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Recognition and Effects of Foreign Adoption Orders

D. P. O'CONNELL*

Adelaide, Australia

In the absence of authority, private international lawyers have had to construct a doctrine on the recognition of foreign adoption orders by English courts. Generally speaking, they have been in agreement that adoption is to be treated as analogous to legitimation, but have been careful to point out that the analogy cannot be pressed too far.¹ An act of legitimation, whether by subsequent marriage or by recognition of legitimacy, is recognized by the common law only if the father was domiciled both at the time of the child's birth and at the time of the subsequent marriage,² or the recognition of legitimacy,³ as the case may be, in a country whose law allows of that form of legitimation. In the case of adoption, however, the parties are normally strangers in blood, and their relationship only arises out of the act of adoption. The potentiality of the child to be adopted either in the law

*D. P. O'Connell, B.A., LL.M., Ph.D., Reader in Law in the University of Adelaide.

¹ Cheshire, *Private International Law* (4th ed., 1952) p. 400; Dicey, *Conflict of Laws* (6th ed., 1949) p. 512; Wolff, *Private International Law* (2nd ed., 1950) p. 398; Goodrich, *Conflict of Laws* (3rd ed., 1949) pp. 449 *et seq.*, 510-512. There is no provision relating to foreign adoption in the English legislation.

² *In re Goodman's Trusts* (1881), 17 Ch. D. 266; *In re Andros* (1883), 24 Ch. D. 637; *In re Grove* (1887), 40 Ch. D. 216. Altered by s. 8(1) of the Legitimacy Act, 1926, 16 & 17 Geo. V, c. 60, to make the father's domicile at the time of the marriage decisive.

³ An inference from *In re Luck's Settlement Trusts*, [1940] Ch. 864.

of the child's domicile of origin, which will be that of its natural parent at birth, or in that of the adoptive father at the time of the child's birth, is in itself irrelevant,⁴ and there is no basis for applying the much criticized doctrine of *In re Luck's Settlement Trusts*.⁵ Domicile at the moment of adoption is alone of significance.

There is, however, no unanimity on the question whether an English court, in ascertaining if a foreign adoption attracts extra-territorial recognition, must look to both the *leges domicilii* of adopted and adopter at the time of adoption, or whether it is sufficient that it look only to one of them and, if so, to which. Falconbridge⁶ deduced from the fact that the Adoption of Children Act, 1926,⁷ confers on English courts adoption jurisdiction where the adopter is domiciled and resident in England, and the child is a British subject resident in England, the conclusion that "the domicile of the adopter at the time of the adoption is alone material". Rabel⁸ follows him in this view of English law, but with respect to American law suggests that opinion favours alternative grounds of adoption jurisdiction: in the first place, he says, "it is agreed that a child can be adopted in the state of its domicil, irrespective of the domicil and residence of the adopting parents. In the second place, there is increasing authority for concurrent jurisdiction of the state where the adopting parents are domiciled."⁹ Like Falconbridge he deduces a rule for the jurisdiction of the foreign court from the jurisdiction of the forum. The Restatement does the same.¹⁰ It proposes that jurisdiction to adopt exists where the status of adoption is created either by the *lex domicilii* of the adopted child, or the *lex domicilii* of the adopter if it has jurisdiction over the person having legal custody of the child or if the child is a waif and subject to the jurisdiction of the adopting state. The Restatement thus leans toward a severance of the natural bond of parent and child rather than towards the creation of the parent-child relationship in the *lex domicilii* of the adopter.

⁴ *In re Donald, Baldwin v. Mooney*, [1929] 2 D.L.R. 244; *In re an Infant* (1933), 34 N.S.W. S.R. 349. In *In re Brophy, Yaldwyn v. Martin*, [1949] N.Z.L.R. 1006, Gresson J. said: "If the domicil of origin of the child is at all relevant, the law of Massachusetts gave him the 'potentiality of changing his status' and becoming the child of another".

⁵ [1940] Ch. 864.

⁶ In (1941), 19 Can. Bar Rev. at p. 39. The jurisdiction of English courts to make adoption orders has been broadened by the Adoption Act, 1950, s. 1(1).

⁷ 16 & 17 Geo. V., c. 29.

⁸ *The Conflict of Laws*, vol. 1 (1945), p. 638.

⁹ *Ibid.*, p. 637.

¹⁰ Restatement of the Law of Conflict of Laws (1934), s. 142.

The rule proposed seems to be based on the American decisions quoted by Beale,¹¹ which are, generally speaking, decisions of courts as to their own jurisdiction to make adoption orders, and not decisions as to the jurisdiction of courts of other states.

Beale himself admits that jurisdiction over status is not the same as jurisdiction over parties to the status, or, to put it another way, that the jurisdiction of an English court does not of itself form a basis of jurisdiction of a foreign court, although it may, in the absence of competing considerations, be indicative of it. The theory that status depends on domicile led the editors of Dicey¹² to propose that "the law of the domicile of the adopter and of the person adopted, at the date of adoption, determines (*semble*) whether the adopted person has the status of an adopted child". The rule as it stands, however, is ambiguous. Does it imply that both parties to the adoption must be domiciled in the country where the adoption is effected, a conclusion that Beale approves in principle?¹³ Cheshire¹⁴ seems to be more liberal when he points out that "adoption alters the status of both parties, and therefore, to attract extra-territorial recognition, it must be valid according to each *lex domicilii*". This formula suggests that an English court is only required to ascertain if the adoption, no matter where effected, is recognized by the *lex domicilii* of the adopter and that of the adopted, an analogy with the rule in *Armitage v. A.-G.*¹⁵

Support for the view that an adoption order can be made effectually only in the court of the country in which both adopted and adopter are domiciled at the time of the making of the order is afforded by the Saskatchewan decision of *Culver v. Culver and Gammie*,¹⁶ where it was held that a child domiciled in Alberta and there adopted by persons domiciled in Saskatchewan was not to be treated in Saskatchewan as an adopted child in respect of which a custody order might be made in divorce proceedings. The case, however, is not satisfactory since it turned largely on a dubious analogy with the rule that no custody order can be made in respect of a child legitimated *per subsequens matrimonium*, English law alone being relevant, unless there has been a previous declara-

¹¹ A Treatise on the Conflict of Laws (1935), vol. II, pp. 713 *et seq.*

¹² *Op. cit.*, pp. 511 *et seq.*

¹³ *Op. cit.*, p. 713.

