introduced by statute in all but three jurisdictions in this country, in all of the common law provinces of Canada during 1920 to 1928, and in England by the Legitimacy Act, 1926.

An important difference exists on the question whether in addition to the marriage some recognition of the child is required. This requirement, in contrast to the German tradi-

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66 E.g., Swiss C. C. art. 133.
67 E.g., French C. C. arts. 201, 202; Ital. C. C. (1865) art. 116, C. C. (1942) art. 128; German BGB. § 1699.
68 RG. (Nov. 11, 1937) JW. 1938, 108 rejecting RAAPE 499.
69 See especially LEREBOURS-PIGEONNIÈRE 377 no. 348.
70 Compare the practice whereby the spouse in good faith and his or her children of the bigamous marriage enjoy the benefit of putative marriage. See supra pp. 587-593 and particularly Cour Paris (March 30, 1938) Nouv. Revue 1938, 353.
71 4 VERNIER § 243.
73 16 & 17 Geo. V, c. 60.
tion, exists in the Latin systems and in almost half of the American statutes, a fact regretted by Vernier as inconsistent with the purpose to improve the status of children born out of wedlock. It ensues from this system that a child may be considered legitimate only in relation to one parent. Moreover, the French system takes into account which parent is first to recognize the child.

A. RULES

1. Decisive Time

English courts, starting from the thesis that legitimacy is determined by the law of the child’s domicil of origin, viz., his father’s domicil at the time of his birth, regarded it essential that this law recognize the possibility of legitimation by a later marriage. This artificial theory, already rejected by Savigny, has been eradicated in England by the Legitimacy Act of 1926 but has nevertheless been adopted as a common law rule by Beale and the Restatement. The ancient basis for this rule, namely, that birth may give the child a certain faculty to be legitimized, appears in the older English doctrine and also in Beale’s theory in the form of a supposed logical necessity that the child must have a “potential legitimacy” by the law of the father’s domicil. Probably no American decision of actual importance reflects this preconceived idea. However, under the circumstances,

74 Vernier § 243.

75 In re Wright’s Trusts (1856) 2 K. & J. 595, 604; In re Goodman’s Trusts (1882) 17 Ch. D. 266; In re Andros (1883) 24 Ch. D. 637; In re Grove, Vaucer v. Treasury Solicitor (1888) 40 Ch. D. 216. For history and criticism see Mann, "Legitimation and Adoption in Private International Law," 57 Law Q. Rev. (1941) 112, 115-122.

76 Savigny 338 § 380, tr. by Guthrie 302.

77 Legitimacy Act, 1926 § 1 (1) for English and § 8 (1) for foreign domiciliaries.

78 2 Beale 706-709 §§ 139.1 and 139.2.

79 Restatement § 137.

80 Cf. Schaeffner, Entwickelung des Internationalen Privatrechts (Frankfurt, 1841) 49 § 37, tr. in Guthrie’s translation of Savigny 308.

81 See cases in 73 A. L. R. 941, 952 ff. and cf. Minor 216 ff.; Notes, 20 Harv.
Scott, L. J., in *In re Luck* (1940), was justified in thinking the theory to be connected with the American law, although eliminated from the English. He stated:

"The very idea of attributing to a newly-born child, to a *filius nullius*, a sort of latent capacity for legitimation at the hands of the natural father to whom he is denied any legal relation, seems to me an even more absurd legal fiction and even less convincing than that mythical contract of marriage supposed by the canonists to have been entered into at the moment of procreation."

In England, as well as in the United States, it has become perfectly certain that, in the case of a subsequent marriage, the time when the child was born is of no importance.

Also in other legislations, although some provisions contain obscure elements, as a rule the applicable law is simply that of the time of legitimation. In some texts, this is emphasized with the express statement that the status of the parent at the time of the conception and of the birth are immaterial. Such a statement corresponds in the broader field of legitimacy in general with the idea that legitimacy is acquired or denied by the law of the time when it originates, whether by birth or by marriage or by decree or "any other cause," as is the formula of the recent Finnish law.

We may take it that where, under the legislation thus governing, an act of legitimation is void, it cannot be helped

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L. Rev. (1907) 400; 46 Yale L. J. (1937) 1051 n. 15; also Stumberg 333-334, although he surprisingly acknowledges the "logic of the English point of view"; Taintor, 18 Can. Bar Rev. (1940) at 619, 620, 628, supra n. 1.

82 *In re Luck's Settlement Trusts* [1940] Ch. D. 864, 912.

83 *In re Askew* [1930] 2 Ch. D. 259.


85 Especially art. 315 (new 349) of the Argentine Civil Code is defectively drafted.

86 E.g., Argentina: C. C. art. 315 (new 349).


by later events. This is also the general proposition of the American cases.\textsuperscript{88} The status created at the time of a subsequent marriage (or any other act of legitimation) is permanent.

Adequate application of this principle to the legislations of the French system (where a formal acknowledgment of paternity or maternity is an essential part of legitimation by subsequent marriage) depends upon the question whether recognition is allowed after the marriage. In the older style of these enactments, the recognition had to take place before or as part of the act of celebrating the marriage,\textsuperscript{89} so that the status was fixed at the moment of the marriage.\textsuperscript{90} Now the French and some other municipal laws permit recognition of paternity or maternity after a subsequent marriage,\textsuperscript{91} and either postpone the effect of legitimation until the later event\textsuperscript{92} or make it retroactive to the time of marriage.\textsuperscript{93} It may well be concluded that the decisive moment for the choice of law also is deferred to the time of recognition. The personal law of this later moment decides on the question of retroactivity. Such a view might be suitable also to this country, where in many jurisdictions acknowledgment must be added to a subsequent marriage in order to complete legitimation and is generally permitted after the marriage.\textsuperscript{94}

\textsuperscript{88} Smith v. Kelly (1851) 23 Miss. 167 (subsequent marriage during domicil in South Carolina does not legitimate an issue previously born; the later domicil of the family in Mississippi was of no avail). For the general rule see \textit{In re Presley}'s Estate (1925) 113 Okla. 160, 164, 240 Pac. 89, 93; Tainter, 18 Can. Bar Rev. (1940) at 617, supra p. 597, n. 1, and infra p. 630, n. 169.

\textsuperscript{89} Code Napoléon art. 331, widely copied.

\textsuperscript{90} Weiss, 4 Traité 90.

\textsuperscript{91} Spain: C. C. art. 121; France: C. C. art. 331 as amended by Laws of Dec. 30, 1915 and of April 25, 1924.

\textsuperscript{92} Italy: C. C. (1942) art. 283, “or from the day of a recognition posterior to the (subsequent) marriage.”

\textsuperscript{93} Spain: C. C. art. 123. The preliminary draft of the Italian Civil Code (1930) art. 320 followed this rule; cf. Relazione sul progetto (1931) 167.

\textsuperscript{94} In the case of Smith v. Kelly, supra n. 88, at 170, the father would have been able, according to the said view, to add to the ineffective South Carolinian marriage an acknowledgment in Mississippi.
Such a supplement to a previous act of legitimation may likewise be accomplished in the case when the parent has acquired a new personal law. The provisions of this new law determine the decision without regard to any former personal law. Suppose the parents have married after the birth of the child, when they were domiciliaries or nationals of a country whose law does not know legitimation by marriage. If they change their personal status afterward and their new personal law allows legitimation and considers a belated recognition sufficient, such recognition can be effected accordingly. 95

2. Contacts: Usual Rules

(a) Law of Domicil. The law of the domicil of the parents at the time of marriage governs legitimation by subsequent marriage in England and in the United States. It is quite possible that a child, in view of its illegitimacy, has a separate domicil at that time, but this does not count. 96 Analogous rules obtain in Argentina, 97 Switzerland (with respect to foreign legitimations by foreigners), 98 and the other countries following the domiciliary principles. 99

95 See RAAPE, 50 Recueil 1934 IV 405, 441. Similarly, a Swiss court has held that a marriage which had no legitimizing effect under the law of the originally Italian husband would gain that effect after the husband acquired Swiss nationality, Appellationshof Bern (Sept. 3, 1951) 9 Schwz. Jahrb. (1952) 247.

96 Restatement § 140, comment b adds, it is true, a caveat that the law of the child's domicil might be sufficient to grant legitimation; but the basis for this allegation is not apparent.

97 Argentina: C. C. arts. 313–315 (new 347–349), very difficult to understand. ROMERO DEL PRADO, Der. Int. Priv. 330, calls these articles manifestly contradictory; Vico does not attempt any comment. Such an attempt was risked by the Berlin KG. (Feb. 5, 1932) IPRspr. 1932, no. 96.

98 Switzerland, NAG. art. 28. In the case of a husband of Swiss nationality, the application of Swiss law is provided by the Federal Constitution, art. 54. See BÜRKHARDT, Kommentar der Schweizerischen Bundesverfassung 513 ff.; BECK, NAG. 246 no. 106.

