grounds of this decision were clearly stated in the judgments of Latham C.J. and Starke J. The primary ground of the Chief Justice's decision was the principle in *The Colonial Bank of Australasia v. Willan*,[8] which he expressed as follows: "When any tribunal or person is authorized to hear and decide a matter it is *prima facie* left to that tribunal or person to determine whether those who appear or purport to appear before the tribunal have made out a case." "The relevant distinction for the purposes of the case is between 'certain proceedings which have been made essential preliminaries to the enquiry' and 'facts or a fact to be adjudicated upon in the course of an enquiry.'"[9] It would, he thought, have the undesirable effect of erecting mere procedural rules into essential barriers to jurisdiction to treat these questions as to be decided by any other than the Commissioner. Starke J. likewise drew a distinction between the situation where "a statute may . . . provide that if a certain state of facts exist a tribunal shall have jurisdiction but not otherwise," and that where "the statute may entrust the tribunal with a jurisdiction 'which includes the jurisdiction to determine whether the preliminary state of affairs exist as well as the jurisdiction.'"[10] Here, the statute was held to fall into the second class. It may be noted that the questions which the Court thus leaves to the Commissioner to decide are not questions of fact, as in *Willan's* case, but questions of law. Thus they include the question as to *locus standi*, as to whether an irregular notice may be amended and as to whether the amended notice is adequate. Errors by the Commissioner on any of these points are open to correction in the appeal provided for by the Act. But they cannot be reviewed in prohibition proceedings.

—A. C. KING.

8. (1874) L.R. 5 P.C. 417. Since the writ concerned in *Willan's* case was certiorari, it appears that Latham C.J. follows modern developments in putting prohibition and certiorari on the same basis.
9. 61 C.L.R., at pp. 250 and 249.
10. *ibid*, at p. 256.

LEGITIMATION BY A FOREIGN LAW.

In re Luck's Settlement Trusts, Walker v. Luck.[1]

There are several dicta in English reported decisions which have made it clear that a child born out of wedlock whose putative father was at the time of its birth domiciled in England can never, for the purposes of English law, become legitimate. However, the recent case of *In re Luck's Settlement*[1] has, it might appear, thrown some doubt on the breadth of the principles laid down in the older cases. The facts of *Luck's* case may be briefly stated. The defendant was the natural son of a domiciled Englishman whose English wife was still living. His father later acquired a Californian domicil and adopted him by declaration. By Californian law this act made the defendant legitimate from birth and he now claimed to be entitled, as the legitimate son of his father, to share in certain trust funds in England.

It was argued for the other claimants that the case was governed by *In re Wright's Trusts*[2] and *Udny v. Udny*.[3] The basis of the decision of

1. [1940] 1 Ch. 323.
2. 2 K. & J. 595.
3. (1869) L.R. 1 H.L. (Sc.) 441.

Lord Hatherly, Page Wood V.C. as he then was, in *In re Wright's Trusts* was that a child whose putative father, at the time of that child's birth, was domiciled in England is *filius nullius*. He said, " I am driven to this dilemma : if the child be legitimate, it is the child of one who, at its birth, was a domiciled Englishman ; but if that is admitted and it is contended that the child was born before marriage, it must be illegitimate, for it has no father by English law, and nothing whatever can establish any relationship between the putative father and the child . . . I think as Lord Cottenham says in *Munro v. Munro*[4] the question in such cases must be, can the legitimization of the children be effected in the country in which the father is domiciled at their birth, for their legitimacy must be decided by the law of that country once for all."[5]

The principle there laid down still stands as good law. If, however, it needs any support then it is suggested there is ample to be found in *In re Goodman's Trusts*,[6] *In re Andros*,[7] *In re Grove*[8] and particularly in the subsequent judgment of Lord Hatherly in *Udny v. Udny*[9] where his Lordship said : " I have myself held and so have other Judges in the English Courts, that according to the law of England a bastard child whose putative father was English at its birth could not be legitimated by the father afterwards acquiring a foreign domicil and marrying the mother in a country by the law of which a subsequent marriage would have legitimated the child. I see no reason to retract that opinion. . . . I do not think the English law can recognize a capacity in any Englishman, by a change of his domicil, to cause his paternity and consequent power of legitimation to be recognized."[10]

It is true that in the latter case the Court found as a fact that at both the time of the birth of the child whose legitimacy was in question and at the time of the subsequent marriage of its parents the child's father was domiciled in Scotland, and therefore the question of what was the English law applicable to such a case did not arise, and that both the Lord Chancellor himself and Lord Chelmsford specifically mention this, while Lord Westbury and Lord Colonsay treated the matter as purely one of Scots law. However, it has never in any subsequent case been suggested that English law is other than as stated by Lord Hatherly. Even Farwell J. recognized this in *Luck's* case—" It was said by Cotton L.J. in the case of *In re Grove, Vaucher v. Solicitor to the Treasury*[11] that the child at birth must have ' the capacity of being made legitimate,' so that if by the law of the domicil of the father at the time of its birth there was not that capacity, then the subsequent marriage of its parents was insufficient to render it legitimate according to the law of this country. There is no doubt that that is the effect of both the cases of *In re Wright's Trusts* and *Udny v. Udny* and those decisions, if they apply here, are binding on me and I must follow them, though I confess that I feel difficulty in appreciating exactly on what ground they were based."[12]

4. 7 Cl. & F. 842.
5. 2 K. & J. 595, at pp. 612, 613.
6. (1881) 17 Ch. D. 266.
7. (1883) 24 Ch. D. 637.
8. (1888) 40 Ch. D. 216.
9. (1869) L.R. 1 H.L. (Sc.) 441.
10. *ibid*, at p. 447.
11. (1888) 40 Ch. D. 216, at p. 233
12. [1940] 1 Ch., at p. 328.

