THE CANADIAN BAR REVIEW

VOL. XXXIII AUGUST-SEPTEMBER NO. 7

The Legal Effects of Adoption*

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I

The legal effects of adoption, particularly in Canada, have not yet been fully analyzed. During the last generation or two the trend in most English-speaking countries has been toward making the adopted child for all purposes and in all relationships a member of a new family and no longer a member of the old. But the full implications of the trend have not yet been appreciated in most jurisdictions by draftsmen, legislatures and the courts. Has the child, for example, become not merely the child of his adopting parent but also the nephew of that parent's brother? Has he ceased to be a child of his natural parents, or a grandchild of his natural parent's parent?

What legislatures are doing is to transfer, piecemeal, particular rights and obligations from the natural to the adopting family, leaving the common law to fill in the gaps. For example, when the legislature gives the child a right to inherit on intestacy from his adopting parents, without more, the common law, which

*EDITOR'S NOTE.—This month the Review departs from its usual practice by devoting a whole issue to a single article. The topic Professor Kennedy deals with here is of wide interest and we think that readers will prefer to have his article complete in one place rather than spread over several issues. With the October number we shall return to the usual type of contents: articles, Case and Comment, book reviews and correspondence.

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knows nothing of adoption, will probably govern his inheritance rights from others. Few legislatures have attacked the problem as a whole by making the child for all purposes and all relationships a member of a new family and no longer a member of the old.

The common law's non-recognition of any form of legal adoption is well known. The statements in earlier editions of *Eversley*[1] that "the law of England, strictly speaking, knows nothing of adoption" and that

> parents cannot enter into an agreement legally binding to deprive themselves of the custody and control of their children; and, if they elect to do so, can at any moment resume their control over them

are reflected in early decisions. In *Re Quai Shing*,[2] in a habeas corpus proceeding for the return of an adopted daughter who had been taken away from them by a stranger, adopting parents were told that they had no more rights than a stranger to the custody of their adopted child. This was an adoption under the old method of agreement between adopting parents and natural parents, an agreement which, as Riddell J. holds in *Re Davis*,[3] was not even binding upon the natural parents. The vigorous argument in the *Quai Shing* case by Davie C.J. to the effect that, in relation to strangers, the adoption gave the adopting parent a legal status capable of being maintained against a mere invader failed to prevail. The application to adoption situations of another common-law rule being slowly developed—that in custody applications the best interests of the child are of primary concern, despite legal rights of parents—was cautious and gradual.[4] With this background, it is not surprising that the courts were slow to accept change, in any form. Even society did not seem prepared for today's wholesome attitude, despite the early history of adoption in Roman law. Even that early Roman history found no counterpart in the modern civil law of, for example, Quebec or Scotland.

[1] Eversley, Domestic Relations (3rd ed.) pp. 514, 513.

[2] (1898), 6 B.C.R. 86 (F.C.).

[3] (1909), 18 O.L.R. 384 (Riddell J.).

[4] In *Re Whitefild* (1922), 70 D.L.R. 658 (B.C., McDonald J.), a father was refused, in the best interests of the child, custody of his child whom he had orally agreed six years earlier to allow *S* and his wife to have. The Ontario courts were not agreed on this problem: Sutherland J. in *Re Scott* (1920), 17 O.W.N. 348, bowed to the "superior" claims of the parents; but Lennox J. in *Re Tuttle* (1920), 19 O.W.N. 234, and Middleton J. in *Gordon* v. *Adamson* (1920), 18 O.W.N. 191, preferred the child's interest. See today, *Re A*, [1955] 2 All E.R. 202 (C.A.), where the illegitimate child's welfare and father's plans for it prevailed over the mother's wishes to put it out for adoption. An intermediate statutory device is noted by F. Read in (1928), 6 Can. Bar Rev. 166, at p. 167. More recently some standing has been given to the agreement for property purposes: see *Re Miller*, [1954] O.W.N. 897 (Barlow J.), discussed at footnote 260.

Change did come by statute as early as 1851 in Massachusetts and, in the Commonwealth, as early as 1873 in New Brunswick. Adoption might now be legally entered into with certain legal consequences. England in 1926 was one of the more recent jurisdictions to introduce legislation and, even then, the legal effects, until 1949, were extremely limited. Today most parts of the Commonwealth (including England, Scotland, the ten provinces and two territories in Canada, the six states of Australia, New Zealand and South Africa) and all states in the United States have statutory adoption laws in one form or another.

No account will be taken in this study of the problems leading up to the making of the adoption order. In most jurisdictions the pattern is uniform—a judicial proceeding in which an adoption agreement is approved or, more often, in which an application to adopt is granted in the form of an order authorizing the adoption. By way of exception, orders are made by the Registrar of Births and Deaths in the two main cities in Tasmania (Hobart and Launceston)[5] and by the Director of the State Children Department in Queensland.[6] Once the order is made by the court, registrar or director, certain legal consequences follow.

Any examination of the changes consequent upon an adoption order must keep in mind (a) the common-law background of adoption, (b) the somewhat cautious approach of the courts in interpreting any legislation that may affect property rights, and (c) the acceptance today of adoption as desirable social policy, even to the extent of so cutting off the child from its former family as to make it almost impossible, without a court order, to trace its ancestry. The new social policy is so far ahead of portions of the law in many countries that some strange anomalies appear. Practically all jurisdictions provide, for example, for new birth certificates showing the child as the child of the adopting parents. And normally no one can go behind the new certificate without a court order. Yet, at the same time, many jurisdictions preserve the child's right to inherit from its natural parents and kindred.

This article will deal exclusively with internal or domestic problems. In a separate article, to appear later, I shall attempt to discuss (a) the jurisdiction, internationally, of a court to make an adoption order, and (b) the position locally of a child adopted abroad.

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[5] Adoption of Children Act, 1920, No. 5 (as amended to 1952), ss. 2, 2A (Tas.).

[6] The Adoption of Children Acts of 1935-52, s. 4 (Q'ld.).

II. *General Survey of Adoption Legislation*

The effect of an adoption order varies greatly in the different jurisdictions. At one extreme we have the English legislation of 1926, which in effect dealt merely with the child's "future custody, maintenance and education", defined to include the appointment of a guardian and the consent or otherwise to marriage. This legislation expressly provided, in addition, that the child should not by the adoption lose or gain any property rights.[7] On the other hand, we have the New Zealand legislation as rewritten in 1949 and 1950, in which, except for a few specified items, the child becomes the child of his adopting parents and ceases to be a child of his natural parents for all purposes, including not only parental but kindred relationships.[8] In Canada and many Commonwealth jurisdictions, the legislation tends, in defining the effect of an adoption, to talk in terms of divesting persons of rights and obligations, and of giving rights and obligations to others. The exact language of each major provision is set out later.[9] In the immediate general survey that follows, little will be said about property rights. They loom so large that no summary is attempted at this stage. It is sufficient to say that in too many jurisdictions the legislation deals separately with property rights upon testate and intestate succession. By way of contrast, these rights flow from the general language of the statute in South Africa, New Zealand and some Australian states.

In only four provinces in Canada—Alberta, British Columbia, Newfoundland and Saskatchewan—is this "divesting" reasonably complete. Thus in Alberta the natural parent is divested of "all legal rights" and freed from "all legal obligations and duties in respect of the child", the child is made "to all intents and purposes the child of the adopting" parents and, in addition,[10] "all legal obligations and duties" are imposed on the adopting parents as if they were the natural parents. But even the broad language of the Alberta legislation, which divests and grants "legal rights", then goes on in typical Canadian fashion to deal with one legal right—that of property—in a separate and somewhat different manner.

Are there other qualifications upon this disposition of "all

[7] Adoption of Children Act, 1926, c. 29, s. 5(1, 2) (U.K.). The statute did not apply to Scotland.

[8] *Infra*, footnote 11.

[9] See footnotes 18 to 29; 136 to 147.

[10] Not in Saskatchewan where the child is made the child of the new parents as if born to them in lawful wedlock. The imposition of obligations and duties is thus unnecessary.

legal rights"? At least five persons or sets of persons are involved: the child, his natural parents, his natural kindred, his adopting parents and his adopting kindred. "Kindred" is used throughout to denote kindred other than parents. "Family" includes both parents and kindred. "Natural" as applied to parents and kindred refers to the parents and kindred of a child, whether born legitimate or illegitimate, had there been no adoption. Former adopting parents and their kindred constitute a potential sixth class. A small group of persons may on occasion require separate consideration: the natural parent and his or her child where that child is adopted by the natural parent's new spouse.

With so many classes, the "divesting and imposing" type of legislation may cause trouble, as a glance at the Alberta legislation will show. If we forget property rights for the moment, an adoption order in that province shall

> (a) divest the natural parent, guardian or person in whose custody the adopted child has been, of all legal rights and free them from all legal obligations and duties in respect of the child.
>
> (b) make such child, to all intents and purposes the child of the adopting parent or parents;
>
> (c) impose upon the adopting parent or parents all legal obligations and duties as if the adopting parent or parents were the natural parent or parents of the child as from the date of the order of adoption.

The legislation is practically identical in Newfoundland and similar in effect in British Columbia. Does a provision divesting the *natural parents* of rights and obligations divest the *kindred* of their rights and obligations? Further, the Alberta and the Newfoundland legislation, which is careful to divest the natural parents of rights *and* obligations and to impose *obligations* on the *adopting parents*, is silent about the grant of any express *rights* to the adopting parents.

What about the child in relation to its *adopting kindred*? Making the child the child of his adopting parents "to all intents and purposes" ought to cover relationship to his adopting parents' kindred. And I should be prepared so to argue. Some of the property cases to be discussed later suggest otherwise—that the artificial relation created is only in respect of the parties and relationships named—child and parents. The spelling-out of what rights and obligations are divested or imposed is used to strengthen the argument against kindred relationship.

What about, finally, *previous adopting parents*? These people are mentioned separately in Alberta where "all legal consequences of the former order of adoption shall, upon a subsequent adop-

tion, determine", except for property rights already vested *in the child*. The rights and obligations of the natural parents may thus revive. Are they taken away on the second adoption, which divests "the natural parent, guardian or person in whose custody" the child has been? Does *or* mean *and?* In British Columbia, the legislation divests "the natural parents . . . , *and* any previous parent by adoption, *and* the guardian" (section 9).

By using the Alberta legislation as an illustration, I have tried in a general way to point to some of the difficulties in the "divesting" type of legislation.

Another objection to this type of legislation is that it does not take account of legal consequences that are neither rights nor obligations. What of domicile, nationality or citizenship? These are just additional problems, made even more difficult when the divesting clauses may differ in time of application. Compare Alberta's clause (b) with clause (c).

The legislation in Alberta, British Columbia, Newfoundland and Saskatchewan goes further, it has been noted, in "divesting and imposing" than elsewhere in Canada. The problems of the Alberta-Newfoundland legislation have been illustrated. British Columbia's legislation is similar, but omits Alberta's (b), and makes (c) mutual—child and parent sustain toward each other the legal relation of parent and child and "shall respectively have all the rights and be subject to all the obligations and duties of that relation". Does this cover kindred relationships? Only one province—Nova Scotia—has, in newly re-enacted legislation largely copied from that of 1876 in Massachusetts, used a different and simpler approach, although with respect to property the provisions for the adopted child are slightly less favourable than in the majority of Canadian provinces. In Nova Scotia, upon the making of an adoption order,

> all rights, duties, responsibilities, and other legal consequences of the natural relation of child and parent, including settlement, shall thenceforward exist between the child and the petitioner *and his kindred*, and shall except as regards marriage, incest or cohabitiation, terminate between the person so adopted and his natural parents *and kindred*, or any previous adoptive parent. [S. 9 (1), italics added]

How much simpler this is, and how many of the difficulties encountered in the Alberta legislation and to be encountered elsewhere across Canada disappear because of it? A minor difficulty does arise with Nova Scotia's provision. The only matters listed are "rights, duties, responsibilities, and other legal consequences of the natural relation of child and parent". Does your particular

question involve a legal consequence of the natural relation of child and parent?

New Zealand offers an excellent example of legislation[11] dealing with the effect of an adoption order:

> 21. (2) Upon an order of adoption being made the following paragraphs of this subsection shall have effect for all purposes, whether civil, criminal, or otherwise, but subject to the provisions of any enactment which distinguishes in any way between adopted children and children other than adopted children, namely:—
>
> (a) The adopted child shall be deemed to become the child of the adopting parent, and the adopting parent shall be deemed to become the parent of the child, as if the child had been born to that parent in lawful wedlock:
>
> (b) The adopted child shall be deemed to cease to be the child of his existing parents (whether his natural parents or his adoptive parents under any previous adoption), and the existing parents of the adopted child shall be deemed to cease to be his parents [with proviso as to "forbidden marriages" and incest]:
>
> (c) The relationship to one another of all persons (whether the adopted child, the adopting parent, the existing parents, or any other persons) shall be determined in accordance with the foregoing provisions . . . :

Clause (c) contains a very useful provision, especially in the light of litigation[12] dealing with kindred of both sets of parents. In New Zealand, these clauses govern property rights also, subject to a very slight modification for existing *inter vivos* instruments and for wills of persons dying before the adoption order is made.

The selected statutes from Alberta, British Columbia, Newfoundland, Nova Scotia and New Zealand illustrate the problems involved. In other Canadian jurisdictions the legislation is largely of the "divesting" and "making" type, very often with limitations. In Manitoba there are three clauses. Clause (a) declares that "all rights and duties as between the child and the natural parents of the child shall cease and the child shall thereafter be the child of the adoptive parents". But there are two more clauses: clause (b) says that the child "shall be entitled to proper support and care from its adoptive parents" (and also deals with its right to inherit from the adopting parents only), while clause (c) gives the adopting parent the "services, wages, control and custody" of the child (together with inheritance rights from or through the child). Do the specific grants cut down the generality of the second part of

[11] Infants Act, 1908, No. 86, s. 21 (as rewritten by 1950, No. 18, s. 2) (N.Z.).

[12] *E.g.*, *Re Goldsmid*, [1916] N.Z.L.R. 1124, at p. 1126 (Edwards J.).

clause (a) making the child the child of the adopting parents? Why the specifications? I should like to think that they were for clarification purposes only, but, in the absence of a clear-cut statement in clause (a) or any stated reason for putting in the specifications in clauses (b) and (c), it is arguable that the clause deals solely with the so-called status of the child, and clauses (b) and (c) add only such incidents of that status as the legislature thought desirable.

In New Brunswick, Prince Edward Island and the two territories, the natural parent, guardian *or* person having custody is divested of all legal rights to the child, but is only freed from the obligations and duties "as to maintenance of the child". Further, the child is made the child of the adopting parents only "for the purposes of the custody of the person and rights of obedience". Upon the adopting parents is imposed only the obligation arising out of a claim by the child "for nurture, maintenance and education". The child loses none of its obligations, except in New Brunswick. There it is freed "from all legal obligations of obedience and maintenance in respect of his natural parent, guardian or person in whose custody he had been", but is not specifically required to maintain its adopting parents. Relations to natural kindred are left untouched. Probably no relationship to adopting kindred is acquired.

Saskatchewan was a member of this group until recently and its new legislation still reflects the earlier pattern. The natural parents are divested of all rights but freed only of obligations to maintain. But as of July 1st, 1955, the balance of the legislation reflects a new approach. The child is "to all intents and purposes" the child of its new parent as though born to that parent in lawful wedlock. This approach is much simpler than conferring rights and obligations. And I suggest that with the new provision it is quite possible and proper to find that kindred relationships automatically follow. The old kindred are not expressly cut off, but the new are created by the new position the child holds as a child born in lawful wedlock to his new parents.

In Quebec, the natural parent, tutor or person having custody loses all rights "possessed under the civil law" and is freed from all obligations. The child is "in every respect . . . with regard to such [sic] custody, obedience to parents and the obligations of children towards their father and mother" to be considered as the child of the adopting parents. In addition, the adopting parents are "bound to maintain and bring up the child as if it were their own".

Ontario has more specific restrictions than elsewhere in Canada, even in the new statute which came into force on January first of this year. All "rights, duties, obligations and liabilities" of the parents and guardians "in relation to the future custody, maintenance and education . . . , including all rights to appoint a guardian or to consent or give notice of dissent to marriage" are extinguished, and all "such" rights and obligations are exercisable by and enforceable against the adopting parents. In respect of the same matters, and of the liability to maintain its parents, the child is to be treated as a child of the adopting parents, but the child's obligation to support his natural parents (in so far as it is not a "right" of parents) is not specifically removed. If the adopting parents are husband and wife, rights to custody, maintenance and access are to be ascertained, as between the parents and towards the child, as if the parents were the lawful father and mother of the child. After special provisions for names, property, succession duty and fatal accidents, section 77 (12) enacts:

> Except as provided in this Part, an adopted child shall not be deemed the child of the adopting parent.

The statute is silent as to natural kindred, but, because of the detailed spelling-out of what is given and taken away, they probably remain unaffected. The statute is also silent as to what if any incidents of the child-to-parent relationship are extinguished, except in so far as the taking away of rights and obligations from parents may remove certain obligations and rights from the child. The child is only the child of the adopting parents for specific purposes. For example, domicile is not specifically included. Does this incident follow automatically? It should be noted also that in Ontario, by section 76, the court may impose in the adoption order "such terms and conditions" as it may think fit. In particular, it may require the adopting parent by bond or otherwise to make such provision for the child as the court thinks just and expedient.

The laws of the various jurisdictions in Canada, as just summarized, might be compared with the current English legislation, applicable also, except for property rights, to Scotland. Ontario had deserted the somewhat more liberal Canadian pattern in 1927 and adopted the English act of 1926. The major revision in 1949 of the English concept of adoption in relation to property brought about a new consolidating act in 1950.[13] Very little change in matters other than property rights appears. The changed property rights

[13] 14 Geo. 6, c. 26, ss. 10-16 (U.K.).

were dutifully incorporated into Ontario in 1954 to a large extent. The legislation in England and Scotland is thus similar to that described for Ontario, except that (a) there is no provision comparable to Ontario's express saving clause, already quoted; (b) specific mention of the child's obligation to maintain its parents is removed for English adoptions; and (c) there is special provision for affiliation orders and citizenship in the United Kingdom act. Differences in property rights will be discussed later. A new broom might have been used in the English consolidation of 1950 and the Ontario revision of 1954 in the light of the larger property rights now given upon adoption in both England and Ontario.

This general survey reveals a serious problem in interpretation. On the one hand, we have New Zealand legislation that gives the child a new family and cuts it off from its old family for all purposes (including property), with four specific and limited exceptions, such as the crime of incest. On the other hand, we have Ontario, which gives only certain limited changes and provides that in no other respect will the child be treated otherwise than before the adoption. In between these extremes, there are varying degrees of change with special provision for property rights in most instances. It is easy and orthodox to point to the absence of legal adoption at common law and to suggest that the adoption legislation of the various provinces and states alters that older law only in so far as its express language allows. Thus when a child is made the child of its adopting parents for some purposes, whether few or many, we are inclined to say that it does not become the grandchild of the adopting parents' parent for the same purposes. This conclusion is mandatory in Ontario. But it is not elsewhere. In the light of today's concept of an adopted child as a full member of his adopting family, a court will not be wrong when, putting aside a technical approach, it gives a larger measure of recognition to the effect of an adoption.

This approach applies both in the child's relationships to various kindred, old and new, and in the child's status as child or other relative for various purposes. Thus the High Court of Australia has recently unanimously held in *Dehnert* v. *Perpetual Executors*,[14] reversing the lower court, that an adopted child is a child of a testator within the testator's family-maintenance legislation of the state of Victoria. There was no definition in the legislation to include a testator's adopted child within the word "child". The court, however, looked to the adoption legislation,

[14] (1954), 28 Aust. L.J. 355 (H.C.).

where it found that, for purposes of the future custody, maintenance and education of the child, the child stands to his adopting parent as if born to the parent in lawful wedlock, and that, by a separate subsection, the child is given a right of succession to the property of his adopting parent as if born to him in lawful wedlock, and loses his right to take from his natural parent. Reading the two subsections together, the court held that for purposes of testator's family-maintenance legislation, the child was now the child of the adopting parent and no longer the child of his natural parents. A strict or limited interpretation of the benefits conferred by the adoption act should not be made. Sir Owen Dixon C.J. said, after reviewing all the provisions of the adoption legislation and their possible interpretations:

> It appears to me that all the foregoing matters combine to show that s. 7 of the [Adoption] Act provides a general rule with respect to the position of an adopted child taking property on the death of an adopter wide enough to include a statutory power in the Court to vary the testamentary dispositions made by the adopter so as to make a provision for the adopted child's maintenance. To interpret s. 7 otherwise would be to mistake its purpose and miss the fact that it is a provision which expresses a principle to be applied generally in the law affecting parent and child, namely, that in reference to custody, maintenance and education and the devolution of property, the adopter takes the place of the natural parent. [pp. 356-357]

His Honour also emphasized, in an earlier passage, that in interpreting the legislative provision which puts the child in the same position as a child born in lawful wedlock for purposes of future custody, maintenance and education, the rights and obligations so dealt with need not be "*inter se:* they may be rights, etc., *adversus extraneos*"—and not just those between parent and child. Reference was made by the court to an earlier decision of the House of Lords in *Coventry* v. *Surrey*[15] for a comparable English view. In both cases the rights expressly conferred upon adoption were somewhat limited. Yet that did not prevent the full enjoyment of such rights as were given, even to the extent of altering by implication the interpretation of the words "child" and "parent" in another statute.

The court did not refer to its own decision a year earlier in *Pedley-Smith* v. *Pedley-Smith*,[16] in which adopted children were excluded from the word "issue" used in a power of appointment contained in a will executed some years before the adoption. But, even here, the court was prepared[17] to treat such children as

[15] [1935] A.C. 199 (H.L.).
[16] (1953), 88 C.L.R. 177.
[17] At p. 188.

"issue" within the will, except for the presence of a proviso in the New South Wales legislation there under discussion. The exception provided that adopted children should not acquire any interest in property under any deed, will or instrument executed before the order of adoption unless the document so permitted. The *Pedley-Smith* case really illustrates again, apart from the proviso, the present inclination of the courts to go the whole way in putting the adopted child in the same position as a natural child so far as the legislation allows. To repeat the language of the *Dehnert* case: "It is a provision which expresses a principle to be applied generally".

I now propose to deal specifically with the many situations where the status of an adopted child may have significance. For convenience, the discussion is divided into the following parts:

III. Family Problems and Relationships
- (a) Custody and access
- (b) Guardianship
- (c) Maintenance of the child
- (d) Maintenance of others by the child
- (e) Child's wages
- (f) Marriage
- (g) Effect of an adoption upon nullity proceedings
- (h) An adopted child's name
- (i) Torts

IV. Effect of Adoption on Other Statutes
- (a) General
- (b) Provincial statutes
- (c) Federal statutes

V. Intestate Succession
- (a) General
- (b) Property legislation
- (c) Intestacy of natural parents and kindred
- (d) Intestacy of former adopting parents and their kindred
- (e) Intestacy of adopting parents
- (f) Intestacy of kindred of adopting parents
- (g) Intestacy of adopted child
- (h) Intestacy of the adopted person's child or other issue
- (i) Half-blood, double-blood and step-relationships
- (j) Rights of the Crown to bona vacantia or by escheat

VI. Testamentary and Other Dispositions of Property
- (a) General

(b) Statutory definition of "child" in wills and other documents
(c) Lapse
(d) Effect of adoption on special property rules

VII. Life Insurance

VIII. Miscellaneous Problems
(a) Application of present legislation to earlier statutory adoptions
(b) Present effect of earlier informal adoptions
(c) Revocation of adoption orders

IX. Conclusions.

The adoption legislation applicable to family problems and relationships and to the effect of adoption on other statutes is set out at this point for convenience of reference. The subsidiary provisions for former adoption orders and for special statutes are omitted, but will be referred to from time to time where they are relevant. In the case of every Canadian jurisdiction except Manitoba and, in a minor respect, British Columbia, property dispositions are dealt with in separate provisions of the adoption legislation and they will be set out later.

ALBERTA[18]

97. (1) An order of adoption shall,—
(a) divest the natural parent, guardian or person in whose custody the adopted child has been, of all legal rights and free them from all legal obligations and duties in respect of the child.
(b) make such child, to all intents and purposes the child of the adopting parent or parents;
(c) impose upon the adopting parent or parents all legal obligations and duties as if the adopting parent or parents were the natural parent or parents of the child as from the date of the order of adoption.

(2) The adopted child shall bear the surname of his adopting parent, unless otherwise ordered by the judge.

(3) In and by the order of adoption the judge may in his discretion give to the adopted child any first or Christian name or names requested by the petitioner in his petition.

BRITISH COLUMBIA[19]

9. Subject to the provisions of subsection (2) of section 3, upon the making of the order of adoption:—

[18] Alberta: The Child Welfare Act, 1944, c. 8, ss. 97-103. In footnotes 18 to 29, all sections dealing with the effect of an adoption order are listed. Not all are copied in the text at this stage. Others, dealing with property, are copied later: see footnotes 136 to 147.

[19] British Columbia: Adoption Act, R.S.B.C., 1948, c. 7, ss. 9-12; am 1953, 1st sess., c. 3.

(a) The natural parents of the unmarried minor, and any previous parent by adoption, and the guardian shall be divested of all legal rights in respect of the unmarried minor, and shall be freed from all legal obligations and duties in respect of the unmarried minor as from the date of the order:

(b) The unmarried minor shall take the surname of the petitioner as his parent by adoption with his own Christian or given name or names, or such surname and Christian or given name or names as the Court on the request of the petitioner may order; and the order of adoption shall state the surname and Christian or given name or names so taken by the unmarried minor:

(c) The parent by adoption and the minor so adopted shall sustain toward each other the legal relation of parent and child, and shall respectively have all the rights and be subject to all the obligations and duties of that relation, including the right of inheritance and succession to real and personal property from each other, except as those rights are affected by the provisions of this Act.

[3. (2) In like manner an adult husband and his adult wife together may adopt the unmarried minor child of either of them, whether legitimate or illegitimate; but in the case of a legitimate child so adopted, the making of the order of adoption shall not affect the legal rights, obligations, and duties existing between that child and the adopting husband or wife who is the natural parent of the child.]

MANITOBA [20]

97. (1) Where a decree of absolute adoption has been made,

(a) all rights and duties as between the child and the natural parents of the child shall cease and the child shall thereafter be the child of the adoptive parents;

(b) the child shall take the surname of its adoptive parents unless, in the case of a legitimate child, the adoptive parents request that it shall retain the surname under which its birth was registered; and the child shall be entitled to proper support and care from its adoptive parents, and shall have the same rights of inheritance from the adoptive parents as a child born of parents married to each other would have from its parents; and

(c) an adoptive parent shall be entitled to the services, wages, control and custody of the adopted child and shall have the same rights of inheritance from or through the adopted child as a parent would have from a child born of parents married to each other;

but neither the adopted child nor an adoptive parent shall be capable of inheriting from, or taking through, each other property expressly limited to heirs of the body of the child or adoptive parent.

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[20] Manitoba: The Child Welfare Act, R.S.M., 1954, c. 35, ss. 97-99.

NEW BRUNSWICK[21]

28. An interim adoption order from the date it is made until it is set aside, and an adoption order from the date it is made, shall

(*a*) divest the natural parent, guardian or person in whose custody the child had been of all legal rights in respect of the child, and free such persons from all legal obligations and duties as to the maintenance of the child;

(*b*) make the child free from all legal obligations of obedience and maintenance in respect of his natural parent, guardian or person in whose custody he had been;

(*c*) make the child, for the purposes of the custody of the person and rights of obedience, to all intents and purposes the child of the adopting parent;

(*d*) give the child the same right to any claim for nurture, maintenance and education upon his adopting parent, as he would have were the adopting parent his natural parent.

29. (1) Upon the making of an interim adoption order the child adopted shall take the surname of his adopting parent.

(2) Upon ordering the issue of an interim adoption order or at any time thereafter until the issue of the adoption order, the Court may on the application of the adopting parent order that the Christian name or names of the child be changed to such name or names as the adopting parent may request and where such an order is made the child shall take the Christian name or names so given upon the making of the order.

(3) The adoption order shall state the surname and Christian name or names so taken by the child.

NEWFOUNDLAND[22]

Section 142 is the same, in all material respects, as Alberta's s. 97.