(b) Law of Nationality. The national law of the father at the time of marriage or recognition governs the problem under most European conflicts laws.\(^{100}\)

3. Personal Law of the Child

Under some of the more recent conflicts legislations, however, the personal law of the child is observed in determining the question whether legitimation requires certain conditions to be fulfilled in the person of the child, such as consent by the child or its guardian.\(^{101}\)

Occasionally the national law of the child has been claimed to govern legitimation as a whole.\(^{102}\) This opinion has been generally rejected, however.\(^{103}\) The contrary view prevails

\(^{100}\) Austria: Decree of Oct. 15, 1941, § 13 par. 1.
Czechoslovakia: Law on private international law of 1948, § 29.
Finland: Law of 1929, § 22.
France: prevailing opinion, see PILLET, Traité 644 no. 313. SURVILLE 459 no. 313; NIBOYET 770 no. 651 (2). BATIFFOL, Traité 532.
Germany: EG. art. 22 par. 1.
Greece: C. C. (1940) art. 22.
Guatemala: see MATOS no. 274 (except where the child is not under parental power) but, under the actual laws, it would be more consistent to apply the domiciliary test.
Japan: Law of 1898, art. 18.
Poland: Law of 1926, art. 22.
Siam: Law on private international law of 1939, § 31.
Switzerland: NAG. art. 8; where the marriage is celebrated in Switzerland, see BG. (May 31, 1919) 45 BGE. I 155, 163; BG. (Jan. 28 and May 20, 1914) 40 BGE. II 295, 302. BECK, NAG. 171 no. 64. If the father is a German or an Italian, authorization by the court is needed, Just. Dept., Bundesblatt 1941, 1103 no. 8, 1104 no. 9.
\(^{101}\) GEBHARD, Draft I (1881) § 22, Gebhardsche Materialien 7.
Czechoslovakia: Law on private international law of 1948, § 31.
Japan: Law of 1898, art. 18.
Código Bustamante art. 60, but see infra n. 109. Cf. BAR § 102, n. 4. However, what conditions of such kind are provided for in actual legislations? RAAPE 559 deals with the requisite of consent by a child of full age.

\(^{102}\) In France a few decisions about 1926-1927 were to this effect; also MARTIN in 9 AUBRY et RÊU § 546, 81, n. 8 ter; see also for the Netherlands, MULDER 121-124.

\(^{103}\) For France, see BATIFFOL, Revue Crit. 1935, 623 no. 14; J. DONEDIEU DE VARES 497.
for the good reasons that legitimation is an effect of marriage, that one law should govern the family as a unit, and that the child's entrance into this family should not be prescribed by another legislation. The English Act of 1926 refers distinctly to the law of the father's domicil, because otherwise a domiciled Englishman could be burdened with a child legitimimized abroad.\textsuperscript{104} It is equally certain in the United States that neither the law of the domicil of the child nor that of the mother controls any acts of legitimation by the father.\textsuperscript{105} Moreover, if the child's own law is adverse to the legitimizing effect of marriage, the child should not suffer therefor.\textsuperscript{106}

In a third opinion, the law of both parent and child must concur for every requisite in allowing legitimation.\textsuperscript{107} As usual, such a doctrinary cumulation of laws is a very inconvenient solution.

4. Rules on Effects of Legitimation

Most of the rules mentioned determine both the act of legitimation and the effect of this act. In some codifications, however, special rules have been provided with respect to the effects of legitimation.\textsuperscript{108} The Código Bustamante, in particular, states that:

\textsuperscript{104} See Note, 7 Cambr. L. J. (1941) 405.
\textsuperscript{105} Blythe v. Ayres (1892) 96 Cal. 532, 572, 31 Pac. 915; In re Presley's Estate (1925) 113 Okla. 160, 240 Pac. 89.
\textsuperscript{106} PILLET, \textit{i} Traité 647 no. 315; POULLET (ed. 2) 514 no. 395; Nouvelles Belges, 2 D. Civ. 620 no. 591; RAAPPE 551 (b), 558 (b); Trib. civ. Seine (Dec. 21, 1916) Clunet 1917, 1419; Cass. (civ.) (Nov. 25, 1857) D.1857.I.423, S.1858.I.294.
\textsuperscript{107} France: Isolated decisions.
Italy: DIENA, 2 Princ. 183.
The Netherlands: KOSTERS 550; VAN HASSELT, 6 Répert. 635 no. 200. Código Bustamante art. 60 \textit{in fine}.
Brazil (under the former law): BEVILAQUA, \textit{i} Código Civil (ed. 6, 1940) Introd. art. 8 no. 18.
\textsuperscript{108} Japan: Law of 1898, art. 18 par. 2.
China: Law of 1918, art. 13 par. 2.
"The effects of legitimation and the action for contesting a legitimation are governed by the personal law of the child." 109

It seems that this rule is destined in the first place to take care of the case where the legitimated person has retained his separate nationality and under his national law becomes of full age earlier than under that of the parent,110 but the fact that by such an event parental power is terminated rests upon the nationality law and upon the law of status and is not an incident of the parent-child relation.

5. Renvoi

As is their wont, French and German courts apply renvoi,111 and English courts follow in applying any law that is applied at the domicil of the parent. It was in fact a case of legitimation that gave rise to the celebrated judgment upon renvoi of Lord Maugham in In re Askew.112

6. Soviet Russia and Other Socialist Countries

The problem offered by the Soviet Russian and other socialist laws and those American statutes which make no distinction between legitimacy and illegitimacy has been more discussed in connection with the subject of legitimation

109 Art. 62.
110 See Bustamante, 2 Der. Int. Priv. 74.
112 Germany: K.G. (Nov. 21, 1930) IPRspr. 1931, no. 88; and in the same case, KG. (Feb. 5, 1932) IPRspr. 1932, no 96 (marriage of an Argentinian domiciled in Florida, law of Florida applied); LG. Wiesbaden (Oct. 10, 1932) JW. 1933, 193 (Englishman if domiciled in the Netherlands, Dutch law applied).

Italy: a decision of App. Firenze (Jan. 23, 1919) 12 Rivista (1918) 288, against the current Italian doctrine.

than with that of legitimate birth. A German court has held that the child of a Russian who married the German mother after the birth was illegitimate, because the Russian law does not know legitimation.\textsuperscript{113} However, as the Russian law does not discriminate and as under German law the child who was, before the marriage, an illegitimate relative of the mother, would become by the marriage a fully recognized child of both parents, legitimacy agrees with the spirit of both legislations involved.\textsuperscript{114} An analogous view is certainly appropriate in this country where the parents of a previously born child marry in Arizona.\textsuperscript{115}

**B. SCOPE**

1. Validity of the Marriage

Conforming to principles mentioned before, the validity of the marriage is to be determined under the ordinary rules concerning the formalities, on one hand, and the intrinsic validity of marriage, on the other.

*Illustration:* The parents, Frenchmen, having lived in concubinage in France, went to New York and continued there to live together. French courts made the recognition of the marriage dependent upon the question whether their relation had assumed at some time the character of a common law marriage under New York law, and this is pertinent also to legitimation.\textsuperscript{116}

There is, however, a tendency to regard the subsequent marriage as valid if it is valid under the law governing the legitimation.\textsuperscript{117}

\textsuperscript{113} St.AZ. 1930, 44, cited with apparent approval by Nussbaum, IPR. 172 n. 6.

\textsuperscript{114} This solution was foreseen by Raape 568, 569; and Raape, 50 Recueil 1934 IV at 505.

\textsuperscript{115} See *supra* n. 38.

\textsuperscript{116} See the case of Trib. civ. Havre (Feb. 14, 1907) and App. Rouen (Feb. 26, 1908) Clunet 1909, 1057; the question was left open only because the recognition of maternity was missing in any case.


Other cases, see *supra* n. 41a.
2. Conditions and Effects of Legitimation

Where the marriage is valid under all laws concerned, the conflicts rule is applicable to the questions:

(i) Whether legitimation follows from the marriage always, or never, or not for the issue from adulterous or incestuous cohabitations, or only for certain privileged classes of children.

Whether legitimation is invalid where it is proved that the child has not actually been begotten by the husband or borne by the wife of the marriage;

Whether consent of the child is required, et cetera.

(ii) Regarding the acts sometimes required in addition to the marriage ceremony, particularly the formal acknowledgment of paternity or maternity as required by the French Civil Code, art. 331, and its many followers. This provision has been applied by the French courts as an incident of the personal law to Frenchmen at the forum and abroad. Likewise, where the man is of Bulgarian nationality, a court in Germany (where no such requisites exist) requires recognition by both parents according to the Bulgarian provision. Conversely, where foreigners marry in the Netherlands, the Dutch requisite of recognition is released in favor of the national law not requiring recognition.

