should rescind the contract."[5] Finnemore J. therefore came to the conclusion that the re-selling vendor was in a position analogous to a pledgee and could not retain more than his contract price, i.e., the £200 deposit was recoverable by the plaintiff.

Halsbury[6] comments as follows: "Whether the unpaid seller under the foregoing provisions re-sells the goods in the capacity of an owner, so as to be entitled to any profit which may be realized by way of re-sale, or whether he re-sells the goods in a capacity analogous to that of a pledgee . . . is doubtful but *semble*, the former is the correct view."

This case does not involve a dispute as to profits received on re-sale but the reasoning on which the decision as to the deposit is based is equally applicable to the question of profits. Finnemore J. quoted the above passage from Halsbury and dissented from it. Perhaps on a strictly technical view, that dissent is *obiter*, but there can be no doubt that any claim by a seller to retain profits received on a re-sale made under section 48 of the English Act (section 52 of the Victorian Act) would be in conflict with the reasoning of Finnemore J. in this case and, with respect, it is submitted that such a claim should fail.

D. P. D.

5. *per* Finnemore J., [1949] 1 All E.R. at p. 924.
6. *Laws of England*, Hailsham (2nd) edition, Vol. 29, p. 186.

PRIVATE INTERNATIONAL LAW: LEGITIMACY.

In re Bischoffsheim; *Cassel v. Grant.*[1]

A priori, it would seem that legitimacy is a matter to be decided by the personal law of the individual. If a child is legitimate by the law of the country where his parents are domiciled at the time of his birth, then it seems reasonable that his legitimacy should be recognised everywhere. A logical difficulty may arise where the domiciles of the parents differ and it becomes necessary to beg the question of the child's legitimacy in order to decide whether to refer to the *lex domicilii* of the father or of the mother. But logical perfection is not the chief aim of law, and either one of two sound working rules could be adopted. The child could in each case be assumed to be legitimate, and the question referred for final decision to the law of the father's domicile; or, in cases where it is the relationship between the child and the mother which is in doubt, the child's legitimacy could be determined by the law of the mother's domicile. This qualification is accepted by the American *Restatement*.

There can be little doubt, from a reading of reported decisions, that this is what most English judges feel, and have felt, should be the law. There is, however, an eighty years old decision of the House of Lords which, it is submitted, defies all principles of reason and logical consistency. This is the case of *Shaw v. Gould.*[2]

1. [1948] 1 Ch. 79.
2. (1868) L.R. 3 H.L. 55; (1865) L.R. 1 Eq. 247.

Certain funds were bequeathed by a domiciled Englishman in trust for E. H. for her life and after her death in trust for her " children." Certain English land was also devised, after her death, to " her first and other sons lawfully begotten." E. H. at the age of sixteen years married, in England, a domiciled Englishman. Later she obtained a divorce in Scotland, and there married again. By Scots law both the divorce and the re-marriage were valid. The couple acquired a Scots domicile of choice, and so, when children were born, they were legitimate according to their personal law.

The House of Lords, however, considered the question as one of succession and held that the word " children " in the will meant " children born in lawful wedlock " according to the rules of English domestic law. Since English law did not recognise the validity of the Scots divorce and re-marriage, the children of course were held to be illegitimate and so unable to take under the English will.

That the decision has not endeared itself to English judges is shewn by the way in which all subsequent cases have tended to restrict its operation as far as possible. By a series of decisions, it has been confined to cases of legitimacy as distinct from legitimation, and to cases of succession under an English will or intestacy.

It has been contended by R. S. Welsh[3] that the problem in such cases is purely one of construction of the will, and that this is a satisfactory reason for the application of English law to English wills. This is reasonable to the extent that the word " child " must, when used in an English will, mean " legitimate child," but, in determining legitimacy, why should English private international law not accept the verdict of the personal law of the child ? It is not unreasonable for English courts to insist that a person must be legitimate by English standards in order to succeed to English real property,[4] but there seems to be no reason why the rule should extend to succession to movables.

This, at least, was the view taken by Romer J. in the recent case of *In re Bischoffsheim*.[5]

By the will of a testator who died in 1908, a trust fund was settled on N. for life, with remainder to her children. N. was married twice, firstly to R. W. who died in 1914. There were two children of this marriage. Then N. married in New York, in 1917, G. W. the brother of her first husband. The domicile of origin of both N. and her second husband was English and their marriage would have been void in 1917 by English law. The second marriage was, however, valid according to the law of the State of New York, where, it was contended, N. and her second husband had acquired a domicile of choice immediately before their marriage.

There was one child of this marriage, and it was admitted that the couple had acquired a domicile of choice in New York by the time of his birth.

Romer J. held that the son of N.'s second marriage was entitled to share in the trust settlement. He held that where succession to personalty depends on the legitimacy of the claimant, the status of legitimacy

3. 63 *L.Q.R.* 65, *Legitimacy in the Conflict of Laws.*
4. See the leading case of *Doe d. Birtwhistle v. Vardill*, (1835) 2 Cl. & F. 571, at 573-4.
5. [1948] 1 Ch. 79.

conferred on him by his domicile of origin (i.e. the domicile of his father at his birth) will be recognised by the courts of England, and, if that legitimacy be established, the validity of his parents' marriage should not be considered a relevant subject for investigation.

His Lordship relied upon two cases dealing with legitimation—*In re Goodman's Trust*[6] and *In re Andros*[7]—and indeed there seems to be no reason in logic or authority why he should not have done so.

The decision in *Shaw v. Gould*[8] still presented a serious obstacle, since the present case was one of legitimacy, not legitimation. It is submitted, with respect, that Romer J. solved the problem by refusing to recognise its existence. He said in effect that the over-riding importance of the validity of the marriage according to English rules in the earlier case was " a matter rather of assumption by the House than one of direct decision "[9]. He also pointed out that " the claims under consideration were not confined to personal estate in England, for there was a claim to English real estate as well ; and this may have had some effect on the line which was adopted both in the argument and in their Lordships' opinions."[10]

One might be excused for thinking that an " assumption " by the House of Lords, with only one of their number expressing any doubt at all on the point, was a fairly good indication of the actual state of the law.

It now remains to be seen whether other judges sitting alone, not to mention courts higher in the hierarchy, will follow the lead of Romer J. The future is obscure in this matter, as it is in so many other aspects of the comparatively new branch of the law which we know as Private International Law.

R. M. NORTHROP.
A. E. WOODWARD.

6. (1881) 17 Ch. D. 266.
7. (1883) 24 Ch. D. 637.
8. *supra*.
9. [1948] 1 Ch. 79, at 91.
10. [1948] 1 Ch. 79, at 91.

PUBLIC INTERNATIONAL LAW: IMMUNITY OF FOREIGN STATES.

Krajina v. The Tass Agency and Another.[1]

Once it was established that the Tass agency, the first defendant in this libel case, was a Department of the Soviet State, it was inevitable that it would succeed in its claim to immunity. There is therefore nothing surprising in the decision of the Court of Appeal (Tucker, Cohen and Singleton L.JJ.) in affirming the decision of the Master, setting aside the service of the writ on Tass. However the case does raise several interesting questions.

In the first place it was suggested by the plaintiff that, if Tass were shewn to be an entity distinct from the Soviet State, it must follow that it could not claim immunity. Neither Tucker L.J. nor Cohen L.J. was

1. [1949] 2 All E.R. 274.