NORTHWEST TERRITORIES[23]

9. (2) An order under subsection one has the effect of —

(*a*) divesting the natural parent, guardian or person in whose custody the unmarried minor has been, of all legal rights in respect of him and freeing such persons from all legal obligations and duties as to the maintenance of the unmarried minor;

(*b*) making the unmarried minor, for the purposes of the custody of the person and rights of obedience, to all intents and purposes the child of the adopting parent; and

(*c*) giving the unmarried minor the same right to any claim for nurture, maintenance and education upon his adopting

[21] New Brunswick: The Adoption Act, R.S.N.B., 1952, c. 3, ss. 28-33.
[22] Newfoundland: The Welfare of Children Act, R.S.N., 1952, c. 60, ss. 142-145, 147, 150.
[23] Northwest Territories: Adoption Ordinance, 1948, c. 35, ss. 9, 13-16.

parent as he would have had were the adopting parent his natural parent.

(3) In and by the adoption order the stipendiary magistrate may in his discretion give to the adopted child the surname of his adopting parent and change his Christian name or names, giving the child such Christian name or names as the adopting parent may desire, and in such event the child is thenceforth entitled to and be known by the surname of the adopting parent and the Christian name or names so given.

NOVA SCOTIA[24]

9. (1) If the court is satisfied of the identity and relations of the parties and that it is proper that the adoption should take place, the court shall make an order by which, except as provided in this Act, all rights, duties, responsibilities, and other legal consequences of the natural relation of child and parent, including settlement, shall thenceforward exist between the child and the petitioner and his kindred, and shall, except as regards marriage, incest or cohabitation, terminate between the person so adopted and his natural parents and kindred, or any previous adoptive parent.

(2) Such order shall not place the parent by adoption or adopted child in any relation to any person, except each other, different from that existing before as regards marriage, or rape, incest or other sexual crime committed by each or both.

(3) The court, by an order for adoption, may order such change of name of the person adopted as the petitioner requests, or may order that the name of person adopted shall not be changed by the adoption.

(4) Unless the court otherwise orders, the surname of an adopted person shall be surname of the person who adopts him.

ONTARIO[25]

76. The court may impose such terms and conditions in an adoption order as the court thinks fit and in particular may require the adopting parent by bond or otherwise to make for the adopted child such provision as in the opinion of the court is just and expedient.

77. (1) Upon an adoption order being made and unless the adoption order provides for the adopted child to retain his surname, the adopted child shall assume the surname of the adopting parent.

(2) In and by an adoption order, the court may in its discretion change the Christian or given name or names of the child to be adopted giving the child such name or names as the adopting parents may desire, and thereafter the child shall be entitled to and known by the names so given.

(3) Upon an adoption order being made, all the rights, duties, obligations and liabilities of the parent or parents, guardians or guardians of the adopted child in relation to the future custody, main-

[24] Nova Scotia: Adoption Act, R.S.N.S., 1954, c. 4, ss. 9-12, 19.
[25] Ontario: Child Welfare Act, 1954, c. 8, ss. 76-80, 82.

tenance and education of the adopted child, including all rights to appoint a guardian or to consent or give notice of dissent to marriage, are extinguished, and all such rights, duties, obligations and liabilities vest in and are exercisable by and enforceable against the adopting parent as though the adopted child was a child born to the adopting parent in lawful wedlock, and in respect of the same matters and in respect of the liability of a child to maintain his parents, the adopted child stands to the adopting parent in the position of a child born to the adopting parent in lawful wedlock.

(11) For the purposes of the enactments relating to fatal accidents, the adopting parent shall be deemed to be the parent of the child.

(12) Except as provided in this Part, an adopted child shall not be deemed the child of the adopting parent.

PRINCE EDWARD ISLAND[26]

10. (1) An order for adoption shall:

(a) Divest the natural parent, guardian or person in whose custody the child has been, of all legal rights in respect of such child and free such person from all legal obligations and duties as to the maintenance of such child;

(b) Make such child, for the purposes of the custody of the person and rights of obedience, to all intents and purposes the child of the adopting parents;

(c) Give the child the same right to any claim of nurture, maintenance and education upon his adopting parents that he would have were they his natural parents.

(2) In and by the adoption order the Judge may in his discretion give to such adopted child the surname of the adopting parent and in that event from thenceforth such child shall be entitled to and be known by the surname of the adopting parent.

QUEBEC[27]

16. From and after the judgment granting the adoption:

1. The parents, tutor or persons entrusted with the custody and care of the child shall lose all the rights they possessed under the civil law, and be freed from all the legal obligations by which they were bound with respect to such child;

2. The child adopted shall in every respect be considered, with regard to such [sic] custody, obedience to parents and the obligations of children towards their father and mother, as the adopting parents' own child;

3. The adopting parents shall be bound to maintain and bring up the child as if it were their own.

17. In the judgment granting the petition, the judge may at his discretion order that the child shall thereafter bear the surname of the

[26] Prince Edward Island: The Adoption Act, R.S.P.E.I., 1951, c. 3, ss. 10-11, 13-17, 19.

[27] Quebec: Adoption Act, R.S.Q., 1941, c. 324, ss. 16-19, 21-23, 25.

adopting parent, or any other name, and such child shall then be entitled to such name or to such other name mentioned in the judgment, and shall be legally described thereunder.

25. (1) A certificate of the judgment . . . must be transcribed in the duplicate registers of civil status kept for the church, congregation or religious society to which the adopting parents belong, or in the duplicate registers kept under the provisions of article 53a of the Civil Code, in the place of the present or former residence of the adopting parents. [Form omitted]

(2) Such transcription shall then be equivalent to an act of civil status.

SASKATCHEWAN[28]

78. (2) Except as provided in clause (*a*) of subsection (3), the order shall:

(*a*) divest the natural parent, guardian or person in whose custody the child has been, of all legal rights in respect of the child, and free such person from all legal obligations and duties as to the maintenance of the child;

(*b*) make the child to all intents and purposes the child of the adopting parent as though the child were a child born to the adopting parent in lawful wedlock.

(3) Where the adopting parent is an applicant under sub-section (2) of section 68:

(*a*) clause (*a*) of subsection (2) of this section shall not apply with respect to the natural parent who is the spouse of the adopting parent; and

(*b*) the order shall give to the adopting parent and his spouse who is the natural parent of the child the same rights and obligations with respect to the custody, guardianship and maintenance of the child as if both were the natural parents and the same powers, rights and duties as joint guardians under subsection (1) of section 22 of *The Infants Act*.

(4) In and by the adoption order the judge may in his discretion give to the adopted child the surname of his adopting parent and change the Christian name or names of the child, giving the child such Christian name or names as the adopting parent may desire, and in such event the child shall thenceforth be entitled to and be known by the surname of the adopting parent and the Christian name or names so given.

YUKON[29]

Section 9 (2, 3) is the same as the Northwest Territories' section 9 (2, 3).

III. *Family Problems and Relationships*

It is proposed in this part to deal with such basic common-law

[28] Saskatchewan: The Child Welfare Act, R.S.S., 1953, c. 239, ss. 78, 80-83, 87-87A, as replaced by 1955, c. 55.

[29] Yukon Territory: Adoption Ordinance, 1954, 3rd sess., c. 13, ss. 9 13-16.

family problems as custody, guardianship and maintenance. Provisions for the child's name will be noted. Those problems which involve, largely, questions of the application of the adoption legislation to other statutes, provincial or federal, will be considered in Part IV.

(a) *Custody and access*

It will be remembered that a child may be in the lawful custody of *A* but under the guardianship of *B*.[30] As has been noted in Part I, the emphasis placed in the old common law upon the father's right to custody has been modified in recent years. The child's welfare is to a large extent paramount,[31] even over the rights of the parent.[32] But, subject to the overriding consideration of the child's welfare, one or other of the parents has prior claim. Strangers are normally excluded.

Who, then, is "parent" for custody purposes where an adoption has intervened? Before adoption was provided for by statute this problem gave rise to considerable difficulty. It is, therefore, not surprising that all twelve jurisdictions in Canada divest the *natural* parents of the right to custody either specifically as in Ontario or, elsewhere, through a general clause divesting them of all rights to the child. It would seem to be a fair inference that a statute which divests all rights takes away the right to custody, especially when the same statute gives the right to custody, specifically or generally, to others. Whether the clause divesting "all rights" includes a right not conferred on any one else need not, therefore, be considered at this stage.

It is suggested that this removal from the natural parents of the right to custody applies not merely to custody as known at common law but also to any right arising under a statute.[33] And it would seem that a right to custody granted under an order of the court made before the adoption is superseded by the adoption order. England and Ontario specifically provide that, in respect of any court's jurisdiction to make custody orders, the adopting parents stand to each other and to the child in the same relation as if they had been its natural parents.

It is submitted, however, that, in the other jurisdictions that

[30] *Re Christiansen*, July 29th, 1952 (B.C., Coady J.); *X* v. *Y*, [1955] V.L.R. 105 (Sholl J.).

[31] *McKee* v. *McKee*, [1951] 2 D.L.R. 657, at p. 666; [1951] A.C. 352 (J.C.P.C.).

[32] *Re Emmons* (1922), 67 D.L.R. 218 (Man., Prendergast J.); *Re Ross* (1914), 6 O.W.N. 242 (Britton J.); *Re Fex*, [1948] 3 D.L.R. 754 (Ont. C.A.).

[33] See, for example, Divorce and Matrimonial Causes Act, R.S.B.C., 1948, c. 97, s. 20.

have only the more general cutting-off of custody rights, the same principle applies. In *Crossley* v. *Crossley*,[34] the English legislation was held sufficient to end an earlier custody order. The mother had obtained the custody of the child, by court order, at the time she divorced Crossley. She later married England. The Englands adopted the child. In these proceedings by the mother to obtain the court's permission to take the child out of the jurisdiction, the court held that the former custody order applied only to a child of the Crossley marriage and that the provisions of that order requiring the consent no longer applied to the child. It was no longer the child of the Crossley marriage, but was by reason of the adoption the child of the England marriage. His lordship's language is not qualified in any way and for present purposes no qualification would appear to be necessary. But, because of the limitations upon the effect of an adoption in England, it may be that in matters other than custody, maintenance, education and property rights some qualification is required. What is important for present purposes is that in a matter mentioned in the legislation—custody—the court is prepared to give the fullest effect to the legislation. "He is the child of Mr. and Mrs. England: he is not the child of the marriage between Mr. and Mrs. Crossley."[34] There is no reason to believe that the *Crossley* decision would not be given effect to in all Canadian jurisdictions. An adoption order supersedes a custody order made by a court in favour of a natural parent.

Adopting parents specifically receive the right to custody upon adoption in seven Canadian jurisdictions, and in the other five it is a fair inference that, if any incidents flow from the language making the child the child of the adopting parents (Alberta, Newfoundland and Saskatchewan) or creating the legal relation of parent and child (British Columbia) or vesting all rights and other legal consequences of the natural relation of child and parent (Nova Scotia), the incident of custody belongs to the adopting parents. The only hesitation exists in Alberta and Newfoundland, where the child is made the child of its new parents, but the parent is not expressly made the parent of the child. In these two provinces, the natural parents lose all rights and are freed from all obligations, the child is to all intents and purposes made the child of the adopting parents, and the legal obligations of parent are imposed upon the adopting parent. The legislation ought to have completed the picture and conferred the *rights* of parent upon the new parents.

[34] [1953] P. 97 (Davies J.); see especially p. 99.

This is really, however, a complaint against the *form* of the legislation. I am satisfied that a court would look to the substance and hold that, despite the specification of obligations only, both rights and obligations and all other aspects of the relation of parent and child, except as specifically cut down, were conveyed by the general language making the child, to all intents and purposes, the child of the adopting parents. It is possible, even here, to say that this does not make the parent the parent of the child to all intents and purposes. Again, I submit, this looks to the form of the legislation and not its true substance. The logical inferences to be drawn from the remarks of Porter J.A. in a recent Alberta decision support the larger view of the question of custody favoured in this article.[35]

Assuming the right to custody is given, what does the grant entail? The adoption legislation in force in Canada does not spell out the answer, with one small exception in Ontario to be noted shortly. We must look elsewhere for the effect of the adoption legislation's grant of custody. Other statutes give courts jurisdiction, may equate mothers' rights to fathers' rights, and otherwise provide for questions of custody of all children generally. It would seem clear that a statute which deals with the power of a court to award custody to a parent would include an adopting parent in all Canadian jurisdictions.

In *Coventry* v. *Surrey*, Lord Atkin (with whom the balance of the House of Lords concurred) said, in dealing with an English statute making certain municipal liability depend upon the residence of a child's parents:[36]

> In construing any statute, therefore, in order to ascertain whether it affects adopter or adopted children it is only necessary to consider whether the statute purports to deal with the rights or obligations of parents or the position of a child in relation to the matters of custody, maintenance, or education [the three matters dealt with by the English Adoption Act]. If it does the adopter has the same rights and obligations as though he were the natural parent, and the child is in the same position as though he were the legitimate child of the adopters. I venture to think that this expresses the legal position better than to say that in such statutes parent must be read as meaning adopter: or that there are now two species of parents, natural and adoptive.

The House, in overruling the Court of Appeal, which had held that the Poor Law did not apply to adopting parents, recognized

[35] *Hawkins* v. *Addison*, (1955) 15 W.W.R. 18, at p. 29 (Alta. C.A.); the remarks appear as obiter in the majority judgment. The dissenting judgment did not mention the point.

[36] [1935] A.C. 199, at pp. 205-206 (H.L.).

that the Adoption Act made adopted children children of their new parents for some purposes only, but that those purposes included "custody, maintenance and education". While Lord Atkin's language refers to adoption legislation that purports to deal with *either* the rights or obligations of parents *or* the position of a child in relation to these matters, the actual legislation before him dealt with *both* the rights of the adopting parents (specifically giving, for example, custody) *and* the position of the child in relation to such parents (specifically with respect to the same matters).

Is it fair to apply the language of Lord Atkin to the Alberta statute, where the adopting parent is given no general or specific rights over the child? There is a clause by which the child is to all intents and purposes made a child of the adopting parents. The clause is sandwiched in between others divesting and freeing natural parents from rights and obligations and imposing obligations (but giving no rights) upon adopting parents. We must remember, too, the language of Edwards J. in *Re Goldsmid* when dealing with an adoption statute of 1881, which by section 5 made the child the lawful child of the adopting parents and by section 6 the adopting parents the parents of the child. Of section 5 his lordship said in a property case:[37]

> It seems to me that this section is designed to define the rights of the adopted child against the parents by adoption, and that it does not follow, because those rights are artificially given against the parents by adoption, that the parents by adoption have reciprocal rights against the property of the adopted child.

This is statutory interpretation at its worst when applied to the modern concept of adoption under, for example, the Alberta and Newfoundland statutes. I raise it, not only to warn legislators to avoid its pitfalls, but to cast it down: to suggest that the view of Lord Atkin is applicable not merely to the English statute defining the positions mutually, but also to those, including Alberta's, where one side of the story only is set out specifically. The other side is a proper inference today, especially in matters of custody, guardianship, maintenance and access.

As between the adopting parents, where they no longer live together, are there any problems? The common law preferred the father to the mother except in very special cases of gross immorality or abandonment. A number of jurisdictions have, apart from the premise that the welfare of the child is paramount, put the claims

[37] [1916] N.Z.L.R. 1124, at p. 1126 (Edwards J.).

of the mother and father on a parity. Thus the Equal Guardianship of Infants Act in British Columbia gives the court power "upon the application of either parent" to award custody to either parent, "having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father".[38] "Parent", "father" and "mother" are not defined. Assuming that Lord Atkins' remarks apply to cover the parent-child relationship, do they apply to cover the relationship *between the parents*? Does an adopting mother acquire under the statute a position of equality with her co-adopting parent, the father? In Ontario (as in England and parts of Australia)[39] the point is expressly covered by providing that for purposes of custody, maintenance and access the adopting parents shall stand, not only to the child but also to each other, in the same position as if they had been the father and mother of the child.

What about other jurisdictions where the legislation is silent on this point? It is submitted that where the adopting parents are given the right to custody all the incidental items that go with that right are included. There is less difficulty in answering this question where the child is made the child of the parents (Alberta) than in those jurisdictions, such as British Columbia, where the legislation merely says that the child and parent shall sustain *toward each other* the legal relation of child and parent. While the Canadian legislation in its present form leaves a theoretical difficulty, I suggest that a fair interpretation would hold that the new relationship existed not only between the parents and the child but also between the parents. Specific provision for this problem by Ontario and England in one or two situations leaves an implication that as to other situations the relationship of the parents *inter se* is not covered. In those two jurisdictions little more than custody, maintenance and education is given, so that the potential problem is not serious. It would be better, if any provision is made, to use New Zealand's clause (c):[40]

> The relationship to one another of all persons . . . shall be determined in accordance with the foregoing provisions of this subsection so far as they are applicable.

A few custody problems remain. The statutory power of a divorce court to make a custody order upon the dissolution of the

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[38] R.S.B.C., 1948, c. 139, s. 13.

[39] Ontario: s. 77(4); U.K.: s. 10(2); Queensland: *supra*, footnote 6, s. 8(1); Victoria: Adoption of Children Act, 1928, No. 3605, s. 7(1).

[40] See footnote 11.

marriage raises no substantial difficulties.[41] For custody purposes, adopted children become the children of the adopting parents: *Crossley* v. *Crossley*.[42] Does the same rule apply to a statutory jurisdiction to award custody following a declaration of nullity or a decree of annulment of the "marriage" entered into between the adopting parents? A large number of jurisdictions do not permit more than one person to adopt a child at the same time, except a husband and wife. In none of the cases where the court has made a custody award following a decree of annulment has there been any suggestion that the adoption is invalidated by the decree, which in effect is retroactive to the date of the marriage. In *Martin* v. *Martin*,[43] a voidable marriage case, the wife who had secured a decree on the ground of her husband's impotence obtained without difficulty an order from Hill J. for custody of the couple's adopted child. In *S* v. *R*[44] the discussion centered around the power of the court to make the order: Did the statute giving jurisdiction to make custody orders cover adopted children? Macrossan C.J. held that it did and awarded the female petitioner, in nullity declaration proceedings on the ground of bigamy, custody of the couple's adopted child. Finally, in *Skinner* v. *Carter*,[45] the English Court of Appeal discussed this point fully in a case where the marriage was bigamous. The court had no difficulty, despite the requirement that two persons may adopt only if they are spouses, in holding that until set aside, if it could be, the adoption order remained in effect.

Access to the child by a parent who does not have custody is not a matter of right unless agreed to by the parties or ordered by the court. Many orders giving one parent custody grant access to the other at reasonable times to be worked out between the parties. If the court has power to award custody of an adopted child to one parent, it would seem to have power to award access to the other. Few special problems, apart from those for custody, appear. In all Canadian jurisdictions, as has been noted, an adoption

[41] In *Humphries* v. *Humphries*, (1953) 11 W.W.R. 95 (B.C., Coady J.), jurisdiction was not questioned. In *Culver* v. *Culver*, [1933] 2 D.L.R. 535 (Sask., Taylor J.), the court found difficulty with a foreign adoption, and without deciding upon the rights of that adoption, granted the husband, in his application for "custody, care and control", the "care and control" of the adopted child then living with the mother. The child was within the jurisdiction and the court's inherent power was always available.

[42] [1953] P. 97 (Davies J.), discussed *supra*, in text to footnote 34.

[43] (1930), 142 L.T. 560; 46 T.L.R. 257 (Hill J.).

[44] [1947] Q.W.N. 42 (Macrossan C.J.).

[45] [1948] Ch. 387 (C.A.); see particularly the remarks of Lord Greene M.R. and Somervell L.J. during the argument (pp. 388, 389), and Lord Greene's judgment at pp. 391, 395.

order terminates a parent's rights of custody, even when they are given by a court order. It is suggested that any right to access is equally lost. In Ontario custody is taken away, custody *and* access specifically conferred. I think, however, that the removal of the right to custody removes the potential right to access. In British Columbia, where an adoption order divests all rights, the court has refused to make an adoption order in favour of a mother who had custody and her new husband, because of the objections of the first husband, the father of the child. The father had a right to access and feared that his rights, actually exercised only once in eight or nine years, might be cut off by the adoption order.[46]

Manitoba has tried to circumvent this problem by providing that in the case of dissolution of the parents' marriage where one parent is awarded custody, and remarries, that parent "shall be deemed to be the guardian of the person of the child for the purpose of adoption by himself and his spouse under" the adoption legislation "unless the order otherwise provides".[47] Is an order giving the father access a provision otherwise?

(b) *Guardianship*.

The legislation in all jurisdictions in Canada except Manitoba and Nova Scotia divests the guardian at the time of adoption of all rights or, in Ontario, all rights of custody, maintenance, education and consent to marriage.[48]

In Manitoba an adoption order terminates the guardianship of the Director of Public Welfare or of a child welfare society.[49] There is no express provision divesting any other guardian of

[46] *Re Midland*, (1955) 14 W.W.R. 699 (B.C., Wood J.). See also to the same effect *Re Toms*, [1950] 2 W.W.R. 863 (B.C., Macfarlane J.), where the father was quite happy to allow the child to continue in its new family home, but did not wish to lose his rights. In both cases, it was suggested that when the child was old enough to have its own wishes put before the court, the court might then reconsider. In a more recent Alberta case, while the majority assumed in obiter that an adoption would cut off custody *and* access (at p. 29), O'Connor C.J.A., dissenting, would have varied the adoption order by allowing the natural father (former husband) "the right of access he has under the divorce decree" (p. 25). The majority allowed the natural father's appeal from an adoption order which had dispensed with his consent: *Hawkins* v. *Addison*, (1955) 15 W.W.R. 18 (Alta. C.A.).

[47] Manitoba: s. 101.

[48] In Alberta, N.B., Nfld., P.E.I., Quebec (substitute "tutor" for "guardian"), Sask. and the two territories the persons divested are the "natural parent, guardian *or* person in whose custody" the child has been. In those jurisdictions where there are testamentary guardians, and one parent has died appointing testamentary guardians who are acting jointly with the surviving parent, does the "or" clause operate to divest all? In B.C. and Ontario the disjunctive "or" is not used.

[49] Section 96(11).

powers and duties. His consent is required and, "until a decree of absolute adoption has been made", he is not "relieved of any duty or liability" merely by signing the consent.[50] Is it to be inferred that this section, dealing with consents to adoption inferentially, has the effect of divesting him of rights and duties once the order is made? All rights and duties as between child and natural parent cease: this provision probably disposes of the rights of the natural parent as guardian. But what of other guardians? The child is made the child of the adopting parents, with the specific effects set out. Guardianship is not mentioned. And what of a testamentary guardian[51] appointed by a now deceased parent who honestly seeks to have the child adopted for its own future welfare, who consents to an adoption which is effected, but who comes to court and says, "I have been managing $10,000 in securities belonging to the infant and receiving the rents and profits of the infant's real property. I realize that the child's adopting parents are probably now guardians of his person, perhaps jointly with me, but are they guardians of his property solely, or jointly with me?" There is nothing inconsistent in one parent and a testamentary guardian appointed by the other parent acting jointly as guardians. It would appear that a testamentary guardian's rights continue in Manitoba in the absence of any clear provision[52] that his rights and duties necessarily cease with the adoption of the ward. It is true that, if he is adopted into a family by a married couple, social policy would prefer an end to the testamentary guardianship, at least in so far as custody and education are concerned. Can the same be said of property matters? If the law in other provinces is any indication, perhaps so. But, even there, the courts might interpret the word "guardian" in its context, as limited to guardian of the person. The legislation should be clarified.

In Nova Scotia the order terminates all rights, duties, respon-

[50] Section 94(2, 5).

[51] Testamentary guardians are still recognized in Manitoba: The Welfare of Children Act, R.S.M., 1953, c. 35, s. 103(3), and the powers of a guardian include, by s. 108, "possession and control of the real property of the infant and the receipt of rents and profits thereof"; "management of the personal property".

[52] The adoption legislation is not clear: there is no removal of the rights of a guardian, other than those of the society by s. 96(11) and those of the the natural parent (as natural parent?) by s. 97(1)(a). And yet the same legislation a few sections further on deals with the rights and duties of guardians of infants generally, specifically deals with who is guardian for consent to adoption purposes in case the marriage of the child's natural parents has been dissolved, yet says nothing of the other problems of guardianship in relation to adopted children. Do these specifications cut down what might otherwise be the effect of s. 97(1)(a, c), dealing with the general effect of an adoption, and copied *supra* at footnote 20.

sibilities and other legal consequences of the natural relation of child and parent "between the person so adopted and his natural parents and kindred, or any previous adoptive parent". Nothing is said about guardians, testamentary or otherwise. The general interpretation given to statutes is that acts already validly done are not affected unless the intention to alter them is clear. The *right* of a parent to appoint a guardian by will disappears once the child is adopted. But I suspect that a testamentary guardian already functioning under a deceased testator's will is not thereby ousted. On the other hand, is it clear that a guardian *of the person* in Nova Scotia loses his status upon the adoption of his ward by someone else?

In both Manitoba and Nova Scotia the natural parents' power to go to court to have a guardian appointed is of course removed, as is, it is suggested, the power of the court to appoint a guardian under any special legislation for orphans or neglected or deserted children, except, of course, in so far as an orphan status, neglect or desertion may arise from the new relationship.

In Ontario the authority of the guardian is removed only for the matters listed. Management and control of property is not one of them. What is the authority of a testamentary guardian over the infant's property in this province after adoption? It is assumed, though there is some doubt,[53] that testamentary guardians still exist.[54]

From the other point of view, do the adopting parents become the guardians of the child? In no province is the office expressly conferred. In all twelve Canadian jurisdictions I suggest that the adopting parents do become guardians of the person, with such rights and duties as are incident to the status. Some doubt might be occasioned by the unfortunate divesting-and-granting type of legislation used in all jurisdictions except British Columbia and Nova Scotia. In these ten jurisdictions, the natural parents and

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[53] See *Re McPherson*, [1945] O.W.N. 533, where the continued existence of testamentary guardians in Ontario is preferred, despite the repeal of the statutory power to appoint such guardians (it being remembered that the power was statutory in the first place).

[54] The statement by Logie J. in *Cullen* v. *Kemp*, 28 O.W.N. 324, at p. 326; [1925] 4 D.L.R. 579, at p. 582 (language slightly different in D.L.R.), that the "statutory effect [of an adoption order] is to deprive the testamentary guardian of *all legal rights* in respect of the infant" was made at a time when Ontario's adoption legislation was similar to that today in New Brunswick, Alberta and other jurisdictions: divest the natural parent, guardian or person having custody of *all* legal rights: 1921, c. 55. In 1927 Ontario adopted restrictive provisions based upon the former English legislation of 1926; the 1954 Ontario legislation brought in the English property changes of 1950, but made no alterations as to guardianship.

guardians (parents only in Manitoba) are divested of all legal rights to the child, but the adopting parents are not expressly given comparable rights. Perhaps, as I have said before, these rights follow by necessary intendment. The new parents do get custody. Guardianship of the person should follow. Even then there are difficulties in Ontario.[55]

What about guardianship of the child's property or "estate" by the adopting parents? These parents probably receive,[56] in British Columbia, Nova Scotia and Saskatchewan, such guardianship rights over the child's property as are held by a normal parent. The language of the legislation in these three provinces is sufficiently broad. In Manitoba, where the child is thereafter "the child of the adoptive parents", the same rule would seem to follow. The express provision in this province that the adopting parents become entitled to the child's wages is not really any help in this connection. It is a strange provision to find in a statute as recently rewritten as 1953. In any event, it suggests ownership, not the trusteeship of a guardian. In the other jurisdictions clarification is needed.

Finally, what about the right of the adopting parents to appoint guardians, testamentary or otherwise? In Ontario the right "to appoint a guardian" is expressly given.[57] No distinction is made between person or property. Is any to be implied from the limited nature of the rights given in that province and from the context in which the right is given—rights and obligations as to custody, maintenance and education and to consent or dissent to marriage? It is suggested that no limination is intended or appears. In British Columbia, Nova Scotia and Saskatchewan the right, as to both person and property, appears to follow from the status created. In *Penwarden* v. *Gray*[58] it was held, under the comparable legislation then force in New Zealand, that, as a lawful parent had the right to appoint a testamentary guardian, the making of the new parents for all purposes parents of the child, with the exception of certain property rights, gave them the right to appoint a

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[55] In Ontario "all rights to appoint a guardian" are expressly given. Nothing is said about the new parents being made guardians. Subsection 12 expressly limits the effects of the act to such things as are listed. The status of the adopting parents as guardians is not one of them.