¹⁴ *Op. cit.*, p. 401.

¹⁵ [1906] P. 135. For criticism see Morris in (1946), 24 Can. Bar Rev. at p. 75. The analogy is accepted by Mann in (1941), 57 L.Q. Rev. at p. 123, n. 44.

¹⁶ [1933] 2 D.L.R. 535. See also *Burnfiel v. Burnfiel*, [1926] 2 D.L.R. 129.

tion of legitimacy as required by legislation, and also because the court made no attempt to test the conflict of laws rule it purported to apply. The rule in question was, however, accepted, though obiter and with hesitation, by Davidson J. In *In re an Infant*,¹⁷ and may have formed the basis of Vaisey J.'s decision in *Re Wilson*, which will be discussed later.

If, however, English law has not committed itself as yet to one rule or the other, it is necessary to test the several solutions that have been proposed. Campbell¹⁸ asserts that the convenience of a rule requiring that an English court look to both *leges domicilii*, either separately or in association, goes no further than preserving the formal elegance of theory. The grounds of his criticism are not clear, but investigation tends to support it. If the adoption has to be effected in the country where both parties are at the time domiciled, a large class of persons is, in the view of English law, excluded from valid adoption, and unless the exclusion is required by principle it should as a matter of policy be avoided. If, on the other hand, it is sufficient that each *lex domicilii* recognize the adoption, no matter where the order was made, the class of persons rendered susceptible of valid adoption is considerably broadened, but diverse and conflicting results are arrived at according to the systems of law applied. In a federal system the consequent confusion may be avoided, as Falconbridge suggests,¹⁹ by legislation achieving uniformity of rules both of internal law and the conflict of laws. Where, however, the conflict arises outside a federal system, and the competing claims of the *leges domicilii* of both adopter and adopted have to be sorted out without the possible benefit of uniform rules either of internal law or the conflict of laws, inconsistent and even absurd results cannot be avoided.

It is true, as Dicey and Cheshire point out, that adoption effects a change of status. An adopted child, in order to acquire rights under the *lex domicilii* of the adopter, must be recognized as such by it, a consideration that the Restatement ignores. Equally, the *lex domicilii* of the child at the moment of the adoption, if it is to cease to regard itself as the child's personal law and to preserve the rights and duties of the natural parents, must recog-

¹⁷ (1933), 34 N.S.W. S.R. 349. In *In re Brophy, Yaldwyn v. Martin*, [1949] N.Z.L.R. 1006, Gresson J. expressly refrained from approving or disapproving this proposed rule.

¹⁸ The Law of Adoption in New Zealand (1952) p. 167.

¹⁹ 3 Guir. Comp. DIP., No. 85, p. 171, as quoted by Rabel, *op. cit.*, p. 639.

nize the adoption. But does it follow that the change cannot be recognized in an English court unless it is effective in the personal laws of both parties? It is perhaps surprising to find Cheshire so insistent on the niceties of the personal law theory in this instance, when he rejects it in favour of another theory in the case of marriage. Status, it must be realized, is not a category of fixed import. It is a condition of legal relationship with other members of the community, either imposed by law or predicated on an act of the parties. In determining whether a certain status is constituted by an event abroad an English court will look to the results of the event, to the capacities, incapacities, rights, duties, powers and liabilities attributed to the parties, and will not proceed on any generalized notions of status as such.²⁰ It is very difficult to imagine one instance in which an English court would be placed in an illogical position, or in which irreparable harm would be done to the child's interests, if a foreign adoption, valid only according to one *lex domicilii*, for instance that of the adopter, were to be recognized. In other words, there seems no cogent reason why an English court should not recognize a foreign adoption even though the child's personal law at the moment of adoption fails to do so. A few examples may be used to test the matter.

Suppose *A*, domiciled in Queensland, adopts there *B*, domiciled in South Australia. The adoption is effected without the knowledge of the natural mother, and even in opposition to her wishes. South Australian law does not recognize the adoption. An English court might hesitate to admit the severance of legal relationship between mother and child. However, if all parties were domiciled in Queensland and the facts were the same, an English court would probably give effect to the adoption. It is not, therefore, compelled by any necessary logic to preserve the natural parent-child relationship when by attributing to the child a Queensland domicile it can produce the same result as if all parties were domiciled in Queensland. In fact, such a situation would be rare, since in most systems the consent of the natural parent to the adoption is a prerequisite, and the consent is added reason for an English court admitting the severance of the natural parent-child relationship. In addition, a foreign adoption order made improperly and without knowledge of the parents might be refused recognition on the general principles governing the recognition of foreign judgments.

