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THE LAW OF DOMICILE IN CONNECTION WITH THE RIGHT OF SUCCESSION TO BOTH PERSONAL AND REAL ESTATE.

THE question of domicile has of late years assumed an importance, resulting from the increased international relations of different countries and the facilities of locomotion, that is likely seriously to complicate family surroundings, unless a clear and distinct rule of interpretation is speedily accepted and acted upon, based upon the principle of the comity of nations, but which as yet remains to be formulated. In a case recently decided in England, *Re Goodman's Trusts*, Law Rep., 14 Chan. Div. 19, June 12th 1880, it was held, that a child illegitimate according to English law, but who was legitimate according to the law of its domicile, and of its parents' domicile, cannot take under the Act of Distributions as one of the next of kin of an intestate dying, domiciled in England—the word "children" in the statute meaning, children according to the English law.

Such was the decision of Sir GEORGE JESSEL, M. R., but that decision has been since overruled, upon appeal, Law Rep., 17 Ch. Div. 266 (April 13th 1881), COTTON and JAMES, L.JJ., dissenting from, and LUSH, L.J., agreeing with the judgment of the Master of the Rolls. The property in dispute being but small, it is doubtful whether the case will be carried further, though it is very desirable that it should be. The decision of the court below seems to be fully sanctioned by precedents, for to say nothing of the *dicta* of Sir W. PAGE WOOD, V. C., in *Boyes* v. *Bedale*, 1 H. & M. 79; and in *Re Wilson's Trusts*, per KINDERSLEY, V. C., both of which are referred

to by Sir G. JESSEL in his judgment; numerous cases, including *Somerville* v. *Somerville*, 5 Ves. 754, and *Gambier* v. *Gambier*, 7 Sim. 263, are in accord. The rule, in fact, hitherto recognised, seems to be that stated by Mr. Burge, viz., that if the law of domicile exclude those who are not born in lawful wedlock, those who are legitimated by the subsequent marriage of their parents, are not admissible to the succession. It follows, therefore, that the law which has conferred on them legitimacy, must yield to that which governs the succession; and the law of the *domicile of the deceased*, will defeat the claim to the personal estate as effectually as the existence of a similar law *in loco rei sitæ* would defeat the claim to real estate. The result of the judicial decisions is, that the *status* of legitimacy or illegitimacy, or the capacity to become legitimate *per subsequens matrimonium*, is governed by the law of the domicile of origin; yet, if the legitimacy be not that which the *lex loci rei sitæ* or the *lex domicilii* requires in those whom it admits to the succession, it will not entitle the person to the succession. The law of the domicile of origin must yield to that of the *situs* of real property, or to that of the domicile of the deceased, according to the nature of the property which is the subject of litigation: 1 Burge on Foreign Law 111, 112.

By an order of STUART, V. C., made July 1862, in *Goodman* v. *Goodman*, 3 Gif. 643, a case arising out of a *will* in the same family, but under different circumstances of domicile, it was declared that, it appearing that the then testator was domiciled in Holland, where the law of legitimation *per subsequens matrimonium* was recognised, a child legitimated by her parents' post-natal marriage could take a share in the legacy bequeathed to "children." By way of illustration, and to show that the rule as above, viz.: the law conferring legitimacy on ante-nati children, must yield to that which governs the succession, is not confined to England alone, a domiciled Englishman, being the putative father of an illegitimate child, born in France of a French woman, and afterwards becoming domiciled in France, cannot, on his subsequent marriage with the mother of the child, legitimize the child under the French law, so as to enable it to share in a bequest to his children contained in the will of a person in England. *In re Wright*, 2 Kay & J. 595.; 2 Jur. N. S. 465; 25 L. J. Chan. 621.