Since in the new text of the French Civil Code, art. 231, postnuptial recognition is allowed but must be effectuated by

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118 France, England, Italy, the Netherlands, etc.
119 Chile: C. C. art. 210 (adult child); art. 211 (child with tutor or curator).
121 Cass. (req.) (Jan. 20, 1879) S.1879.1.417; Cass. (civ.) (April 20, 1885) D.1885.1.23; Cass. (req.) (July 8, 1886) Clunet 1886, 585.
122 KG. (Nov. 29, 1929) HRR. 1930, no. 882, IPRspr. 1930, no. 85 (on the ground that the Bulgarian provision requiring recognition is not meant for evidence of the procreation only).
123 VAN HASSELT, 6 Répert. 635 no. 201.
court proceedings, this requirement, too, is to be considered a part of the substantive personal law \(^{124}\) rather than a formality with territorial effect.\(^{125}\)

(iii) Respecting the effect attached to legitimation:

Whether legitimation is effective from the time of marriage or retroactively from the birth or from the date of recognition (Anglo-Canadian laws, for instance, prefer the effect from birth);\(^{126}\)

Whether already existing children born in wedlock retain rights of "primogeniture";\(^{127}\)

Whether rights normally included in legitimacy are denied;\(^{128}\)

Whether in particular the child receives the name of the father.\(^{129}\)

3. Invalid Subsequent Marriage

A delicate question arises, if the subsequent marriage is considered invalid at the forum; under what law should we determine whether, nevertheless, the child is legitimized? Express municipal provisions are made in the German and Swiss Civil Codes,\(^{130}\) whereby the rules of putative marriage should be applied by analogy. Such an analogy is convenient also in the field of the law of conflicts. In the same way that

\(^{124}\) Batiffol, 8 Répert. 424 no. 124; a strange case of application: Trib. civ. Rochelle (May 29, 1934) Clunet 1935, 370.

\(^{125}\) Surville, Clunet 1916, 769, 780.


\(^{127}\) Cf. Austrian Allg. BGB. § 161.

\(^{128}\) Germany: cf. Bay. ObLG. (June 8, 1921) 42 ROLG. 105 (Czechoslovakian decree of legitimation withholding rights of inheritance).

\(^{129}\) See E. H. Perroud, Clunet 1911, 503; 4 Frankenstein 161 n. 40.

\(^{130}\) BGB. § 1721; Switzerland: Egger, 2 Kommentar zum Schweizerischen Zivilgesetzbuch art. 258 (1) (b). In France, the same solution obtains, Planjol-Ripert-Boulanger, 1 Traité élémentaire de droit civil (ed. 5, 1950) 385 no. 1051.
the personal law of the parent at the time of the marriage determines whether legitimacy is dependent or not upon a valid marriage, the law governing legitimation by subsequent marriage should determine also the effect of an invalid subsequent marriage.\footnote{In this sense also \textit{4 Frankenstein} 153 (d), while \textit{Raape} 570 follows his theory referred to, \textit{supra} p. 613, n. 68.}

In the United States it has been contended, however, that where the marriage was void no effect could be recognized with respect to the children.\footnote{\textit{2 Beale} 708 n. 5. The decision in the Matter of Look Wong (1915) 4 U. D. Dist. Haw. 568, cited by \textit{Beale}, does not seem to support this view, but it has been expressed in \textit{Adams v. Adams} (1891) 154 Mass. 290, 28 N. E. 260 even with respect to the liberal California legislation.} As a matter of fact, the statutes conferring legitimacy on children, irrespective of the intrinsic validity of the marriage, have overlooked the case of a subsequent marriage, but it may be asked whether courts should not grant analogous application\footnote{\textit{Cf. Note}, 46 Yale L. J. (1937) 1049, 1051 n. 16.} by virtue of the liberal construction generally given these beneficial statutes. Were this done by the domiciliary law, no other jurisdiction would have any reason to refuse recognition.

The inverse case that the marriage is considered invalid under the personal law but valid under the internal rules, has been discussed in Germany; the father’s personal law was said to determine the parent-child relationship in this case also.\footnote{\textit{Raape}, JW. 1934, 2951; same in 50 Recueil 1934 IV 405, 487 no. 63 against other opinions.}

4. Acquisition of Nationality

Nationality of the parent is regularly transferred by legitimation to the child in the Continental European laws. This raises peculiar problems, particularly in France.\footnote{Code de la nationalité (1945) art. 34.} English law excluded until 1948 this acquisition of nationality.\footnote{The rule of \textit{Abraham v. Att. Gen.} [1934] P. 17 was changed by the British Nationality Act, 1948, s. 23.}
5. Prohibitive Public Policy of the Forum

Much thought has been given to those municipal provisions which prevent legitimation of the children conceived or born in polygamous, incestuous, or bigamous relations. There is no such provision in most American jurisdictions nor in Germany, the Scandinavian countries, nor Switzerland. The Venezuelan Civil Code expressly permits legitimation by subsequent marriage even though the parents were incapable of marrying at the time of the conception.\textsuperscript{137} The former text was similar, but it prohibited the recognition of children born to such marriages.\textsuperscript{138} Yet British and French influence has prompted a great number of provisions against such a legitimation. Recent French reforms modifying the famous article 335 of the \textit{Code Napoléon} brought only partial relief.\textsuperscript{139}

(a) \textit{United States}. The courts of New York persist in their general policy of outlawing the children of "prohibited" marriages.\textsuperscript{140} In the other states, the weight of authority recognizes the domiciliary law without objection stemming from an opposed local policy.\textsuperscript{141}

(b) \textit{England}. According to the British Legitimacy Act of 1926, the offspring of an adulterous union cannot be legiti-
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mated when the parents are domiciled in England, but no such express clause has been added in section 8 (1) dealing with marriages celebrated while the spouses are domiciled abroad. By reasonable interpretation, it has been held that a child born of a father with a foreign domicil is legitimated according to the domiciliary law without interference by English public policy. 142

(c) Continent. Similarly, legitimation is recognized in France when foreign nationals marry abroad, 143 except in the case where the parents, both formerly French, have abandoned their nationality for the purpose of evading the French provision against legitimation of adulterines. 144 However, the problem has been much discussed, 145 and an increasingly nationalistic attitude of the Court of Cassation has made from what is left of article 335 of the Civil Code, after repeated modifications, a rule of “ordre public international.” 146 This possibly means that adulterine children


144 Cour Paris (July 16, 1902) Clunet 1903, 392 (French parties had become Swiss citizens).

145 On the different opinions and the stages of development of the cases see Weiss, 4 Traité 94; Valéry 1147 no. 1. 808; Niboyet 771 no. 652; Lerebours-Pigeonnière 373 no. 348; Bartin, 2 Principes 359 § 324 (critical); Notes to Cass. (civ.) (March 31, 1930) by Savatier, D.1930.1.113 and Batifol, 8 Répert. 425 nos. 134 ff. and Revue Crit. 1934, 615.

146 Cass. (civ.) (March 31, 1930) D.1930.1.113 at 118, S.1931.1.9 and ibid. at 177, Case Note by Geny; Clunet 1930, 650, Revue Crit. 1934, 615 (a Russian, Reweliotty, married and being father of children by this marriage, had an illegitimate child in France by one Struve, whom he married after having been divorced from his first wife. Both parents had acknowledged the child. The Czarist law admitted legitimacy, and the Soviet Russian law ignores any qualifications of children. The Appeal Court refused recognition for the double reason that the child, being of French nationality, was subject to French law. Lerebours-Pigeonnière (ed. 2) 412 no. 1, and 415 n. 1 stresses the point that the Supreme Court did not disapprove of the second ground, although it did not examine it. Similar in Belgium: Trib. civ. Bruxelles (March 27, 1930) Pasicrisie 1930.3.173 and Trib. civ. Liège (Nov. 13, 1930), both in Revue 1933, 358, even for the case where recognition was made abroad, on the worn authority of 5 Laurent 554 no. 266.
cannot be legitimated where any one of the three persons involved is of French nationality or a part of the facts happened in France. The courts are apprehensive that the people may become accustomed to polygamy.

Where all three persons are of foreign nationality, however, the objection of public policy is unlikely to be raised in a European court. But renvoi may have an influence on these considerations. For instance, where an Englishman was domiciled and married in the Netherlands, a German court, by renvoi from the national English law, applied Dutch law in determining that the premarital issue was not legitimated because born in adultery.

Also on the grounds of public policy, the Appeal Court of Hamburg refused to recognize a legitimation valid under Dutch law, where an unmarried woman of German nationality, mother of a German child, married a Dutchman and both parties recognized the child as their own. The German courts, like those of some American jurisdictions, regard as necessary for legitimation that the man marrying the mother shall in fact be the father. The Court extended this requirement to the foreign legitimation of a German child, on the ground that, if the child is not actually an offspring of the married couple, its interest ought to be protected as is done through the other form of legitimation, viz., in the course of legitimation by state authority. This reasoning results, however, in creating a double status of the child as legitimate abroad and illegitimate at the forum, and should not be followed in the jurisdictions mentioned above.