²⁰ See generally Graveson, *Status in the Common Law* (1953), ch. IV; Allen in (1930), 46 L. Q. Rev. at p. 293; Falconbridge, *Conflict of Laws* (2nd ed., 1954) pp. 751 *et seq.*

A and *B*, domiciled in Queensland, adopt there *C*, domiciled in South Australia. South Australian law does not, for the purposes of discussion, recognize the adoption. *C* lives with his adopted parents in Queensland for some years and then accompanies them on a visit to England. There *A* and *B* are killed in a motor accident and *C* claims to be a "child" competent to institute proceedings under the Fatal Accidents Act. It is assumed for the moment that under the law of Queensland *C* is a child of *A* and *B*, and that English law will give effect to a foreign adoption duly recognized as qualifying a person to claim as a child under the act. Suppose that at the same time *C*'s natural mother claims custody of *C* in an English court as against relatives of *A* and that English law will admit, subject to the discretion conferred by the Guardianship of Infants Act, 1925, that the claims of a natural parent under the *lex domicilii* of the infant at the moment have priority over the claims of strangers. The law of Queensland claims to be *C*'s personal law, and so does that of South Australia. Under the former *A*'s relatives are *C*'s next of kin for guardianship purposes, under the latter *C*'s mother is next of kin. Is an English court in a dilemma? Clearly not, because it can merely recognize the adoption, thereby attributing to *C* a Queensland domicile and at the same time perhaps exclude the mother's claim and admit the infant's under the Fatal Accidents Act.

To carry the *reductio* a stage further, suppose that *A* had a South Australian domicile of origin, and that this had revived so that now *C* has without any doubt a South Australian domicile. It is still quite possible for an English court to conclude that *C*'s status was altered under Queensland law, that that status commands universal recognition, and that the fact that it is not recognized by the *lex domicilii* at the moment is irrelevant. This conclusion might be tested by supposing that Victorian law is now *C*'s *lex domicilii* and that Victorian law does not recognize the adoption, although the laws of both Queensland and South Australia do. Would an English court refuse to recognize the adoption in this case for the purpose of ascertaining if the mother's natural relationship with the child had been severed?

Suppose, to raise a different point, that *A*, domiciled in Queensland, adopts there *B* domiciled in South Australia, South Australian law not recognizing the adoption. Suppose that *B*'s domicile of origin was South Australia, and that this revives later in life so that upon *B*'s death in England it is his personal law. *B* leaves movables and immovables in England. The former are distributed ac-

according to South Australian law, which does not recognize *A* as a person entitled to succeed. The latter are distributed according to English law which, it is assumed for the moment, will acknowledge *A* as a successor if it recognizes the adoption. Is the court placed in any illogical position by recognizing the adoption? No more so than if Victoria was *A*'s domicile at the moment and does not recognize the adoption, although the laws of both South Australia and Queensland do so.

One instance may be given of a situation where damage is caused to the infant by such recognition, but again it involves no essential compromise of principle. Suppose *A* and *B*, domiciled in Italy, adopt *C*, domiciled in Northern Ireland. *A* and *B* die and *C*, at an early age, is returned to his natural mother in Northern Ireland. At the age of fifteen he marries. According to the law of Italy, he has no capacity to marry, according to that of Northern Ireland he has. Years later he dies intestate while domiciled in England, and his son, born after the Northern Ireland marriage, claims succession. The English court, if it decides to recognize the adoption, must hold the claimant to be illegitimate. But, undesirable as this result may be, the case is no different from that where an infant of fifteen years of age, domiciled in England, marries in Northern Ireland.

Although, owing to the deficiency of authority on both adoption and custody in the conflict of laws, no clear answer to any of the problems just posed can be given, they at least demonstrate that logic does not require a conflict of laws rule based on the cumulation of the *leges domicilii* of both parties. This conclusion, however, is not of itself sufficient to demonstrate positively what the conflict of laws rule should be. Logically, no preference is to be given to either *lex domicilii*, and the choice between them, or in favour of a rule based on their cumulation, must result from arguments of policy. Policy would seem to exclude the cumulation rule because the rule would limit the number of valid adoptions, and it might well be considered that the evils resulting from non-recognition of adoptions outweigh any theoretical and speculative advantages the rule may have. The policy argument favouring the *lex domicilii* of the adopted child will be based on the consideration that the law from which the child is withdrawn and which provides the existing framework of his legal relations should have some say in the change. The proponent of the *lex domicilii* of the adopter will answer that in most instances the child will live with the adopter in his legal environment and purport to share

in his community of legal relations, perhaps for a lengthy period of time. To attribute to him a connection with a system of law with which he has, perhaps, had no point of contact since his earliest months might be considered artificial. Taking into account the norm, and on balance, it seems that the *lex domicilii* of the adopter might be favoured. The answer to this policy question would, however, probably depend on a statistical survey of the advantages accruing to children from adoptions, and since this is not possible to a court of law resort must be had to other techniques of reasoning. Perhaps the suggestion that the conflict of laws rule of the forum should, in the absence of competing considerations, reflect its own jurisdictional rule might find a fitting place in this context,²¹ in which case Falconbridge's deduction from the English adoption legislation might be sustained. The suggested rule would then be that English law will recognize any adoption recognized as valid by the *lex domicilii* of the adopter. Such a rule seems to commend itself by reason of its moderation and practicability.