The reasons of this are, first, that marriage, being a personal contract, is like other personal contracts, regulated by the law of

the domicile of the party; secondly, that the law of the domicile of the putative father attached to the child at its birth, and by that law its bastardy was indelible; thirdly, that by the law of France, a bastard cannot afterwards be made legitimate, if, at the time of its conception, the parents were incapable of contracting to legitimize the child after its birth, and a domiciled Englishman, by the laws of his country, cannot, for civil purposes, be more than the putative father of a bastard child: *Re Wright*, 2 Kay & J. 595; 2 Jur. N. S. 465; 25 L. J. Chan. 621. Thus, it is seen, the French law, though recognising legitimation *per subsequens matrimonium*, only recognises it *sub modo; i. e.*, only so far as it does not contravene the doctrine of the *lex loci domicilii*. A child may, therefore, be legitimate in the abstract, such legitimacy being governed by the domicile of origin, yet it may not be the legitimacy which the *lex loci rei sitæ* or the *lex loci domicilii* requires for the purpose of inheritance or succession. It may here be remarked that by the law of Scotland, legitimation *per subsequens matrimonium* operates only from the time of the marriage, not from the time of the birth: *Shedden* v. *Patrick*, 1 Macq. H. L. Cas. 535. It will thus be seen that there are difficulties in applying the law so as to meet the comity of nations. As was said by Sir C. CRESSWELL, in *Simonin* v. *Mallac*, 2 Sw. & Tr. 67 (the case of a marriage in England between two foreigners): "What right has one independent nation to call upon another nation to surrender its own laws in order to give effect?" &c. "If there be any such law, it must be found in the law of nations, that law 'to which all nations have consented, or to which they must be presumed to consent, for the common benefit and advantage.' * * * Which law is to prevail? To which country is an English tribunal to pay the compliment of adopting its law? As far as the law of nations is concerned, each must have an equal right to claim respect for its laws. Both cannot be observed; would it not then be more just, and therefore more for the interest of all, that the law of that country should prevail which both are assumed to know and to agree to be bound by?" (The learned judge, it should be remembered, is here speaking of marriage, for the validity of which contract no special domicile is required by the English law; but, *mutatis mutandis*, the reasoning is equally applicable to legitimacy.) "If once the principle of surrendering our own law to that of a foreign country is recognised, it would be followed with

all its consequences, the cases put are therefore a fair test as to the possibility of maintaining that by any *comitas* or *jus gentium*, this court is bound to adopt the law of France as its guide."

Sir JAMES HANNEN, President of the Court of Matrimonial Causes and Legitimacy, says, in *Sottomayor* v. *DeBarras*, reported in Law Rep., 2 P. D. 81, and vol. 5, 94; also in 19 American Law Reg. (N. S.) 76, after referring to Sir C. CRESSWELL'S remarks just cited: "But on what principle are our courts to refuse recognition if not on the basis of our own laws? What have we to do, or, to be more correct, what have the English tribunals to do with what may be thought in other countries on such a subject?" This reasoning applies equally to any other country as to England, and as the laws of legitimacy differ in different countries, the *comitas* of nations involves special and intricate investigations. Assuming the legitimacy, the question is whether that *status*, that character, entitles the person so designated to the rights and privileges of the law of the domicile of the deceased, such domicile not admitting the doctrine of legitimation *per subsequens matrimonium*.

We are not now discussing the question of indelibility of illegitimacy, but whether a child legitimized by a post-natal marriage, can take, under the English Statute of Distributions, as one of the next of kin of an intestate dying domiciled in England. Could he do so in New York? It is not a question of the domicile of origin, nor yet that of the parents *per se*, nor even that of the place where the marriage took place, but that of an intestate who might, or might not, be the parent upon the occasion. We have seen, in *Re Wright* (*supra*), that, according to the law of France, a child born in France of a domiciled Englishman, cannot share in a bequest to his children contained in the will of a person in England, neither can it be legitimated *per subsequens matrimonium*, although such legitimation is, as a rule, admitted by French law. It follows upon the same principle that it could not take as next of kin of an intestate. In this case the law of England seems to be respected and acted upon almost to an extreme. The law of New York not admitting the doctrine of legitimation *per subsequens matrimonium* within its own state (*Shedden* v. *Patrick*, *supra*), could it so contravene the principle of the *lex loci domicilii* as to admit a child so legitimized to participate either in a bequest to "children" or as one of the next of kin of an intestate, the tes-

tator or intestate being domiciled in the state of New York? In England, the liability to succession and legacy duty is governed by the law of the place of domicile: *Callanane* v. *Campbell*, 24 L. T. R. (N. S.) 175, M. R.