However, Farwell J. held that he was not bound by these decisions because they, together with all other cases in which the same principle has been applied, were cases of legitimation *per subsequens matrimonium* whereas in the case which he had to decide the legitimation of the child was effected by the law of its domicil without any marriage between its parents.

Admittedly therefore the means whereby the defendant was legitimated were different from those in the previous cases dealing with legitimation, but it is submitted that they do not fall outside the general principle of the Common Law that the natural child of a man domiciled in England at the time of its birth is *filius nullius* and can never become legitimate and that Farwell J. was wrong in holding that he was not bound by *In re Wright's Trusts* and *Udny v. Udny*.

He decided that the correct test for determining whether a person is legitimate is to look to the law of the domicil of the person whose legitimacy is in question at the time when the question of his legitimacy arises—" Whether a person is legitimate or not is a question of status and I think it is clear on the authorities that, *prima facie* at any rate, the question of a person's status is governed by the law of his domicil."[13] This may well produce somewhat curious results.

Suppose that the defendant in *Luck's* case were to lose his Californian domicil and acquire an English one and the question of his legitimacy were to arise again. It is submitted that Farwell J. could no longer look to what had been done when the defendant was domiciled in California, with the result that if either the principle of *Udny v. Udny* or that of *Luck's* case were to be applied the Court would have to hold the defendant illegitimate. One would have the spectacle of Farwell J., having first held that according to English law the defendant was legitimate and later, again according to English law, holding that he was illegitimate.

A further factor which simplified *Luck's* case was that the defendant had long since attained his majority when the case came before the Court. If he had been a minor would Farwell J. have taken his domicil to be that of his father or his mother since a woman does not acquire a man's domicil by mere cohabitation with him ? This might well have been a question of some importance as the following example is intended to illustrate.

Suppose that before the child's birth its parents had gone through a form of marriage which by the law of the father's domicil was irregular and did not make the child legitimate, but which according to the law of the mother's domicil was valid. Applying Farwell J.'s test one would be confronted with this dilemma ;—assuming the child to be legitimate then its domicil must be the same as that of its father, but by the law of the father's domicil the child is illegitimate. Assuming the child to be illegitimate then its domicil must be that of its mother and by the law of her domicil the child is legitimate.

It is submitted therefore that the principle laid down in *In re Wright's Trusts* and *Udny v. Udny* is more logical and produces more certainty in the law than that suggested in *Luck's* case. It is not, however, contended that the principle of *Wright's* case and *Udny v. Udny* is the only

13. *ibid*, at p. 327.

workable one. Other systems of law have devised principles which produce sufficient certainty and often operate far less harshly than the English principle since they only require, e.g., that at the time of the subsequent marriage of the child's parents the father shall be domiciled in a country by the law of which legitimation *per subsequens matrimonium* is recognized.

Although the passing of the Legitimacy Act in England in 1926[14] has done much to detract from the importance of the Common Law rules as to legitimation the exception that nothing in the Act shall legitimate a person whose father or mother was married to a third person at the time of its birth, together with facts such as those in *Luck's* case, shows that the Common Law principle has not completely lost its importance. That principle, though sometimes harsh in its effect does produce certain results where certainty is highly desirable and it is accordingly submitted that the principle applied by Farwell J. is bad in law, would result in unnecessary confusion, and should not be followed.[15]

—J. C. MORRIS.

14. 16 & 17 Geo. V c. 60. For Victoria see Registration of Births Deaths and Marriages Act, 1928, Part II.
15. Since this note was written *Luck's* case has been reviewed by the Court of Appeal ([1940] 3 All E.R. 307) and the decision of Farwell J. reversed by the majority (Greene M.R. and Luxmoore L.J.) for reasons similar to those expressed here. However, in view of the strong dissenting judgment of Scott L.J. and the cogent reasons there advanced this question cannot be regarded as finally settled until it is known whether advantage will be taken of the leave granted to appeal to the House of Lords. The decision of the Court of Appeal also contains a new and authoritative discussion on the law of domicil.—[EDITOR.]

RESPONSIBILITY OF OCCUPIERS TO PERSONS WHO ENTER AS OF RIGHT.[1]

It has been by no means easy for the law to keep distinct the duties of care owed by an occupier to such entrants as trespassers, licensees, invitees and those who enter under contract. But the duty owed to those who enter as of right is even more obscure. Where the visitor is using the premises of a public utility the courts have laid down that the occupier must use reasonable care to prevent injury. Normally, in such cases the relationship is an economic one.

What, however, is the duty owed to a person who enters, as of right, public gardens playgrounds and such places where no charge is made for admission ? This was the problem betore the High Court in *Aiken v. Municipality of Kingborough*.[2] The facts were that the owner of a boat was injured while using a public jetty under the control of defendants because of a concealed defect of which defendants were aware. Latham C.J. pointed out that no general principle has yet been established to govern the case of persons who enter as of right. The plaintiff was obviously not a trespasser and could not logically be said to have entered on the jetty with an express or implied licence. But, whatever the duty of care owed to the plaintiff, since there was here a danger of which defendants were aware, liability did exist and there was no need to deter-

1. The writers of this note acknowledge with gratitude the help received from discussion with the Honours class in The Law of Wrongs.
2. 62 C.L.R. 179.