There is little guidance as to the law governing the variation or discharge of an adoption order. Jurisdiction for these purposes is usually given to a court on the same terms as jurisdiction to make an adoption order. Considerations favouring the validity of an adoption recognized by the *lex domicilii* of the adopter also favour the validity of a variation or discharge of adoption recognized by his *lex domicilii* at the relevant time. There is no cogent reason why jurisdiction to vary or discharge should be limited to the *lex loci actus* or to the *lex domicilii* of the adopter at the time of adoption, especially since a subsequent change of domicile may well have deprived the court making the order, or the courts of the system governing the adoption, of internal jurisdiction. This was the view advanced obiter in *In re M.*²² The difficulty with the proposed rule is that jurisdiction to annul an order may by internal law depend upon whether the order was made under that law, irrespective of subsequent change of domicile. The jurisdiction of New Zealand courts is limited in this way.²³

²¹ *Travers v. Holley*, [1953] 2 All E.R. 794, per Hodson L.J. at p. 800; Kennedy in (1954), 32 Can. Bar Rev. 359; Griswold in (1951), 25 Aust. L.J. at p. 264. Roxburgh J. seems to have accepted the adoption rule above proposed in *Re Fletcher, Barclays Bank Ltd. v. Ewing*, [1949] 1 All E.R. 732, at p. 734, when he said: "These orders were made by the competent court having jurisdiction according to the law of Mrs. Ewing's domicile".

²² [1944] 4 D.L.R. 258.

²³ Infants Act, 1908, s. 22; Maori Land Act, 1931, s. 210.

The Choice of Law in Adoption

At least since the introduction of the category of adoption into English law, it has not been doubted that there is an English conflict of laws rule governing the recognition of foreign adoptions, even if there is great doubt as to what it is. Two questions arise, however, from the application of the rule, and they have not been adequately distinguished in some discussions of the matter: first, what law governs the effects of the adoption, and, secondly, which of those effects are to be recognized in England? It is frequently pointed out that, whereas a legitimated person is truly a child for all purposes and must be recognized as such no matter what law is being applied, an adopted person is a "child" in an artificial sense only. Adoption is not a clearly defined category, but a term signifying a relationship of fictitious consanguinity, the purposes, incidents and effects of which differ greatly in various legal systems, as do the means by which the relationship comes into being. Hence the necessity for ascertaining the governing law. Scott L. J. employs the expression "proper law" in *Re Luck's Settlements Trusts* to designate the law creating a status relationship, but the term is best restricted to a law based on choice of the parties. In this paper the term "governing law" is employed to designate the law defining the status relationship arising from adoption.

One view, which has found expression in the Restatement,²⁴ is that English law will attribute the same effects to a foreign adoption as it does to an English adoption. This is a corollary of Dicey's doctrine, now discredited and probably untenable,²⁵ that an English court will not recognize any foreign status unknown to English law. There is no authority for the proposition that policy requires an English court to recognize only those incidents and effects of a foreign status that are "similar" to the incidents and effects of the corresponding status in English law. Wolff advances, though in a casual spirit, the proposition that only the effects common to both *leges domicilii* of the adopter and adopted can be recognized.²⁶ In other words, he applies the "similarity" doctrine to establish a common denominator, not between English law and a foreign law, but between two foreign laws. In view of the doubtful effects of an

²⁴ S. 143.

²⁵ *Srini Vasan v. Srini Vasan*, [1946] P. 67; *Baindail v. Baindail*, [1946] P. 122. See the sixth edition of Dicey at p. 512 for a repudiation of Dicey's view. But see Allen in (1930), 46 L.Q. Rev. at p. 302; Beale, *op. cit.*, p. 651; *Burnfiel v. Burnfiel*, [1926] 2 D.L.R. 129; *In re Donald, Baldwin v. Mooney*, [1929] 2 D.L.R. 244. See generally Falconbridge, *op. cit.*, footnote 20, p. 753.

²⁶ *Op. cit.*, p. 401.

adoption even in English internal law, a more inconvenient rule can hardly be imagined.

The only laws that can seriously compete to govern the effects of adoption are the *lex loci actus* and the *lex domicilii* of the father at the moment of the adoption. Rabel²⁷ favours the former and has the support of statutes in Quebec²⁸ and British Columbia.²⁹ Campbell,³⁰ who appears to adopt Rabel's argument, instances as additional support for it several American and Canadian decisions.³¹ In these, however, the domicile of the adopter was the country of the adoption, so that there was no competition between the two relevant laws, and there seems to be no decision in which a question of choice between them has been raised. Campbell further draws upon Rabel's argument that it is illogical to attribute to the law of the place of adoption the same consequences as flow from an adoption in the country of the forum. This, however, is an argument against the "similarity" doctrine, not an argument favouring the *lex loci actus*. Campbell admits that Rabel's final argument favouring the *lex loci actus* is unsound. Rabel says that "it is inadmissible that an adopter could change the effect of an adoption by changing his domicile". But it is the *lex domicilii* of the adopter at the moment of adoption that competes to be the law governing the status of the parties, not the *lex domicilii* at any subsequent moment. Therefore, it is the *lex domicilii* at the moment of adoption that claims to establish certain immutable and universally recognized characteristics of the status, leaving, as Mann suggests,³² subsequent *leges domicilii* to determine the mutability of some of the incidental effects of the status, just as the relations between husband and wife or parent and child vary in some respects according to the *lex domicilii* of husband or parent from time to time.

The only argument favouring the *lex loci actus* is that the effects of a relationship should be measured by the law which establishes the relationship, especially since, in the case of adoption, the effects of the relationship in the *lex loci actus* and those in the *leges domicilii* of the parties may radically differ. But there is no such

²⁷ *Op. cit.*, pp. 648 *et seq.*

²⁸ The Adoption Act, R.S.Q., 1941, c. 324, s. 22.

²⁹ Adoption Act, R.S.B.C., 1948, c. 7, s. 11.

³⁰ *Op. cit.*, p. 175.