In the case of real property, the *lex loci rei sitæ* governs the right to inherit, as was said by ALEXANDER, C. B., in *Doed. Birtwhistle* v. *Vardill*, 5 B. & C. 438; 8 D. & R. 185; 9 Bligh N. S. 72–78; 2 Cl. & Fin. 592–98: "While we assume that B. is the eldest legitimate son of his father in England as well as in Scotland, we think that we have also to consider whether that *status*, that character, entitles him to the land in dispute as the heir of that father? And we think that this question, inasmuch as it regards real property situated in England, must be decided according to those rules which govern the descent of real property in that country, without the least regard to those rules which govern the descent of real property in Scotland." So in respect of the American Union, the law of the state in which a deceased was domiciled must govern the distribution and succession to personal property, and the law of the *situs* of real property must govern the right of inheritance. It is not so much a question of legitimacy or illegitimacy in the abstract, as that of the law of domicile, or that of the *situs* of real property according to the nature of the property which is the subject of litigation. For instance, should the law of primogeniture prevail in the country of the *situs*, though not in the country of a domicile of origin, the law of primogeniture would attach, and *vice versa*.

The words "children" in a statute regulating succession, or "the next of kin" of an intestate, or "the heirs" of a deceased, must, it would appear, be construed according to the meaning which attaches in the domicile of the deceased. Thus, a person who is not born in lawful wedlock cannot, by the common law of England, inherit land. The celebrated reply of the lords contained in the Statute of Merton (20 Henry III., c. 9), in answer to the attempt of the bishops to introduce legitimation *per subsequens matrimonium*, with one voice proclaimed "*Nolumus leges Angliæ mutare quæ hucusque usitatæ sunt et approbatæ.*" See 2 Inst. 96; Preface to 5 Rep. 11 and 12; 12 Rep. 72.

This point, decided in *Doe d. Birtwhistle* v. *Vardill*, 5 B. & C. 438; s. c. 8 D. & R. 185, was based upon the ground that though the validity of the marriage was to be determined by the *lex loci con-*

tractus, the right of the issue to inherit land in England depended on the *lex loci rei sitæ;* that English land was not inheritable by every legitimate child, but only by a child legitimate *sub modo*, viz.: born after wedlock; and that the Statute of Merton, which declares "he is a bastard that is born before the marriage of his parents," was not restricted to those born in England. The case, upon appeal, having been a second time argued in the House of Lords, TINDAL, C. J., delivered the unanimous opinion of the judges, as follows: "This opinion," he said, "rested on the rule or maxim of the law of England, that the son, in order to succeed as heir, must be born after the actual marriage of his father and mother; this was a rule regulating the descent of real property, which could not be disturbed by the laws of the country where the party was born, and which may be allowed to govern his personal *status* by the comity of nations." Lord BROUGHAM declared that the doubts which he had entertained when the case was before the House on a former occasion, had not been removed. See 9 Bligh N. S. 72, 78; 2 Cl. & Fin. 582, 598. The privileges, he said, granted by the common law to the bastard *eigne*, favored the doctrine that the *status* of the person once established, the title to inheritance followed. The judgment of the court below was affirmed 10th August 1840: 1 Robinson's Appeal C. 627, 652. Whatever might have been the common-law privileges of the *bastard eigne* and *mulier puisne*, they appear to have been destroyed by the statute 3 & 4 Wm. 4, c. 27, s. 39, which enacts that "no descent cast shall defeat any right of entry," and at all events the analogy drawn by Lord BROUGHAM appears not only exceptional but inconsistent with the legal maxim: "*Mobilia personam sequuntur, immobilia situm.*" Chancellor KENT lays down the principle thus: "It has become a settled principle of international jurisprudence, and one founded on a comprehensive and enlightened sense of public policy and convenience, that the disposition, succession to and distribution of personal property, wherever situated, is governed by the law of the country of the owner's or intestate's domicile at the time of his death, and not by the conflicting laws of the various places where the goods happened to be situated. The principle applies equally to cases of voluntary transfer, of intestacy and of testaments: *Stanley* v. *Bernes*, 3 Hagg. Eccles. R. 373; *Ferraris* v. *Hertford*, 3 Curteis 468; *Dessebats* v. *Berquier*, 1 Binney 336. On the other hand, it is equally

settled in the law of all civilized countries, that real property, as to its tenure, mode of enjoyment, transfer and descent is to be regulated by the *lex loci rei sitæ*:" 2 Kent's Com. 428, 429.