[56] Except for such property already under the control of a guardian (testamentary or otherwise) at the time of adoption, and whose rights may not have been removed, as noted in an earlier paragraph.

[57] See footnote 53 for doubts whether a testamentary guardian exists today in Ontario.

[58] [1931] N.Z.L.R. 780 (C.A.). Cf. especially Smith J. at pp. 793-794; the other judges proceed on this premise.

testamentary guardian. In this case the testamentary guardian was asserting a right to custody, but no exception for property is suggested. In the other jurisdictions it might be argued from the limited nature of the "rights" given to the adopting parent that the right to appoint a guardian is not one of them. On the basis of the approach to the legislation suggested earlier, however, a fair interpretation of an adoption in Canada as providing a change in status would carry with it this right.

(c) *Maintenance of the child*

The obligation to maintain the child is removed from the natural parents and imposed upon the adopting parents in all Canadian jurisdictions. It would follow, then, on the basis of the interpretation discussed in the general survey earlier in this article, particularly the case of *Coventry* v. *Surrey*,[59] that all questions of maintenance of the child by the *parent*, whether by statute or at common law, would be resolved by treating the child as the child of the new parents and not the child of the old parents. Thus a provision in workmen's compensation legislation providing for the maintenance and education of the child of a deceased worker is now held to include an adopted child of the worker.[60] And provision in divorce legislation providing for an order for maintenance of the children of the marriage will include adopted children.[61] Despite what has been said, specific legislation may define words in maintenance legislation as including or excluding for that statute some or all of the adopted relationships.

For purposes of parent-child maintenance a change has clearly occurred. But has it carried over into other relationships besides that of parent and child? Does the *Coventry* case help us to determine whether an adopting parent's father is a grandparent within the meaning of a statute imposing upon grandparents a liability to maintain? Is he liable to maintain his child's adopted child—his "grandchild"? Or is the natural grandfather the one upon whom the legislation imposes liability?

The liability of natural kindred to maintain the child is not likely to be of practical importance. It might arise from statute. The Alberta Maintenance Order Act[62] requires that the father, mother and children "of every old, blind, lame, mentally defi-

[59] See footnotes 15 and 36.

[60] *Ward* v. *Dorman Lang*, [1933] 2 K.B. 658 (C.A.), as expressly overruled in *Coventry* v. *Surrey*, [1935] A.C. 199, at p. 208, (H.L.).

[61] *Humphries* v. *Humphries*, (1953) 11 W.W.R. 95 (B.C., Coady J.).

[62] R.S.A., 1942, c. 135, ss. 2, 3(1), 4(2) (long title: "An Act to Provide for the Maintenance of Children and Poor Persons").

cient or impotent person, or of any other poor person who is not able to work, shall provide maintenance . . . for such person". The father, and mother, of every child under sixteen are required to provide maintenance. By definition, "father" includes "grandfather", "mother" includes "grandmother", and "child" includes "grandchild". Section 4 provides an order of liability, that of grandparents not arising unless the parents are unable to maintain the child. Nothing is said about relationship by adoption. Illegitimate children are excluded by definition from the word "child".

In Nova Scotia there would be no difficulty with kindred. The change in family is completed not only for parents but for kindred. In the other Canadian jurisdictions there is the usual divesting of *parents* of rights and obligations. Nothing is said about kindred. Rights and obligations are imposed upon the new *parents*. In addition, however, in Alberta, Manitoba, Newfoundland and Saskatchewan, the child is made the child of the adopting parents. And in British Columbia the new parent and the child "sustain toward each other" the legal relation of parent and child. There is in these five provinces, I suggest, sufficient statutory justification to carry over the new relationship so created to the kindred relationships.

It is true that a very legalistic interpretation would say that the legislation does not change the old common-law relationships any more than is specifically set out. In fact, even in the parent-child relationship, you will find dicta, such as that of Wood J. in *Re Lakha Singh*,[63] which ignore the approach of *Coventry* v. *Surrey*. In the *Lakha Singh* case, the court was faced with an application under testator's family-maintenance legislation by an illegitimate child of the testator. The court noted, in obiter, that by the terms of the legislation a "child is stated to include an adopted child" and added, "Without this legislation even an adopted child could not succeed". With respect, I suggest that, even without a special definition of child in the legislation, an adopted child could come in as a child of the testator: not only does the Adoption Act of British Columbia provide that child and parent shall sustain toward each other the legal relation of parent and child but gives each all the rights of the relationship "including the rights of inheritance and succession . . . from each other". But progress is slow where the approach to legislation used in the *Lakha Singh* case is allowed to prevail. Fortunately every statute, apart from

[63] (1955) 14 W.W.R. 617 (B.C., Wood J.). See text to footnote 106 for a discussion of this case: its premise on this point is inaccurate.

the Adoption Act, does not require its own definition to bring in adopted children.

Is it not part of the same scheme and interpretation which I have suggested to hold that adopted children are cut off from natural kindred for the purposes of maintenance? To do so goes two steps further in using the new relationship of child and parent. We use that new relationship beyond the immediate child-parent relationship—use it in the child-kindred area. We also use it, not merely affirmatively to establish the relationship with new kindred, but negatively to cut off the old relationship with natural kindred. In the five provinces mentioned, in addition to Nova Scotia, I am prepared to go that far. Legislative clarification would be welcomed. New Zealand's model again suggests itself.[64]

In the other six Canadian jurisdictions the divesting and granting relates to parents only. Nowhere is the child made the child of the parents generally. And, in Ontario, we must remember the express provision that the child is not made the child of his adopting parent for any purposes other than those listed. Maintenance by kindred is not expressly included as one of them. Maintenance by parents is. I hesitate to suggest that any change has occurred in these six jurisdictions, no matter how absurd this may seem in the actualities of modern adoption practice, by which as many difficulties as possible are, quite properly, put in the way of identifying the child with his natural family. But they are not insurmountable difficulties. The information can be obtained by way of a court order. Legislative change is essential in these jurisdictions: not to amend the various maintenance and other statutes to remove the liability of natural kindred and to add that of adopting kindred, but to amend the adoption legislation itself to achieve the same result for all purposes and for all laws, whether common or statutory.

The liability of the adopting kindred is likely to be of more practical importance, yet I suggest that this obligation is in the same unsatisfactory position as that of natural kindred. The detailed discussion for *natural* kindred in the preceding five paragraphs sets out sufficiently the problems and their solution for adopting kindred.

A word of caution is pertinent at this point. Maintenance

[64] A partial solution is provided by the United Kingdom adoption legislation of 1949, c. 98, s. 13 (not repealed by the consolidating act of 1950, c. 26), which provides that for the purposes of certain listed statutes dealing with children and maintenance, inter alia, "relative" (defined to include certain relatives only) includes relatives by adoption.

legislation may not impose correlative rights and obligations. A statute may provide for the care and maintenance of a mentally ill person in a provincial hospital, and impose an obligation upon specified relatives to reimburse the state in whole or in part. In so far as this obligation may not be a right in the patient to be maintained by the relative or, it may be said, is an obligation owed to the state and not to the individual, we must watch our adoption legislation, which may divest and grant rights to maintenance by specific persons or remove and impose obligations owed to specific persons. Presently we speak of "rights and duties as between the child and the natural parents" (Manitoba) or "of all legal rights in respect of the child" (for example, Saskatchewan).

An obligation owed to the state may not be a duty "as between" child and parent: it probably is a right "in respect of" the child. Even Nova Scotia may not have covered this point. Here "all rights, duties, responsibilities and other legal consequences of the natural relation of child and parent" are dealt with. But they are to exist *between* child and new parents and kindred, and to terminate *between* child and natural parents and kindred.

What about the form of maintenance in favour of an illegitimate child arising out of an affiliation order? I have said in the opening sentence of this section on maintenance that in all Canadian jurisdictions the natural parents are freed from their obligations to maintain the child. All jurisdictions use the term "natural parents" in this connection, except Ontario and Quebec where the simple "parent" is used. The term "natural parent" is not defined in any jurisdiction's adoption legislation. Does an adoption order free a putative father from his obligations under legislation providing for the maintenance of children of unmarried parents? Is he a "natural parent" in the sense used, or "parent" in the sense used in Ontario and Quebec? In Saskatchewan, the "natural parent" is relieved of the obligation to maintain: "parent" is defined as including "a guardian and every person who is by law liable to maintain a child" (section 2(15)). The putative father probably, therefore, in this province is a "parent", but is he a "natural parent"? In Alberta, Part III of the Child Welfare Act deals with adoptions and speaks of "natural parent"; Part IV of the same legislation deals with children of unmarried parents and includes provision for orders against the "putative father".

In Prince Edward Island, likewise, there is no definition of "natural parent" in the adoption legislation, but Campbell C.J., in considering the suitability of the mother of an illegitimate child

and her husband (by a marriage after the child's birth) as adopting parents, said: "all the child can lose [by the adoption order] is the possible advantage of an affiliation order against its putative father, with its stigma".[65] This remark may have been made on the assumption that a putative father was a natural parent within the adoption legislation and hence upon the making of the adoption order was freed "from all obligations and duties [whether owed, it would seem, to the child or to the state] as to the maintenance of such child". Or it may have been based on the view that upon adoption the child is no longer the child of its former parents, whether legitimate or illegitimate.

In Western Australia the same result was reached by a slightly different approach. In *Maddocks* v. *Robinson*[66] the full court held that an adoption has the effect of making the child the legitimate child of the adopting parents and that it is therefore no longer a bastard. An existing affiliation order is, in that event, no longer enforceable against the putative father. It is true that the adoption legislation of 1896 in that state provided that the adopted child shall, for all purposes, civil and criminal, be deemed the child born in lawful wedlock to the adopting parents and that all rights and legal responsibilities and incidents existing between the child and his or her natural parent shall terminate.[67] Likewise there is no definition of natural parent. The whole spirit of the act gives the child, as the marginal notes indicate (even assuming inadmissibility), the "status of a legitimate child" of the adopting parents and these parents the status of lawful parents. But probably on this question no real difference exists in Canada.

A comparable approach has been taken in England. In *Crossley* v. *Crossley*, noted already in relation to custody orders,[68] the child was held to be no longer the child of the former marriage for purposes of custody. Maintenance and custody are two of the limited number of matters dealt with in the English statute. What applies for one should apply for the other. The child should be no longer the child of the putative father for purposes of affiliation orders. In fact, whether this would follow or not, the statute of the United Kingdom[69] has since 1949 expressly provided that

[65] *Re A* (1944), 17 M.P.R. 307 (P.E.I., Campbell C.J.).

[66] (1913), 16 W.A.L.R. 4 (F.C.). The case of *Howie* v. *Barron*, [1929] Q.W.N. 1 (F.C.), comes to a different result, but the legislation then in force in Queensland gave the adopted child no new rights and took away none (other than altering birth certificates).

[67] Adoption of Children Act, 1896, No. 6.

[68] *Supra*, footnote 34; for an earlier view *contra*, see (1932), 174 L.T. Jo. 301.

[69] (1949) 12, 13 & 14 Geo. 6, c. 98, s. 11(2); (1950) 14 Geo. 6, c. 26, s.

an affiliation order ceases upon the adoption of the child. It is true that no question of the use of "parent" or "child" in relation to illegitimacy arose in the custody case. But, even apart from the express statutory provision, the principle of the custody cases seems equally applicable to affiliation. There are no longer any natural parents, whether legitmate or otherwise: there are only the new parents.

The same approach will be applied in Canada, I suggest. Ontario does offer some difficulty. Here, both adoption and affiliation orders are dealt with in one act—a new statute enacted in 1954.[70] Section 42 makes an attempt to meet this problem by providing that nothing in the sections dealing with affiliation orders requires the director "to interfere with the care and maintenance of a child born out of wedlock where the child has been adopted . . .". This provision does not prevent the mother, or even the director, from bringing affiliation proceedings. The inference is that an adopted child is to be largely, but not entirely, removed from such proceedings. Has section 42 by its negative inferences altered what might otherwise have been the effect of the adoption portion of the legislation?

(d) *Maintenance of others by the child*

Only in New Brunswick is the child specifically freed from maintenance of its natural parents. In Manitoba and Nova Scotia all rights and obligations as between parent and child cease. Elsewhere in Canada, except Ontario, the parent is divested of all rights with respect to the child. In so far as the child's obligation to maintain its parents is a right in the parents, that right is lost. In Ontario maintenance of the child is transferred from old to new parents, but maintenance by a child is merely given to the new parents. The old liability is not removed in what is rather specific legislation on this subject. In addition, the "child shall not be deemed the child of the adopting parent" except as provided in the legislation. Does the old liability continue?

The liability of the child to maintain natural *kindred* is not clearly removed except in Nova Scotia. What was said in the last section on the kindred's obligation to maintain the child applies in the other provinces to maintenance *by* the child. In short, the child's obligation to maintain either its former parents or kindred

12. The legislation contains two exceptions: (1) arrears; (2) adoption by a single woman of her illegitimate child. The second exception ceases to operate "if she subsequently marries".

[70] The Child Welfare Act, 1954, c. 8, s. 42.

should be removed. A court might hold that the legislation goes this far. Clarification is needed, especially when it is remembered that, in some provinces, the obligation to maintain *new* parents or kindred is far from clear.

In British Columbia, Nova Scotia, Ontario and Quebec, the child's obligation to maintain its adopting parents is clear. In Alberta, Manitoba,[71] Newfoundland and Saskatchewan the obligation to adopting parents probably arises from the making of the child to all intents and purposes the child of the adopting parents. It might exist also to adopting kindred. In the remaining four jurisdictions it is doubtful if the adopting parents acquire any rights of maintenance, or even indirect benefits. No obligation is imposed upon the child and the child is made the child of its new parents only for the purposes of custody and obedience.

Only in Nova Scotia is the obligation to maintain adopting kindred clear. There is probably none elsewhere in Canada, except, as just indicated, in Alberta, Manitoba, Newfoundland and Saskatchewan.

No attempt has been made in these two sections on maintenance to be exhaustive or to take into account all specific statutory modifications, other than by the adoption legislation itself, of the general picture just set out. My purpose is to show the inadequacy of the present adoption legislation in Canada, and to suggest changes. My examination, by no means exhaustive, of the ordinary maintenance laws of the provinces shows that the problem of relationship has to a large extent been ignored. Perhaps the failure to deal adequately with the problem in maintenance legislation is sound. The remedy lies in proper adoption statutes.

Testamentary provision for dependants is not specifically dealt with in this section. This type of maintenance is purely statutory and not generally considered as within the word "maintenance" when used, as it is in a number of the adoption acts, in conjunction with custody and education. The testators family-maintenance legislation should itself be examined, where the adoption legislation does not go far enough, to see if the relationship by adoption is included. A full discussion appears in Part IV.

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[71] Manitoba's is not "to all intents and purposes", merely "child shall thereafter be the child of the adoptive parents", but this is followed by an express grant: new parents "entitled to the services, wages . . . of the adopted child". The express grant might be construed either as illustrating the former or as defining its measure. I have preferred the former, but the matter is not free from doubt.

(e) *Child's wages*

In so far as a parent is entitled to the wages of his child living at home,[72] it would seem clear that in Canada the adopting parent replaces the natural parent as the person entitled. In no jurisdiction is this matter expressly dealt with, except in Manitoba. But it seems to follow necessarily from the new relationship created and the new parents' obligations to maintain the child.

In Manitoba "an adoptive parent shall be entitled to the services, wages, control and custody of the adopted child". The entitlement is clearly not a grant of more rights to the child's wages than that of a natural parent to his own child's wages. The right to a child's wages is historically closely linked to the question of maintenance and does not form part of the child's separate property rights. But its inclusion as late as 1953 in Manitoba's rewritten legislation is surprising when we consider the trend away from the old rule as to wages. Is it still part of our "common law"?

(f) *Marriage*

The subject of marriage is separately mentioned because of the prohibited degrees of consanguinity and affinity within which persons may not marry.[73] How far does adoption end earlier natural consanguinity or affinity and provide new prohibitions? Adoption legislation that makes the child for all purposes the child of the parent, particularly if it does so (as in Nova Scotia) for all consequences of the natural relation of parent and child, would clearly provide a new relationship within the prohibited degrees. Such a result might follow in the six general-purpose Canadian jurisdictions, subject to certain limitations. In British Columbia, Alberta, Manitoba and Newfoundland the new relationship may, upon construction, be limited to that between the child and adopting parent. Under Saskatchewan's 1955 legislation the same limitation may be present. I suggest not. In Nova Scotia, where the new relationship covers kindred relationships also, the statute expressly limits the effect of the new relationship, for the purposes of marriage, to that between child and adopting parent, leaving the child free to marry his "sister", the natural daughter of the adopting parents. The purpose of this last special exception is not clear in a statute enacted in 1952 at a time when the new

[72] Stated in 17 Halsbury, Laws of England (2nd ed.), Infants, s. 1401, as a right in the father.

[73] For a discussion of the nature and effect of these prohibitions in Canada, see my note (1952), 30 Can. Bar Rev. 508, and that by Leal (1954), 32 Can. Bar Rev. 447.

position of an adopted child as a full member of the family is largely recognized by the balance of the statute. In the other six jurisdictions in Canada, no new relationship is created. The child is free to marry any of his adopting relatives.

In the six general-purpose jurisdictions in which the child is made the child of the adopting parents, only in Nova Scotia does he formally cease to be a child of his natural parents or, in that province, related to his natural kindred. But in Nova Scotia the old relationship is expressly preserved for purposes of marriage. And, despite what has been said earlier about the child ceasing to be a child of the old family either generally or for some purposes, the prohibited degrees of marriage probably involve a situation where a court would say that the old relationship continues in all Canadian jurisdictions. Apart from Nova Scotia and Ontario, my suggestion is based upon simple statutory interpretation: it is a fair inference that the legislature had no intention of going that far. The further problem whether marriage relationships are changeable only by federal legislation[74] is discussed in Part IV.

Apart from the strict law, social policy probably requires the continuance of the old relationships. If so, however, they should be continued by way of an express exception in the adoption legislation's general provision cutting off all old relationships. The exception might be limited to persons related by consanguinity and not by affinity. New Zealand[75] and Nova Scotia are illustrations. It is difficult, however, in practice to reconcile the suggested exception and the policy behind it with other social policy which requires the non-disclosure of all knowledge, not of the existence of adoption, but of who were the parents and kindred before adoption.

It has been suggested to me, and I agree, that in adoption law, where natural relationships are being retained for marriage purposes, only those of consanguinity should be considered. Old natural relationships by affinity should not bar marriage.

Consent of parents to the issue of a marriage licence is largely regulated by legislation in each province and is best considered along with other special statutes in Part IV.

(g) *Effect of an adoption upon nullity proceedings*

Is the adoption of a child by a couple a bar to a later pro-

[74] Legislative power upon this subject is in the federal parliament. So far the power has been used only to relieve from some of the earlier prohibitions.

[75] See text to footnote 11, *supra*.

ceeding by one of the spouses to annul the marriage on the ground of the impotence of either spouse? Has the marriage been so approbated, by the adoption, that the usual remedy by way of annulment is lost? Yes, provided, as *Slater* v. *Slater*[76] holds, that the party seeking the remedy knew not only the facts entitling him to the remedy but also the law. Thus, in the *Slater* case, the marriage was in 1945. The husband, as the wife knew before marriage, was impotent owing to a childhood injury. In September 1949 they adopted a child. In November of the same year the wife first learned that her husband's condition gave her a legal remedy to end the marriage, though she was somewhat hazy as to what the remedy was. Singleton L.J. in the Court of Appeal, after referring to the distinction between knowledge of the facts and knowledge of the law as fine or subtle, but "none the less . . . a real one", said:[77]

> If, as Karminski J. found, the wife petitioner did not know that she had a remedy for the wrong done to her, the adoption of the child did not amount to approbation of the marriage; nor had anything else up to November, 1949, any such effect.

Is it fair to say, then, that if, with knowledge of both the facts and the existence of a legal remedy, the couple adopt a child they have approbated the marriage? Decisions in England[78] and New Zealand[79] so hold. In each of these cases the defect in the marriage was impotence. Presumably the result would be the same where there are other defects making the marriage voidable, as distinct from void. Thus marriages suffering from a wilful refusal to consummate,[80] fraud or duress, if and so far as they make the marriage voidable, would appear to be on the same footing.

Assuming that the adoption of a child has operated as an approbation of the marriage, it would seem from the very nature of the bar by way of approbation that some discretion, though little, may be left in the court. The basis of approbation as a bar is akin to estoppel—circumstances "which so plainly imply, on the part of the complaining spouse, a recognition of the existence and validity of the marriage, as to render it most inequitable and contrary to public policy that he or she should be permitted to go on

[76] [1953] P. 235 (C.A.). [77] At p. 245.

[78] *W* v. *W*, [1952] P. 152; [1952] 1 All E.R. 858 (C.A.) (subsequent proceedings: [1954] 2 All E.R. 829 (C.A.)).

[79] *B* v. *B*, [1954] N.Z.L.R. 358 (C.A.); *L* v. *L*, *ibid.* 386 (McGregor J.).

[80] In England, but not in Canada where wilful refusal to consummate is not a defect.

to challenge it with effect".[81] In a case not involving adoption, Birkett L.J. says:[82]

> I think that the test is this: in the light of all the known circumstances of the case—the proved incapacity of the husband, the nature of the married life, the effect of granting or withholding the remedy sought, and the plain approbation of the marriage with knowledge of the facts and the law, and all the other circumstances—is it contrary to public policy that the wife's prayer should be granted?

But there may well be a question whether the adoption of a child does in all cases amount to approbation, assuming a knowledge of the facts and law. In most jurisdictions a child may not be adopted by two persons at the same time unless they are husband and wife. This technicality is not suggested as enough in itself to constitute approbation. In some jurisdictions, however, a child may be adopted by one spouse with the consent of the other. An adoption of this type or a consent to an adoption by the other spouse might not operate as approbation. Even an adoption by both spouses together might not be approbation of the marriage if the adoption was effected purely for the child's sake and out of a feeling of duty to someone else. An adoption by an uncle and aunt of their orphaned nephew or niece might well not amount to approbation in that such an adoption would not necessarily imply a recognition of the existence and validity of the marriage. In his discussion of the two adoptions in *W* v. *W*,[83] Sir Raymond Evershed M.R. made it clear that an adoption will not in itself amount to approbation. There is even a suggestion that, if the adoption was inspired by the hope that through it the marriage might eventually be consummated, then there may not be approbation.[84] I question, however, this form of "conditional" acceptance of the marriage.

The courts have been reluctant in the past to use the doctrine of approbation in nullity cases. It looks as if their reluctance is being carried over into a new area of potential use—approbation of an unconsummated marriage by adoption of children. It is clear, however, that despite their reluctance the courts will treat adoption in many cases, if not in all, as an act of approbation.

(h) *An adopted child's name*

A brief note on the adopted child's name is in order. There is the background of the common law's permission to change a sur-

[81] *G* v. *M* (1885), 10 App. Cas. 171, at pp. 197-198.
[82] *Tindall* v. *Tindall*, [1953] P. 63, at p. 77; [1953] 1 All E.R. 139 (C.A.).
[83] *Supra*, footnote 78. [84] At p. 159.

name by deed poll together with the oft-repeated declaration that Christian or given names may not be changed. Most Canadian jurisdictions now have change-of-name legislation that requires advertising in a local newspaper and recording in a public record office, sometimes coupled with a judicial hearing. Changes of name otherwise than upon marriage or in accordance with adoption legislation is in these jurisdictions usually prohibited. In fact, British Columbia's change-of-name legislation expressly prohibits a man from applying to change "the surname of any of the unmarried minor children of his wife born prior to his marriage to her, except as provided in the 'Adoption Act' ".[85]

The adoption legislation of all twelve jurisdictions in Canada has some provision for the child's surname upon adoption, and in all but three[86] there is provision for Christian or given names. The pattern followed for surnames is to give the child the surname of the adopting parent unless the judge otherwise orders. In British Columbia the court may depart from the new parent's surname only if requested by that parent. In Manitoba a departure from the new parents' surname is permitted only where an adopting parent requests that a legitimate child retain "the surname under which its birth was registered". Only in New Brunswick must the child take the surname of the adopting parent. The departures from the new parents' surname probably are meant to permit children by a previous marriage to retain their original surname upon adoption by their mother and her new husband. Retention is possible in all jurisdictions except New Brunswick. In British Columbia and Manitoba the court may not order retention without the adopting parents' request.

Once the surname is given by the adoption order, any further change must be effected in the manner authorized by change-of-name legislation. Thus where, following divorce, the adopted children of the parties go to live with the mother and her new husband, they are not entitled to assume their step-father's surname.[87] In fact, where the mother had allowed the children to use her new name, the court directed, at the father's request, that they revert to their proper name.

Given or Christian names may at the time of adoption be chang-

[85] R.S.B.C., 1948, c. 44, s. 4(8). A change in the given name is permissible with the consent of the mother, the father and, if over age twelve, of the child: s. 4(4).

[86] Manitoba, Prince Edward Island, Quebec.

[87] *Humphries* v. *Humphries*, (1953) 11 W.W.R. 95 (B.C., Coady J.). The father had been awarded custody at the time of the divorce, but had allowed the children to reside with their adopting mother and her husband.

ed as the adopting parent requests or, in New Brunswick, to any name. I am, however, uncertain about the rule in the three jurisdictions where no provision is made in the adoption legislation for Christian names.

(i) *Torts*

The law in each Canadian jurisdiction may or may not make third persons liable to parents for wrongs committed against the child. There may or may not be a parental liability in tort for damage committed by a child. I shall assume the possibility of action in each case. How far does the law in each jurisdiction cover the parental relationship created upon adoption? In the first situation there were a number of common types of action: action by parents for loss of a child's services arising out of an assault or battery upon the child, out of harm done by negligence, out of the enticement or abduction of the child, or through a daughter's seduction. These common-law actions arose not from the parental relationship as such but from the master-servant relationship on the basis of loss of the child's service. The service was largely implied from the nature of the relationship of parent and child. In addition, there has been, for over one hundred years in England, and now in most Canadian jurisdictions, a statutory claim by a parent under what is known as Lord Campbell's Act, or the Fatal Accidents Act, for damages for injuries resulting in the death of a child where the child, had he lived, would have had a claim for the injuries. The statute also allows the child compensation for the death of the parent. The statutory actions do depend upon the relationship of parent and child and have nothing to do with the action, if any, which may be brought by the personal representative.

In all Canadian jurisdictions the natural parents are divested of all their "legal rights" to the child. It would seem that these potential tort claims are lost to the natural parents. In the general-provision provinces (Alberta, Manitoba, Newfoundland, Saskatchewan, British Columbia[88] and Nova Scotia) it is fair to say that both children and parents by adoption obtain them. In the first four of these provinces, my conclusion is a fair inference, even though the child is made the child of the new parent without

[88] The inference to be drawn from the short note of the judgment of Wilson J. in *McCrindle* v. *C.P.R.* (1953), 11 The Advocate 235, is that the decision, in a fatal accident proceeding, would have been in favour of the child had the adoption been completed before the deceased's death.

express reciprocal relationship. And, in the first three of them, the parent receives duties without express rights. The change in status is sufficiently extensive, however, to cover these tort situations, whether arising out of the parent-child relationship or out of the old master-servant relationship.

Apart from the general statement for these six provinces, the fatal accident legislation in Manitoba and Saskatchewan[89] makes it clear that the relationship by adoption is included—an unnecessary and possibly detrimental precaution, it is suggested. The danger of separate definition in each piece of legislation, rather than allowing the main adoption legislation to speak for itself, appears in Alberta where there should be no difficulty under the adoption legislation in holding relationships by adoption to be within, for example, the fatal accident legislation. Unfortunately, under the fatal accident legislation in that province[90] "child" is defined as including, *inter alia*, an adopted child, but a parent by adoption is not included among the meanings given to "parent". The dangers of this type of double legislation and the defect in the definition of "parent"[91] will be discussed more fully in Part IV. Here I shall merely emphasize my belief that it is safer to leave all adoption definitions to the adoption legislation alone rather than try to spell out in each statute the various relationships by adoption. In the other three general-provision provinces, British Columbia, Newfoundland and Nova Scotia, the problem does not arise: the fatal accident legislation is silent on adoption.