³¹ *Woodward's Appeal* (1908), 81 Conn. 152; 70 Atl. 453; *Slattery v. Hartford-Connecticut Trust Co.* (1932), 115 Conn. 163; 161 Atl. 79; *In re McGillivray, Purcell v. Hendricks*, [1925] 3 D.L.R. 854; *In re Ramsey*, [1935] 2 W.W.R. 506; 50 B.C.R. 83. But see *Anderson v. French* (1915), 77 N.H. 509; 93 Atl. 1042.

³² *Loc. cit.*, p. 126.

doctrine in the conflict of laws, and there seems no good reason for distinguishing the status relationship arising out of adoption from the relationship which arises out of marriage or legitimation. The effects of marriage are not measured by the *lex loci celebrationis*, whose connection with the parties may be purely fortuitous. In the same way, in the case of legitimation of an infant, as Cheshire argues,³³ the attributes of the status, its primary effects and consequences, are determined solely by the law of the father's domicile at the date of the legitimating event. The analogy between adoption and legitimation is accepted by Mann³⁴ and seems to be quite proper.

Applying these general considerations, the following rules may be proposed: (1) The *lex domicilii* of the adopter at the time of adoption governs the question whether the adopted acquires the status of a natural born child so as to enter into a legal relationship with blood relations of the adopter on the same terms as the adopter's natural children,³⁵ or with persons in the relationship of step-mother or step-father.³⁶ It also governs the question whether or not the natural parents retain any rights over the adopted or in respect of the adopted's estate, and *vice versa*. (2) The adopted acquires the domicile of the adoptive father as from the date of adoption.³⁷ (3) The *lex domicilii* of the adopted at any subsequent time determines for the moment questions of custody,³⁸ maintenance³⁹ and education.

Recognition of Effects of Adoption

For what purposes is an adoption order recognized by English

³³ *Op. cit.*, p. 403.

³⁴ *Loc. cit.*, pp. 126-127. That the proper law governing the status of an adopted person is the *lex domicilii* of the father at the time of the adoption was the view of Gresson J. in *Re Brophy (infra)*.

³⁵ For example, it has been held in New Zealand that an adoption effected there effects a complete notional change of parentage so as to deprive the adopted of status under the Family Protection Act and confer on him the status of "lawful issue" of the adopting parent: *In re C.K., M. v. L.*, [1950] G.L.R. 296; *In re Allen, Miller v. Allen*, [1948] N.Z.L.R. 1235. S. 21(2) of the Infants Amendment Act, 1950, terminates the natural parent-child relationship. It has been held in Western Australia that a child of a child adopted under the law of the state is a grandchild of the adoptive parents: *In re James* (1937), 39 W.A.L.R. 113.

³⁶ *Wilson v. Commissioner of Stamp Duties*, [1928] N.Z.L.R. 167.

³⁷ Mann, *loc. cit.*, p. 124; Restatement, s. 35. It is unnecessary to discuss the remote effects of adoption, such as change of nationality. The latter (*semble*) is dependent upon the nationality law of the country to which the adopter is subject. The analogy with legitimation is instructive: *Abraham v. A.-G.*, [1934] P. 17; *Masemann v. Masemann*, [1917] N.Z.L.R. 769.

³⁸ Subject to the discretion given by the Guardianship of Infants Act, 1925.

³⁹ *Coldingham Parish Council v. Smith*, [1918] 2 K.B. 90.

courts? On this point authority is no less confused and opinion even more inconclusive. Rabel⁴⁰ telescopes the question with that of the governing law of the adoption so as to attribute to any recognized foreign adoption the same effect before the forum as it has in the *lex loci actus*. Wolff does the same, it seems, in his application of the "similarity" doctrine.⁴¹ The editors of Dicey leave the question in a very unsettled state. They argue that an English court will extend recognition to a foreign adoption for limited purposes only, leaving questions of succession exclusively to the internal rules of the *lex successionis*.⁴²

In Rabel's theory the *lex successionis* would first determine the categories of persons to succeed on testacy or intestacy, and then, if it contains a conflict of laws rule on the recognition of foreign adoptions, would ascertain by reference to the governing law of the adoption whether or not the adopted child fell within one of these categories. In Dicey's theory the *lex domicilii* of the adopter at the date of his death would determine in the case of movables and, generally speaking, the *lex situs* would determine in the case of immovables whether the adopted child fell within these categories of persons to succeed. In the law of England an adopted child is not regarded as a "child" for all purposes, and it is only in virtue of section 13(1) of the Adoption Act, 1950, that a person adopted in England can take on the intestacy of the adopting parent. If, therefore, English law was the *lex successionis*, and Tasmanian the governing law of the adoption, opposite results would follow from the two theories. Dicey would find that the child was not a child in the law of England, Rabel would make reference to the law of Tasmania to determine whether or not he was a "child" in that law.⁴³

In adoption, as in legitimation, the question presented to an English court will normally be one of construction, either of a statute or some instrument such as a will. In *Re Andros*⁴⁴ Kay J., dealing with the claim of a legitimated child under a will, recognized that the problem of construction could be solved subjectively only if the intention behind the instrument could be ascertained from intrinsic or extrinsic evidence.

⁴⁰ *Op. cit.*, p. 648.

⁴¹ *Op. cit.*, p. 401.

⁴² *Op. cit.*, p. 512.

⁴³ The Ontario Child Welfare Act, 1954, c. 8, s. 78, entitles an adopted claimant to the same rights of succession as in the law of the province where he was domiciled when adopted, but not exceeding what he would have had if adopted in Ontario. The Alberta Child Welfare Act, 1944, c. 8, s. 102, confers on an adopted child the same rights of succession as he would have had if adopted in Alberta. The Saskatchewan Child Welfare Act, R.S.S., 1953, c. 239, s. 81, amended in 1954 and renumbered section 82 in 1955, is similar.