"The construction of wills," says Mr. Justice STORY, "as to real property is to be given according to the *lex rei sitæ;* and as to personal property according to the *lex domicilii, unless it be manifest* that the *testator* had the *law of some other country* in view:" Story on Conflict of Laws, sect. 465, 474; *Harrison* v. *Nixon*, 9 Peters 503. See also Jarman on Wills, edit. Boston 1845, ch. 1, 1–10, where the numerous authorities are referred to. Also, in Story's Confl. Laws, sects. 424, 428, the authorities, foreign and domestic, are collected in favor of the proposition that real property is exclusively governed by the territorial law of the *situs*. At the same time each state is competent to regulate within its own territory that succession in personal and real property at its pleasure: Id., sect. 23, 447; *Jones* v. *Marable*, 6 Humph. 116.

"The rule," says KENT, "as settled in England, and by the general usage of nations, as to the succession and distribution of personal property, has repeatedly been declared to constitute a part of the municipal jurisprudence of this country:" 2 Kent's Com. 561–2. In proof of this he cites a whole string of cases.

Although an English lawyer has humorously observed that the same person might, by the same court, be deemed legitimate as to the real estate, and illegitimate as to the personal, and, we might add, *vice versa*, "legitimate as to the mill, illegitimate as to the machinery, born in wedlock as to the barn, but a bastard as to the grain within it," yet, as before observed, it is not so much a question of legitimacy or illegitimacy as of domicile and of *situs*. If the deceased were domiciled, say, in Scotland, the succession would be determined according to the law of Scotland with respect to land situated there, as well as with respect to personalty situated there or elsewhere. If the deceased were domiciled in England, such domicile would determine the succession to the personalty, but the realty, if situated in Scotland, would pass according to the law of Scotland—otherwise, if situated in England. It is true this indirectly raises the question of legitimacy, but so it might indirectly raise the question of the validity of a divorce and perhaps a subsequent marriage and resulting issue. This is the inevitable result of a conflict of laws; but might not the attempt

to reconcile this conflict result in further conflicting decisions, making confusion even worse confounded? As an instance of such complication by the law of Scotland, legitimation *per subsequens matrimonium* operates only from the time of the marriage, not from the time of birth: *Shedden* v. *Patrick*, 1 Macq. H. L. Cas. 535.

In the case before us, the Court of Appeal, composed of JAMES, COTTON and LUSH, L.JJ., the judgment of the Master of Rolls was overruled, the two first-named judges being of opinion that the *status* decides the question of legitimacy, and questions of *status* depend on the law of domicile of origin, *i. e.*, the place where the parents were domiciled at the time of the child's birth, or where they became subsequently domiciled. Their lordships cited Story on the Conflict of Laws (paragraph 93), where he states that foreign jurists generally, though not universally, maintain that questions of legitimacy are to be decided exclusively by the law of domicile of origin, and (paragraph 93, c.), that the same general doctrine is avowedly adopted by the courts of England; in corroboration of which he refers to the opinion of Lord STOWELL, in *Dalrymple* v. *Dalrymple*, 2 Hagg. Const. Rep. 54, that, according to the law of England, the *status* or condition of a claimant is tried by reference to the law of the country where the *status* originated. Lord Justice JAMES said that though heirship to land depended on local law, the law of the country, the manor, or even the *forma doni*, kinship was an incident of the person and individual. Lord Justice LUSH took the same view as Sir GEORGE JESSEL (Master of the Rolls), viz.: that the right to succession in the case of personalty was governed by the law of the domicile of the deceased. Who shall decide when such doctors disagree? It seems very desirable that the House of Lords should determine the issue so far as England is concerned, and it would be well if an international congress could set the question at rest for the civilized world.