147 Cf. Kosters 538, 554.
148 LG. Wiesbaden (Oct. 10, 1932) JW. 1933, 193, IPRspr. 1933, no. 51.
151 Cf. Eckstein and Lorenz, notes to the decision in 6 Giur. Comp. DIP. no. 132.
6. Permissive Public Policy of the Forum

Occasionally, the father's law prohibiting legitimation has been disregarded for reasons of a benevolent local policy.\textsuperscript{152} French courts affirmed the effect of legitimation under French law where an Englishman married a French woman, although legitimation was not yet recognized by English law.\textsuperscript{153} This may be the right decision, provided the couple is domiciled in France.\textsuperscript{154}

7. Law of Situs

The famous English case of \textit{Birtwhistle v. Vardill}\textsuperscript{155} has retained authority, inasmuch as a state where land is situated may require birth in lawful wedlock for the capacity of inheriting land, although in other respects foreign legitimation by subsequent marriage is recognized, and certainly in England it has been recognized in all respects by the law of 1926.\textsuperscript{156} Very few American cases have followed this doctrine,\textsuperscript{157} more suitable, indeed, to old feudal institutions.

\textsuperscript{152} LG. Frankfurt am Main (Dec. 6, 1953) 20 Z.ausl.PR. (1955) 341 (critical note by Neuhaus); LG. Karlsruhe (May 15, 1952) IPRspr. 1952-53 no. 1952; RAAPE 562(a), 563, in the case of a Belgian domiciled in Germany who in adultery had a child by a German woman, later married the mother of the child in Germany.

\textsuperscript{153} Cass. (civ.) (Nov. 23, 1857) S.1858.1.293 (sounding as though French law were always applicable); Cour Bourges (May 26, 1858) S.1858.2.533, D.1858.2.178; App. Rouen (Jan. 5, 1887) Clunet 1887, 183; Cour Paris (March 23, 1888) Clunet 1889, 658, approved by VALÉRY 1148 no. 11 802; but disapproved by most writers, see WEISS, 4 Traité 96 ff.; DESPAGNET 838 no. 277; SURVILLE 461 no. 313.

\textsuperscript{154} NIBOYET 734 no. 625 II, but contra 5 Traité 490.

\textsuperscript{155} (1826) 5 Barn. & C. 438; (1835) 2 Cl. & F. 571; (1840) 7 Cl. & F. 895.


“Legitimation per rescriptum principis,” by which the emperor in the Roman imperial epoch elevated a child to the status of legitimacy, has been preserved in numerous civil law countries. The state’s chief acted on the instance of the father, or of both parents, or upon the father’s wish expressed in a will. In some countries, the legislature or the monarch or state president was replaced by courts. This method has been followed in a few common law jurisdictions of the United States.

Moreover, legitimation may be effected by parental acknowledgment or by conduct of public repute, so as to place the child upon the footing of a legitimate child. Thus, in eight states of the Union by oral or written, and in Michigan, by written acknowledgment, legitimation is performed for all intents and purposes. We are not dealing now with institutions conferring limited rights upon an illegitimate child. The subject includes, however, those kinds of legitimation which give the child a full position of legitimacy minus the right of inheritance, as in Delaware and formerly Czechoslovakia.


161 Georgia, Mississippi, North Carolina, Tennessee; 4 Vernier 181 § 245. 4 Vernier § 244.

162 4 Vernier § 245. Allg. BGB. § 162 replaced by the Family Law of Dec. 7, 1949. In fact, faced with a Czechoslovakian decree of legitimation, the Bay. ObLG. (June 8, 1921) 42 ROLG. 105 held that the status was concerned and the act should be recorded at the civil status register.
I. United States

The conflicts rule of the United States, in the evidently prevailing opinion,\textsuperscript{165} is the same as that concerning subsequent marriage; the law of the domicil at the time of the act governs. It does not matter whether the foreign legitimation has been executed in a form not known at the forum, as for instance by a special statute, nor whether the child would have been barred from legitimation by the policy of the forum. These principles have been very clearly expressed.\textsuperscript{166} Also, the child's domicil is not taken into consideration; a legitimation by acknowledgment has been upheld in California despite the English domicil of the child,\textsuperscript{167} quite as, conversely, the Virginia statute of 1866, legitimating colored children, was refused application in Massachusetts in respect to a father who was domiciled there, although the child resided in Virginia.\textsuperscript{168} A domicil of the father or even of all parties at a time posterior to the legitimating act is without importance.\textsuperscript{169}

2. England

No case had occurred in England before the Legitimacy Act of 1926, where a foreign legitimation other than by subsequent marriage was in question,\textsuperscript{170} and the Act likewise limited itself to recognizing English and foreign legitima-

\textsuperscript{165} Restatement § 140; Stumberg 331. The author of the Note in 46 Yale L. J. (1937) 1046, 1053 thinks that the doctrine is in a "chaotic condition," but this contention is not well supported by the few deviating cases and the absence of authority as to certain details.

\textsuperscript{166} See, e.g., Adkins, J. in Holloway v. Safe Deposit & Trust Co. of Baltimore (1926) 152 Md. 321, 134 Atl. 497; Buchanan, J. in Scott v. Key (1856) 11 La. Ann. 232 (legitimation by special statute of Arkansas legislature) quotes with Story § 51 from Boulenois: "Habilis vel inhabilis in loco domicili est habilis vel inhabilis in omni loco."

\textsuperscript{167} Blythe v. Ayres (1892) 96 Cal. 532, 31 Pac. 915.

\textsuperscript{168} Irving v. Ford (1903) 183 Mass. 448, 67 N. E. 366.


\textsuperscript{170} Supra p. 613.
tions by marriage. Soon afterwards, however, in the case of *In re Luck*, it happened that an Englishman, when domiciled in England, procreated an illegitimate son and, while domiciled in California, acknowledged him pursuant to the California Civil Code, section 230, by receiving the child into his family with the consent of his wife and by obtaining a decree of legitimation from the time of birth. It would have been a reasonable expectation that the legitimation should simply be recognized under the law of the father’s domicil at the time of the act, by analogy to the rule laid down in the law of 1926. The father’s domicil at the time of the birth should be of no significance. However, the Chancery judge reached this result by resorting to the child’s law,\(^{171}\) which was an unwarranted breach with the principles in force. Two of the three Lords of Appeal were apparently so strongly under the spell of the dogma abolished by the Legitimacy Act, that they refused recognition because of the father’s English law as of the time of the birth of the child.\(^{172}\) The resulting decision is obviously regrettable.\(^{173}\)


In the countries following the nationality principle, the rules are the same as in the case of a subsequent marriage. Hence, a foreign legitimation agreeing with the national law of all parties is recognized, even though the specific procedure is unknown to the forum. For example, French courts respect a foreign legitimation by state authority although unknown to French municipal law.\(^{174}\)

\(^{171}\) *In re Luck’s Settlement Trusts* [1940] Ch. D. 323 at 329.

\(^{172}\) *In re Luck’s Settlement Trusts* [1940] Ch. D. (C. A.) 864 at 890.


\(^{174}\) See Cour Paris (April 13, 1893) Clunet 1893, 557; WEISS, 4 Traité 101; VALÉRY 1150; POUJET 469 no. 395.
Where the parties are of different nationality, usually the father's law alone is applied.\footnote{175} But with respect to legitimation by acts other than marriage, it is convenient to require the consent of the child or of some competent agent on its behalf, as municipal legislations frequently provide,\footnote{176} and there is a tendency to apply such provisions of the child's law as an exception to the rule referring to the father's law. The German statute (EG. art. 22, par. 2) directly provides that in the case of a German child the consent of the child or of the persons and courts charged with the care of it should be secured in accordance with the German rules.\footnote{177} French courts and certain writers require application of French law every time that any party is of French nationality.\footnote{178}

4. Argentine Doctrine

Another application of local public policy, enunciated in Argentina, is that a legitimation by act of a foreign state should not be recognized because "it presents a privilege." \footnote{179}

V. Recognition of Foreign Legitimation

Much discussion has been devoted to the relations existing between the above-mentioned rules and the conflicts rules concerning succession upon death.

\footnote{175} See for instance App. Bern (May 11, 1939) 36 SJZ. (1940-1941) 128 no. 23. Swiss C. C. arts. 260 ff. applied although the woman and the child were Germans. For an opposite view requiring that the parties and the authority rendering the decree belong to the same state, see WEISS, 4 Traité 104; \textit{contra} ROLIN, 2 Principes 158 no. 628.

\footnote{176} \textit{Cf.}, for instance, German BGB. § 1726 in contrast to § 1719 (legitimation by subsequent marriage); Peru: C. C. (1936) art. 320; Venezuela: C. C. (1942) art. 233.