⁴⁴ (1883), 24 Ch. D. 637, at pp. 639-640.

What did the testator intend by this gift? That is answered by the rule of construction. He intended A.'s legitimate children. If you ask the further question, Did he intend his children who would be legitimate according to English law or his actual legitimate children? How can the rule of construction answer that?

Both Kay J. and the majority of the Court of Appeal in *Re Goodman's Trusts*⁴⁵ clearly understood that an English court is forced, in the absence of ascertainable intention, to choose between two laws in order to decide if the *de cuius* is one of a class embraced by the terms of an instrument. Once the categories are established, the question of construction is exhausted; thereafter "it is a question of status".⁴⁶

Status, whether it arises from an act of legitimation or an act of adoption,⁴⁷ invites universal recognition, not for some purposes only, but for all purposes. The truth of this proposition has been frequently obscured in academic discussions by a tendency to concentrate on criticism of Scott L. J.'s confusion of status with the effects of status in *In re Luck's Settlement Trusts*.⁴⁸ As earlier pointed out, the law conferring on an adopted person the status of legitimate child does not necessarily govern all the effects of the status and the capacities and the incapacities incidental to it; these are contingent upon changes of the personal law. This distinction between status and its incidents does not, however, validate the inference sometimes drawn that a court may at once recognize a status and refuse to recognize the incidents. The question logically posed is not as to the purposes for which recognition will be extended but as to the relevant law to be applied. Scott L. J.'s primary principle that the law of England acts for all purposes on the status declared by a foreign system is sound and has the full authority of *Re Goodman's Trusts*.⁴⁹

The rule proposed by the editors of Dicey that the internal rules of the *lex successionis* alone define the rights of an adopted person in intestacy ignores the inter-relation of the question of

⁴⁵ (1881), 17 Ch. D. 266, esp. *per* Cotton L.J. at p. 292; *Re Grove* (1887), 40 Ch. D. 216; *Re Grey*, [1892] 3 Ch. 88.

⁴⁶ *Re Andros* (1883), 24 Ch. D. 637, at p. 639.

⁴⁷ In *Re Skinner*, [1948] 1 All E.R. 917, at p. 920. Lord Greene M.R., referring to the effects of an adoption order made without jurisdiction, said that "status is a serious and important thing and it might well be thought to be more consistent with public policy that, once a status is purported to be changed, changed it should remain".

⁴⁸ [1940] Ch. 864, at pp. 894, 907.

⁴⁹ See generally Graveson, *op. cit.*, p. 66; Falconbridge, *loc. cit.*, footnote 6, pp. 43 *et seq.*; Welsh in (1947), 63 L.Q. Rev. at p. 75; Allen in (1930), 46 *ibid.* at pp. 297-298; Taintor in (1940), 18 Can. Bar Rev. at p. 621; Robertson, Characterization in the Conflict of Laws (1940) pp. 144-145. Cf. *In re Bischoffsheim*, *Cassel v. Grant*, [1948] Ch. 79.

construction with the concept of status in the manner understood by the majority in *Re Goodman's Trusts*. It is true that legislation creates a special right of succession in the case of persons adopted in England, and does not mention persons adopted abroad. But is the legislation to be construed as limiting the succession to persons who fall, in the meaning of English internal law, within the categories of the Administration of Estates Act, 1925? That such a construction is necessary or desirable may well be disputed. Until statute⁵⁰ filled the gap, a person adopted in England was not a "child" within the meaning of the Fatal Accidents Acts. No provision has been made for persons adopted abroad. Does it follow that the legislation is to be construed as creating rights only in respect of children adopted in England? If an English court were to assume⁵¹ that where a statute refers to a "child" it means a legitimate child as comprehended by English law,⁵² this would involve a refusal to recognize that under a foreign law an adopted child has status of a legitimate child: a limitation would be placed on the purposes for which recognition of a foreign adoption is accorded. Why in this respect should a distinction be drawn between a person who has the status of legitimate child as the result of a foreign legitimating event and one who has it as the result of foreign adoption proceedings? The basis of the distinction proposed by the editors of Dicey is that, whereas in the case of legitimation a person legitimated is truly a "child" of the parent, an adopted person is a child in an artificial sense only. This, however, is no more than a reflection of the discredited "similarity" doctrine which they elsewhere repudiate, and does not touch the heart of the matter. There seems no cogent reason why the status of a person adopted abroad should not be left to the conflict of laws in the same way as the status of a person legitimated abroad. If this

⁵⁰ Law Reform (Miscellaneous Provisions) Act, 1934, s. 2(1).

⁵¹ Mann, *loc. cit.*, p. 135. His argument, substantially based on *Birt-whistle v. Vardill* (1840), 7 Cl. & Fin. 895, is perhaps misleading since succession to estates tail was an exception and recognized as such in *Re Goodman's Trusts*. See also Falconbridge, *op. cit.*, footnote 20, p. 793. The proviso to r. 120 in Dicey seems, despite Falconbridge's opinion, sufficient to explain the matter.

⁵² In *Re Fergusson's Will*, [1902] 1 Ch. 483, it was held that "next of kin" as an expression in an English will raised solely a question of interpretation, and that though the legatees were domiciled in Germany this was no ground for interpreting the expression in accordance with German law. The court distinguished the question from that in *Re Goodman's Trusts* as not involving status. It is difficult, therefore, to see what rôle the decision plays in the logic of Mann's argument. The Victorian decision of *In re Williams, Curator of Deceased Persons v. Williams*, [1936] V.L.R. 223, is more difficult to explain away, although the court stated that *Re Goodman's Trusts* had no bearing on the question. See Falconbridge, *op. cit.*, footnote 20, p. 798.

is the case, then it is clear that legislation is required only to cover the case of English adoptions, the effects of which are limited; the claimant under the Fatal Accidents Act, if a "child" under the governing law of the adoption, should be allowed to succeed; if not a "child", then he will not succeed. The same question arises in respect of the Workmen's Compensation Act, 1925,⁵³ contributory pensions, death duties, insurance and health benefits,⁵⁴ and is essentially no different from that which arises in respect of succession under section 13(1) of the Adoption Act, 1950.