In the other six Canadian jurisdictions it is not so clear that parents or children by adoption obtain tort rights. Specific provision may, of course, be made in either the adoption legislation or elsewhere for specific claims. Thus in Ontario the question of fatal accidents is covered in the adoption legislation itself.[92] In the Northwest Territories and Prince Edward Island[93] the fatal accident legislation defines "child" and "parent" to include most relationships by adoption. In New Brunswick "child" only is so defined.[94] These definitions provide, of course, only a partial remedy. They apply only to fatal accident legislation.

[89] The Fatal Accidents Act, R.S.M., 1954, c. 84, s. 2; R.S.S., 1953, c. 102, s. 2.

[90] The Fatal Accidents Act, R.S.A., 1942, c. 125, s. 2.

[91] A defect avoided in England by careful drafting: Law Reform (Miscellaneous Provisions) Act, 1934, c. 41, s. 2(1).

[92] Section 77(11), copied *supra* at footnote 25.

[93] Ordinances of N.W.T., 1948, c. 15, s. 2, am. 1953, 1st sess., c. 21, s. 2; R.S.P.E.I., 1951, c. 57, s. 1.

[94] R.S.N.B., 1952, c. 82, s. 1.

Apart from special definition, where the tort action arises not out of the parent-child relationship as such but out of either the "in loco parentis" relationship or the relationship arising from custody, the problems of adoption are not serious. It is fair to say that throughout Canada the adoption legislation provides both of these relationships as between child and parent by adoption. Thus, in so far as the adoption legislation in six Canadian jurisdictions may not be sufficient to create the parent-child relationship for tort purposes, the gap is filled by those other relationships that undoubtedly arise upon adoption, in so far as any tort action is based upon one of them. And I suggest that both adopting parents stand *in loco parentis* to the child, notwithstanding the fact that one adopting parent may be a natural parent of the child. The case of *Re McClenaghan*,[95] though it did not involve adoption, is relevant. Because the child's putative father was a part of the household the court held that the child's aunt did not stand *in loco parentis*, even though she "brought him up and gave him the most care and attention", in effect took the place of his mother. The household consisted of a grandfather, his daughter and son, and the son's illegitimate child. The daughter, a widow, looked after the house. The child's mother was dead. The case suggests that, but for the presence of the child's father in the household, its aunt would have stood *in loco parentis* to it. I suggest that this case cannot be used to prevent an adopting parent from standing *in loco parentis* just because his co-adopting parent is also a natural parent, even in British Columbia where the adoption order "shall not affect the legal rights, obligations, and duties existing between [the] child and the adopting husband or wife who is the natural parent of the child".[96]

Does a different principle apply to the torts of the adopted child? Apart from adoption, it would seem that the liability, if any, of a parent for his child's torts is based primarily not upon the parent-child relationship but upon negligence. The duty imposed upon the parent is not imposed upon him *qua* parent, but as one having care and custody of his child. It would be difficult to make a parent not having custody liable in tort. It would seem therefore that, upon adoption, the adopting parent by acquiring custody gains, and the natural parent by losing custody loses, the potential obligation to make redress for his child's torts.

[95] [1954] 1 D.L.R. 675 (Ont., Judson J.).

[96] See Adoption Act, s. 3(2), copied at footnote 19. This proviso could well be repealed.

IV. *Effect of Adoption on Other Statutes*

(a) *General*

Earlier, I noted the decision of the House of Lords in *Coventry* v. *Surrey*,[97] in which Lord Atkin, for the House, made it clear that, where for purposes of custody, maintenance and education a child is made the child of the adopting parents, then in the application of statutes dealing with custody, maintenance or education the adopted child should be treated as the lawful child of the adopting parents. There is no necessity to define, for example, "child" as including an "adopted child". And it makes no difference to the interpretation if the adoption legislation further specifically makes the adopted child a child of the adopting parents for the purposes of certain named statutes, where the specification is by way of illustration or is, as in the English statute of 1926, by way of addition to the questions of custody, maintenance and education—the matters set out in the general-effect section.[98] The difficulty with the application of the adoption legislation to other statutes is that in very few jurisdictions does the adoption legislation make the child the lawful child of the adopting parents for all purposes. It is therefore necessary to determine whether the child is a child of the new parents for the purposes of the specific statutes.

There is an old rule of construction that in the absence of some statutory indication to the contrary references in a statute to the relationship of parent and child and other relationships flowing from it refer to the relationship of a child born in lawful wedlock, thereby excluding foster children, step-children and illegitimate children. This old rule was applicable to adopted children in earlier years. I say "old" rule because I suggest that more and more courts should and will disregard the artificial meaning given to the parent-child relationship when referred to in a statute or even in a document. There is revolt, already, against its use to exclude illegitimates.[99] For adopted children there should be all the more reason for excluding the old rule. In Part VI, I shall discuss a statutory reversal, for adopted children, in wills and other documents to a large extent throughout Canada. A comparable reversal of this old rule for statutes could be brought about very simply.

[97] [1935] A.C. 199, at pp. 205-206 (H. L.); passage quoted in text to footnote 36.

[98] *Ibid.*, at p. 207.

[99] Cf. *Re Leong Ba Chai*, [1952] 4 D.L.R. 715, at p. 718 (B.C., Clyne J.), aff'd without reference to this point, [1954] 1 D.L.R. 401 (S.C.C.); Denning L.J. in *Packer* v. *Packer*, [1954] P. 15, at p. 21. *Contra*: *Re Kolbe*, [1951] 1 D.L.R. 462 (Sask. C.A.); *Re Lakha Singh*, (1955) 14 W.W.R. 617 (B.C., Wood J.). All four cases deal with illegitimates.

How far our present adoption legislation has changed the adopted child's position in this respect is not too clear. In New Zealand there is no problem. There, for all purposes, with two or three specific exceptions, the child is to be treated as the lawful child of its adopting parents with all consequential changes in other relationships. Apart from property rights and two or three other specific matters, the same is probably true in Nova Scotia. At the other extreme is Ontario, with its subsection 12:

> Except as provided in this Part, an adopted child shall not be deemed the child of the adopting parent.

In the remaining Canadian jurisdictions, as indicated in the general introduction, it may be said that the courts are prepared to treat the adopted child as the lawful child of the adopting parents, with other consequential changes in relationship, in as many instances as possible. Because the legislation, apart from Nova Scotia, does not go the whole way except for a few listed matters, there will be a tendency to use the specific-matter approach, unconsciously, along the lines indicated by Lord Atkin in *Coventry* v. *Surrey*. Does the particular statute under consideration deal with a matter or purpose for which the adoption legislation has put the adopted child in the position of a lawful child of the adopting parents? The sooner we can go the whole way, the better. We need adoption legislation that makes the child a lawful child of the adopting parents for all but one or two specific purposes. Then there would be fewer doubts. In the meantime our courts can do much to help by so construing existing legislation, as they may easily do, as to place the child in the position of lawful child of his new parents in as large a number of situations as possible.

In Alberta, British Columbia, Manitoba, Newfoundland, Nova Scotia and Saskatchewan the child is either made the child of the adopting parents or placed in the legal or natural relation of child and parent with his adopting parents. Subject to what has been said in Part II about possible modification of the generality of these words in Manitoba by additional clauses spelling out special rights and obligations only and the possible exclusion in British Columbia of relationships beyond that of parent and child, there should be no problem in most non-property statutes in these provinces.

If we exclude Ontario as a very special case, the child in the remaining five Canadian jurisdictions is made the child of the adopting parents only with respect to either custody, obedience and "obligations of children towards their father and mother"

(Quebec) or custody and obedience (others). Further, in these five jurisdictions the adopting parents are obliged to "maintain and bring up" (Quebec) or to provide "nurture, maintenance and education" (others) "as if" the child were their own. The provision for the child's maintenance and education does not, in so many words, make the child the child of the adopting parents for the purposes of maintenance and education. But it does impose the obligations of the parent-child relationship for these purposes. In effect, I think it is fair to say that the adoption legislation makes him a child of his adopting parents only for certain purposes and for those purposes he is their lawful child with consequent rights and obligations.

I have discussed in Part III some specific problems—custody, maintenance, guardianship, fatal accidents—which involved statutes other than the adoption legislation itself. Others will be mentioned shortly. In all of them, we have not only the question whether the child has been put into full or sufficient relationship with his new family but also the question whether the legislation ceases to apply to the child as a child of his old family.

There is a further problem arising out of the effect of an adoption on statutes other than the adoption act. Some of these other statutes either provide definitions which bring in some or all of the adoption relationships or contain language which negates the application of the old rule of construction that "child" in a statute excludes an adopted child.[100] These statutory definitions are a danger signal, as already noted in connection with the fatal accidents legislation in Alberta.[101] Let me illustrate. Assume a statutory reference to a person's (*A*'s) "parents, grandparents, children, *adopted children*, grandchildren, brothers, sisters, nephews and nieces". Does the adopted relationship apply only to children adopted by *A*, and not to those adopted by *A*'s children or by *A*'s parents or brothers or sisters, so as to exclude them from the class headings "grandchildren", "brothers or sisters" and "nephew or nieces", respectively? It is probable that they are excluded. What about *A*'s adopting parents? Also excluded. What about lawful children of adopted children—are they grandchildren within the same clause? Probably not.

Or assume a definition of "child" as including "son, daughter,

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[100] Even in a statute distinguishing between parents and adopting parents, the former word may, by reason of context and the effect of the adoption legislation, include the latter: *Re R.M.* (1941), 193 L.T.Jo. 7 (C.A.).

[101] See text to footnotes 90 and 91.

grandson, granddaughter, step-son, step-daughter, *adopted child*, a person to whom the deceased stood *in loco parentis*, and an illegitimate child".[102] Are children adopted by a son included? In this case they probably are, although I should be more confident if the terminology had been consistent throughout—either "son" and "daughter", each preceded by "adopted", or "child" used throughout in place of "son" and "daughter".

And if "child" is defined as including an adopted child, but parent, while defined, is not stated to include an adopted child, are adopting parents excluded?

A further problem arises out of specific definitions in statutes other than the adoption statute itself. What does "adopted child" mean in the legislative illustrations just given which define "child" as including an adopted child? Presumably it means children adopted in accordance with the adoption legislation of the province, and also any other children, adopted abroad, who would within the province or territory receive recognition of their status as adopted children. It presumably would not include children adopted under the informal method in use before the enactment of adoption legislation[103]—adoptions by agreement—unless the adoption legislation put the children in the same position as children adopted under the legislation. The uniform life insurance legislation, to be discussed in detail in Part VII, provides one of the few attempts to define the words "adopted children" and "adopting parents". The definitions are tied to the right to inherit real property from each other.

Finally, in Canada and other federations, there is the problem, to be dealt with later in this part, of the application of provincial adoption legislation to federal statutes, and of the meaning to be given to definitions of "child" and other words in federal statutes where persons related by adoption are declared to be included.

(b) *Provincial statutes*

The testators family-maintenance legislation[104] of the five most westerly provinces of Canada is a good illustration of the problems involved in the application of adoption legislation to other statutes of the province. Under a testators family-maintenance

[102] The Fatal Accidents Act, R.S.M., 1954, c. 84, s. 2(a).

[103] So held in *Re McClenaghan*, [1954] 1 D.L.R. 675 (Ont., Judson J.); in that case the definition of "child" antedated any adoption legislation in Ontario by many years.

[104] R.S.B.C., 1948, c. 336; Alberta, 1947, c. 12, s. 2(b); R.S.S., 1953, c. 121, s. 2(1); R.S.M., 1954, c. 264, s. 2(a); R.S.O., 1950, c. 101, s. 1. The Saskatchewan legislation applies also to intestates.

statute a court may vary, in its discretion, the terms of a will in order to make more adequate provision for close relatives. In British Columbia the "wife, husband or children" may apply. Neither "child" nor "children" is defined. In the three prairie provinces, "child" is defined to include "a child lawfully adopted". In Ontario "child" is defined only in terms of its age or infirmity. Let us look first at British Columbia and Ontario—the two cases where the legislation does not specifically include adopted children. Is a child adopted under the adoption legislation a child within the testators family-maintenance legislation? I have already submitted[105] that in British Columbia the answer is yes. The adopted child acquires upon adoption, at least as between himself and his new parents, the full relationship of lawful child of the adopting parents, including inheritance and succession rights. In addition, we have here an excellent opportunity to apply the *Coventry* case.

It is true that in holding that an illegitimate child was not within the British Columbia Testator's Family Maintenance Act, Wood J. said:[106]

> According to the Act a petition may be launched on behalf of the wife, husband or of a child or children of the deceased. A child is stated to include an adopted child. Without this legislation even an adopted child could not succeed.

But the British Columbia statute does *not* state that an adopted child is included. Wood J. was probably thinking of the prairie legislation, to which, I am informed, he was referred. The act is silent. Despite this, I am satisfied that, because of the adoption legislation, the word "child" in the testators legislation includes an adopted child. This view is strengthened by two earlier cases in British Columbia, in both of which a child adopted outside the province by a testator dying domiciled within the province was held to be within the legislation.[107]

It was doubtful under the former Ontario legislation whether the same result would follow. The child was made the child of the

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[105] See text to footnote 63.

[106] *Re Lakha Singh*, (1955) 14 W.W.R. 617 (B.C., Wood J.).

[107] *Re McAdam*, [1925] 4 D.L.R. 138; 35 B.C.R. 547 (W.A. Macdonald J.); *Re Ramsey*, [1935] 2 W.W.R. 506; 50 B.C.R. 83 (Robertson J.). Cf. also *Re Shadforth*, [1943] 2 D.L.R. 123 (B.C., Coady J.), where the petition of the wife and adopted daughter was dismissed on the merits and without any suggestion that the latter had no status. It is my own view, to be discussed in the separate conflict of laws article, that *Re Donald*, [1929] S.C.R. 306; [1929] 2 D.L.R. 244, did not affect the *McAdam* case. In any event the later cases were decided subsequently to the Supreme Court of Canada's decision. The special provision in the adoption legislation dealing with foreign adoptions was inapplicable in all three provincial cases as it dealt only with intestacies.

adopting parents only for certain purposes: custody, maintenance, education, consent to marriage, inheritance upon intestacy from adopting parents only. I doubt if the form of "maintenance" referred to would bring in under the *Coventry* rule the type of legislation we are now considering. And we must remember Ontario's "no other purpose" clause. I am inclined to agree with the authors of a recent book on Ontario probate practice that it is questionable whether the testators legislation of that province would have applied to an adopted child.[108] But the modifications of the Ontario adoption legislation in 1954 may make a difference. For our purposes the only change is to add to the earlier purposes a provision under which an adopted child takes "the same rights to and interests in property" under a will of his "adopting parent as if the adopted child was a child born to the adopting parent in lawful wedlock".[109] In Ontario a child of a testator has certain rights and interests in his parents' property under the Dependants' Relief Act—a right to apply, if under sixteen or infirm, for an order making proper provision for his adequate maintenance. This is not an automatic right to a share in the property but a right to apply for it. The order is discretionary. But it surely is a sufficient interest in the property to bring in an adopted child. The Australian High Court decision already discussed dealt with this very point, under comparable legislation, and unanimously held an adopted child to be included: *Dehnert* v. *Perpetual Executors*.[110]

Where the testators family-maintenance legislation provides that "child" includes a child "lawfully adopted"—in the three prairie provinces—what does the definition add? It may exclude informal adoptions not validated under the adoption legislation. But in British Columbia, where there is no definition, they are equally excluded.[111] In neither case should foreign adoptions recognized locally be excluded. In any event, I suggest that the word "lawfully" adds nothing. In all five provinces, children recognized as adopted within the province will be included. Children of foster parents will not be, for the time being.

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[108] I. M. Macdonell and T. Sheard, Probate Practice (Toronto, 1953) p. 95.

[109] Section 77(6), copied in full, *infra*, at footnote 143.

[110] (1954), 28 Aust. L.J. 355 (H.C.); see footnote 14. The only major difference in the adoption legislation was Ontario's continued "no other purpose" clause. It is suggested that there is "provision otherwise" in subsection 6.

[111] *Re Esplin*, [1946] 2 D.L.R. 404, at p. 406 (B.C., Coady J.). In *Re Lawther*, [1947] 2 D.L.R. 510, at p. 513, Williams C.J.K.B. was inclined to the view that they were included in Manitoba. That province gave statutory force, however, to many earlier informal adoptions.

The prairie solution, with or without "lawfully", looks at first glance less open to doubt. But that is merely because the family-maintenance legislation does not go beyond the first generation—does not go outside the parent-child relationship. If it did go to grandchildren, difficulties with the prairie definition would arise. The prairie solution also avoids the difficulty now to be encountered under the comparable English legislation. There the adoption legislation is, for England, but probably not for Scotland where no property rights are yet given, comparable for these purposes to that in British Columbia and Ontario. "Son" or "daughter" in the English testators family-maintenance legislation should automatically include an adopted son or daughter: *Coventry* v. *Surrey*. But the English testators legislation[112] provides its own definition, which includes a "child adopted by the deceased by virtue of an order made under the provisions of the Adoption of Children Act, 1926" and amendments. What of adoptions abroad which under conflict of laws rules would be recognized in England? Are children of such foreign adoptions excluded from the special statute? While I suggest that the definition is not exclusionary, it would have been simpler to omit it. Make the adoption legislation do the job it should do, as the *Coventry* case shows it can. In fact the definitions could be left out, so far as the testators family-maintenance legislation is concerned, in the prairie provinces also.

Does adoption cut a child off from his natural family for the purposes of testators family-maintenance legislation? May *C*, a child long since adopted by *B*, apply as a dependant for a share or larger share in the estate of his natural parent, *A*? The legislation permits the testator's wife or husband and children to apply. Is *C* still a child of *A* for the purposes of this legislation? I submit that he is not. He is in many jurisdictions no longer the child of *A*; in others all *A*'s obligations, either generally or to supply maintenance, have been removed. The obligation under this special statute may not be one of maintenance. On the other hand, it is not one dealing with intestate succession, an area where the old relationship is specially preserved in Canada. Further it is not a problem of testamentary succession itself; it is more of a statutory right of a "dependant" to apply for a share. I think that it is fair to say, except possibly in Ontario with its "no other purpose" clause, that *C* is no longer the child of *A* for this purpose. In a

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[112] The Inheritance (Family Provision) Act, 1938, c. 45, as re-enacted 1952, c. 64, Sch. IV.

New Zealand case,[113] it had been argued that the right to apply under the testators family-maintenance legislation was not a right (or obligation?) existing between parent and child, but a "privilege" apart from the relationship. The court of appeal rejected the argument and ruled that any "moral obligations" to his child which may have been imposed upon a testator-parent under the Family Protection Act came to an end upon the adoption of the child by someone else. The testatrix had died in 1947 when an adoption order in New Zealand terminated "all the rights and legal responsibilities and incidents existing between the child and his natural parents, except the right of the child to take property as heir or next of kin of his natural parents directly or by right of representation". Notwithstanding the preservation of the property rights, the court held that under the adoption legislation *C* was no longer the child of *A*, for testators family-maintenance legislation purposes. I suggest that for the same purposes the legislation in Canada is comparable, except possibly in Ontario.

In many of the provinces and territories there are other types of maintenance legislation, apart from the one just discussed, which was really not strictly maintenance legislation. There is the legislation in force in most provinces making provision for deserted wives and children. A court may order the husband or father to make periodic provision for his children. Who are "children"? It is unthinkable that under this legislation any but the adopting parent could be brought in for an adopted child. The specific legislation is largely silent, but the adoption legislation will in any event, as it should, cover such maintenance. In all jurisdictions, as we have seen in Part III(c), the adopting parent is obliged under the adoption legislation to maintain the child. The principle of the *Coventry* case is sufficient to bring adopted children under the deserted wives' and children's maintenance legislation.

An analogous problem is presented by the maintenance provided by municipal authorities under either child protection or poor relief legislation. In both cases it is not maintenance of the child by the parent or of the parent by the child, but of a person by the municipality. Yet it is with respect to this maintenance that the relationship may become relevant. Municipal liability usually is dependent upon residence; in the case of younger children, upon their parents' residence. Sometimes there is a right of reimbursement against a parent. Who is a parent in these cases? Again

[113] *Re C.K.*, [1950] G.L.R. 296 (C.A.), aff'g. [1949] N.Z.L.R. 874 (O'Leary C.J.). The new legislation of 1949 did not apply to this case.

there should be no difficulty in Canada in bringing in the adopting parent. Poor relief was the very type of maintenance in question in the *Coventry* case.

Occasionally in the poor relief legislation there is a right to a lien or charge against the real property of the person to whom the aid was given. This is true in the Yukon, for example, where, when aid is granted to a person for himself or a dependent member of his family, a notice having the effect of creating a lien may be filed in the Land Titles Office. "Dependent" is defined to mean "father, mother and child or any blood relative of a person living with such person".[114] What about a relationship by adoption? The first three words should cause no difficulty. An adopted child is a child within the definition by reason of the adoption legislation, which makes the adopted child equivalent to a lawful child, at least for purposes of maintenance. So, too, an adopting parent is a mother or father. The additional class—blood relatives—should not be construed as so modifying the first three words as to cut out relationships by adoption. While there may be a tendency to say that because "father, mother and child" normally connote blood relatives only and the final clause is specifically limited to a "blood relative", the legislature intended to exclude a father, mother or child who was not a blood relative. But this is only part of the story. It may be fair to say that each of the four categories denotes a blood relative. But who is a blood relative? An adopted child and an adopting parent are given that status, for maintenance purposes at least. Then what about the fourth class itself—"blood relative"? A grandchild "of a person living with such person" (whatever that may mean in the ordinance) is presumably a blood relative. Is the adopted child of a child a grandchild, a blood relative? Here there may be difficulty, not only because of the words "blood relative" themselves, but because an adopted child may not in the Yukon be a grandchild of his adopting parents, assuming it necessary to go beyond the parent-child relationship to answer the question. A change in the adoption legislation is needed to clarify the situation. In result, the use of "blood" neither adds to nor detracts from the adopted child's position. If he is made a relative at all, his status as a blood relative or a relative by marriage depends, for the purposes of this statute, not upon adoption. If he is not a relative, he is excluded. "Blood" is used to distinguish between relatives by blood, includ-

[114] The Indigent Persons' Estates Lien Ordinance, 1951, 2nd sess., c. 9, s. 2(b).

ing those given that relationship by adoption, and relatives by marriage.

Apart from maintenance, our problems may arise in many fields. What about consent to marriage? Most provinces provide that persons under a certain age must obtain the consent of their parents, or one parent, or a guardian, to the issue of a licence to marry within the province. Who is parent or guardian of an adopted child? The marriage legislation is silent. Fortunately in Ontario's limited adoption statute, the question is specifically answered — the adopting parents. Elsewhere in Canada the adoption legislation is silent on the point. It should be, in fact, if the generality of the change of status and incidents upon adoption is sufficiently complete. It is clearly so in some jurisdictions; less, in others. But I suggest that, even though in New Brunswick, for example, the child is freed from only two obligations to his natural parents and guardian (obedience and maintenance) and is made the child of his new parents only for the purposes of custody, maintenance and obedience, the child is the child of the new parent for purposes of consent to marriage. I place no reliance on the technical transfer of the right of "obedience". Instead, I look to the effective change in the child's family as a whole. It is unthinkable that the natural parents or a guardian appointed by them should control the question. No court, reading the adoption legislation of any Canadian jurisdiction, would find in favour of the natural parents. The same proposition is probably true of any other legislation, or of any proceeding or activity, requiring parental consent. The club that requires a parent's consent before a child goes in swimming rightly looks to the adopting parents in the case of an adopted child. These questions may technically fall within the control a parent having custody receives. But the problem extends beyond mere custody. A new relationship has been created for many day-to-day activities.

Sometimes a statute will place a responsibility on the parent for his son's or daughter's civil liability arising out of the operation of a motor vehicle. Here again the whole spirit of the change in relationship should cover the situation and any comparable situations, even though not technically within, in the six less generous jurisdictions, custody, obedience, maintenance or education.

These illustrations serve to point to the problems arising under specific provincial legislation, apart from the adoption legislation itself. Other illustrations will arise in connection with property. Beyond that it would be foolish to set out every provincial statute where some or all of these problems arise.

(c) *Federal statutes*

Constitutionally in Canada adoption legislation as such is a matter of provincial regulation. The question then arises how far an adopted child, who has become the child of the adopting parents, either generally or with respect to specific matters, is a child of the new parents within federal statutes. This is a constitutional problem and does not depend upon conflict of laws rules. By way of illustration, how far does a child of *A* adopted by *B* cease to be the child of *A* and become the child of *B* for the purposes of the criminal law, federal income tax law, federal succession duty law, federal family allowance legislation, prohibited degrees of marriage legislation, and other federal statutes where the relationship of one person to another is material? Within a unitary jurisdiction there is no difficulty, and the adoption legislation may make the child, as it does in New Zealand, the child of the adopting parents for all purposes, civil, criminal and otherwise, except as specified ("forbidden marriages" and "the crime of incest").

In Canada, no constitutional problem arises in the two territories, which are governed in all respects by the federal parliament or its delegate, the commissioner in council. But in the ten provinces some questions may arise.

Let us, assuming no definition in the federal statute, look at the legislation in the six provinces that makes the child the child of the adopting parents for all purposes, subject to specific exceptions. Does "child" in the federal income tax legislation include an adopted child? I submit that it does. There seems to be no reason why the status acquired by the child should not attract to it the incidents, whether obligations or rights or otherwise, federal or provincial, of that status or relationship. No one questions the status acquired by a "husband", "wife", "infant", "legitimate or lawful child", "legitimated child" or "illegitimate child" conferred by provincial laws. This remark is, of course, subject to any overriding federal laws specifically dealing with their rights. Is there any more reason to question the status of lawful child conferred by adoption?

It would seem therefore that there is no real constitutional problem. The problem for federal statutes is generally no different from that for provincial or territorial laws. "Child" in a federal statute includes a child adopted under provincial or territorial law, where the appropriate law either generally or for the purpose under consideration makes the child the lawful child of the new parent. "Adopted child" in a federal statute means, apart from a

definition to the contrary, a child adopted in a province or territory or one adopted abroad and recognized locally. Other words of relationship bring in the adopted relationship only where possible provincially. The local law governs. But there are a few qualifications.

The federal statutes deal with persons who are "children" of other persons under the laws of any one of twelve different jurisdictions. Is a child adopted in one of the more restricted jurisdictions to be included or rejected equally with a child adopted in one of the general-status provinces? In Ontario, for example, more limited rights follow upon adoption. Nothing is said about the benefits of the relationship of parent and child that may come to a parent under, for example, federal tax legislation or to a child under federal succession duty legislation. Is a child adopted under the Ontario adoption legislation a child within those federal statutes? No, in Ontario, especially in the face of Ontario's specific "no other purpose" section. The same thing is probably true of the other restricted provinces (New Brunswick, Prince Edward Island and Quebec) and of the two territories. Whether, if he moves to the Pacific coast, he will get better treatment is a matter for my later article on recognition problems. I suggest in the meantime that he acquires the incidents of the law of the place where he resides and does not carry with him the restrictions or benefits of his original adoption jurisdiction. This, I think, is equally true of an illegitimate child whose status was acquired in Ontario and who is now in British Columbia. The rights or otherwise incident to his status as an illegitimate or adopted child are governed by the local applicable law, not Ontario law. These differences again point to the necessity for proper adoption statutes making the child the child of the adopting parents for all purposes except for those specified situations where it is desirable to retain the old relationship.

It might appear therefore that, for federal statutes, "child" includes an adopted child where, by the provincial or territorial adoption legislation under which the child was adopted, he is either generally or for purposes with which the federal legislation happens to deal made the child of the adopting parent.

And under this rule the words "adopted child" in a federal statute would refer, apart from adoptions receiving international recognition, to any child adopted in accordance with provincial adoption statutes, regardless of the residence or domicile of the child or parent at the time of adoption. I suggest that in applying

Canadian federal statutes to provincial adoptions, no conflict of laws problems need worry us. Federal legislation does not discriminate among the various Canadian adoptions. That legislation merely refers to the "children" or "adopted children" of *A*. Such persons are included as are by the appropriate provincial laws the "children" or the "adopted children" of *A* (either generally or for the purpose dealt with in the federal statute). This is one of the benefits of a federal state in which, for the moment, technical rules of the conflict of laws, whatever they may be, are ousted.