Even the Statute of Merton, now that aliens may inherit land in England (33 & 34 Vict. c. 14, s. 2), might be so far modified as to put real and personal property on the same footing in this respect, one of the objects of that statute having been to exclude the introduction of the foreign element in the descent of lands in England. As was said by TINDAL, C. J., in delivering the unanimous opinion of the judges in the House of Lords, in *Re Bert-*

whistle v. *Vardill* (*supra*): "At the time of the passing of that statute (Merton), Normandy, Aquitaine and Anjou belonged to the crown of England. Many of the English nobles were of foreign lineage, if not of foreign birth, and had possessions in those countries as well as in this country. The civil law, which allowed legitimation by subsequent matrimony, prevailed in those provinces, and it was of course a matter which much concerned these nobles to determine by what rule the descent of their lands in England should be governed. Yet, at the time of the passing of the Statute of Merton, no words were introduced into it to except from its general provisions cases like the present; but the law was allowed to be laid down broadly in the form in which it was now found to exist." Under the head of "Who shall take advantage of the trial of bastardy, &c.," (Rolle's Abridg., vol. 1, p. 732), there is a case put of a man "born before marriage, and after the marriage was had, the ordinary will not certify him to be a bastard, but a mulier;" this is said not to be "any estoppel, because he may be a bastard by our law notwithstanding; but judgment shall be given in the action in which the certificate is made, according to the certificate" (40 Edw. III., 40). Such certificate of the ordinary would of course relate only to personal property. It would appear from this that so far as personalty was concerned, the ordinary would not at this remote period certify that a man "born before marriage," the marriage having been subsequently had, was a bastard, and as the church never abated any of its pretensions, and such certification was deemed the "highest trial thereof" (Ibid.), it seems but fair to presume that so long as the ordinary's certificate was required in matters of intestacy, just so long, at all events, were the courts bound to act upon it, the person so certified being "perpetually bound against all the world to avoid a contrary certification (Ibid.). The subject is fraught with difficulties, and no means of reconciliation seems commensurate short of an international understanding upon the interpretation of the foreign *status*.

As an instance of the conflicting character of the law of domicile—where the father is a domiciled Scotchman, it is of no consequence in what country his natural children have been born, or his marriage with the mother of those children celebrated, neither does it matter what the law of that country may have been in regard to the legitimation *per subsequens matrimonium*, but in

such a case, it is the law of Scotland alone which must give the rule in the question of legitimation, and that within Scotland at least, and to all proper Scotch effects, the legitimation of the child is unquestionably worked out by the mere fact of the subsequent marriage. In *McDouall* v. *Dalhousie*, 10 Danl., Bell & Murray 6, the Scotch court, in giving judgment, said: "We are bound to state that the place of the person's birth, or the law of that place which would be applied to an English marriage and a domiciled English husband, can form no bar to the operation of the settled rule of the law of Scotland in relation to such a case as is now before us. * * * In all the three cases of *Shedden* v. *Patrick*, *Strathmore* and *Ross*, the judgments mainly proceeded on the *domicile* of the parties; and in the last especially, the point of *indelibility from place of birth*, was expressly waived by the Lord Chancellor LYNDHURST. Judging, therefore, by all the light we possess on the subject, our deliberate opinion is that above expressed." The decree of the Court of Session was affirmed by the House of Lords 10th August 1840: 1 Robinson's Appeal C. 475, 491. The case of *DeCoute*, cited in *Ross* v. *Ross* (*supra*), 4 Wils. & Shaw 289, decided in France in 1668, established that where a child is born in a country where he would become legitimate by a subsequent marriage, he becomes so, although the marriage has taken place in a country in which a different law prevails, and where a subsequent marriage would not have the effect of rendering him legitimate. That child was born in France, where that law has effect; the parents afterwards came over to England, and were married in England. The French court decided that the effect of the marriage in England, although that law does not prevail in England, was to render the child legitimate in France, which is a complete confirmation of the principle that the personal quality of a man must be decided by the law of the country in which he was born. This case clearly establishes that neither the law of the actual domicile of the parents, nor that of the place in which their marriage was celebrated, determined the *status* of the party, but that the capacity to become legitimated had been conferred by the law of France. In the case of *Shedden* v. *Patrick*, 5 B. & C. 444; 4 Wils. & Shaw Appeal Cases 296, a native of Scotland went to America, where he was domiciled; he lived there for more than twenty years. He had a child there by a woman whom he afterwards married in America. His father had a landed

estate in Ayrshire, in Scotland, and the child, born previously to the ceremony of marriage, claimed as heir. The court decided against the legitimacy of the child, because by the law of the country of its birth, the illegitimacy was indelible, and therefore a subsequent marriage could not have the effect of rendering the child legitimate. New York was the domicile of the parents at the time of the birth of the child, and also of their marriage.