If in all these cases English internal rules alone are applied, it is difficult to see why English law has a rule as to recognition of foreign adoptions at all. There are, generally speaking, only two sets of circumstances in which an English court would be required to examine the validity of a foreign adoption. The first is where English law provides the categories and the governing law claims to fill then in, as in the foregoing examples. The second is where questions of custody or maintenance and incidental matters come before an English court. These matters are determined by the *lex domicilii* of parent and child at the moment. English law will recognize the validity of a foreign adoption in order to ascribe to the adopted the domicile of the adopter. Thenceforth it is the *lex domicilii* in question that governs the custody or maintenance problem, and it will assume jurisdiction to do so only after recognizing the adoption and ascertaining that under the governing law of the adoption the *de cuius* is a "child" susceptible of custody and entitled to maintenance. The reference by the English court to the *lex domicilii* must, therefore, be to both the internal rules and the conflict of laws rules of that system. Why, then, when the question involved is not one of custody or maintenance, but one of succession, is the reference to the internal rules alone of the *lex successionis*? And why, when English law is the *lex successionis*, and admittedly contains a rule as to the recognition of foreign adoptions, should it not refer to the governing law to ascertain if a claimant is a "child" within the meaning of a will or the Administration of Estates Act, 1925?⁵⁵

⁵³ Adoption of Children (Workmen's Compensation) Act, 1934, s. 1(1).

⁵⁴ Widows', Orphans' and Old Age Contributory Pensions Act, 1929, s. 24; Adoption of Children Act, 1926, s. 5(5); Second Schedule to Carriage by Air Act, 1932; Finance Act, 1936, s. 21(9); Inheritance (Family Provision) Act, 1938, s. 5(1); Unemployment Insurance Act, 1939, s. 4(2).

⁵⁵ Cheshire in the latest edition of his book arrives at the conclusion on the basis of the Adoption Act, 1950. The case of *Re Wilson* (*infra*), however, suggests that he has been somewhat emphatic in his deductions. See also Campbell, *op. cit.*, p. 182.

The only English decision on the subject of recognition of the effects of a foreign adoption, *Re Wilson (decd.) Grace v. Lucas*,⁵⁶ is of doubtful authority, inasmuch as it confused the three separate questions of jurisdiction to adopt, the choice of law in adoption, and the effect of the governing law upon the construction of an English statute. The deceased and his first wife were British subjects domiciled in England. In 1939 they adopted, in Canada, according to the law of Quebec, an infant domiciled in that province. No formal steps were taken under the Adoption of Children Act, 1926, upon their return to England. In 1946 the deceased's first marriage was dissolved, and he re-married. He and his second wife were killed in an aircraft accident, and she was deemed to have predeceased him, so that he died intestate leaving movable property to which the child laid claim. Vaisey J. said that "it would certainly be very surprising if the artificial relationship arising from an adoption effected under an alien jurisdiction were to give rise to rights of inheritance such as are properly derived through a natural relationship". He pointed out that the nature and incidents of adoption vary widely from country to country, and it was not to be supposed that an institution by that name created under foreign law bore any significant resemblance to adoption in English law. It was held that the act of 1950 did not create a right of succession in respect of any person not adopted under it. The claimant was not, therefore, a child of the deceased for the purpose of taking on intestacy. The analogy with legitimation Vaisey J. considered to be "inapplicable", apparently because, in his view, the question is not one of "status governed by the law governing the adoption", but "a matter of succession governed by the law governing the succession". The two matters are not, however, as earlier explained, antithetic, but are merely successive steps in logic: the *lex successionis* defines the categories, the governing law determines whether a given person falls within them. There is no question of the governing law being allowed both to establish the categories and to fill them in: the English court should look to the governing law only to ascertain what status an adopted person has, and is not concerned to give him the same rights of succession as he would have in that law. Vaisey J. was inhibited from perceiving the inter-relation between the two laws because his thinking was governed by echoes of Dicey's "similarity" doctrine.

Had Vaisey J. terminated his analysis at this point, the case would support the view that the internal rules of the *lex succession-*

⁵⁶ [1954] 1 All E.R. 997.

is determine if an adopted person can succeed on intestacy. He went on, however, to say that had the adoptive father been domiciled at the time of the adoption in Quebec, the child's case would have been "different and very much stronger".⁵⁷ Did he then decide the case on the ground that because the adoption had not been effected under the law of the adopter's domicile the adoption was not recognized by English law and the adopted could not therefore be recognized as the "child" of the adopter? If he did, the case, despite its stated reasoning, is no authority on the question of the purposes for which a foreign adoption will be recognized by an English court. One would be prepared to say that Vaisey J.'s comment was quite gratuitous but for the Victorian decision of *Re Pearson, Equity Trustees Exors. & Agency Co. Ltd. v. Michaelson-Yeates*,⁵⁸ which he quoted and did not expressly disapprove. In that case a testator left an interest to, among others, a child or that child's issue. The child predeceased him leaving an infant adopted in accordance with the law of Tasmania, where, it seems, both parties to the adoption had been domiciled when the adoption was effected. The infant claimed to be "issue". Acting upon the analogy with legitimation, Gavan Duffy J. held that, "if there is a gift to a child, and the question arises whether someone is a child, and he has a domicile other than Victoria, you decide that question according to the law of his domicile. The facts in this case are such that the adoption order in Tasmania would be given full effect in Victoria under the rules of private international law." Examining Tasmanian law, Gavan Duffy J. ascertained that it provided for any adopted child to have the status of a child born in wedlock, but that no such adopted child should acquire any right to property which would devolve on any child of the adopting parent by virtue of any instrument or will made before the adoption order. On the technical point raised by this last provision the claim failed.