\footnote{177} It is controversial whether this rule is applicable to foreign children. The prevailing answer is in the negative. See RG. (July 11, 1929), 125 RGZ. 266; RAAPE 549; NUSSEBAUM, IPR. 173, n. 3. The Czechoslovakian statute on private international law of 1948, § 31, generalizes by providing that the requirement of consent by the child or any other persons is governed by the child's national law.

\footnote{178} See the criticism by CHAMPCOMMUNAL, Revue 1910, 57, 73.

\footnote{179} 2 VICO no. 171 at 127.
1. Validity of Legitimation as a Preliminary Question

There is a general problem respecting the law applicable to legitimation or adoption, when either one is a condition for an individual's sharing in a succession upon death. Where a claim to participate in a distribution of assets, governed by the inheritance law of state X, is based on a legitimation created in state Y, should the validity of the legitimation be adjudicated under the law of X or Y? This question occurs in its purest form in third states; should a court in state Z apply its ordinary conflicts rule concerning legitimation or does application by such court of the inheritance law of X by implication include the conflicts rule of X regarding legitimation? (There is, of course, nothing to recommend the lex fori of X, or the substantive legitimation law of X as such.) The problem is significant only where the conflict rules on inheritance and those on legitimation or adoption result in contrasting solutions. No case in the English or American practice to illustrate this contrast has been found by Robertson, and only one German decision of the kind has been found. In this case, an Alsatian in adultery had a child by a woman whom he afterwards married. He acquired French nationality by the Treaty of Versailles but died in Germany. As well known, Frenchmen cannot legitimize adulterine children, but Germans are allowed to do so. As the man's succession under the German conflicts rule was governed by French law, the court decided to apply French rules of conflicts. Under the French conflicts rule concerning legitimation, as the court understood it, the legitimation operated in favor of the child in spite of its adulterine position, because the parties were German at the time of their subsequent marriage. Acknowledging the legitimacy of the

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180 The logical necessity of applying the law of the state of inheritance to the preliminary question has been expounded by Melchior § 175; Wengler, 8 Z. ausl. PR. (1934) 148 at 166; also Robertson, Characterization 137 ff.
181 Robertson, ibid. 135, 151.
child, the court therefore ordered that it share in the succession. 182

The case is instructive in two respects and helps us to distinguish two problems.

One of these problems, neglected in Europe, holds an interest in this country, in view of the persistent effort to separate statutes of legitimacy (or status) from statutes of distribution. In the French law, the statute of distribution furnishes only the words: "enfants et descendants" (C.C. art. 731). Legitimacy, of course, is presupposed, but an adulterine child is only indirectly excluded by reason of its incapacity to be legitimized. And only the conflicts rule on legitimation prescribes that the ban on adulterine children ceases where all facts happened abroad and at the time did not concern a French national. This seems, in fact, to be the averred doctrine; 188 at least the German court was entitled to assume its correctness.

We may conclude that, if recognized at all, the foreign act is valid in our jurisdiction as measured by its own law. It cannot be recognized for the purpose of family law and eliminated for the purpose of distribution.

What the European literature discusses, however, concerns the other problem, namely, whether the German court should have decided the validity of the legitimation according to its own German conflicts rule on legitimation, 184 instead of following the provisions of French law because it governs the succession. 185 The individual case gives no solid basis for arguing this question, since the legitimation could not be denied validity in any event; it had been effectuated in Germany by parties then of German nationality. Arguments

182 OLG. Karlsruhe (March 20, 1931) IPRspr. 1931, no. 96, Revue 1932, 702.
183 SAVATIER, D.1930.116, LEREBOURS-PICKEONNIÈRE (ed. 2) 318 no. 279.
184 RAAPE, 50 Recueil 1934 IV 494.
185 LEWALD, 4 Rechtsvergl. Handwörterb. 454.
of practical convenience may be considered. If such preliminary questions are subjected to the statutes regulating inheritance, consistent application of these statutes may be facilitated. On the other hand, by applying constantly the law indicated by the forum's special conflicts rules on legitimation or adoption, consistency in deciding the effects of the same marriage or adoption is promoted. The latter consideration appears preferable.

2. Effect of Foreign Legitimation on Inheritance Rights

Where a child has been legitimized under the law of state X and an inheritance is governed by the laws of state Y, should the effect of the legitimation on the inheritance be determined under the inheritance law of X or Y? This much discussed question has no serious significance, if we understand legitimation to mean an act elevating the illegitimate child to full legitimacy. The analogous question concerning foreign adoption is less simple, because an adoption may produce various degrees of rights. It is obvious that full recognition of a foreign legitimation assimilates the child to legitimates in the sense of any statute of distribution which does not except legitimized children, an exception practically occurring only in anachronistic applications of the Statute of Merton. 186

VI. RELATIONS BETWEEN LEGITIMATE PARENTS AND CHILD

A. RULES

A comparative survey of this topic has to face a situation similar to that encountered with respect to the effects of marriage. The Continental systems start from a comprehensive notion of parental power, historically derived partly from the Roman patria potestas, partly from the Germanic munt.

186 See cases cited supra p. 628, n. 157.
and result in the recognition of a status governed by the personal law of the parent. In common law, much is left to the rules concerning contract, tort, and support; the remaining small domain of domiciliary law is difficult to define.

Even so, we may be astonished at the scarcity of conflicts rules that are discussed in this country with respect to parental rights and duties. The Restatement (§§ 144-148) devotes to parental power as a status only one conflicts rule, subjecting “custodianship” of a legitimate child to the law of the father’s domicil at the time of birth, and treats jurisdiction for modifying custody in a few sections. Support and domicil are dealt with separately, but neither personal property of a child nor the authority of a parent to act for the child are expressly mentioned in the chapters on property and contracts, respectively. Such subjects as personal services and earnings of children do not seem to fit under any rule of the Restatement. This neglect, of course, is not accidental. Whereas Wharton and Story dedicated some space to the differences of civil and common law conceptions about this matter, subsequent writers seem to reduce the “status” of legitimacy to custodianship, which word, used in this connection, probably means no more than personal care and education, excluding maintenance (which otherwise may be included in the term). Exactly as with respect to matrimonial rules, the methods of civil law and common law are divergent; concentration of the effects of legitimacy under the aspect of family law in the Continental conception contrasts with dispersal into several topics in the American system. To account for all implications of the personal law, we have to base our survey upon the broader scope of the civil law doctrines.

1. Personal Law of Father

Wherever the unity of the family law is in the foreground of thought, the personal law of the father is deemed to de-
termine the relation between both parents and the child, even when, as today, wife and child may have separate personal laws. This has remained the rule especially in Germany, Italy, Belgium, Japan,\(^{187}\) and in the French dominant opinion,\(^{188}\) where the national law of the father governs the entire complex of relations, as well as in other countries, including Switzerland,\(^{189}\) where the law of the father’s domicil governs.

Correspondingly, in this country, “custody” is governed by the domiciliary law of the father,\(^{190}\) although sometimes the opinion is expressed that parental power should always be subject to the local policy of the parties’ momentary residence.\(^{191}\) The only exception to the rule of the foreign domicil should be urgent public policy, and this not so often as is generally claimed.

\(^{187}\) Nationality:
Austria: Decree of Oct. 15, 1941, § 10.
Germany: EG. art. 19 sentence 1.
Belgium: ROLIN, 2 Principes 100 no. 587, 646; POULLET 436 no. 374;
Novelles Belges, 2 D. Civ. 759.
Benelux-Draft, art. 9 par. 1.
Japan: Law of 1898, art. 20.
China: Law of 1918, art. 15.
Siam: Law on private international law of 1939, § 30 par. 1.
Iran: C. C. art. 964.

\(^{188}\) France: Cass. (civ.) (Jan. 13, 1873) S.1873.1.13, Clunet 1874, 245; Cass. (civ.) (March 14, 1877) S.1878.1.25, Clunet 1878, 167 (in this case the parents were Frenchmen and the child a foreigner). See NIBOYET 784 no. 674, and for cases \textit{ibid.} 784, no. 675; in 5 Traité 372 ff., the author pleads for the application of French law if only one of the parties is a French national! SURVILLE 472 n. 1; PILLET, 1 Traité 659 no. 328. BATIFFOL, Traité 541 ff.

\(^{189}\) Domicil: Switzerland: (for Swiss citizens abroad) NAG. art. 9. Treaty of Montevideo on international civil law, text of 1940, art. 18, correcting the existing art. 14. Uruguay: C. C. (as amended 1941) art. 2396.

\(^{190}\) Restatement § 144 combines this rule with § 30 declaring that the child normally shares the father’s domicil, thus no change of award of custody would occur regularly against the law of the father’s domicil under § 145. The same rule applies to support, Berkley v. Berkley (1952) 246 S. W. (2d) 804.