The submissions apply not merely for the word "child" as used in a federal statute but for any other word importing the relationship of one person to another, where the provincial legislation is broad enough to go this far. Very little of it is.

Again, as in the preceding section on provincial statutes, there is the additional problem of what happens where a federal statute does attempt to define "child" or other analogous words. A brief examination will be made of the more important statutes to illustrate not only the general rules but also the problems of specific definitions.

I have already suggested that, for the six provinces where the child is generally "the child of his adopting parents", adopted children are, apart from specific definitions, within the Income Tax Act's use of "child", but that in the other four provinces (New Brunswick, Ontario, Prince Edward Island and Quebec) and two territories they would probably not be. The statute does contain, however, not only a definition of "child", which does not refer to adoption but indirectly includes some adopted children, but also two references to "adoption", for one of which "adoption" is defined. "Child" is defined in section 139(8) as including any child, whether the taxpayer's or not, of whom the taxpayer has or had before majority, "in law or in fact, the custody and control", if the child is "wholly dependent on the taxpayer for support". In effect those adopted children who are "wholly" dependent are brought in, because in all twelve jurisdictions the parent gets custody and probably control of an adopted child. My discussion assumes, of course, that "child" in the income-tax legislation has not yet, at common law, any broader meaning than lawful child.

But the Income Tax Act has two references to adoption. Sections 26 and 139(5A) refer to persons "connected" "by blood relationship, marriage or adoption". Section 139(6) defines connection by adoption, for the purposes of section 139(5A) only, as adoption "legally or in fact, as the child of the other or as the

child of a person who is so connected by blood relationship (otherwise than as a brother or sister) to the other". Section 139(5A) concerns "arm's length" dealing and is coupled with a long list of relationships and definitions. There is no definition of "adoption" for section 26, which deals with exemptions from tax and those entitled to married status (the "householder's" status of the old Income War Tax Act). The inclusion of a reference to "adoption" first appeared in 1926 at a time when all the nine Canadian provinces of that date had adoption legislation. Yet in 1947 Angers J. held[115] that two very informally "adopted" children were within the term "adoption" in that section. This is an encouraging approach to the interpretation of a word in a statute: it is not to be interpreted too strictly. The word is to be read in its popular sense, and in that sense is not to be limited to lawful adoptions. I must ask, however, what is the popular sense of the word. Does it refer to foster children in addition to legally adopted children? Has legal adoption not become so generally accepted that a distinction is now properly drawn, popularly, between legal adoptions and those informal "adoptions" best described today as involving a mere foster relationship?

To add to the confusion at this point, there is in Stikeman's annotations to section 26, after a reference to the definitions of "child" in section 139(8), a remark that the definitions do not exclude the "ordinary or normal meaning" of the word. "The normal meaning of 'child' is that of a child born in wedlock or adopted, or otherwise taken into the family as a step-child."[116] For what purpose is this the "normal" meaning?

The Dominion Succession Duty Act[117] defines "child" to include "a person lawfully adopted while under the age of twelve years by the deceased as his child". For the purposes of this legislation, then, only some adopted children are included. There is no definition of "lawfully adopted", but it is submitted the words mean adopted pursuant to the *statutory* provisions for adoption in any Canadian jurisdiction, or elsewhere. This would exclude a "common law" agreement to adopt except in so far as the agreement has been converted into a statutory adoption. It might even, by its blunt wording, include foreign adoptions whether recognizable internationally or not. May children adopted at or over the

[115] *Anderson* v. *M.N.R.*, [1947] 4 D.L.R. 262; [1947] Ex. C. R. 389 (Angers J.).

[116] Canada Tax Service, Toronto, Richard DeBoo Limited, p. 26-103, dated March 21st, 1955.

[117] R.S.C., 1952, c. 89, s. 2(b).

age of twelve years in those six provinces where an adopted child is made the child of the adopting parent for all purposes come within the word "child" in the statute? Apart from the definition section, it should be clear that they would. But by putting in a definition section that defines "child" to "mean" (and this is even stronger than the simple "to include") (i) a child of the deceased and (ii) a person lawfully adopted as previously defined, it is a fair interpretation to say that the legislature is distinguishing between natural children and adopted children, to the exclusion of some members of the second class. Here the danger of defining "child" is not as great because there is a legislative intent to exclude some adopted children. But the danger arises in those sections[118] of the act referring to other relationships—grandfather, grandmother, father, mother ("parent" is *not* defined to include adopting parent), lineal ancestor, brother, sister, descendant of a brother or sister, stranger in blood. Does the specific definition of "child" just referred to, under which it is made clear that only some adopted children come in, negate any other relationship by adoption, even from jurisdictions where the additional relationships are created to a greater or less extent, for example, British Columbia, Nova Scotia, Saskatchewan, the two territories and New Zealand? Ordinary statutory interpretation would argue that the very specific definition of child in which adopted children are clearly discriminated against shows either (a) an intent to exclude all adopted relationships except such as are allowed in, or (b) an intent to define this one word only and to let other relationships stand or fall without help from this definition. I prefer the second interpretation, even though it leaves the solution somewhat uncertain until the law of the appropriate province or other jurisdiction is examined to determine what other relationships come in.

The criminal law raises a number of difficulties. There are offences an essential ingredient of which is the relationship of the accused to some other person, for example, incest, intercourse with a stepdaughter or between foster child and foster parent, allowing a daughter to be defiled, failure of a parent or guardian to provide necessaries for a child.[119] In these cases the law insists upon, not only strict proof of the relationship, but also a strict interpretation of the statute in order not to punish any one who does not clearly fall within its terms. Thus, without going into the criminal law in detail, it is sufficient to note that a man accused of

[118] *Ibid.*, s. 11(b, c).

[119] The Criminal Code, 1953-54, c. 51, ss. 142, 145 (1) (a), 155, 186. The new code came into force on April 1st, 1955.

incest may apparently successfully defend the charge by showing that the girl, a daughter of his wife, conceived and born during his marriage to the mother, was not in fact his child, even though born in such circumstances that at common law there is a presumption that the child is his legitimate daughter. This is because of the peculiar nature of the offence of incest. If such is the case, would intercourse between adopted child and adopting parent be incest? Would a provincial statute, such as Nova Scotia's, providing that all legal consequences of the *natural* relation of child and parent shall exist upon adoption create the new relationship for purposes of incest? An examination of Nova Scotia's section 9(2)[120] suggests that while the old relationship between child and natural parent is not cut off for purposes of incest the new relationship is, so far as a province may, created for this purpose. And what about Manitoba's statute where the child "shall thereafter be the child of the adoptive parents"? Or the British Columbia provision by which parent and child "shall sustain toward each other the *legal* relation of parent and child"? I think that, despite provincial adoption legislation, the special nature of this one offence prevents the new relationship from being sufficient to constitute the crime of incest as presently understood.[121] And this is now clear by the new definition of incest in the 1955 Criminal Code.

A different view has been taken in New Zealand, however, where under the legislation then in force the adopted child became, for all purposes, civil and criminal, and other consequences of the natural relation of parent and child, the child born in lawful wedlock to the adopting parents (subject to certain property exceptions). In *Rex* v. *Stanley*[122] an adopting father was convicted of incest with his adopted daughter. The same result would follow under the present legislation of 1950. Incest is not defined in New Zealand in the same restricted way as in Canada. There is no reason why the Canadian rule should not be similar in the light of the new relationship that modern adoption proposes to give the child, preserving in this instance, as does the New Zealand

[120] See footnote 24.

[121] In *Rex* v. *Schmidt*, [1948] O.R. 198, at p. 212; [1948] 2 D.L.R. 826, at p. 838 (C.A.), Aylesworth J.A. (Henderson J.A. concurring) suggests in obiter that the adopted relationship is not enough for this offence. (Reversed on other grounds, but all judges speak of "blood relationship": [1948] 4 D.L.R. 217 (S.C.C.)) This case was under the old code.

[122] (1903), 23 N.Z.L.R. 378, 1100 (C.A.); cf. also *Wilkinson* v. *The King*, [1947] N.Z.L.R. 412 (C.A.). These cases do not decide whether the cutting-off of all relationship to the natural parents, also for all purposes, civil and criminal, cuts off liability for incest in case of intercourse between a natural father and his daughter after her adoption by a stranger. The 1950 New Zealand legislation cleared up this question.

legislation, the liability for such acts when committed between natural parent and adopted child. A male parent would in any event be caught today under the defiling-of-daughter section, assuming, as I think we must, that "parent" in section 155 includes adopting parent.

Apart from incest, other crimes involve questions of relationship. Is an adopted child a foster child within the meaning of the section making intercourse between a foster parent and foster child an offence? Most provincial jurisdictions use the term "foster child" to refer, not to an adopted child, but to a child being brought up by another family under an informal arrangement. The difficulty is that many sections of the code, including this one, now 145(1)(a), date from the original code of 1892, passed at a time when only one Canadian province had formal adoption legislation. "Foster child" may well have included adopted children in those days when most "adoptions" were effected by way of legally unenforceable agreements. Has the meaning of "foster" changed, for criminal-code purposes, with the change in provincial use? Probably yes. In any event the new code in 1955 uses, in different places, the two distinct terms "foster daughter" and "an adopted child".[123] This is the first appearance of the term "adopted child" in the Criminal Code and gives legislative recognition to the existence of the new relationship. In view of what was a very careful revision, especially on family relationships, I suggest that the foster daughter section does not include an adopted daughter as a foster daughter. But in so far as her adopting father is her "guardian", and I have suggested that he may be throughout Canada,[124] then the adopting father is caught by the same section. The interpretation of the word "guardian", in the absence of any federal definition, will depend upon the provincial law.[125]

In other respects it is probable that the usual rules for federal statutes should apply to other offences under the Criminal Code, care being taken to watch for the limits of provincial legislation creating the necessary relationship.

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[123] Sections 145 (1) (a), 185(b).

[124] *Supra*, pp. 777-778.

[125] Reference should perhaps be made to the Criminal Code's s. 3(5): "Where an offence that is dealt with in this Act relates to the subject that is dealt with in another Act, the words and expressions used in this Act with respect to that offence have, subject to this Act, the meaning assigned to them in that other Act". And "Act" is defined in s. 2(1) to include an act of the legislature of a province; "Act of a legislature" is defined in the federal Interpretation Act, R.S.C., 1952, c. 158, s. 35(1), to include territorial ordinance, while "province" is defined to include the two territories: s. 35(24).

Citizenship offers a further illustration. If for all purposes a child is made the child of the adopting parents, citizenship should be included. The new English adoption statute contains specific legislation. Where a child who is not a citizen of the United Kingdom and Colonies is adopted by a citizen (or by spouses of whom the male is a citizen) the child becomes a citizen.[126] But as the English statute is not a general one and special provision was therefore needed, and as no special provision is made for loss of citizenship of the United Kingdom and Colonies upon adoption by an alien, presumably citizenship is not lost merely upon adoption. On the contrary, the New Zealand statute *is* a general one and, but for any special provision, the child should, it would seem, lose or acquire citizenship in the same way as other incidents. In fact, however, the new New Zealand legislation of 1950 expressly excepts any change in citizenship. "The order of adoption shall not affect the nationality or citizenship of the adopted child."[127]

In Canada the picture is none too clear, despite the provisions of the Citizenship Act:[128]

> The Minister [of Citizenship and Immigration] may, in his discretion, upon application, grant a certificate of citizenship to a person who has been lawfully admitted to Canada for permanent residence and who, at any time in a province of Canada pursuant to the law of that province then in force,
>
> (a) has been adopted, if the adopter or, in the case of a joint adoption, the male adopter is a Canadian citizen; or
>
> (b) [has been legitimated].

The difficulties with this section are many: (a) it applies only to the acquisition of Canadian citizenship by an alien child and is silent as to its loss when a citizen is adopted by an alien; (b) it leaves open the question whether it applies only to adoptions by persons who at the time of adoption are citizens, or also to cases where the adoption (in Canada) is by aliens who later become citizens; (c) it makes no provision for children adopted outside Canada and, in making some provision for adopted children, by implication probably excludes them from the persons to whom a certificate may be granted under an earlier section,[129] which gives the Minister power to grant a certificate of citizenship to a minor

[126] 1950, c. 26, s. 16 (U.K.).

[127] Section 21(2)(e), as enacted by 1950, No. 18, s. 2 (N.Z.). A New Zealand court, in obiter, had discussed these problems in *Re A* (1946), 4 M.C.D. 434; 41 M.C.R. 13.

[128] R.S.C., 1952, c. 33, s. 11(2)(a); "province" in any federal statute or territorial ordinance includes the territories: R.S.C., 1952, c. 158, s. 35(1,24).

[129] *Ibid.*, s. 10(5), as rewritten 1952-53, c. 23, s. 17(4). Section 10 is the main section providing for a grant of citizenship.

child of a Canadian citizen (other than a natural-born citizen); and (d) there is, worst of all, no right to anything—all is left to a minister's discretion. In so far as all infant children, lawful or otherwise, are subject to a discretion, I cannot complain. It is true that there is in the act an over-all power in the Minister to grant a certificate to any "minor" "in any special case", whether or not the conditions required by the act have been complied with and "whether or not the case comes within" the adoption subsection.[130] It is also true that the general provision for a certificate to "minor" children might be interpreted to include a child adopted abroad, contrary to the view just suggested. But in view of case law the other way on another Commonwealth member's citizenship legislation,[131] the Canadian statute might clearly have included all adopted children who are still infants.

There are dangers in an adoption procedure being used (abused) in an effort to circumvent immigration laws, if the citizenship legislation too freely accepts all adoptions. This might be an appropriate place to limit recognition of adoption to those made during minority of the "child", assuming that adoptions after majority are, in some jurisdictions, possible. It has been suggested to me that, with respect to citizenship, adoption should be treated in somewhat the same way as marriage is normally treated today. In effect neither adoption nor marriage would bring about an automatic change in citizenship. I disagree to this extent. If a special position is accorded to lawful infant children upon naturalization of the parent, an equally special position ought to be accorded to the parent's existing *adopted* infant children. The two should be treated in the same way. What that treatment is does not matter for the moment. Perhaps, when an alien is adopted by a citizen, some distinction might be made with a view to preventing abuses, as suggested. The distinction should not be based merely upon adoption and should leave room for equal application of

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[130] *Ibid.*, s. 11(3).

[131] *Masemann* v. *Masemann*, [1917] N.Z.L.R. 769, at p. 771 (Chapman J.): the New Zealand Aliens Act, 1908, s. 12, provided: "Where the father . . . has become naturalized in New Zealand, every child of such father . . . who during minority becomes resident with such father . . . in New Zealand shall be deemed to be himself naturalized". Respondent's adopted father had adopted *R* in Germany, where, the court assumed, the adoption gave "the child the status of a child born in wedlock to the adopting parent or parents". The father subsequently moved with his family to New Zealand where he became naturalized. In holding, obiter, that *R* was not covered by s. 12, the court said: "Whatever international respect might be paid to such status acquired in Germany, the terms of s. 12 of our Act do not extend to the case of parentage other than natural parentage".

ordinary citizenship rules to children born to a citizen and to children adopted at an early age by citizens.

V. *Intestate Succession*

(a) *General*

Canadian legislation, when dealing with property rights, has been hesitant in giving full effect to the social policy behind a modern adoption. Even those jurisdictions that would like to make the child for all purposes the child of his new parents do not do so for property purposes. The generality of Nova Scotia's main section,[132] for example, is cut down by a separate set of property sections, in some ways more restrictive than elsewhere in Canada. Here, as in the earlier parts of this article, the major problems revolve around separation from the old family and full introduction into the new. Is the child fully transferred for inheritance purposes from one family to the other? As we shall see, the pattern in most jurisdictions has been to preserve the old relationship while giving only partially, sometimes fully, the new relationship. Usually the adopted child has a double opportunity to inherit. Sometimes the double opportunity does not extend to all relatives in both families.

The varying middle course in Canada should be compared with Scotland, England and New Zealand. On the one hand, under the 1949 legislation in Scotland an adoption effects no change in status for property purposes at all.[133] Yet, on the other hand, the same legislation effects for England,[134] as does legislation of 1949 for New Zealand,[135] a practically complete severance of the old relationship and the substitution to almost the full extent of the new. The method in England differs from New Zealand's. In England the property rights are dealt with specifically and are subject to exceptions for entailed estates created before the adoption and interests coupled with dignities of honour. In New Zealand, as I have noted before, the whole field of adoption is covered in one sweeping change of relationship for all purposes, civil, criminal and otherwise, subject only to a few specific exceptions. One of these, and it appears in England too, is the effect of dispositions made before a certain date.

[132] Quoted at footnote 24.

[133] 1949, c. 98, s. 15(e), now 1950, c. 26, s. 15 (U.K.). The Mackintosh Committee on Succession (Cmd. 8144, 1951, ss. 23, 24, 40) recommends in effect that the rules for Scotland be equated with those in England for property purposes.

[134] *Ibid.*, 1949, ss. 9-10; 1950, ss. 13-14.

[135] Infants Act, 1908, No. 86, s. 21, as amended 1949, No. 51, and rewritten 1950, No. 18, s. 2. The text is largely set out at footnote 11.

It is proper that there should be no doubt about property rights. But it is suggested that today the rather anomalous position of the adopted child for property purposes be changed. Make him fully the child of his new family; cut him off completely as a *member* of his old. This will not prevent successions to him by way of *inter vivos* or testamentary gift as from any other strangers. Present-day legislation attempts to prevent knowledge by the child, not of the fact of adoption, but of who his old parents and kindred were, as well as knowledge by each family of the other. Under the existing law in many jurisdictions Mary's illegitimate child, born during her teens, adopted out at birth and long since removed from view, shares equally with Mary's lawful children on her intestacy years later. The problem of location is not too difficult, with the co-operation of the child welfare departments. But what of the social readjustments when knowledge of present whereabouts becomes known and one family seeks to visit, perhaps interfere, with the other? When a child is young these readjustments can be disturbing and may give the new family no peace. To an older child they may be less significant, though they are never negligible.

(b) *Property legislation*

The legislation for most of the property problems discussed in Parts V and VI is, for convenience, now set out in one place.

ALBERTA[136]

98. (1) A person who has been adopted in accordance with the provisions of this Part shall upon the intestacy of an adopting parent take the same share of property which the adopting parent could dispose of by will as he would have taken if born to such parent in lawful wedlock, and he shall stand in regard to the legal descendants but to no other kindred of the adopting parent, in the same position as if he had been born to him.

(2) If the person adopted dies intestate his property acquired by himself or by gift, inheritance or descent from his adopting parent or from the kindred of such parent, shall be distributed according to the laws of the Province relating to intestacy among the persons who would have been his kindred if he had been born to his adopting parents in lawful wedlock, and the property received by gift or inheritance from his natural parents or kindred shall be distributed in the same manner as if no act of adoption had taken place.

(3) Where a person is adopted, he shall not lose his right to inherit from his natural parents or kindred.

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[136] 1944, c. 8 (Alta.).

BRITISH COLUMBIA[137]

9. Subject to the provisions of subsection (2) of section 3, upon the making of the order of adoption:—

(c) The parent by adoption and the minor so adopted shall sustain toward each other the legal relation of parent and child, and shall respectively have all the rights and be subject to all the obligations and duties of that relation, including the right of inheritance and succession to real and personal property from each other, except as those rights are affected by the provisions of this Act.

10. (1) As to inheritance and succession to real and personal property, a person adopted in accordance with the provisions of this Act shall, subject to the provisions of subsection (2) of section 3, stand in regard to the kindred of his parent by adoption, in the same position as if born to that parent in lawful wedlock.

(2) No person shall by being adopted lose his right of inheritance and succession to real and personal property from his natural parents or kindred.

(3) If a person adopted dies intestate, his real and personal property received by gift, will, settlement, inheritance, or succession from his natural parents or kindred shall be distributed in the same manner as if no adoption had taken place; and all his other real and personal property shall be distributed in the same manner as if he had been born to his parent by adoption in lawful wedlock.

[Section 3(2) is reproduced, *supra*, in the text to footnote 19.]

MANITOBA[138]

97. (1) Where a decree of absolute adoption has been made, . . .

(b) . . . the child shall be entitled to proper support and care from its adoptive parents, and shall have the same rights of inheritance from the adoptive parents as a child born of parents married to each other would have from its parents; and

(c) an adoptive parent shall be entitled to the services, wages, control and custody of the adopted child and shall have the same rights of inheritance from or through the adopted child as a parent would have from a child born of parents married to each other;

but neither the adopted child nor an adoptive parent shall be capable of inheriting from, or taking through, each other property expressly limited to heirs of the body of the child or adoptive parent.

(2) An adopted child shall not lose the right to inherit from his natural parents or kindred.

NEW BRUNSWICK[139]

Section 30 (1, 2) is equivalent to Alberta's section 98(1); section

[137] R.S.B.C., 1948, c. 7; am. 1953, c. 3.
[138] R.S.M., 1954, c. 35.
[139] R.S.N.B., 1952, c. 3.

30(3) to Alberta's section 98(3); and section 30(4) to Alberta's section 98(2).

NEWFOUNDLAND [140]

Section 143 is almost identical with Alberta's section 98.

NORTHWEST TERRITORIES [141]

13. (1) A person who has been adopted under this Ordinance has the same rights of succession to property from or through his adopting parent as though born to such parent in lawful wedlock on the date of the order of adoption.

(2) Where a person who has been adopted under this Ordinance dies intestate, his property shall be distributed in the same manner as though born to his adopting parent in lawful wedlock.

(3) Where a person is adopted he does not lose his right to inherit from his natural parents or kindred.

NOVA SCOTIA [142]

Section 10 is equivalent to Alberta's section 98.

ONTARIO [143]

76. The court may impose such terms and conditions in an adoption order as the court thinks fit and in particular may require the adopting parent by bond or otherwise to make for the adopted child such provision as in the opinion of the court is just and expedient.

77. (5) An adoption order does not deprive the adopted child of any right to or interest in property to which, but for the order, the child would have been entitled under an intestacy or disposition, whether occurring or made before or after the making of the adoption order.

(6) An adoption order confers upon the adopted child or any issue of the adopted child the same rights to and interests in property under any intestacy of or disposition by the adopting parent or any kindred of the adopting parent as if the adopted child was a child born to the adopting parent in lawful wedlock.

(7) [Subsection 7 is equivalent to Alberta's section 98(2).]

(12) Except as provided in this Part, an adopted child shall not be deemed the child of the adopting parent.

PRINCE EDWARD ISLAND [144]

Sections 13 and 14(1) are equivalent to Alberta's section 98(1, 2).

14. (2) No person shall by being adopted lose his right to inherit from natural parents or kindred except in cases where such natural parents or kindred have legal descendants other than such adopted person.

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[140] R.S.N., 1952, c. 60.
[141] 1948, c. 35 (N.W.T.).
[142] R.S.N.S., 1954, c. 4.
[143] 1954, c. 8 (Ont.).
[144] R.S.P.E.I., 1951, c. 3.

QUEBEC [145]

18. (1) The adopted person shall take out of the property which the adopting parents may freely dispose of by will, if the latter die intestate, the same share that he would have taken if born to such parents in lawful wedlock, but he shall not succeed to those related or allied to his adopting parents.

(2) (a) The property which he has acquired by himself, or by gift, will or inheritance from his adopting parents, or from one of them, as well as from those related or allied to his adopting parents or to one of them, shall devolve in accordance with the rules of the Civil Code to the persons who would have been his relatives if he had been born to his adopting parents in lawful wedlock;

(b) The property acquired by him by gift, will or inheritance from his natural parents and relatives shall devolve in the same way as if he had not been adopted.

SASKATCHEWAN [146]

80. (1) A person who has been adopted in accordance with the provisions of this Part, and his issue, shall, notwithstanding any law or statute to the contrary, have the same rights of succession to property from or through the adopting parent as though the person adopted had been born to such parent in lawful wedlock on the date of the order of adoption.

(2) If a person adopted dies intestate his property shall be distributed in the same manner as though born to his adopting parent in lawful wedlock and for the purpose of this subsection where a natural parent of the person adopted is the spouse of the adopting parent the natural parent shall be deemed to be an adopting parent.

(3) Where a person is adopted he shall not lose his right to inherit from his natural parents or kindred.

YUKON [147]

Section 13 is the same as the Northwest Territories' section 13.

(c) *Intestacy of natural parents and kindred*

Subject to a slight modification in Prince Edward Island, in all Canadian jurisdictions the child's "rights" [148] to property upon the intestacy of his natural parents or their kindred are preserved. In all except Quebec there is an express preservation of the rights. In Quebec, neither is the child made the child of his new parents for all purposes nor does he cease to be the child of his natural parents except for certain purposes, not including property rights.

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[145] R.S.Q., 1941, c. 324.
[146] 1955, c. 55 (Sask.).
[147] 1954, 3rd sess., c. 13 (Yukon).
[148] "There can be no vested right in a mere expectation well or ill founded of relatives or other persons to share in the property of a person still living." Kilgour J. in *Re Scott*, [1928] 1 W.W.R. 168, at p. 178 (Man.).

By implication, his existing rights, not being curtailed, are preserved.

Only in Prince Edward Island has any Canadian legislature "dared" to interfere with these "rights". There the child does not take "where such natural parents or kindred have legal descendants other than such adopted person". Here is a start. It would seem sensible, however, to go the whole way as is now done in England and New Zealand.[149] The British Columbia Section of the Canadian Bar Association, at its annual meeting on June 24th, 1955, at Victoria, recommended that their province follow New Zealand.

I have noted the dangers of the present Canadian legislation, particularly in its application to illegitimate children born to teenage girls where the child was adopted out at birth. The difficulty in tracing the child is probably not serious today. A search of the adoption records would probably be permitted to find the present name and whereabouts of the child.[150] If the records are opened, what precautions are available for the preservation of the anonymity of the child and its present parents from those members of the natural family still alive?

The suggestion of cutting off all ties with the natural family should, of course, be coupled with a grant of full inheritance rights from the members of the adopting family.

In the one province where a partial change has been made — Prince Edward Island — the meaning of the word "descendants" may raise some difficulty. The right to inherit on the natural side from both parents and kindred is preserved except "where such natural parents or kindred have legal descendants other than such adopted person". Either "kindred" is to be restricted to those persons capable of having the child, now adopted out of the family, as a lineal descendant or "descendant" must be given a meaning much wider than the usual lineal line. The section is cutting off your right to inherit from your natural parents and kindred where they have "descendants" other than you. "Kindred" includes all kinds of collateral relatives. You are not their descendant, unless

[149] In Queensland (The Adoption of Children Act, 1935, No. 7, s. 8(2)(b)) and Victoria (Adoption of Children Act, 1928, No. 3605, s. 7(2)(b)) the right to inherit from natural parents, but not natural kindred, has been cut off for sometime. And see *Re H*, [1947] V.L.R. 170 (Herring C.J.).

[150] The court has, in the case of an adopted child who was the natural child of a married woman whose husband had been overseas for some time, made an order that a certified copy of the birth entry be furnished to the husband for use in divorce proceedings brought by the husband on the ground of adultery: *Re M*, [1946] Q.W.N. 16 (E. A. Douglas J.).

the word has a broader meaning here. And, even in the lineal line, do your own children count as "descendants" for this purpose? A natural sister, *A*, dies intestate leaving as her nearest next-of-kin the adopted person, *B*, and their brother, *C*. It is difficult to say that *A* has left any descendants, yet the intention of the legislation seems to be to exclude *B*, the adopted person, because the intestate has left next-of-kin in the same degree. *A* has left no descendants. Has *A* left no descendants "other than such adopted person"? Such adopted person is not here a descendant, yet *A* has left as his nearest next-of-kin two brothers, one of whom was the adopted person. I suggest, therefore, that "descendants" must be construed, when used in relation to natural kindred who are collaterals, as next-of-kin of the same degree, or at least next-of-kin of the same degree and family. An uncle, *L*, dies leaving as his nearest next-of-kin a nephew, *M* (son of *L*'s brother, and adopted out of the family), a niece, *N* (*M*'s sister, but not subject to an adoption order) and *O*, a second niece, daughter of *L*'s sister. It is suggested that *M* is excluded upon *L*'s intestacy because of *N*'s presence. Had *N* predeceased *L*, *M might* have come in because, while in the same degree, *O* belongs to a different family. What does the legislature intend?