In other words, Gavan Duffy J. adopted the Rabel theory. The logical process involved was more completely examined by Gresson J. in *In re Brophy, Yaldwyn v. Martin*.⁵⁹ A testatrix died domiciled in New Zealand leaving movables to be divided between certain named persons or their issue *per stirpes*. One of the named persons had predeceased the testatrix leaving a child adopted in New York when both adopting parents and child were domiciled in that state. It was ascertained that according to the law of New York an adopted child was not treated as "issue" for the purpose

⁵⁷ At p. 1001.

⁵⁸ [1946] V.L.R. 356; [1946] A.L.R. 387.

⁵⁹ [1949] N.Z.L.R. 1006.

of taking under a will, whereas in New Zealand he is so treated. The steps in the reasoning of the court may be set out briefly as follows: (1) the *lex successionis*, in this case New Zealand law, governs succession to movables, that is, questions of testacy and intestacy, and construction of a will; (2) had the adoption been effected under New Zealand law the adopted person would have had the status of "issue"; (3) the problem raised by his adoption elsewhere was not a problem of which of two rival systems is to govern a distribution, but of what intent is to be attributed to the testatrix; (4) this requires that it be ascertained whether the child has acquired through the adoption the same status as that of a child born in lawful wedlock; (5) if under the law governing that status the child is not deemed "issue", no intention on the part of the testatrix can be construed to treat him as issue; (6) applying the most stringent requirements suggested as necessary for an adoption to attract extra-territorial recognition—namely, that it must be valid by each *lex domicilii* of adopter and adopted—the court found that the law governing the child's status was the law of New York; (7) that the legal effects of the child's status did not bring him, as a matter of interpretation, within the term "issue" in the will.

The court's approach was logical, but the discussion was confused by a somewhat unhappy choice of expression on the notion of status. Gresson J. said: "My conclusion is that the status of Emmett McMahon is fixed by the law of his domicile; that under that law he was 'the child' of Bridget McMahon . . . ; that his status as such child must be recognized by the Courts of New Zealand; but that the legal effects of such status do not bring him, as a matter of interpretation, within the term 'issue' of Bridget McMahon as contained in the will of Bridget Lena Brophy in the absence of any affirmative intent".⁶⁰ The question really was: Did Emmett McMahon acquire under the law of New York the same status for succession purposes as a natural legitimate child? To say he had the status of a child but not its effects is meaningless. What he had was a status that for some purposes, but not for others, equated him with natural legitimate children. At the basis of the confusion is a defect of characterization. As Falconbridge points out, "the incidents or consequences of status and the capacity of a person who has a particular status may involve questions which are not accurately characterized as questions of status and which are governed by some other law than the law which governs status".⁶¹ Gresson J. supposed that the attribute of being treated for all pur-

⁶⁰ At p. 1017.

⁶¹ *Loc. cit.*, footnote 6, p. 43; Robertson, *op. cit.*, p. 145.

poses as issue is an effect of status whereas, in fact, it is the status itself. He seems to have confounded the effects of status with the effects of adoption.⁶²

Conclusions

In view of the unsatisfactory nature of the cases discussed, and the contradictory rules they propose, it is not possible to do more than advance tentative conclusions:

(1) A foreign adoption will be recognized by English law if it is recognized by the *lex domicilii* of the adopter at the time of the adoption.

(2) The governing law of the adoption is the *lex domicilii* of the adopter at the moment of the adoption.

(3) The governing law of the adoption determines the status of the adopted in consequence of the adoption. This status will be recognized by an English court. On the other hand, the incidental effects of the status, such as capacity, incapacity, power and disability, may be governed by other laws such as the personal law of the adopted.

(4) Where English law is the *lex successionis*, its internal rules alone will determine if a person adopted abroad is entitled to succeed on testacy or intestacy. This is apparently the decision in *Re Wilson* but is inconsistent with conclusion 3.

Co-operation

English liberty, of which we Americans are the heirs, is a moderate, tolerant liberty. It is not an instinctively passionate kind, but it requires cultivation of the spirit of compromise. It is the kind of liberty which will recognize and fight for minority interests—at the same time assuming that the minority will acquiesce loyally in the decision of disputed questions by majority vote. The insistence on 'absolute truth' or 'absolute principle' is radically un-English and un-American. Absolutists seem to feel that, if they yield a point, they betray the cause of absolute truth. 'The liberty they want is liberty to follow the truth, and to make all others follow it.' 'Liberty' of this latter sort, the absolute type, means either anarchy or despotism. 'It is despotism in so far as it means the banding together of the like-minded to impose their passionate truth upon those of a different faith or of a less fervent temper.' (Eugene C. Gerhart, *American Liberty and "Natural Law"* (1953) pp. 148-149)

⁶² There is a clash between these decisions and *In re Donald, Baldwin v. Mooney*, [1929] 2 D.L.R. 244. A child adopted in the State of Washington was held not entitled to take under a bequest to the children of a beneficiary named in the will of a person domiciled in Saskatchewan. The adoption statute of Washington gave the adopted child the status of a natural born child, but the court refused to interpret the will in reference to it.