\(^{191}\) See especially 1 WHARTON §§ 253, 254. For England, WESTLAKE § 4 infers from the old case of Johnstone v. Beattie (1843) 10 Cl. & F. 42, 113, 114 that the authority of a foreign parent over his child living in England is recognized to the extent to which an English parent would have similar authority, whatever that means.
2. Cases of Different Nationalities

The now frequent cases where the parties have different personal laws are treated variously.

(a) Certain writers of the civil law countries, now followed by some legislations and courts, suggest that a personal law of the child different from that of his father should prevail.\textsuperscript{192} The favorite argument for this view is that paternal power in modern law serves only the welfare of the child; this is true, but it is no argument for the national or domiciliary law of the child.

The problems of the common law lie on another plane. British law, followed in this instance in Scotland,\textsuperscript{193} recognizes the jurisdiction of the child’s domicil as competent, although not exclusive. Likewise in this country, “the state of domicil of the child can change the custody of the child from one parent to the other, or to, or from both.”\textsuperscript{194} The courts apply their own substantive laws, but the doctrine of the child’s domicil by operation of law corrects this apparent rupture of the system.\textsuperscript{195} So long as the family lives together, there is no question at all; even if the community is disrupted by one parent abandoning the child or by separation or divorce of the parents, the child is considered domiciled with one of the parents.

(b) The Polish and Czechoslovakian laws have adopted

\textsuperscript{192} Finland: Law of 1929, § 19.
\textsuperscript{193} Código Bustoamante art. 69 (with broad exceptions on which later).
\textsuperscript{194} Hungary: Decree-Law no. 23/1952, § 17 par. 2, reserving, however, Hungarian law if this is more favorable for the child and the child lives in Hungary.
\textsuperscript{195} France: Surville 468 no. 319, ibid. 472 no. 320 n. 2; Despagnet 821 no. 269 II; Champcommunal, Revue 1910, 716, 718; Weiss, 4 Traité 27, 146, 164; Cour Paris (Aug. 5, 1908) Clunet 1909, 173.
\textsuperscript{196} Brazil: 2 Pontes de Miranda 110.
\textsuperscript{197} The Netherlands: Rb. Rotterdam (May 18, 1934) W. 12791 (authority of the father, a foreigner, over a Dutch child, determined by Dutch law).
\textsuperscript{198} Ponder v. Ponder [1932] Session Cases 233, 4 Giur. Comp. DIP. No. 123.
\textsuperscript{199} Restatement § 145.
\textsuperscript{200} Restatement § 33.
the last national law common to both parties, as in conjugal matters.196

(c) The recent Greek Code, elaborating the subject matter, makes the relation between legitimate parents and their child dependent: (i) upon the national law that was last common to the father and the child, (ii) in absence of such, upon the law of the father at the birth of the child; (iii) if the father is dead, upon the last law common to the mother and the child; and (iv) in absence of such, upon the law of the mother at the death of the father. This symmetrical solution solves all possible cases but is arbitrarily chosen. Moreover, in both this and the Polish regulations, paternal rights and duties are determined by a law that may be alien to both parties for the time being.197

(d) In another opinion, both laws are to be cumulatively applied.198

(e) Also the law more favorable to the person sued on account of an obligation of parent-child relationship has been advocated.199

(f) The law of the forum has been applied, where one party was a national of the forum, sometimes as an expedient because of the unsettled conflict laws, but in France as a declared policy where either the father or the mother is of French nationality, even though the child be a foreigner.200

196 Poland: Law of 1926 on international private law, art. 19; criticized by SCHNITZER (ed. 1) 209 n. 1; Czechoslovakia: Law on private international law of 1948, §§ 21, 22.
197 Greece C. C. 1940, art. 18. See also infra p. 652.
198 2 ZITELMANN 889; 4 FRANKENSTEIN 70, n. 161; CAVAGLIERI 242; FEDOZZI 502; Trib. Venezia (Jan. 30, 1932) 24 Rivista (1932) 106; see contra: RAAPE 464.

Germany: German law applied where the mother is of German nationality and the child stayed with the mother in Germany, see RG. (Feb. 20, 1913) 81 RGZ. 373; OLG. München (Aug. 24, 1938) HRR. 1938, no. 1463.
3. Renvoi

Where the rule refers to foreign law, renvoi may be applied.201

B. SCOPE OF THE RULES

1. Maternal Rights

The rules outlined above determine what rights the mother has during the father's lifetime and after his death.

Illustration: After the death of his German father, a son was entrusted to an uncle in Italy and later was released from his German nationality. It was held that, under German conflicts law, the mother, being of German nationality, retained her maternal powers, so that no guardian was to be appointed.202

2. Personal Care

The content of paternal or maternal rights embraces "care, advice and affection," in other words, personal care and education. Religious education is included, insofar as it is considered of private concern and the foreign law does not offend public policy by compromising religious freedom.205 The law governing parental relations extends to the action by which a parent entitled to custody sues the other parent for restitution of the child; in the prevailing opin-
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ion, also after a divorce, this law excludes the law under which the divorce has been granted.207

The French decisions are divided; the majority apply French law under the color of public policy,208 and an English court is likely to follow the same method in the case of a ward of the court.209 In the United States, it seems difficult to tell in what cases a court may be inclined to apply a foreign law. Correction and chastisement have always been indicated as an example of parental power limited by the territorial habits of the place where they are exercised.210 Probably a parent's renunciation of his right to visit would be held contrary to public order, as has been held in Germany.211

The requirement of parental consent to the child's marriage, as discussed earlier, is included in parental rights under civil law, while it is categorized with formalities according to the traditional British view and is, without qualification, subject to the law of the place of celebration under the American conflicts rules.

3. Duty of Providing a Dowry

Whether a parent has a duty to settle property as a dowry for his daughter, as he had under the German law but not under Dutch law, is a question determinable under the rules outlined above.212

(Austrian law); RG. (May 23, 1927) IPRspr. 1926–1927, no. 79 (Bulgarian law; the form of procedure, however, is subject to the law of the forum); LG. Stuttgart (Nov. 12, 1953) 19 Z. ausl.PR. (1954) 152 with note Käser.

207 Supra p. 573; Bay. ObLG. (Oct. 8, 1930) IPRspr. 1931, no. 84.

208 See Trib. civ. Seine (June 18, 1934) D. H. 1934. 471, Clunet 1935, 619 and the practice reviewed by BATIFFOL, Revue Crit. 1937, 427 ff. who wishes that a foreign personal law be observed with vigilant criticism rather than to be neglected; Cour Paris (July 13, 1951) Clunet 1952, 612.

209 See In re B-'s Settlement, B- v. B- [1940] Ch. 54.

210 1 WHARTON § 254; Código Bustamante art. 72.

211 KG. (Nov. 14, 1930) IPRspr. 1931, no. 8.

212 RG. (April 12, 1923) Leipz. Z. 1923, 449.
4. Protecting Interference by Courts

Many cases have dealt with the power of courts to protect children who are resident at the forum, against parents who are foreigners. German courts are ready to recognize that it is primarily a matter of the personal law of the parent, whether and under what conditions parental rights can be abridged or terminated. Such remedies as are provided in the Italian or the Dutch civil codes have been found sufficient. \(^{213}\)

Where the national law did not offer an adequate basis for intervention of the German court, temporary measures were always permitted. \(^{214}\) Incidentally, where the welfare of a child resident within the country appeared to be menaced, public policy was often invoked in favor of the local remedies, but this view has been challenged recently. \(^{215}\)

A similar practice in favor of the personal law exists, for instance, in the Netherlands. \(^{216}\) In Switzerland parents domiciled within the country are subject to Swiss law under the domiciliary principle itself. \(^{217}\)

\(^{213}\) KG. (June 5, 1921) 53 Jahrb. FG. A 56 (Italian law); KG. (Nov. 28, 1913) 45 Jahrb. FG. A 18 (Dutch law). See also KG. (Sept. 6, 1935) JW. 1935, 3483 (applying Austrian law); Bay. ObLG. (Dec. 6, 1933) JW. 1934, 699 and Bay. ObLG. (Feb. 14, 1934) JW. 1934, 1369, IPRspr. 1934, nos. 63, 64 (Lebanese law).

\(^{214}\) RG. (May 23, 1927) IPRspr. 1926–1927, no. 79 and cited writers. In a constant practice sec. 63 par. 1 (2) of the Law on Youth Welfare of July 9, 1922, providing for emergency education of depraved children, is applied to foreigners. See RG. (June 30, 1927) 117 RGZ. 376; RG. (May 22, 1933) JW. 1933, 45, 5 Giur. Comp. DIP. 137 no. 51.

\(^{215}\) KG. (Jan. 12, 1934) IPRspr. 1934, no. 62 denies jurisdiction as to foreigners if any one of the parties interested in an order regulating custody or right of visitation is not to be found within the territory of the state. OLG. München (May 18, 1938) HRR. 1938, no. 1281, (although the child was at the forum, depriving the Bulgarian father of his powers was held excluded because the Bulgarian law did not recognize such a measure).