A second point arises from the Prince Edward Island provision. Do persons born in lawful wedlock, but tracing ancestry through an adopted person, become "descendants"? *X* dies leaving as his nearest next-of-kin a son, *Y*, adopted out of the family by one, *S*, and *Y*'s lawful natural children, *C* and *D*. Are *C* and *D* to be treated as "descendants" of *X*, thereby preventing *Y* from sharing in her natural parent's estate?

(d) *Intestacy of former adopting parents and their kindred*

> If the child has been previously adopted, all legal consequences of the former order of adoption shall, upon a subsequent adoption, determine except in so far as any right, title or interest in property may have vested in law or equity in the adopted child.[151]

This quotation from Alberta is an example of a provision (with slight variations in language) in the adoption legislation of all Canadian jurisdictions except British Columbia, Manitoba and Ontario. In so far as the "former order" gave a right of inheritance upon the intestacy of an adopting parent or his kindred, the right would appear to be wiped out for future intestacies, upon a second or subsequent adoption. Quebec's provision is slightly different, referring only to a *second* adoption order and using "devolved"

[151] Alberta, 1944, c. 8, s. 103.

instead of "vested".[152] Under the Alberta wording, "vested" will exclude a contingent interest, a point not pertinent to intestacies. It will be referred to later when dealing with wills and other dispositions.

Of the three provinces which do not have the Alberta provision, Ontario clearly preserves inheritance rights from former adopting parents and possibly former adopting kindred. The former adopting parent is, if living, made the parent of the infant "for all the purposes of this Part". A continued right to inherit from parents and their kindred is one of those purposes.[153] In British Columbia and Manitoba, all rights are taken away from the former adopting parent but, in view of the silence of the statutes on this point, the rights of the child to inherit from such parent are presumably preserved. In *Public Trustee* v. *Ferguson*,[154] Nicholas C.J. held that, as there was nothing to take away the child's right earlier bestowed, it could inherit from its former adopting parent.

(e) *Intestacy of adopting parents*

Subject to a qualification for Manitoba, the adopted child may inherit without limitation from the adopting parent in all Canadian jurisdictions. In Manitoba property limited to the heirs of the body of the adopting parent may not be taken.

What about issue of a deceased adopted child? The point may not be clear in any Canadian jurisdiction, except under the new legislation which came into force in Ontario and Saskatchewan this year. If the adopted child predeceases the adopting parent leaving lawful natural issue alive at the adopting parent's death intestate, can the issue come in to take their parent's share under the usual intestate succession provision, which allows deceased children to be represented by their issue? There are at least two approaches to the problem. Has the adoption legislation put the adopted child in such a relation to its new parents that its issue become issue of the parent? Or, in a more restricted approach, are the intestate succession rules so worded that, even if the child is made a child of its parent only, the child's children may still

[152] A second adoption order is not permitted in Quebec unless either the previous adopting parents are dead or the earlier adoption has been annulled (s. 15).

[153] See 1954, c. 8, s. 80, read with s. 77(5). Newfoundland has both the Alberta and Ontario provisions: s. 147(1, 2). Perhaps the latter is to be construed as limited to procedural matters connected with the application for the subsequent adoption, the former to rights and status.

[154] (1940), 57 W.N. (N.S.W.) 63 (Nicholas C.J.).

take from the adopting parent? The second approach may be put another way. Even though the children of the adopted child are not made grandchildren of the adopting parent, may they still take, because of the language of the intestacy laws, on the parent's intestacy, assuming the adopted child's earlier death?

The first and more general approach seems to have been applied in *Re James*[155] to the legislation of Western Australia of 1896.[156] There the child became "for all purposes" and "as regards all legal . . . consequences of the natural relation of parent and child" "the child born in lawful wedlock [to] the adopting parents", subject to four specific exceptions, none of which was relevant to our problem. A complementary provision made the parent for all purposes the parent of the child. The full court had no difficulty in holding that upon the death intestate of the adopting parent a lawful daughter of a deceased adopted child was entitled to the whole estate. The intestate's brothers and sisters were excluded.

> One very important consequence of the relation of parent and child is that in case of the intestacy of the parent the child shares in the estate of the intestate or, in the event of the child having predeceased the parent leaving lawful issue, such issue takes the share which its parent would have taken.[157]

It was not necessary to decide one point put forward by counsel — whether the daughter became a "grandchild" of the adopting parent. The full relationship between child and new parent was sufficient. Property rights flowed, not from a special provision, but from the main relationship itself: so much so, that in another aspect adopting kindred were under the same provision enabled to inherit upon the intestacy of the adopted child.[158]

The second and more specific possibility looks to the intestacy legislation and applies to it whatever adoption legislation is available. This approach may be more necessary for the time being in most Canadian jurisdictions where property is dealt with separately and where it is not possible, in intestate succession problems, to say that the adopted child has become the child of his new parents for all purposes. Can a lawful daughter of a deceased adopted child take a share upon the intestacy of the adopting parent? The uniform intestacy provision, taken from British Columbia,[159] will illustrate:

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[155] (1937), 39 W.A.L.R. 113 (F.C.).
[156] Adoption of Children Act, 1896, No. 6 (W.A.).
[157] (1937), 39 W.A.L.R. 113, at pp. 115-116, *per* Northmore C.J.
[158] *Re Goldsmid,* [1916] N.Z.L.R. 1124 (Edwards J.). The New Zealand legislation was then similar to that of Western Australia.
[159] R.S.B.C., 1948, c. 6, ss. 111(4) and 112, as renumbered by 1955, c. 2, s. 3.

111 (4). If a child has died leaving issue and such issue is alive at the date of the intestate's death, the widow shall take the same share of the estate as if the child had been living at the date.

112. If an intestate dies leaving issue, his estate shall be distributed, subject to the rights of the widow (if any), per stirpes among such issue.

Into this intestacy picture we must place the appropriate adoption legislation. In British Columbia there are rights as between adopting parent and child to inherit "from each other": section 9(3). In the other Canadian jurisdictions, apart from Ontario and Saskatchewan, the "child" or "person adopted" receives a right to inherit from his adopting parent or to take the same share, upon the intestacy of the adopting parent, "as *he* would have taken had he been born to such parent in lawful wedlock". The statutes spell out the right of a specific person, the adopted child, to inherit from a specific person, the adopting parent, and from some or all of their kindred. Nothing is said about others who claim through the adopted child. May they take from the adopting parents? The approach of the decision in *Re James* is probably not available. But I do point to the possibility of some use of the case itself, notwithstanding the absence of a general creation of the parent-child relationship. The language in the case, already quoted,[160] does suggest that if the adopted child would have taken, had he or she survived, and the ordinary law permits issue of a child who has predeceased the intestate to take, then an adopted child's issue may take because their parent could have taken if alive. Does the ordinary law provide this?

The provisions of the uniform intestate succession legislation, just quoted, are in force throughout Canada except in Ontario, Quebec and Nova Scotia. Let us assume *H* and *W* adopt two children, *X* and *Y*. *Y* has died leaving a lawful daughter, *D*, alive at *H*'s death. *H* dies intestate. If there is only one child, the widow is entitled to one-half the estate; if more than one, to one-third only.[161] It would appear that, for purposes of section 111(4), *Y* was a child who if alive would have taken by reason of rights given by the adoption legislation but who has died leaving issue, *D*, alive at *H*'s death. Would the issue be looked to to determine the widow's share under section 111? The section refers to "child" and to "issue" *of that child.* Must "child" include an adopted

[160] In the text to footnote 157.

[161] Under the two subsections of the uniform act immediately preceding those quoted. The departure from the uniform act by British Columbia in 1955, in order to give the surviving spouse the first $5,000 in any event under s. 111, is irrelevant to this discussion.

child—or does it under our piecemeal adoption legislation have that meaning only for specific purposes, not including this one? The "issue", *D* in our hypothetical case, is unquestionably born in lawful wedlock. Thus it would seem that the adopted child *Y* may well be recognized sufficiently to cut down the widow's share to one-third (*X* is also alive). But when we look at section 112, the distribution of the estate is to "issue" per stirpes. This is "issue" *of the intestate*, not of the "child". *D* may be lawful issue of *Y*, but nothing makes her lawful issue of the intestate. The link in the chain is broken by *Y*'s adoption.

This approach is extremely artificial and literal. It may be that a court should read the two sections together, and hold that "issue" in section 112 is to be interpreted in the light of the previous section, thereby including lawful issue of a deceased lawful child. In this case it would not matter whether the deceased child is lawful by reason of being a natural child or by reason of being given that status through the adoption legislation. On the other hand, and again with a view to uniformity, the court might exclude an adopted child from section 111(4). The view which brings in the issue of the adopted child in both sections is possible and to be preferred.

The old statute of distributions of 1660[162] may be better than the uniform provision. It provides for distribution among the "children" of the intestate (and the adoption legislation makes adopted children children for this purpose) and such persons as legally represent them. *D* in my illustration certainly legally represents *Y*. Thus, by a quirk of fate, *D*'s position would be more dubious in those provinces with the uniform act than in an old 1660 jurisdiction.[163]

The problem just discussed, whether children of an adopted child may inherit from the adopting parent, does not arise today in Ontario and Saskatchewan under the new legislation which came into force this year. In both provinces, the right of inheritance from the adopting parent is given not only to the child but to any issue of the child.[164] On the other hand, the Yukon's new ordinance of 1954 does not provide comparable rights for the issue of adopted children under adoptions in that territory. The old rule continues.

[162] *E.g.*, R.S.O., 1950, c. 103, s. 29.

[163] This was the situation in Ontario until the 1954 adoption act. It is still true in Nova Scotia: R.S.N.S., 1954, c. 69, s. 6. The same result is possible in Quebec, which is neither a 1660 nor a uniform province, under art. 619 C.C.

[164] Ontario, s. 77(6); Saskatchewan, s. 80(1).

There remains one minor point in connection with a child's inheritance from an intestate adopting parent. Does the specification of a new date of birth in Saskatchewan and the two territories affect the right to inherit from adopting parents? The child shall "have the same rights of succession[165] to property . . . as though . . . born to such parent in lawful wedlock *on the date of the adoption order*". The specification of a new date of birth for this purpose does not seem to affect ordinary intestate succession. Does it affect collateral problems? May an adopted child, adopted at age five and now age twenty-five, give a valid receipt to an executor because, by this section, he is considered to have been born only twenty years before and is therefore an infant? I suggest that he is not an infant. The phrase is designed to make clear that the inheritance rights upon adoption are not retroactive beyond the date of the adoption. An adoption is not to affect rights, whether vested or contingent, which have already been transferred before the adoption. In addition, the phrase relates to "succession to property", and not to other purposes, such as the receipt in the problem just mentioned, or parental consent to marry while under age, or parental authority for apprenticeship contracts or for a claim as an infant child for a larger share in the intestate's estate under the Dependants' Relief Act, now extended in Saskatchewan, as in England, to intestate as well as testate successions. In effect, then, the words "on the date of the adoption order" put in statutory form what a court would probably hold in any event had they been omitted from the statute.[166] In the case of a will, however, to which the section is also apparently applicable, it is possible that the words would affect a gift to an oldest son of a specific person. *A* has two sons, one his own lawful son born in 1947 and the other adopted in 1949 at age three. I think that, as a direct question of succession to property is involved, the plain words of the statute apply, and the adopted son would not be the elder son *of X*, even though he is in fact older than the other son.

(f) *Intestacy of kindred of adopting parents*

By way of summary, the child acquires no right to inherit from the kindred of his new parents in Manitoba and Quebec, acquires full rights in British Columbia, Saskatchewan, the two territories and, since January 1955, Ontario, as well as in England and New

[165] It is fair to assume that "succession" to property covers intestate as well testate succession.

[166] Cf. *Ireland* v. *Payne*, [1934] 4 D.L.R. 375 (Man. C.A.).

Zealand, and acquires only partial rights in the remaining Canadian jurisdictions. Probably the adopted child's issue acquire rights to inherit from these kindred in only two jurisdictions — Saskatchewan and Ontario. British Columbia is a possibility here.

In Manitoba the adopted child may inherit "from the adoptive parents", whereas the parent may inherit "from or through the adopted child". The apparently deliberate difference in two consecutive clauses, (b) and (c), of section 97(1) makes it difficult to suggest otherwise than that the child may not inherit from his adopting kindred, even though the effect of an adoption order is, by clause (a) of the same section, to make the child thereafter the child of the new parents. The specification in the inheritance clauses has probably cut down the effect of the general statement. In Quebec, the adopted child "shall not succeed to those related or allied to his adopting parents".[167]

In British Columbia, Saskatchewan, the two territories and Ontario full inheritance rights are provided for the adopted child from all the kindred of his new family. In Saskatchewan and Ontario, these rights expressly extend to the adopted child's issue. In British Columbia, the point is not expressly covered, but a wide interpretation of section 10(1) as presently worded would allow inheritance from adopting kindred by the adopted child's issue and other kindred. The section speaks in general terms: "as to inheritance and succession". It is not limited to inheritance and succession by a particular person or group of persons. And it then goes on to provide a *relationship* generally, not a *right to inherit* by a specific person from specific persons. The whole spirit of the present section 10(1) would seem to require the court to allow an adopted child's issue, or other next-of-kin, to inherit from the adopting parent's kindred, even though by the strange wording of section 9(c) they might not inherit from the adopting parent himself. The recommendations for change made in British Columbia recently would not only clarify this problem but provide all relationships upon adoption without the present doubts and loopholes. In making the recommendations New Zealand's section 21(2)(c) was used as a model.[168]

In the two territories, while the child may inherit fully from all his new parent's kindred, the right is not apparently extended to the child's issue. The right is given to the adopted person as a right to inherit from the kindred. No right is given to—nothing is said about—the adopted person's issue.

[167] Section 18(1).

[168] See footnote 11.

In the five remaining Canadian jurisdictions—Alberta and the four maritime provinces—the adopted child may inherit from those kindred who are "legal descendants" of his adopting parents. A typical provision, after providing for inheritance from an intestate adopting parent, provides that the adopted person

> shall stand in regard to the legal descendants, but to no other of the kindred of such parent, in the same position as if born to such parent in lawful wedlock.[169]

The drafting here is bad. In none of the five jurisdictions does the legislation state the purpose for which the child is to stand in regard to his new parent's legal descendants. It is only from the proximity of another provision, dealing with inheritance by the child from his adopting parent on the latter's death intestate, that we may guess the meaning—intestate succession. The reason for the limitation to legal descendants is not clear, other than that it was introduced into the formerly much broader Massachusetts legislation in 1876 and from there into much of the legislation of the other states of the United States. Even as late as 1952, in Nova Scotia, our legislators have slavishly imitated these old forms. That such a limitation still exists today is surprising, expecially when it has long been possible for the adopting kindred to the remotest degree to inherit from the adopted child in many of the jurisdictions where the limitation exists. A simple method of removing this stigma, without seriously altering the pattern of the legislation, is to delete the words "the legal descendants, but to no other of". A better solution is to rewrite the legislation completely.

It should be mentioned that in none of the Australian states is inheritance from any of the kindred of the adopting parent yet[170] permitted, but New Zealand's change in 1949 will probably be adopted in due course. The earlier New Zealand legislation of 1881 and 1896 was the basis of the legislation in a number of the Australian states.

(g) *Intestacy of adopted child*

Canada has inherited a strange rule for the disposition of an adopted person's estate on his death intestate. Apart from Mani-

[169] Nova Scotia, s. 10(1). The same provision existed in Ontario from 1921 to 1927, in Saskatchewan until 1946, in British Columbia until 1953, in the Yukon until 1954, and in the Northwest Territories until, I believe, 1948. A comparable provision existed in Manitoba from 1922 to 1934. From 1927 to 1955 in Ontario no right to inherit from any adopting kindred existed; none has existed in Manitoba from 1934.

[170] It has not been possible to check the exact legislation beyond 1952. Some revision occurred in Victoria, for example, in 1953.

toba, where the distribution is uncertain, and Saskatchewan and the two territories, where the natural family, both parents and kindred, are cut out completely, the distribution depends upon the source of the property. A double-source provision sends property acquired by the adopted person "himself or . . . from his adopting parent or the kindred of such parent" to his adopting family, and property acquired "from his natural parents or kindred" to his natural family. If a division according to source is to be made at all, the variation in British Columbia is recommended — property from his natural parents or kindred, on the one hand; all other, on the other. There is then no doubt that all property is covered.

Some problems arise in all eight "double-source" jurisdictions. How do you trace the property back? Money from both sources may be deposited from time to time in a single bank account on which withdrawals are made from time to time. Or a car received by inheritance from a member of the natural family is traded in on a new car two years later, further trades being made at regular intervals over a period of years before death intestate. To whom does the car or its value go?

What is the meaning of "kindred" in the phrase "natural parents or kindred"? Does it include only people who could be the adopted child's next-of-kin (assuming no intermediate persons)? Or does it include their spouses? Does it include a god-parent, step-parent, brother-in-law, the wife of an uncle, or any relationship beyond that of parent traced through either adoption or illegitimacy? The spirit of the section would seem to suggest that all these relationships should be included. In this connection Quebec uses the words "natural parents and relatives". The last word, when appearing in a will, has generally been held to be either so uncertain as to invalidate any gift depending upon it or to be limited to statutory next-of-kin. Here it is used in a statute, not a will. The context does not suggest a limitation to potential next-of-kin. My own view is that an equally broad interpretation would, in the spirit of the section, be given to both "kindred" and "relatives".

In all the eight jurisdictions, except British Columbia and Quebec, the phrase "by gift or inheritance" is used for property acquired from the natural family. Quebec uses "by gift, will or inheritance"; British Columbia uses "by gift, will, settlement or inheritance". Is "inheritance" limited to its usual meaning of inheritance upon intestacy and, if so, does "gift" include gift by will?

A further question involves property received by way of gift

or inheritance from a stranger. Is a gift from a stranger property acquired by the adopted person *himself?* Is a gift by will from a close friend, perhaps business associate, of the natural parent acquired by himself or received from his natural "kindred", or is it not covered?

These are just some of the problems arising out of this anachronistic legislation. It is time to repeal it and substitute the solution found in Saskatchewan, the two territories, England, New Zealand and probably four of the six Australian states: all property of the adopted child passes upon his death intestate, as if he had been born to his adopting parents in lawful wedlock. In these eight jurisdictions, not only the parent-child relationship is created; the child is put into relationship with all his new parents' kindred as if born into his new family in lawful wedlock. In fact, I repeat my suggestion that all ties with the natural family should be cut off.

It is true that these difficulties will seldom arise. If there are issue of the adopted person, they take. If there is a surviving spouse and the estate is small enough, the spouse will take all. The adopted person may, and should be advised to, leave a will. Modern adoption practice is to keep the identity of adopting parents from the natural parents, thereby lessening the possibility of property being received from the natural family. Despite the unlikelihood of difficulty arising, an overhaul is necessary.

The existing provision in Manitoba[171] is unique in Canada. In the other jurisdictions the property is dealt with separately from the other effects of an adoption. In Manitoba, most property provisions appear as part of the main section on the effect of an adoption order. The adopting parent is entitled, inter alia, to "the same rights of inheritance from or through the adopted child as a parent would have from a child born of parents married to each other". The adopting parents clearly obtain a right to inherit upon the adopted person's death intestate. Do the natural *parents* lose their rights? They lose "all rights and duties as between the child and" themselves. It is clear that intestate succession is considered elsewhere in the section as a "right". Do the natural *kindred* lose their rights? Subsection one, from which I have just quoted, refers only to "parents"; subsection two, in preserving the child's rights to inherit from his natural family, speaks of both "parents" and "kindred". Are we to infer by its specification of kindred in the one case, and its silence in the case of inheritance by the natural kindred, that they are not cut out? Perhaps the general taking

[171] Section 97, copied in the text to footnote 138.

away of all rights as between parent and child was not meant to end inheritance rights at all. In any event thorough clarification is needed in Manitoba.

(h) *Intestacy of the adopted person's child or other issue*

Mary, the lawful child of *F* and *M*, is adopted by *H* and *W*. Some years later, after Mary's death, her lawful child John dies intestate leaving no spouse or issue, no parents, no brothers or sisters. He is survived by his "grandparents", *F*, *M*, *H* and *W*, and by uncles and aunts in both natural and adopting families. Let us assume no immediate relatives on his father's side. His mother was an adopted child. Are her adopting parents and their kindred entitled to share? Yes, in England and New Zealand. In both jurisdictions the natural family would be excluded. But in Canada there is no provision, subject to one qualification, for the death intestate of the adopted person's child or other issue. As no change in relationship for this purpose is made, presumably John's property will go to his mother's natural family as opposed to her adopting family. This is a clear oversight, but hardly one that judicial interpretation can rectify. The changes recommended for British Columbia by the B.C. Section of the Canadian Bar Association also cover this point.

The one qualification on Canada's total neglect of this problem is a strange phrase in Manitoba. There, as I have said, the adopting parents, but not their kindred, may inherit from the child. The exact language is "from or through" the child. Do these words provide at least a partial answer? The child gets rights only "from" his adopting parents. The parent gets them "from or through" the child. The distinction seems deliberate.

Let me illustrate the possible significance of Manitoba's "or through". The phrase raises the question of the intestacy of someone who, we may assume, is not adopted but who has had an adoption in his family history. John dies intestate. John is the child of Mary, an adopted daughter of *H* and *W*. *H* and *W* have also a lawful child *B*. John leaves no wife or issue. *H* and *W* are alive, but Mary is dead. May *H* and *W* take John's estate? Certainly not in other Canadian jurisdictions. The estate would, as Mary is dead, go back to John's nearest next-of-kin, who would be Mary's nearest *natural kin*, her parents *F* and *M*. Does the provision in Manitoba, which provides that "an adoptive parent [*H* or *W*] shall . . . have the same rights of inheritance *from or through* the adopted child as a parent would have *from* a child born of parents

married to each other", provide otherwise? It would seem that it does. But if it does, what about Mary's natural father and mother (*F* and *M*) who are still alive? They are the intestate John's natural grandparents on his mother's side. And if his grandparents on his father's side (*R* and *S*) are also alive, has he now six grandparents to share in his estate? It is true that, if Mary's estate were being distributed, Mary's natural parents (*F* and *M*) would probably not be entitled in Manitoba.[172] But this is not Mary's estate; it is the estate of her lawful child John, "grandchild" of six people. Nothing in Manitoba's section 97 takes away the rights of the natural grandparents. Yet clause (c) seems to confer a right upon the adopting parents to take from their "grandchild"—their adopted child's child. Against this, and arguing that the "or through" is meaningless, it should be pointed out that when the clause goes on to say how they take "through", it says they take such rights "as a parent would have *from* a child born . . .", not "from or through a child born . . .".

(i) *Half-blood, double blood and step-relationships*

In the common-law provinces, the usual rules are (a) half-blood share equally with the full blood;[173] (b) double blood, apart from issue, take one share only;[174] (c) step-relationships do not give rise to any share.[175] It is also important to distinguish between half-brothers and step-brothers. I suggest that the rules apply equally to cases involving an adoption.

When an adoption has intervened, a number of problems arise. If we assume legislation such as that in England and New Zealand, which makes the child a lawful child of the adopting parent for all property relationships, whether between those two persons or between or among any other persons tracing a relationship through the child, no difficulty should arise. Subject to a very special provision otherwise, the child in England and New Zealand is to be treated as a child of the full blood of his adopting parents.

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[172] See the previous section, last paragraph.

[173] *E.g.*, the uniform intestate succession provision: R.S.B.C., 1948, c. 8, s. 118; *Re Adams* (1903), 6 O.L.R. 697 (R.M. Meredith J.); *Re Greenshields* (1914), 26 O.W.R. 309, 6 O.W.N. 303 (Latchford J.); both cases illustrate the rule in a jurisdiction without the uniform act.

[174] *E.g.*, *Re Adams, supra*, where the intestate died leaving as next-of-kin seven first cousins, one being a child of his mother's sister and of his father's brother; two full cousins; and four "half" cousins, children of his father's half brother. All seven took equally. There is a possibility that, if the double relationship were in the direct descending line rather than the collateral line, the person would take an extra share. And see text to footnote 177 for a spouse who is also next-of-kin.

[175] *E.g.*, *Re White*, [1945] 2 D.L.R. 803 (Alta., H. J. MacDonald J.).

If the marriage of these parents comes to an end, and one of them remarries, the new spouse will be step-parent; any children, lawful or adopted, of the new marriage will be half-brothers or sisters of the adopted child of the first marriage. Lawful and adopted children of the same marriage are related to one another in the full blood. The English adoption legislation now so provides for property purposes.[176]

Where the legislation is as piecemeal as it is in Canada, difficulties may enter. A child may be, by adoption, the lawful child of *X*, but he is in most jurisdictions not the grandchild of *X*'s parents. He may not be the brother or sister of *X*'s other children. When the legislation confers rights and removes obligations, or even where it purports to make the child the lawful child of the adopting parents, are collateral relationships established at all?

Adoption does provide a special "double blood" or dual relationship in cases where the adopting parent is a natural relative of the adopted child. The familiar situation of a child adopted by its grandparents upon the death of its parents is a good example. One of the grandparents dies intestate. May the child take one share as an adopted child and part or all of a second share — the one which would have gone to the child's natural parent had that parent been alive? The legislation across Canada almost uniformly, as we have seen, gives a right to inherit from the adopting parents and yet also declares that no person by being adopted loses his right of inheritance from his natural parent and kindred. There is no doubt that he may take from the various members of both families. The question is solely whether, in cases where he is related to the intestate through both families, he may take twice.

Apart from adoption, it would appear that if a person holds a right to inherit in two separate capacities he may take under each. Thus where the widow of an intestate was also his first cousin, it was held that she was entitled to a share as widow and to a share, along with the other cousins, as next-of-kin. "I can see no reason against the view that where a person stands in two distinct relationships to the intestate . . . , she is entitled to the share appropriate to each of those relationships."[177]

No adoption cases on this problem appear to have arisen in Canada. In the United States, from which the Canadian legislative pattern was largely drawn, there are a number. They go both ways. Very often the result depends upon some wording in the

[176] 1949, c. 98, s. 10(1); now 1950, c. 26, s. 14(1). This section does not apply to Scotland.

[177] *Re Morrison*, [1945] V.L.R. 123 (Macfarlan J.).

adoption legislation from which the court finds an intent not to benefit doubly. The rule against dual inheritance stems from Massachusetts, where the legislation is almost identical in this respect with the Canadian—a grant of rights to inherit from the adopting parents and their legal descendants, with retention of inheritance rights from natural parents or kindred. In *Delano* v. *Bruerton*,[178] Morton C.J. for the Supreme Judicial Court of Massachusetts said, in rejecting a claim for a dual share,

> When the legislature provided that no person should by being adopted lose his right to inherit from his natural parents or kindred, we do not think it understood or intended that 'kindred' should include the adopting parent. It intended to save the right of inheritance from other parties, having already provided as to the right of inheritance from the adopting parent. To bring this provision, when applied to a case like this, into harmony with the other parts of the statute, and with its general spirit and scope, we are of opinion that it should be held to apply to the inheritance of the property of some third person, and not of property of the adopting parent. There is no need of a saving provision to prevent injury to the adopted child in any case which is likely to happen of the adoption of a descendant, because the adopted child would almost invariably take more as an adopted son than he could by right of representation or inheritance through his parents.[179]

The suggestion that the preservation of the child's right to inherit from his natural family is a saving clause only, not a separate right in all cases, commends itself to me. These rights are preserved where not otherwise protected by the adoption legislation. "No person shall by being adopted lose his right of inheritance from his natural parents or kindred." On this interpretation, it may be that the "heir" or "next-of-kin" is to take whichever share is larger. He takes what is given on adoption, but is not to lose by adoption.[180] Against the "Massachusetts, New Hampshire and New York rule that where 'the heir occupies a dual capacity, it cannot inherit both as grandchild and adopted child' ", some states allow dual inheritance upon intestacy.[181] In some of these states a difference in wording may be responsible. On the larger view, the New England suggestion appears preferable in the interpretation of the Canadian statutes.

The problem arises where the child is adopted not merely by a

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[178] (1889), 20 N.E. 308, 2 L.R.A. 698 (Mass., F.C.).

