CONFLICT OF LAWS — LEGITIMATION — FORMAL VALIDITY OF A MARRIAGE — RETROSPECTIVE EFFECT OF AUSTRIAN LEGISLATION

IN *Starkowski v. Attorney-General* [1952] 1 All E.R. 495 Barnard J. considered the effect of foreign retrospective legislation altering the validity of a marriage celebrated in that country.

In May 1945 H and R went through a religious ceremony of marriage in Austria; Austrian law at that time required and recognized a civil ceremony only. In June 1945 the Austrian government decreed that marriages such as the above were to have the effect of valid marriages as from the day of solemnization, as soon as they were registered. Later, H and R left Austria, and in 1946 they reached England. They parted in 1947, and then H met M, by whom she bore the precocious petitioner in May 1949. In July 1949 the marriage of H and R was registered under the Austrian decree. H went through a ceremony of marriage with M in 1950. The petitioner sought a declaration that the second marriage was valid and that he was thereby legitimated. Barnard J. found against the petitioner.

The formal validity of a marriage depends on the *lex loci celebrationis*,[1] and the time that the forum has to look at that law is the time that the validity of the marriage is questioned. In the instant case this was 1950.

It was argued for the petitioner that the registration could not have extra-territorial effect; that H had become domiciled in England, and had acquired the status of spinster, and that therefore she was free to marry M. Barnard J. pointed out that the Austrian legislation was in force before the parties left Austria, and thus there was no question of extra-territorial effect. He held that by the comity of nations and the laws of England the rules of the *lex loci celebrationis* must be recognized on the formalities of a marriage, and as the registration made the first marriage valid in Austria, English law must recognize it.

The case is also interesting for the question posed in the judgment—What if the second ceremony had been before the registration? Barnard J. suggested that *Lynch v. Paraguay Provisional Government*[2] and *Re Aganoor's Trusts*,[3] where *Lynch's* case is discussed, may be strong authorities favouring the validity of the second marriage in such circumstances. The basis of these decisions was that the forum was to have regard to the relevant foreign law

[1] *Berthiaume v. Dastous* [1930] A.C. 79.
[2] (1871) L.R. 2 P. & D. 268.
[3] (1895) 64 L.J. Ch. 521.

at the time its operation was called into question; here this would be before registration. In *Re Aganoor's Trusts*, regarding the administration of the personal estate of a person dying domiciled abroad, the Court stated that it should apply the law of the domicil as at the date of death, and should take no account of any subsequent changes made by the Legislature, even though these should be retrospective. Barnard J. made no further comment on this problem.

H. STOREY

TORT — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE LAST CLEAR CHANCE

THE RECENT decision of the High Court in *Alford v. Magee*[1] emphasizes once again the difficulties involved in the law relating to contributory negligence and the inconsistencies apparent in a consideration of the so-called last opportunity rule. In this case, a motor car collided with a motor-cycle at the intersection of two suburban roads. The rider of the motor-cycle, Alford, having been killed, an action was brought on behalf of his dependants under Part III of the Wrongs Act 1928 (the Victorian equivalent of Lord Campbell's Act) charging the motorist, Magee, with negligence causing the accident. The defendant denied negligence, and alleged contributory negligence on the part of the deceased.

The action was first tried in the Supreme Court of Victoria before O'Bryan J. with a jury, which returned a verdict for the plaintiff; on appeal the Full Court set the verdict aside and directed a new trial. Upon appeal to the High Court against that order, the decision of the Full Court was affirmed, and it was held that, on the evidence, the jury should have been directed that if they found the collision was brought about partly by the negligence of the defendant and partly by the negligence of the deceased, their verdict should be for the defendant.

The actual view taken of the direction of O'Bryan J. by the High Court and the elaborate analysis of the law relating to "last clear chance" in the judgment prepared by Fullagar J. are not without difficulties. The Court objected to the direction of O'Bryan J. on the ground that the learned judge did not make clear to the jury that an argument put forward by counsel for the plaintiffs was absolutely untenable, involved a *non sequitur* and was to be ignored. In essence, counsel's argument amounted to this: the deceased motor-

[1] [1952] A.L.R. 101.