\(^{216}\) The Netherlands: Rb. den Haag (Jan. 13, 1939) W. 1939, no. 286 (although the wife was Dutch and the parties lived in the Netherlands, Austrian and German laws were applied as the child's national law, the mother was entrusted with the personal care, and the father excluded from visiting the child).

\(^{217}\) BG. (Sept. 29, 1927) Praxis 1927, 456. The powers of a Dutch father (domiciled in the Netherlands) are characterized under Dutch law: BG. (Feb. 3, 1939) 65 BGE. I 13.
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The lex fori at the domicil of the child simply is applied in the United States 218 for controlling and transferring custody. The Bustamante Code expressly reserves the law of the forum, depriving the parents of their power "by reason of incapacity or absence, or by judgment of a court." 219 To justify the similar practice of the French 220 and the Belgian 221 courts, an author who is otherwise not favorable to extending public policy has adduced that mistreatment of a child arouses public indignation and harms morals. 222

Also in the countries prepared to observe foreign law, temporary residence is sufficient not only to bring provisional legal aid to the child so long as the national country does not assume its care, 223 but also to assist a father or mother in coercive actions against a child, according to the local law. 224

5. Parental Interest in Child's Property

The Roman paternal "dominium" in all family property had given way in the imperial period to a right of "administration and enjoyment" upon property acquired by the children and not excepted from this right. Property either of infants or of children less than eighteen years old is still subject to such paternal encroachment in many civil law

218 Restatement § 148.
219 Art. 72.
220 France: Law of July 24, 1889 as amended Nov. 15, 1921; on the application to foreigners see PILLET, Clunet 1892, 5, and 1 Traité 660 no. 328; WEISS, 4 Traité 157; App. Colmar (March 28, 1935) Clunet 1936, 642.
221 Belgium: Law of May 15, 1912 on Protection of Minors; for application of provisions on the forfeiture of parental power to foreigners see App. Liège (July 10, 1917) Pasicrisie 1917.2.254; Trib. Liège (Nov. 23, 1917) Pasicrisie 1918.3.82.
223 For this situation see Bay. ObLG. (Feb. 14, 1934) IPRspr. 1934, no. 64; Swiss BG. (Feb. 3, 1939) 65 BGE. I 13 (where it is stated that art. 7 of the Hague Convention on custody does not cover the case).
Germany: KG. (Dec. 16, 1938) JW. 1939, 350 (Danish mother and daughter).
countries, including Louisiana. By some American statutes, a parent has control of the property given by him to the child, although only as an administrator. Such control in the predominant interest of the child, with or without duty to account for the revenue, is frequent in modern legislations. Common law and the legislations of Sweden and Czarist and Soviet Russia do not contain any such legal powers of parents, but at common law parents have a right to the earnings of the child, which right affects the property as well as produces obligations. In other countries, on the contrary, earnings are a favorite exception to the management or usufruct of the parents.

In the law of conflicts, immovables must be treated separately, because of their particular position at common law.

(a) That immovables are governed by the lex situs also in regard to the paternal rights, was a doctrine shared by many statutists and older French authors. In more recent times, no civil law text has followed this doctrine, except


227 Arkansas, Kansas, Missouri; see 4 VERNIER § 232.

228 E.g., Austrian Allg. BGB. § 150.

229 See VEITH, 4 Rechtsvergl. Handwörterb. 782.

230 STORY § 463; WESTLAKE § 166.

231 See COUET, Revue de droit francois et étranger 1844, 401, 406; TROPLONG, Droit civil expliqué, privilèges et hypothèques, no. 429 (the legal hypothec upon French immovables of a guardianship has been established abroad, since the “statute” is a “real one”).

232 Legal provisions in Germany: EG. art. 19; Poland: Law of 1926 on international private law, art. 19; Italy: C. C. (1942) Disp. Prel. art. 20 par. 1; Czechoslovakia: Law on private international law of 1948, s. 23; Código Bustamante art. 70.

Doctrine and practice in Belgium and France: see 6 LAURENT 36 § 15;
the Montevideo Treaty of 1889; its new draft of 1940 joins the general doctrine of the civil law, that the entire assets of the child are governed uniformly by the personal law. This is the domiciliary or national law, ordinarily of the parent, while in the Código Bustamante it is again the law of the child. For instance, the usufructuary interest allowed to a parent by the French Civil Code (art. 384) is said to depend upon the personal law of the parties.

But how is this mutual recognition among the countries adhering to the personal law to be effectuated? For illustration, the French and German paternal rights in the real property of a legitimate child are of different nature. The French right is an ordinary usufruct; the German one has a special character and is not recorded in the land register; they differ also as to the periods of duration. If the father is of French nationality, should his right be transformed with respect to German immovables into a German "Nutznies-sung"? This suggestion would amount to applying the law of the situs as at common law. The system of personal law requires rather that the French type of right be recognized in its true nature in Germany; consequently it should be recorded in the German public register to satisfy the requirement of the law of situs for creating an ordinary usufruct.

Rolin, 2 Principes 183 no. 646; Weiss, 4 Traité 150, 151; Cass (civ.) (Jan. 13, 1873) D.1873.1.297; Cass. (civ.) (March 14, 1877) S.1878.1.25, D.1877.1. 385, Clunet 1878, 167.

For the provisions of German EG. art. 28, Polish Law of 1926, art. 19 par. 3, and Czechoslovakian law of 1948, s. 23 respecting the Anglo-American treatment of immovables, see supra p. 367.

233 Treaty on international civil law (1889) art. 15.
234 Treaty on international civil law (1940) art. 19.
235 Art. 70.
236 Survill 469 no. 319.
237 This was suggested by Raafe 463, 476, 487.
238 Rabel, 5 Z. ausl. PR. (1931) 244, 278.
239 4 Frankenst ein 49.
(b) Personal property of the child is submitted everywhere to the personal law, i.e., the domiciliary law or the national law of the parent.

The Código Bustamante limits the domain of the personal law, by the proviso that no prejudice shall arise in foreign countries "to the rights of third parties which may be granted by local law and the local provisions in respect to publicity and specialty of mortgage securities." In the other countries this limitation is included in the rules on property themselves.

6. Authority of Parent

A parent generally is entitled to represent his child in private transactions or court proceedings dealing with its personality as well as its property. The system of personal law embraces all connected problems, such as the question whether the parent is able to act on behalf of the child by force of law, or must be appointed guardian, or needs authorization by a court or a family council for the special purpose.

Illustration: A German prince had a minor son who was a British subject. The question for what transactions on behalf of the son's property the father needed the consent of the court controlling guardianship was decided by a German court in accordance with the father's German law. (EG. art. 19; BGB. § 1643). To the same effect, an English father, a Dutch mother, and an American father

240 1 Wharton § 255 (adhering to German writers).
241 See, e.g., German EG. art. 19; NiBoyer 785 no. 675.
242 Art. 71.
243 KG. (March 14, 1910) 39 Jahrb. FG. A 198 (expressly rejecting the application of the child's law).
244 LG. Darmstadt (Sept. 9, 1907) 9 Hessische Rechtsprechung (1909) 13 no. 6.
246 AG. Tauberbischofsheim (June 14, 1910) 20 Z.int.R. (1910) 545. Other German cases: RG. (Feb. 9, 1925) 110 RGZ. 173 (a Polish father needed authorization by the Polish court for disposing of a German immovable under
were deemed, according to their respective laws, to be without authority to represent their children, so that temporary trustees had to be locally appointed.

The practical difficulties and great costs involved in procuring sufficient authority in some states of this country have thus come to be noticed in German courts. In one case, for this reason, the American father preferred to let the child's property remain in Europe.\footnote{OLG. Dresden (March 4, 1913) 35 Ann. Sächs. OLG. 63, 13 Z.int.R. (1903) 467.}

It is doubtful, however, whether such observance of foreign law is usual in many countries. Common law conceptions are opposed to subjecting dealings with immovables to the personal law, and this view is shared in certain civil law countries.\footnote{In the Netherlands the personal law of the parent governs also in respect to immovables; see for cases \textsc{van HasseLT} 91 § 9.} As to movables, the law governing contracts enters into competition. Finally, peculiar considerations of convenience have a strong influence upon all rules respecting administration of estates. For these reasons, the subject ought not to be discussed further at this place.