[179] 20 N.E. 308, at p. 309; 2 L.R.A. 698, at p. 699.

[180] A view apparently taken in Indiana: *Head* v. *Leak* (1916), 111 N.E. 952.

[181] The cases both ways are reviewed in *Mississippi Valley Trust* v. *Palms* (1950), 229 S.W. 2d 675 (Mo.), a will case. Cf. also annotations in (1932), 80 A.L.R. 1403, at pp. 1407-1408; (1939), 123 A.L.R. 1038, at pp. 1043-1044.

grandparent but by other blood relatives. A child may be adopted by an aunt who subsequently predeceases the child's grandparent (parent of the aunt and of child's natural parent). The grandparent then dies intestate. Does the child take the share of its natural parent, in addition to the adopting parent's share, both being children of the intestate? This problem would only arise in British Columbia, Saskatchewan, the two territories and Ontario, where inheritance from adopting kindred who are ascendants (grandparents) or collaterals is allowed. I suggest that one share only should be taken—that as adopted child. I recognize, however, that a strong argument may be made the other way, based upon a literal interpretation of the statutes.

In wills cases the problem is different—the intention of the testator rather than that of the legislature. In the case of a testator, courts more readily find, even in jurisdictions where they would grant two shares upon an intestacy, that the testator could not have intended a dual or double share by reason of adoption.[182]

Finally, in this section on special relationships, one should be mentioned that arises from the fact that in most Canadian jurisdictions one spouse may not adopt alone. Normally, both must join in the adoption. But there may be cases, as there are in other jurisdictions, where one may adopt alone, usually with the consent of the other. What is the relationship to the non-adopting spouse, assuming that the legislation is not construed as making the child the child of both of them, as in some United States jurisdictions? It may be that the non-adopting spouse is a step-parent, just as if he or she had married the adopting parent after the adoption. One writer[183] prefers this view, but cites two cases as pointing out that no relationship at all is created. These cases correctly state that no legal "relationship" is created. They do not, it seems to me, deny that the quasi-relationship commonly known as a step-relationship is created.

(j) *Rights of the Crown to bona vacantia or by escheat*

Do the rights upon intestacy just set out in sections (c) to (i)

[182] The *Mississippi* case, *supra*. The Canadian case of *Re Scott*, [1928] 1 W.W.R. 168 (Man., Kilgour J.), does not really raise this problem. The residuary gift was to the "next of kin" of the testator and of his wife following a specific gift to "my adopted daughter, Ivey Ellen Scott". Ivey took as next-of-kin either alone as the only child *or* with others as a member of the class nephews and nieces (she was the wife's niece). She could not take two shares of residue, one in each capacity. The court preferred the second solution.

[183] I. D. Campbell, The Law of Adoption in New Zealand (Wellington, 1952) pp. 58-60.

bind the Crown? This question is important where the Crown is entitled, but for the adoption legislation, to the intestate's property as *bona vacantia* or by escheat. If the legislature changes the rules of intestate succession and the effect of the change is to deprive the Crown of what would otherwise be its property by escheat or as *bona vacantia*, is the Crown bound by the legislation?

There is of course a common-law rule, now appearing in statutory form in many provinces, that the rights of the Crown are not affected by a statute unless "it is *expressly* stated therein that Her Majesty shall be bound thereby".[184] When legislation such as the uniform intestate succession act, in force in nine Canadian jurisdictions, includes a provision allowing inheritance, by the mother and certain other relatives, from an illegitimate child who dies leaving no spouse or issue, the legislature was necessarily taking away what had heretofore been the rights of the Crown. A bastard could have no heirs or next-of-kin, other than his own spouse and lawful issue. And even though the Crown was not named in the legislation, it must bind the Crown if any effect is to be given to it at all. The same thing is not necessarily true of the complementary section in the uniform legislation, under which an illegitimate may inherit from its mother. He may be merely cutting out more distant relatives from taking the mother's estate — not necessarily the Crown. But the two sections are so linked together that both of them, I submit, bind the Crown. But the adoption legislation stands by itself and, in providing a new set of relatives, only rarely today affects the Crown. Is the Crown bound? I suggest not.

This opinion does not ignore the case of *Re Cummings*[185] and the obiter of Mignault J. in *Re Stone*.[186] Both suggest that no question of *bona vacantia* or escheat arises until there is ownerless property. This leaves the implication that, if the legislature changes the order of succession so as to remove or postpone the Crown's "rights", the legislation does not affect a right of the Crown because it has none until the property is ownerless, and by the new legislation it is no longer ownerless. An heir has been provided. I find it difficult to accept this argument. The rights of the Crown,

[184] *E.g.*, R.S.B.C., 1948, c. 1, s. 35 (italics added). See also R.S.C., 1952, c. 158, ss. 16, 35(1) (for N.W.T. and Yukon); R.S.M., 1954, c. 128, s. 9; R.S.N., 1952, c. 1, s. 13; R.S.N.B., 1952, c. 114, s. 32; R.S.O., 1950, c. 184, s. 11; R.S.S., 1953, c. 1, s. 7.

[185] [1938] 3 D.L.R. 611 (Ont., Greene J.); aff'd., [1938] 4 D.L.R. 767 (C.A.). The Court of Appeal merely stated its agreement with the conclusion and reasons for judgment of the trial judge.

[186] [1924] S.C.R. 682, at p. 686; [1925] 1 D.L.R. 60, at p. 66. It is a fair implication from the judgment of Idington J. that he did not concur with Mignault J. on this point.

be they contingent or vested, are affected. But in neither case do I disagree with the result of the two cases. Both depended upon statutes so altering the rights of succession that by necessary implication the Crown must be bound.[187] The *Stone* case involved a forerunner of the present uniform intestate succession section which provides next-of-kin for an illegitimate child. The *Cummings* case involved the Legitimation Act of Ontario, under which, again, an illegitimate was provided with next-of-kin—by making him legitimate upon the subsequent marriage of his parents.

One province has met this problem. Prince Edward Island's adoption legislation provides in section 19:

> In the construction of this Act and the right of succession affecting adopted children, the provisions of this Act shall affect and be binding upon the Crown.

In the other provinces, I suggest that a comparable section be included to remove doubts. When so many adopted children are illegitimate and have only a limited number of natural next-of-kin, the problem is bound to arise again in the not too distant future.

VI. *Testamentary and Other Dispositions of Property*

(a) *General*

The problem of testamentary and other dispositions of property is largely one of interpreting a document. Does, for example, the word "child" or "nephew" as used in a will or other document include an adopted child? The old common-law rule of construction that excludes adopted children has been noted in Part IV (a) in dealing with statutes. The same rule must be contended with in wills and other documents.

The old rule excluding adopted children was subject to two exceptions at common law. As a rule of construction, it gave way to a contrary intention, of which evidence was supplied by the testator or other maker of the document. Further, the rule did not apply where the court held that the maker must have intended to benefit the tainted offspring, be they of an illegitimate, step, foster or adopted relationship.

Re Gilpin[188] is a recent illustration. The testator left a one-fifth share of his estate to each of his five children for life, the remainder being settled in each case upon the "child or children" of the life

[187] This point is not noted in the annotation on Escheats, 1 Dominion Law Annotations 900, and in the discussion of the *Stone* case.

[188] [1953] 2 All E.R. 1218; [1954] Ch. 1 (Upjohn J.). See also *Re Fletcher*, [1949] 1 All E.R. 732; [1949] Ch. 473 (Roxburgh J.).

tenant. One of the testator's children, Margery, was to the testator's knowledge unable to bear children as a result of an operation undergone in 1917 at the age of eighteen. Margery and her husband had adopted a son in 1941. The will was made in 1947. Upon a summons to determine whether the adopted son was entitled to share in the estate as a "child" of the testator's daughter Margery, Upjohn J. held "that the testator must have intended in this case to include the plaintiff [the adopted son] in his testamentary disposition".[189] The difficulty with cases of this sort is that they are so dependent upon sufficient proof of a special use of the word "child" to include adopted children. Thus, Upjohn J. relied strongly upon the knowledge by the testator of his daughter's condition, his knowledge of the adoption by her of the boy—an adoption that the testator is said to have encouraged—and the acceptance by the testator of this boy as his grandchild. Even then, the exception to the ordinary common-law rule of construction admitted a specific adopted child. Adopted children generally were not admissible under it, especially children adopted after the date of the will.

The rule of construction would be inapplicable to adoptions if the adoption legislation put the child for all purposes in the position of a child born to the adopting parent in lawful wedlock. In New Zealand, the old rule has disappeared in so far as adoptions are concerned, except in the few specific cases where the adoption legislation is not applicable. It has disappeared also for the purposes of some statutes in Canada where, for the specific statute, the child has by the adoption legislation fully become the child of his new parent. The rule would also disappear for dispositions of property were it possible to say that the child has become the lawful child of its new parents for those dispositions. Unfortunately, practically all the provisions of the adoption legislation dealing with property, and set out in Part V (b), apply to intestate succession and do not help to remove the old common-law rule of construction in the interpretation of wills and other dispositions of property.

Proper adoption legislation would also avoid the necessity for a rule, such as the one in England today, under which any reference, in an instrument made after an adoption order, to the child or children of the *natural* parent is, in the absence of a contrary intention, construed as not being, or as not including, a reference to the adopted child.[190] While this is a salutary provision, I suggest

[189] [1953] 2 All E.R. 1218, at p. 1226; [1954] Ch. 1, at p. 15.

[190] 1949, c. 98, s. 9(3)(b); now 1950, c. 26, s. 13(2)(b). Clause (c) in each case extends the rule beyond the parent-child relationship.

that we should reach the desired result without an express statutory direction. New Zealand, of course, does without one.

In Canada, in the absence of a full transfer from the old to the new family upon adoption, a statutory change in the old rule of construction has been accepted as a temporary measure in ten jurisdictions and, until 1955, in an eleventh, Ontario. This statutory definition of "child" is discussed fully in the next section. In the twelfth jurisdiction, Manitoba, is it possible to say that the old rule no longer applies to adopted children? Manitoba is the only province where all the effects of an adoption, property or otherwise, are rolled into one section. A glance at section 97 of the Manitoba statute[191] shows that by clause (a) the child is after adoption to be the child of the new parents; by clause (b) certain rights are spelled out in favour of the child, including "inheritance" from the new parents; and by clause (c) certain rights are spelled out in favour of the new parents, including "inheritance" from or through the child. Clause (a), standing alone, would be sufficient to remove the old rule of construction, I suggest. But the addition of specific rights in clauses (b) and (c) raises some problems. These rights, in so far as property is concerned, are limited to "rights of inheritance". "Rights of inheritance" normally refer only to rights upon an intestacy and not under a will or other document.[192] But the three clauses are followed by a proviso under which neither the child nor the new parent is capable of "inheriting from, or taking through, each other property expressly limited to heirs of the body of the child or adoptive parent". "Property expressly limited" must refer to property disposed of otherwise than upon an intestacy.

It is a fair inference then that Manitoba's section 97 by its own language makes the child a lawful child of its new parents not only for such intestate succession purposes as are specifically set out but also for inter vivos and testamentary dispositions of property, except where the property is expressly limited to heirs of the body. If this conclusion is correct, the courts in Manitoba should be prepared to hold that the old rule of construction no longer applies to adopted children, or, to put it differently, that for the purposes of the old rule of construction "lawful children" includes adopted children. In two cases in New Jersey, where the statute is roughly comparable in this respect to Manitoba's, including the "heirs of the body" exception, the court, while prepared to include the

[191] See text to footnote 138.

[192] See, *e.g.*, *Perry* v. *Perry*, [1918] 2 W.W.R. 485, at pp. 487, 493 (Man. C.A.); *Re Scott* (1925), 29 O.W.N. 206 (C.A.).

testator's adopted children in the class "children", refused to apply such a principle to children adopted by persons other than the testator.[193] At first glance, it might appear that in Manitoba the same limitation should apply, especially in view of the limitation for intestate succession, at least from parent *to* child, to that between the child and parent only. But the proviso speaks not merely of inheriting from each other but "taking through" each other. If any effect is to be given to these additional words in the proviso, it must contemplate gifts which, but for the proviso, might reach the adopted child from persons beyond the adopting parent, whether kindred or strangers.

Reference should be made at this point to the Manitoba case of *Re Clark*[194] where by a settlement made in 1901, after a life interest to *A*, the residue was settled upon *B* or, if *B* "be then dead, leaving . . . lawful issue", to *B*'s executors or administrators; otherwise it went back to the settlor's estate. *B*, the settlor's grandson, adopted a child, *C*, in 1928 and died in 1934 before the period of distribution. *C*'s property rights were not involved: merely whether he was "lawful issue" of *B*. Dysart J. stated that the term "lawful issue" had an artificial meaning in any event, and that Manitoba's adoption statute has now given it a new meaning. A child adopted under the act is deemed "for every purpose" to be the child of the adopting parents. It was, therefore, "lawful issue" of the settlor's grandson, *B*, within the meaning of the settlement executed in 1901. His lordship was careful to note the special interpretation problem before the court and also the fact that the adoption legislation "declares some of the reciprocal rights and duties which flow from that relationship, including *and limiting* rights of inheritance".[195] The case does extend the new relationship beyond that of the settlor and his own children. It does not deal with the child's property rights.

In an earlier Manitoba case, *Re Scott*,[196] Kilgour J. did look to the "heirs of the body" exception and held that the recital of inheritance rights would seem to be directed to something more

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[193] *Re McEwan* (1940), 15 A. 2d 340 (N.J.); *Re Fisler* (1942), 25 A. 2d 265 (N.J.). In the former the adoption occurred shortly before the will was executed and was known to the testator; on this basis the court found that it must have been the testator's intention to include the adopted child.

[194] [1947] 1 D.L.R. 371, at p. 373; 54 Man. R. 447, at pp. 451-452 (Dysart J.); discussed more fully at footnote 240.

[195] [1947] 1 D.L.R. 371, at p. 372; 54 Man R. 447, at p. 451 (italics added). The language of the adoption legislation was slightly different, but not in any material respect, from today's section 97.

[196] [1928] 1 W.W.R. 168 (Man., Kilgour J.); discussed on the wills aspect at footnote 225.

than intestacies. The court held that an adopted daughter took under two life insurance policies which by the insurance statute, upon the death of the named beneficiary, were payable to the "child" of the insured. The adoption statute was somewhat different in its language from the present statute, but not in any material respect. "The recital of incidents of that changed status, I take it, is rather by way of illustration than as being exhaustive."[197] This is a valuable interpretation. While the actual decision, on this point, was interpreting the word "child" in the insurance *statute*, it is prophetic, I suggest, of decisions yet to come, in which that word or comparable words are interpreted in wills and other dispositions. The other provinces have a special statutory definition of "child" or its equivalent for various purposes, but not including, except in Quebec, statutes. The absence of any definition in Manitoba has left the way open to interpret broadly the insurance statute or any other statute.

In the Yukon there was no special statutory definition of "child" or its equivalent until the new adoption ordinance of 1954. The adoption legislation in that territory is not as helpful as in Manitoba, and it is probable that, so long as the old rule of construction remained, "child" or its equivalent, when used in a will or other document, would in the first instance be construed as excluding an adopted child. In 1954, the Yukon received the statutory definition.

In Ontario's new legislation, which came into force this year, the former statutory definition of "child", "children" and "issue" was repealed. The definition provided that, when any of these words were used in any will or other disposition made after the adoption order by the adopting parent, they should, unless the contrary intention appeared, include "an adopted child or children or the issue of an adopted child".[198] The limitations upon the definition were many. Its repeal was overdue. In substitution we now have only section 77(6):

> An adoption order confers upon the adopted child or any issue of the adopted child the same rights to and interests in property under any intestacy of or disposition by the adopting parent or any kindred of the adopting parent as if the adopted child was a child born to the adopting parent in lawful wedlock.

The position today is very similar to that in Manitoba, with one major exception. Because in Manitoba the child is made the child of the adopting parent for all dispositions of property, it is fair to

[197] At p. 180.

[198] R.S.O., 1950, c. 7, s. 12(3, 5).

say that "child" in *any* instrument includes an adopted child. In Ontario, the language of section 77(6) limits the child's new position to intestacies of and dispositions *by the adopting parent and kindred of the adopting parent.* And in view of section 77(12) — the "no other purpose" section—it is probable that "child" or its equivalent in any other disposition does not include an adopted child. And who are "kindred" for this purpose? Is a god-parent, a relationship by marriage or any other relationship apart from blood within the requirements of "kindred of the adopting parent"?

The change in Ontario is a step forward but it should have gone the whole way. By going only part way it creates difficulties and uncertainties.

(b) *Statutory definition of "child" in wills and other documents*

In Canada, except Manitoba and Ontario, there is a special statutory definition of "child" or its equivalent for the purposes of wills and other instruments (in Quebec for "deeds"). Under this definition, the old rule of construction is reversed for adopted children, at least for the *in*clusion of these children in the new family, but subject to the difficulties and qualifications to be discussed shortly. The Alberta definition is typical:[199]

> The word 'child' or its equivalent in any will, conveyance or other instrument shall include an adopted child unless the contrary plainly appears by the term of the instrument.

Minor variations and limitations exist in some of the provinces. In Quebec the "word 'child' or any other word of the *same* meaning in any other act or in a deed" is defined. In all cases, except Quebec, the language seems to include more than the first generation. Only British Columbia makes the inclusion clear by the use of the word "issue".

A serious variation in Nova Scotia limits the section to instruments made by the adopting parent.[200] No provision is made for wills and documents that leave property to a relative's or a stranger's children. In Nova Scotia, a daughter's adopted children would not be included in a gift under a grandparent's will leaving $1,000 to each of his daughter's children. So, too, a gift in an uncle's will to each of his brother's children would not benefit, in Nova Scotia, children adopted by the brother. Is Nova Scotia's section limited to the first generation? The section defines "child" or its

[199] Alberta, s. 99.

[200] The old Ontario rule did likewise; the effect of the new Ontario provision is to limit to instruments by the adopting parent and kindred of that parent.

equivalent in an instrument "made by a parent" as including "an adopted child of such parent". A testator leaves a small gift to each of his "grandchildren". He has at the time the will is made two lawful children; later he adopts two more. At his death each of the four children has children. It is probable that the common-law exceptions to the old common-law rule of construction do not help the children of the adopted children: they are not grandchildren.[201] Does Nova Scotia's statutory provision help? Its wording limits the new meaning of "child" or its equivalent to an adopted child of the maker of the instrument. Had the testator made the gift to "each child of my children", there would be no difficulty in including the lawful children of the testator's adopted child. Should there be a penalty for using the simpler "grandchildren"? Perhaps a court should be prepared to use the section in interpreting "grandchildren". But only those grandchildren who are lawful children of the adopted child could come in. Adopted children of a lawful child or of an adopted child would be out. A simple solution for Nova Scotia would be to repeal its definition contained in section 11. Section 9, which sets out the general effect of an adoption, is broad enough to reverse, as in New Zealand and Manitoba, the old common-law rule of construction, without any definition of "child". By putting section 11 into the statute unnecessary and perhaps unintended restrictions are placed upon section 9.[202]

Apart from this special problem in Nova Scotia, what does the section defining "child" include? Adopted children would be included in gifts expressed to be to a testator's child, children, sons, daughters, issue, grandchildren and any other words referring to the testator's descendants. In "grandchildren" I include children of the testator's lawful or adopted children, and adopted children of his lawful or adopted children. Also included in the section would be persons described by relationship to descendants —"my son's wife", "my daughter's children"—where the son and the daughter are adopted children. Equally, "son-in-law" and "daughter-in-law" would include the husband of an adopted daughter or the wife of an adopted son.[203] Persons described, not

[201] See text to footnotes 188-189.

[202] The section is set out at footnote 24.

[203] *Contra*, Judson J. in *Re McClenaghan*, [1954] 1 D.L.R. 675, at p. 678 (Ont.): "Daughter-in-law surely means wife of a son, not the wife of a person who may answer a certain statutory definition [of 'child']". This remark would seem totally unjustifiable, except for the possibility that in Ontario the court may have felt that as the definition was limited to three specific words, and had no "or its equivalent", it could not deviate from the old unrealistic approach. The Ontario definition has since been

by relationship to the testator, but by relationship in the descending line to anyone else, would also be included. A gift to "the children of Tom Smith" would include any children adopted by Tom Smith, whether Tom Smith was a brother or a stranger to the testator. In summary to this point, I submit that the section provides a definition not just of "child" or "issue" but of any word that includes some or all children of the first or further generations. "Son" refers to a male child only. Yet this word is an "equivalent" in the section defining "child" "or its equivalent".

What about collateral relatives of a descending line described, not as "the children of my brother Tom Smith" or as "the children of my uncles and aunts", but rather as "my nephews and nieces" or "my cousins"? "Child" or its equivalent includes an adopted child unless otherwise indicated. Are collateral relationships included in the statutory definition? I suggest that they are. A court today would hold that these words of relationship describing a descending line, even though by collateral relationship to the speaker, are included in the operation of the section defining "child" or its equivalent.[204]

I emphasize that my submission is based not necessarily upon the creation of new relationships upon adoption, though, if present, they help. But we are construing wills. The legislature has said that, in the absence of a contrary intention, "child" or its equivalent includes an adopted child. It does not say, except in Nova Scotia, adopted by whom. In British Columbia it did say by whom until 1948, when the restriction was removed. If a bequest to the children of the testator's brother Tom now includes, by reason of the statutory definition of "child" or its equivalent, Tom's adopted children, a court could very well use the legislation to say that a gift to my nephews and nieces also includes my brother Tom's adopted children. The definition is not attempting to define one word, but a number of words of roughly equivalent

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repealed, but in this respect the replacement is even more restricted: *rights* are conferred upon the adopted child or any issue of the adopted child, and upon no one else. Cf. *Wilson* v. *Commissioner*, [1928] N.Z.L.R. 167 (Ostler J.).

[204] In a New Zealand case, the court held that a gift to my "nephews and nieces" did not benefit an adopted daughter of the testator's brother: *Trustees, Executors and Agency Co.* v. *Rowley*, [1939] N.Z.L.R. 146 (Kennedy J.). There was no section defining "child" or its equivalent. The reasoning is based upon the argument that the then New Zealand legislation, comparable to that described for Western Australia in the text to footnote 156, did not put the child in any new relationship except that of child of its new parents. I think that the case would not be followed. In any event, the legislation of 1949 has removed the decision in New Zealand.

meaning. Some jurisdictions make it clear that the equivalence is not limited to the first generation. In British Columbia the phrase is "child", "issue" or "its equivalent". There is nothing to suggest that equivalence must exclude words which describe children by a collateral relationship to someone else. They are still words describing "child" or "children". The spirit and apparent purpose of the statute is to bring in adopted children, by whatever word they are described. "Nephew" describes not merely a person in relationship to the testator as such but a person who is the *child* of the testator's brother or sister.

To what instruments is the statutory definition applicable? In all jurisdications that have the statutory definition, other than Quebec, wills are either expressly or clearly included in the definition. In so far as some wills in Quebec may be "deeds", they would be included. With the exception of Quebec, none of the definitions is made applicable to statutes. So long as the definitions remain, they should be made to include statutes.

Apart from wills and statutes, in what other circumstances does the use of "child" or its equivalent include an adopted child? There is a wide variety of solutions across Canada, depending upon the wording used in the "child" definition. Five jurisdictions (New Brunswick, Prince Edward Island, Saskatchewan and the two territories) use the simple words "in any instrument". Alberta and Newfoundland have "in any will, conveyance or other instrument"; British Columbia, "in a will, grant or settlement"; Nova Scotia, "in a grant, trust, settlement, entail, devise or bequest"; and Quebec, "in any other act or in a deed".

All the definitions would appear to be limited to written forms of expression. Is an ordinary written contract included? An employer contracts with his employee to pay him a pension at age sixty-five for life, and if he fails to reach the age of seventy-five to pay to the widow or, failing her, to the employee's "children". What about trade union and credit union insurance and benefit contracts (not within the life insurance statute)? Probably "instrument" would cover them.[205] A limitation to instruments of the nature of a trust or settlement proper seems out of place. So, too, a simple letter of directions to a debtor to pay a debt to Brown, and if he is dead to "his children", should come within "instrument". Do these contracts, letters and other informal dispositions come within British Columbia's "settlement" or Nova Scotia's

[205] See *Mason* v. *Schuppisser* (1899), 81 L.T. 147, at p. 148 (Stirling J.); *Re Fine Foods*, [1939] O.R. 401; [1939] 3 D.L.R. 472 (Gillanders J.A.).

"trust"? Probably not. They are simply contracts for the benefit of third parties, or assignments of contracts. What of an appointment in exercise of a power of appointment, where the exercise takes the form of a simple letter to the trustee? Does the letter constitute a trust, settlement, grant or deed in the three jurisdictions which do not use "instrument"? These questions are enough to illustrate the need for clarification in many jurisdictions in Canada.

A small point in Nova Scotia should be specially mentioned. That province has the three-fold pattern common to the other provinces: (1) a section dealing with the general effect of an adoption, normally not including property rights; (2) a section setting out the property rights of the parties upon intestacy; and (3) a section providing a definition of "child" or its equivalent in any "grant, trust, *settlement* . . .", but limited in Nova Scotia to instruments of the adopting parent. The point of special comment here is in connection with the first section, which sets out the general effect of an adoption and provides, in part, that upon an adoption,

> except as provided in this Act, all rights, duties, responsibilities, and other legal consequences of the natural relation of child and parent, *including settlement*, shall thenceforward exist between the child and the petitioner and his kindred, and shall, . . . terminate between the person so adopted and his natural parents and kindred. . . .[206]

What do the words "including settlement" mean? They have nothing to do with property and do *not* bring into the general effect section some property dispositions not covered by the limited section defining "child" or its equivalent when used in a settlement. If we may look at legislative history, we find that, while Nova Scotia rewrote its adoption legislation in 1952, these three sections have remained practically unaltered from the original act of 1896. The legislative draftsmen of 1896 apparently copied the three sections from the Massachusetts act of 1876, including the two words "including settlement".[207] The two words, first inserted in Massachusetts in 1876, were removed in that state's statutory revision of 1902, when the three sections were continued with the deletion of these two words. In Massachusetts, it would appear that the word "settlement" referred to what we should call today "residence", possibly "domicile". Thus, for example,

[206] R.S.N.S., 1954, c. 4, s. 9(1).

[207] 1876, c. 213, ss. 7-9 (Mass.); P.S. 1882, c. 148, ss. 6-8; R.L. 1902, c. 154, ss. 6-8. It should be noted that from 1876 until today the child definition section, which lists the various instruments for which the word "child" is defined, lists as one instrument "trust settlement". Nova Scotia from the beginning inserted a comma between these two words.

the statutes of Massachusetts at that period had a statute giving jurisdiction in bastardy proceedings to that court in which the complainant had her "settlement". Another statute declared and still declares that legitimate children "shall follow and have the settlement of their father, if he has any within the State, until they gain a settlement of their own". In bastardy proceedings where the complainant had been adopted, a Massachusetts court held that[208] by reason of the two words the girl had her "settlement" in the place where her adopting father had his settlement. What do the two words mean in Nova Scotia's new adoption act of 1952? Was Nova Scotia using the borrowed words in the sense in which Massachusetts used them in 1876? May a court look behind the use in 1952 of a word that no longer normally bears one of its older legal meanings? It is interesting to note that Nova Scotia also has a statute, the Poor Relief Act, declaring that a legitimate child acquires its father's "settlement".[209] The statute defines settlement as meaning "the *status* of a person who has a right to relief from the overseers".[210] The draftsman of the adoption act has used the same technical legal word in two almost consecutive sections of the same act, yet with an entirely different meaning.

A more serious problem involves all jurisdictions. Is the statutory definition limited to adoptions before the will or other instrument was made? Or to wills and other instruments made after the adoption? A testator leaves, by will made in 1940, $500 to each of the children of *B*. *B* has, on the testator's death in 1950, two adopted children: *C* adopted in 1938 and *D* adopted in 1942. There is nothing in the present statutes to suggest any limitation. The old definition in Ontario applied only to "any disposition made after the making of an adoption order". We should not imply such a limitation in the other jurisdictions. The section is not solely reflecting the testator's intention. It is supplying a presumed intention, in place of the old common-law presumption, in those cases where he does not provide his own.