The *Strathmore Peerage* case was the exact converse of *Shedden* v. *Patrick*. In that case, Lord REDESDALE said of the claimant: "The law that attached to him at his birth was the law of *England;*" and after referring to the *Shedden Case*, proceeds: "So I apprehend that this child was born illegitimate according to the *law of the country in which he was born.*"

These cases evidence the difficulty of endeavoring to apply the *jus gentium* in each individual instance. If, indeed, there were any clearly defined international law on this subject, equally applicable in every case, all difficulty would vanish. But as a departure from the law of the domicile of a deceased would involve in every instance an inquiry into the law of the domicile of origin, the matrimonial domicile, the actual domicile of the parents at the time of marriage, or the law of the country in which the property is situated, the safer course seems that of resting on the law of the domicile of a deceased except where the terms of a will indicate a different intention.

In *Boyes* v. *Bedale*, 1 H. & M. 798; s. c. 10 L. T. Rep. (N. S.) 131 (*supra*), which came before Lord HATHERLEY, when Vice Chancellor, it was decided that the children of a person domiciled in England must mean the children according to English law, as distinguished from the children born before marriage, and which were not legitimate according to English law. The vice chancellor proceeded to the length of saying: "I take it, that the language of the Statute of Distributions would be dealt with in the same way. If an intestate dies domiciled in England, the division of his property is governed throughout by English law, and no person could take by representation under that statute, unless legitimate by the law of England." Again, in *Re Wilson's Trusts* (*supra*), KINDERSLEY, V. C., says: "Now, the will being a will made in England by an Englishman domiciled in England, must be construed according to the law of England. Every term in it must receive that interpretation which belongs to it according to

English law. What is the interpretation which the law of England gives to the term 'children'? Undoubtedly, children lawfully begotten, *ex justis nuptiis procreatus*, unless indeed there be something in the context which satisfies the court that the testator meant to use the expression in a different sense." This entirely agrees with Story's definition.

So, evidently, the decision in *Goodman* v. *Goodman* (*supra*), was based upon the testator's manifest intention, in addition to the fact of his foreign domicile. It may be mentioned incidentally, that the doctrine expressed by the words *hæres ex justis nuptiis procreatus*, if strictly interpreted, would bastardize all children *procreated* before the marriage of their parents, though born after, but it is sufficient that the English law, by one of its many fictions, takes refuge from the procreation in the certainty of birth.

Doubtless, up to the period of the Reformation, the bishop or ordinary to whom was left the power of granting administration of the goods of an intestate, although such power was regulated so early as 31 Edw. III., c. 2, and such regulations were subsequently extended to probate of wills by 21 Henry VIII., c. 5, would act upon the rule of the law of the church in certifying as to the legitimacy or illegitimacy of those claiming to be next of kin, such law knowing no distinction between foreign and domestic *status* in the matter of *ante nati* children, and hence the question of foreign domicile not arising. After the Reformation, and, perhaps, especially after the passing of the Statute of Distributions (22 & 23 Charles II.), the rule of the domicile of the intestate prevailed, and this may be the origin of the application of the English rule of legitimacy indiscriminately to foreign and domestic domicile alike where the intestate's domicile was in that country. For many reasons it may not be desirable to disturb the rule of *lex loci rei sitæ* regulating the succession to real property, although in the United Kingdom it no longer forms a barrier to the introduction of foreigners, or *quasi* foreigners, to the inheritance of real estate; and so far as domicile itself is concerned, the substitution of the actual domicile, whether of origin or acquired, of the claimant, for that of the deceased would appear to reconcile the *status* with the vindication of the law of the country of such domicile. The gravity of this subject will be more fully appreciated when it is remembered that legitimation *per subsequens matrimonium* is admitted with different modifications in Scotland, France, Spain,