7. Duties of Support

Support due to children by parents and to parents by children is in most countries the subject of specific obligations dependent on legitimacy.\footnote{In the United States, most statutes provide maintenance for natural children while in twenty jurisdictions only legitimate or legitimized children have the right to support, see 4 \textsc{Vernier} § 234.} There is the same contrast as in matrimonial matters,\footnote{\textit{Supra} pp. 349–350.} between the rule asserted by the Restatement (§ 458)\footnote{For important complements, see Restatement, New York Annotations 306 § 457.} of applying the law of the forum and

the Polish law. RG. (March 28, 1931) JW. 1932, 588 (an Italian mother, living with the child in Germany, needed authorization by an Italian court). KG. (April 8, 1914) Recht 1914, no. 2691 (an Austrian father must have the consent of court for repudiating the child's share in a succession on death, etc.).
the systems established upon the assumption of familiar duties to support. In such countries as France, the law of the forum is applied only as a check upon the foreign national law under the theory of public policy, but it operates on a large scale. Also in England, it has been considered a common law rule that "liability of a father to maintain his son must be determined by the law of the place of the father's domicil." It has been inferred from this rule that generally any alimentary liability is governed by the law of the domicil of the person against whom a claim is made. This seems a doubtful conclusion. Should not the law of the head of the family govern?

8. Determination of Domicil of the Child

The old rule of private law confers upon the child the domicil of his father by operation of the law, irrespective of the factual circumstances. This is still so much a normal conception that in interpreting the Treaty of Versailles a minor has been considered resident at the place where his father or guardian was residing. Modern conceptions, how-

252 Germany: According to the dominant opinion, EG. art. 19 is applied (law of the parent); see LG. Frankfurt (Oct. 29, 1931) JW. 1932, 2307, IPRspr. 1932, no. 91. Italy: Cass. (July 31, 1930) Monitore 1931.x.132 no. 10 (prefers the personal law more favorable to the debtor). 253 NAST, I Repert. 400 no. 38. In Belgium: the same trend of the courts is noticed by POULETT 435 no. 373, who advocates the standard of the forum only as minimum award; cf. supra p. 349.


255 DICEY (ed. 5) 551 Rule 143 (i) (2), 550 n. i, dropped in ed. 6. Siam: Law on private international law of 1939, § 36 par. 1.

256 Thus, the German BGB. § 11 said simply: A legitimate child shares the father's domicil. Restatement § 30. Swiss BG. (June 6, 1907) 33 BG. E. 371, 378. The English cases have not properly decided whether a child really retains its father's domicil as of the birth invariably throughout minor age; see FOSTER, "Some Defects in the English Rules of Conflict of Laws," 16 Brit. Year Book Int. Law (1935) 84 at 87.

ever, have established exceptions to the rule in more and more countries. Moreover, the cases in which the child shares in the domicil of the mother are not identical in the various jurisdictions.

Of general interest is the case where the husband of the mother contests the child's legitimacy by a suit at the court of his own domicil on the ground that this is the legal domicil of the child. It has been objected that the law there in force is operative only when the child is born in lawful wedlock, which the plaintiff denies. However, the German Reichsgericht encounters this argument of a vicious circle (unduly popular in the law of conflicts) by the consideration that a child is to be regarded as legitimate so long as its position is not destroyed by judgment.

Characterization. But the main question is, which law, the personal law or the law of the forum, should operate in determining domicil by force of "law"? The general idea prevailing in this and other countries has been that, for the purposes of jurisdiction and venue, "domicil" has to be characterized according to the local law of the forum. The Reichsgericht, however, declares that the foreign family law, as the personal law of the father, is applicable even though the problem is of a procedural character. Jurisdiction in particular for disputing legitimacy, thus, becomes a privilege of the court at a domicil recognized by the country of the parent, a limitation of jurisdiction highly desirable in matters of status regarding the entire family.

Other difficulties have been realized in practice, where a parent having custody deserts the child. To impose upon a child the domicil of an emigrated father, as a German court

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258 Cf. Restatement §§ 31 ff. Also § 11 of the German BGB. (supra n. 256) has been altered by the Law of June 18, 1957.
259 RG. (Jan. 12, 1939) HRR. 1939, no. 376.
261 RG. decision, n. 259 supra, and former decisions.
believed to be the law,\textsuperscript{262} is indefensible. The Restators have found a better answer, but they maintain a fictitious domicil of the child at the place of the parent who last abandoned it.\textsuperscript{263} A wholly satisfactory solution would probably be found, if the habitual residence of the child were substituted for the legal domicil, whenever the family life is definitely disrupted.

9. Tort

It may be briefly noted in recalling the analogy of marital relations that in this country actions for tort between parents and child as well as responsibility of a parent for wrongful acts of a child are purely tort matters, while in civil law they are primarily incidents of the family law.

C. CHANGE OF STATUS

1. Mutability of Incidents of the Child’s Status

As we have seen, legitimacy once created under the personal law of the parent, either by the birth of the child or by legitimation, is a permanent status. However, the content of the rights and duties flowing as incidents from this status is, in the dominant opinion, modified by a change of the personal law deemed to be decisive for the child’s status.\textsuperscript{264} The same is true where custody has been awarded or transferred by court order; the meaning of this custody is altered, if parent and child (at common law) move to another jurisdiction or (in most civil law countries) change their nationality, even though the decree regularly will be recognized until re-examination of the situation of the child at the new forum of the parties.

This phenomenon is the same as the better known change

\textsuperscript{262} Bay. ObLG. (Feb. 14, 1934) JW. 1934, 1369, IPRspr. 1934, no. 64.
\textsuperscript{263} Restatement § 33, to be read with Restatement §§ 21, 54 and 109.
\textsuperscript{264} The subject is treated principally by RAAPe 464.
of incidents of personal property rights where a movable is transferred to another state. We have encountered a third instance in the transformation of non-pecuniary matrimonial relations. Such mutability is a general feature of rights of an absolute character.

Illustrations: (i) An American citizen and his fourteen-year-old daughter, a rich heiress from her mother, move to France. Hereby the father acquires (by change of domicil and renvoi) a usufruct upon the movables and French immoveables belonging to the daughter and not subject to a trust. The usufruct is recognized in all other countries.

(ii) An Italian married couple went to Hungary and acquired Hungarian nationality in order to obtain divorce. Afterwards both were restored to Italian citizenship. By this fact, Hungarian law lost any influence upon further decisions concerning the custody over the children.

2. Different Personal Laws

In the case where only one of the two parties, either the parent or the child, changes his status, the decision depends on the person whose law governs under the conflicts rule.

Illustration: A minor German Girl, by her marriage to a Greek national, lost German and acquired Greek nationality. But under her new Greek status, she neither became of age nor subject to a guardianship of her husband. A German court held that as article 19 of the Introductory Law to the Civil Code considered only the national law of the parent, the change of nationality did not affect the father's authority to act on her behalf.

This rule, however, has been replaced in the Polish, Greek, and Czechoslovakian Codes by rules referring to the last national law common to both parties.

265 Supra p. 326.
266 Trib. Napoli (July 13, 1932) 25 Rivista (1933) 281.
267 OLG. Dresden (June 28, 1926) IPRspr. 1926–1927, no. 78, cf. BGB. § 1630 par. 1 and § 1633.
268 Supra p. 638.
Illustration: In the example just given, the result in a Greek court would be the same. But if the father alone changed to American nationality and not his daughter, their relations would under the Greek rule remain governed by German law, both before and after her marriage to the Greek national.

This imitation of a rule good for protecting a wife against her husband's arbitrary change of status is questionable. The father is free to take minor children into a new citizenship without their consent. Why then, should he be bound by their unchanged nationality? Nevertheless, German law has a similar rule, which forms an exception in favor of the lex fori; if a German parent changes nationality while the child retains German nationality, German law governs.\(^{269}\)

3. Non-retroactivity

By reasonable interpretation of the conflicts rule, a change of status does not operate with retroactive effect upon the incidents of parental relations. The name of the child, an emancipation performed under the former law, income from the child's property once devolved to the parent,\(^{270}\) remain unaffected. For instance, under the German Civil Code (§ 1620), a daughter had a right to a trousseau in the case of marriage. The Italian Supreme Court granted a suit of a girl, formerly of German nationality but Italian by marriage, against her German mother, on the ground that the marriage only perfected the mother's pre-existent obligation.\(^{271}\) The German Reichsgericht decided to the same effect in a case where a German father had acquired Swiss nationality.\(^{272}\) Such interpretations, restricting the impact of the change of

\(^{269}\) EG. art. 19 sentence 2. No analogous application to foreign children is permitted in the prevailing opinion, see Lewald 132 no. 183; Raape 469.

\(^{270}\) Stauffer, Nag. 62 no. 2.

\(^{271}\) Cass. Ital. (July 31, 1930) 5 Z. ausl. PR. (1931) 844.

\(^{272}\) RG. (April 12, 1923) Leipz. Z. 1923, 449.
status, are certainly more valuable than any theory of vested
rights of parents and children.

No American doctrine on this subject seems to exist. Re­
sults similar to those described could be reached by an anal­
ogy to the doctrine obtaining in the case of matrimonial
property. Thus each single incident would be governed by
the law of the parent's domicil at the time of the incident.