Much litigation on the former New Zealand legislation, the new legislation in England and that of some of the Australian states[211] on the interpretation of a specific limitation of this sort is therefore irrelevant for us.

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[208] *Washburn* v. *White* (1886), 140 Mass. 586.

[209] R.S.N.S., 1954, c. 218, s. 2. [210] *Ibid.*, s. 1(g). Italics added.

[211] Cf. *Pedley-Smith* v. *Pedley-Smith* (1953), 88 C.L.R. 177, where the cases are collected. There was no suggestion in the case that, but for the express clause preventing the adopted child from taking under an instrument executed before the adoption order, adopted children could not take under instruments executed before adoption.

The present New Zealand legislation, which does not supply a definition as such, provides that the comprehensive section setting out the effect of an adoption shall not apply to wills where the adoption occurred after the *death* of the testator, unless express provision otherwise is made in the will. The effect is thus to include some adoptions after the making of the will—those before the death of the testator. But in the interpretation of New Zealand wills today, a child adopted after the testator's *death* does not come in unless there is express provision otherwise.

I submit that in Canada the statutory definition applies equally to adoptions before and after a testator's death where, by the language of the will, the class is not to close until some future date. The section applies to all adoptions made before the class closes. If a parent may add as many lawful children to the class after the testator's death as he chooses, may he not add adopted children?

Does the section apply to wills or other instruments made before the section was enacted? There would seem to be no reason why it should not, remembering the submission just made as to its purpose—to change the *prima-facie* meaning of "child" or its equivalent in a will or other instrument in the absence of any expressed intention otherwise. In *Re Clark*[212] Dysart J. had no difficulty in holding that the words "lawful issue" of a named beneficiary in a trust instrument executed in 1901, long before any adoption legislation appeared in Manitoba, included a child adopted by the beneficiary in 1928. This is in a province without a statutory definition clause, but the problem of who is within the term "child" or "lawful issue" is comparable. It may even be easier to extend the definition to cover instruments executed before the legislation in those provinces with the specific definition. It is true that in the *Clark* case the child took no benefit, and its status was the sole problem. But the court was prepared, whether for status purposes or for property purposes does not matter, assuming there is a difference, to read a word used in 1901 as modified by general legislation enacted in 1924 and 1926.

There is an Ontario case which might appear to be authority against the view that the definition applies to documents executed before the legislation came into force. In *Re Hughes*,[213] a settlor settled property in 1878 upon *W* for life and then upon such trusts as *H* by deed or will should appoint. *H* appointed, by will executed in 1898, a portion of the property in favour of his daughter *E* for

[212] [1947] 1 D.L.R. 371 (Man., Dysart J.). The case is discussed fully at footnote 240.

[213] [1944] O.R. 407; [1944] 4 D.L.R. 99 (Rose C.J.H.C.).

life, remainder "to her children" with a gift over "if she do not leave any children". *H* died in 1899, *W* died in 1921. *E* died in 1943 leaving no child of her own other than *J*, a child adopted by *E* in 1925 under the original adoption legislation of 1921 in Ontario,[214] which contained in section 12 a statutory definition of "child" or its equivalent very similar to the definition in Alberta quoted at the beginning of this section.[215] There were no restrictions in Ontario preventing the application of the definition of "child" to a child adopted by persons other than the testator or settlor. The restriction came in 1927[216] when Ontario repealed the 1921 act and adopted to a large extent the restrictive enactment of 1926 in England. Rose C.J.H.C. noted the change in the legislation under which the adopted child was now not to be the child of its new parent, except as provided in the act, and "child", in instruments made *after* the adoption order *by* the adopting parent, was defined to include an adopted child. Neither of the restrictions upon the types of "instrument" for which "child" was defined appeared in the definition of 1921 under which *J* was adopted. Rose C.J.H.C. seemed to assume that the earlier legislation under which *J* was adopted applied to the case before him, and on that basis proceeded to rule that, despite the breadth of the 1921 definition, it could not be interpreted to alter the meaning of a word used long before the statute, at a time when its meaning was clear — adopted children were excluded.[217] Apparently the learned judge's attention was not called to section 15 of the 1927 legislation,[218] which reads:

> The property and rights of all children adopted under the Act [of 1921] shall be governed by the provisions of this Act.

Is it not fair to say, because of section 15, that the definition of 1927, and not that of 1921, was to be applied to this litigation? If so, it is clear by the terms of the 1927 definition that *J* could not be included either because she was not adopted by the maker of the instrument or because she was not adopted before the instrument was executed. There might be some question about the meaning of "property and rights" in section 15 in its application to *Re Hughes*. I suggest that the very purpose of the section is to cover the type of interest in *Re Hughes*. This point will be discussed in Part VIII (a) in dealing with the application of the present adoption legislation to earlier adoptions.

[214] 1921, c. 55 (Ont.).
[215] In the text to footnote 199.
[216] 1927, c. 53 (Ont.).
[217] [1944] O.R. 407, at pp. 410-412; [1944] 4 D.L.R. 99, at pp. 102-104.
[218] 1927, c. 53, s. 15; carried forward into R.S.O., 1927, c. 189, s. 14; R.S.O., 1937, c. 218, s. 15; R.S.O., 1950, c. 7, s. 20.

In result, it is doubtful how far the *Hughes* case is good authority for the proposition that the definition sections do not apply to instruments executed before the enactment of the definition. And in *Re Hanna*,[219] a case cited and relied upon by Rose C.J.H.C., Hogg J. held, for the reason I have set out (and not for that given for the decision in *Re Hughes*), that adopted children could not take the income, but might take the principal, in the following situation. A testator died in 1919, leaving a will made in 1918. By the will his two daughters each received thirty per cent of the residue for life; thereafter half of the income of a daughter's share was given to her husband for life, the other half for "the children of said deceased daughter" until the husband's death. Upon this last event, the deceased daughter's share was to be divided "among the children and the grandchildren of my said [daughter] as [she] shall in writing or [by will] appoint and in default of appointment equally per stirpes". Hogg J. held that, even though a daughter's adopted child could not by reason of the statute come within the bequest of income to "children", because it was not a disposition by the adopting parent, the adopted children might take any share of the principal appointed to them by the daughter "because it would be a disposition by the adopting parent of her [sic] property after the making of the adoption order".[220] The daughter's power of appointment was a special power limited by the terms of the will made in 1918, by a testator dying in 1919, to "the children and the grandchildren" of the daughter. His lordship therefore must have concluded, contrary to Rose C.J.H.C. in the *Hughes* case, that the word "children", used in a will executed before any adoption legislation had been enacted, could include children adopted under legislation first introduced into Ontario after the testator's death, in circumstances where, upon a proper construction of the will, the class—children—was to remain open after the testator's death.[221]

My submission that the statutory definition applies to adoptions occurring after the execution of the document, even after a testator's death, or to adoptions after the enactment of the statute obviously does not affect the rule that statutes will be construed so as not to disturb property interests already *vested*. In fact the rule is occasionally put in the statute itself in jurisdictions out-

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[219] [1937] O.W.N. 517 (Hogg J.).

[220] At page 522.

[221] There may be some doubt whether in this case the disposition of the principal was *by* the adopting parent, in view of the fact that the power was a special one. See the *Pedley-Smith* case, footnote 211.

side Canada. But in a gift by will to daughter *A* for life, then to her children if she leave any children, and if not then to *X*, *X*'s interest, though transmissible to his estate if he predeceases *A*, is contingent only and is not touched by a rule preserving property rights already vested. If the testator in this illustration dies in 1935 and *A* dies in 1945 having no children in 1935, but leaving two adopted children at her death in 1945, the adopted children take on *A*'s death, except of course in Nova Scotia where only children adopted by the testator are included in the term "children". *X* is not being deprived of a vested interest. He is being deprived by the legislation of a contingent interest which would, in the absence of children of *A*, have vested in him. The word "vested" is occasionally used inaccurately to include contingent interests which are transmissible.[222] I suggest that the inaccurate and extended meaning cannot be applied to adoption situations because of the intent and purpose of the adoption legislation, particularly its "child" definition section, which changes the *prima-facie* meaning of "child" in a will in the absence of any expressed intention otherwise.

The earlier rule of construction arbitrarily attributed to a testator one meaning or intention. The new one is just as arbitrary. When the testator used the word "children", to be applied at some future date, it is as ridiculous to tie the meaning of the word down to its meaning at the date of the will, or of death, as it is to tie the meaning of any other word down to the earlier date. A testator dying in 1945 makes a gift, after successive life estates, to found an annual scholarship for the top student in each year of the Harvard Law School. Is a woman student to be excluded from this scholarship just because women could not be students at Harvard Law School until a date after 1945? Or does a gift, in the will of a testator dying before 1923, to the testator's daughter's surviving husband (after a life estate to the daughter) exclude a "husband" who was the brother of the daughter's now deceased first husband, a "husband" whom the daughter might not marry in Canada before 1923? Surely "student", "husband", "children" or any other word in a postponed testamentary gift must be read in the light of the word's meaning at the time the postponement ends and the word is called upon to determine the destination of the gift in the absence of any testamentary indication to the contrary. The

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[222] *E.g.*, Rose C.J.H.C. in *Re Hughes*, [1944] O.R. 407, at pp. 412-413; [1944] 4 D.L.R. 99, at pp. 104-105.

judgments of Dysart J. and Hogg J. in the *Clark* and *Hanna* cases would support this conclusion.[223]

A different type of problem arising out of the statutory definition of "child" or its equivalent is whether a reference in a will to a person as being adopted colours the subsequent interpretation of a later general word —"child" or its equivalent? The statutory definition applies "unless the contrary plainly appears by the terms of the instrument". Is a gift of $1,000 each "to my sons John and Lorne and my adopted daughter Nancy", with the residue, after a life estate to the widow, "to my children", a provision by which it "plainly appears" that "children" is not to include adopted children? I suggest that, without attempting to be categorical for all situations, the adopted daughter is definitely within the residuary gift. There is no plain intention to exclude the adopted daughter by calling her "adopted" in one part of the will and afterwards referring simply to "children". The statutory rule prevails in the absence of a plain indication to the contrary. An illustration of the type of problem is to be found in *Public Trustee* v. *Pilkington*,[224] where a testator left £400 to *X*, "my adopted daughter", with the residue, after a life estate to the widow, to "my children". The only child was *X*. The court held that *X* took the residue. There was no statutory definition of "child", but the adoption legislation in New Zealand then provided that an adopted child should, in every respect, except as therein specially set out, be a child of the adopting parent. *X* was, in effect, both his child and his adopted daughter. A reference to her as "my adopted daughter" did not alter the fact that she was a "child" within the meaning of the residuary gift.

In the Manitoba case of *Re Scott*,[225] where the legislation is not as helpful as it was in New Zealand, there was a specific gift to "my adopted daughter Ivey Ellen Scott", the residue to go to the "next of kin" of the testator and of his wife. Kilgour J. held that Ivey Ellen was not a child of the testator for the purposes of the gift to the testator's next-of-kin. His lordship based his decision not upon any inadequacy of the Manitoba legislation but upon a construction of the specific will in the light of the surrounding facts: a specific bequest to this girl as his "adopted daughter", careful provision for a number of collateral relatives, the fact that Ivey Ellen had, at the time of the will, no legal status, her informal

[223] See also Kilgour J. in *Re Scott*, [1928] 1 W.W.R. 168, at pp. 177-178, 181 (Man.).
[224] (1912), 31 N.Z.L.R. 770 (C.A.).
[225] [1928] 1 W.W.R. 168 (Man., Kilgour J.).

adoption being validated sometime after the will was executed, and the fact that she was, in any event, a substantial beneficiary of the residue as one of the wife's next-of-kin. She was the wife's niece. None of these things in themselves was sufficient, but, reading all together with the will, his lordship ruled that the testator did not intend to include Ivey Ellen in the gift to next-of-kin as daughter but as his wife's niece. The adoption legislation made her the child of the testator, but that did not prevent the application of the rule that words in a will are to be read in the light of their context: this will, when construed, did not provide a gift of a portion of the residue to Ivey Ellen as daughter, but as niece. There is one remark in the judgment that is particularly open to misconstruction. After a statement that the adoption legislation gives the adopted child the status and capacity of a child born to the new parent in lawful wedlock, his lordship proceeds: "In other words, a new rule or principle of substantive law has been created, not a new canon of construction for wills".[226] When his lordship declares that there is no new canon of construction for wills, I suggest that he is referring to the rule under which no word in a will has a fixed meaning but depends upon its context and the testator's intention. The statement is not a declaration of the continuing validity of the old canon of construction that the word "child" *prima facie* means a lawful child only. That word, by a change in the substantive law of adopted children, may now include something more in its *prima-facie* meaning—an adopted child.

In a jurisdiction where there is neither a statutory definition nor a general all-purpose adoption statute—where, in other words, the old common-law *prima-facie* meaning of "child" still prevails —then a description of one child as adopted *may* cause exclusion when a later reference is merely to "children".[227] This result, simply as a question of construction of a will, is easier to reach where the old common-law rule provides a *prima-facie* answer against the child.

A further question arises out of the statutory definition of

[226] *Ibid.*, at p. 183.

[227] Cf. *Trimble* v. *Kirkland* (1913), 13 S.R. (N.S.W.) 417 (Simpson C.J.): specific gift to "my adopted daughter known as" P.M.; gift of proceeds of sale of land to be "equally divided between the members of my family". P.M., it was held, did not take as a member of the family of the testator; the use of the phrase "my adopted daughter" suggests that she is to be excluded from the word "family", which is normally limited in the first instance to lawful children: at p. 420. There was no adoption legislation in New South Wales at either the date of the "adoption" or of the death of the testator; the adoption had been merely by agreement.

"child" or its equivalent. Does a reference to the "children" of the adopted child's *natural* parents exclude a child adopted out of the old family? The definitions in Canada are not exclusionary: they merely provide a statutory inclusion of further persons — adopted children — within the normal meaning of a word. They do not exclude those already there merely because they are now by adoption equally within the word when applied to another person — when applied to the adopting parents.[228] Are children adopted out of the family excluded by other provisions of the legislation? In all twelve jurisdictions, with a slight modification in Prince Edward Island, they retain their rights to inherit from the natural family upon intestacy. A different rule does not exist, I suggest, for wills and other instruments, especially in the absence of any general provision cutting the child off from his old family. Nova Scotia is the only province where the legislation approaches a general transfer from the old family to the new. But even here section 9, which terminates all "the legal consequences" of the relation of child and parent between the child and his natural family, is followed by two sections that recognize the continued existence of the old legal relation for purposes of intestate succession by the child from the natural family and by the natural family from the child. For the time being, in Nova Scotia and elsewhere in Canada, "child" of a natural parent includes a child adopted out of the family.

But in New Zealand today the relationship of all persons is to be determined in accordance with the earlier provisions of the adoption legislation under which the child ceases to be child of the old family and becomes a child of the new for all purposes except forbidden marriages, incest, citizenship, instruments (other than wills) made before the adoption order and wills where the adoption order was made after the testator's death. Apart from an indication to the contrary in a will or other instrument, it is clear, I suggest, that the adopted child is no longer within the term "child" or its equivalent when applied to his natural family. This is the sensible approach. Canada's legislation might well follow suit. In England, the same result as in New Zealand is reached by an express clause in the section defining "child" and other words.[229]

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[228] In *Re Carter*, [1941] N.Z.L.R. 33, Blair J. reached this result in a jurisdiction without a statutory definition section such as that in Canada. The case serves to illustrate the position apart from the definition. I suspect that the result would be different in New Zealand today.

[229] See text to footnote 190.

(c) *Lapse*

It is a well-known rule of construction in the law of wills that a gift to a person who predeceases the testator lapses. For many years there has been a statutory prevention of lapse in certain cases. These cases involve relationship to the testator, or to some one else, usually "child" or "issue".

Section 33 of the Wills Acts of the United Kingdom reads:

> Where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed . . . shall die in the life time of the testator *leaving issue*, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Most Canadian jurisdictions have this provision or one comparable to it.

An adopted child's status or rights are involved in two situations. In the first two lines the statute refers to certain persons to whom a gift has been made by will—"child or other issue of the testator".[230] Then in the third line there is a reference to the death of these persons "leaving issue". The second use of the word "issue" refers to a different group of people—to issue of the child or other issue referred to in the first line. In both cases, the adoption legislation's statutory definitions of "child", "issue" or their equivalent do not help because they do not extend to statutes, except in Quebec.

To clarify the section of the Wills Act in British Columbia, until the adoption legislation does its full job, a subsection was added in 1953 to the non-lapse section of the Wills Act:[231]

> In this section 'child' includes an adopted child and 'issue' has a corresponding meaning.

In the absence of proper adoption legislation, the mode of defining "issue" used in this amendment is preferable to one that attemps to set out all potential relationships.

In other provinces the solution is not as easy. I noted in Part IV (a) that in Alberta, British Columbia, Manitoba, Newfoundland, Nova Scotia and Saskatchewan the child is either made the child of the adopting parents or is placed in the legal or natural

[230] Or brother or sister of the testator additionally in some jurisdictions, *e.g.*, Manitoba, Ontario.

[231] 1953, 1st sess., c. 43 (B.C.). For a discussion of U.S. cases on the non-lapse section and adopted children, see annotations (1934), 92 A.L.R. 846; (1938), 115 A.L.R. 444; (1951), 19 A.L.R. 2d 1159.

relation of child and parent with his new parents. Apart from a possible limitation of the new relationship to the first generation only in some of these six provinces, there should not be too much difficulty with the application to adopted children of the Wills Act section dealing with lapse. In Ontario the child does not become, expressly, the child of his new parents, except as provided in the statute, but does acquire some rights to inherit under wills as well as intestacies. In the five remaining Canadian jurisdictions the child becomes the child of his adopting parents only, in summary, for custody, obedience and maintenance, some intestate succession rights and for interpretation of documents dealing with property. Does this mean in the six last-mentioned jurisdictions that for the purposes of our present discussion of the Wills Act, a statute to which the statutory definition of "child" or its equivalent is not applicable, the child is not a member of his new family?

There may be a solution for the first part of the non-lapse section—"child or other issue"—that does not apply to the second—"die . . . leaving issue". In the first line, the words "child or other issue" are used in a clause that refers to these persons as intended beneficiaries of property under a will. If the words may, *in the will*, include an adopted child, may they not also include an adopted child when used in this particular way in the Wills Act? In a gift "to my children", Mary, an adopted child, could clearly have taken, had she survived the testator, by reason of the statutory definition in most Canadian provinces, and in Manitoba and Ontario by reason of other provisions in the adoption legislation. But if Mary predeceases, may the Wills Act apply? "Where any person being a child . . . of the testator to whom any real or personal estate shall be devised or bequeathed. . . ." In so far as the will is concerned, she is a child of the testator to whom property had been given. But is she a child of the testator for the purpose of this section of the Wills Act? Yes. I submit that a court will read the section so that if the adopted child could have taken had she survived the testator, she will be included in the phrase "child or other issue".

Sometimes, therefore, the statutory definition or other adoption legislation will be indirectly modifying the meaning of "child or other issue" in the wills statute; sometimes on the ordinary interpretation of the will the adopted child will be included—a gift "to my daughter Mary" where Mary is an adopted child. In essence, because the words "child or other issue", as used in the

wills statute, are so closely linked with a gift of property by will to a testator's "child or other issue", those persons who are the testator's children or issue within the meaning of the will, whether by reason of ordinary construction or statutory definition or otherwise, will be within the opening words of this section of the Wills Act. Any other construction would be ignoring the context in which these words were used in the statute. Some doubt might be raised for Ontario, where even though Mary is given "the same rights to and interests *in property* under any . . . disposition [that is, any will] by the adopting parent . . . as if . . . born to the adopting parent in lawful wedlock", she is expressly prevented from being treated as a child of this testator "except as provided in this Part". But as the section of the Wills Act which we are considering is presently worded in most jurisdictions, including Ontario, it does deal with Mary's rights or interests in property. In fact, rather than giving the property that otherwise would have gone to her to her issue, the act gives it to her on the basis of a fictitious dying after the testator.[232]

I have just suggested that, if the adopted child could have taken had he survived, he is within the statute's "child or other issue". Does this suggestion apply to a gift to a person described, not by relationship to the testator, but by individual name? There is no difficulty in a gift to "my children" or "to my daughter Mary". What of a gift "to my adopted daughter Mary" or just to "Mary Black"? Is there here sufficient indication that the testator is making a gift to a person who, to him, is his child? Nothing suggests that the testator's description of the person is equivalent to "child". In this situation the statutory non-lapse provision may not apply to adopted children in those jurisdictions where the child is not given equal rights of testamentary succession with lawful children. In Manitoba, where the child is to some extent given equal rights, the court,[233] without reference to this point, held that a gift by an adopting parent to her "adopted son William J. O'Connor" did not lapse upon William's death before the testator. The court assumed that, once the validity of William's adoption was established, no question of lapse arose. The only issue discussed was the sufficiency of the child's adoption — an informal one which the court found was validated by Manitoba legislation. Counsel for the administrator with the will annexed is reported, in the Manitoba

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[232] See text to footnote 236.
[233] *Re O'Connor*, [1946] 1 D.L.R. 38; 53 Man. R. 300 (Dysart J.).

Reports,[234] to have referred to the non-lapse clause in the Wills Act and then to have quoted the adoption legislation on the effect of an adoption order—the child is to have the same rights of "inheritance" from his adopting parent as if born in wedlock.

I have not overlooked the fact that in some jurisdictions the non-lapse section of the Wills Act may not be applicable to class gifts. It is expressly made applicable to them in a number of jurisdictions[235] and in the proposed new uniform Wills Act in Canada. Where the section is not applicable to class gifts, an adopted child is in no worse position than a lawful child—neither, when described as a member of a class, come within the section's opening words "child or other issue of the testator" to whom a gift of property is given by will.

The second part of the statute's non-lapse section—the requirement that the people in the first part "die . . . leaving issue"—raises a slightly different problem. We are not here concerned with the "issue's" property rights. Except in those jurisdictions where the statute has been changed to provide for a gift to the issue,[236] the effect of "leaving issue" does not give the issue as such any property. Therefore, in the words of Dysart J. in *Re Clark*,[237] the question, in the case of adopted children, does not involve any *right* of the adopted child—only his status. Regardless of his property rights, if an adopted child becomes, generally, the child of his adopting parent, whether the testator or a descendant of the testator, and not just for specific purposes, then the non-lapse section of the Wills Act should operate. In Alberta, British Columbia, Manitoba, Newfoundland, Nova Scotia and Saskatchewan, adoption makes the child the child of the adopting parents. To clarify any doubts, especially for relationships beyond that of parent-child, British Columbia added in 1953 the subsection to the Wills Act already noted.[238]

In the remaining six Canadian jurisdictions there is no provision making the child the child of his new parents, either generally or for any purpose that would include the prevention of lapse of testamentary gifts. The statutory definition of "child" or "issue" or their equivalent is of no help because it applies to documents and not to a statute. The varying grants of property interests do

[234] 53 Man. R. 300, at pp. 301-302.
[235] *E.g.*, Alberta, Saskatchewan, Northwest Territories, Manitoba, Ontario, New Brunswick.
[236] *E.g.*, Manitoba, Northwest Territories.
[237] [1947] 1 D.L.R. 371; 54 Man. R. 447 (Dysart J.), quoted *infra*, footnote 241.
[238] In the text to footnote 231.

not help because no property rights are involved in most cases. Are we back to the old rule of construction that, in the absence of any indication to the contrary, "child" or any similar word when used in a statute refers to children born in lawful wedlock only?

This problem of the meaning of "child" or its equivalent can arise in any number of cases where the property or contractual rights not of the child but of someone else are in issue. Rights of one person may depend upon whether someone else has or has not died leaving "children" or "issue". A man's sick benefits under a contract may be larger for each "child" of his under a specified age. Or a man's liability to contribute to a medical or hospital scheme may increase if he has "children". Are adopted children "children" for these purposes? In the statutory-definition jurisdictions, a document using the word "child" or its equivalent would bring in adopted children to the extent that the statutory definition applied to the type of document in question. But in a jurisdiction where the definition is not sufficient, where there is no definition,[239] or where the word to be interpreted appears in a statute, we are back to the point raised in connection with the non-lapse statute: Is there anything in the adoption legislation of the six more restrictive jurisdictions to remove the old *prima-facie* meaning of the word "child" or "issue" when used, not of the child's rights, but of someone else's rights? These rights may be, for example, dependent upon the existence of, or upon dying leaving, "children" or "issue". And the adoption legislation may fall short of making the child a child of his new parents for this purpose. In all jurisdictions except Ontario a willing court might well bridge the gap. In some cases, it could be done upon an examination of the special purpose of the legislation in which the word is used. The purpose might be hospitalization insurance in which premiums are based upon the number of dependent children—a problem in part of maintenance. And for maintenance purposes the child is made the child of the adopting parents in all Canadian jurisdictions. The non-lapse statute should not be left, in the six more limited jurisdictions, in a doubtful state. An adjustment to the adoption legislation is needed at once.

In Manitoba, one of the general-provision provinces, Dysart J. had to consider the problem of "status" rather than "rights" in *Re Clark*.[240] A trust agreement made in 1901 between C as settlor

[239] Manitoba and Ontario.
[240] [1947] 1 D.L.R. 371 (Man., Dysart J.).

and *D* as trustee provided that a fund of $8,000 be held for the benefit of *C*'s daughter-in-law, *F*, and her infant son, *G*. The agreement went on to provide, as to part of the fund, that after the death of *F* and *G*, if *G* be dead "leaving him surviving lawful issue, then [that part of the fund] shall be paid to his executors or administrators"; but if he "be then dead, not leaving him surviving any lawful issue", it should revert to *C*'s estate. In neither event did *G*'s "lawful issue" take any direct gift: they might get nothing if *G* left a will disinheriting them. It was simply that, if there were "lawful issue", *G*'s estate took; if not, *C*'s estate took. *G* married in 1924 and died in 1934, leaving only one child *H*, adopted in 1928. Was *H* "lawful issue" of the *cestui que trust* of the 1901 trust agreement?

Dysart J. refers to adoption under the statute in force in Manitoba at the time of *G*'s death, the adoption legislation of 1924, and says:

> Section 128(1) of the Act provides, in part, that 'When a child is adopted in accordance with the provisions of this Act. . . . Such child shall thereafter be deemed and held to be for every purpose the child of his or her parent or parents by adoption as fully as if by natural birth, and such child shall take the name under which it is adopted.' The section also declares some of the reciprocal rights and duties which flow from that relationship, including and limiting rights of inheritance; but with those rights and duties this motion is not concerned, because the question before us for answer does not involve any right of the adopted child, but only his status,—that is, whether or not the child falls within the class of persons designated as 'lawful issue'.[241]

After pointing out that the epithet "lawful" as applied to "issue" merely declares and emphasizes what the law presumes—that the issue are legitimate—and that the combined term "lawful issue" has an artificial meaning when applied to issue or children, excluding some of which the "lawful father" is in fact the father, and including others of which he is not, his lordship continues:

> If then the law, in declaring that all children born in wedlock are lawful issue of a husband, can disregard the actual paternity, why may not the law also declare that a child adopted into a man's family is also his lawful issue? This is precisely what the *Child Welfare Act* does. That public Act expressly declares that a child so adopted *shall be deemed and held, for every purpose, to be the child of its adopting parents as fully as if born to them.* That declaration makes the child lawful issue of its adopting parents.[242]

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[241] *Ibid.*, at p. 372. The present statute, s. 97, can be compared at footnote 138.

[242] *Ibid.*, at p. 373 (the italics are his lordship's).

His lordship does not decide the rights of an adopted child to take under this legislation: merely the status. He does refer, however, to the "well-considered" judgment in *Re Scott*[243] as holding that an adopted child is included in the term "children" *of a testator*, and as such entitled to take a gift under a will. But he makes it clear that regardless of such rights, whatever they may be, the child has the status of "lawful issue" of the beneficiary of the trust. In Manitoba today I submit that the present clause making the child "the child of the adoptive parents" is no different in this respect than the one considered in *Re Clark*, which had two additional phrases: "for all purposes" and "as fully as if by natural birth".

Does the result in the *Clark* case depend upon the general position conferred by Manitoba's legislation? If it does, the answer to the questions posed earlier would definitely be different in Ontario, where by express provision no change in relationship, marginally called "status", is brought about save for the limited purposes set out. The Manitoba decision would apply in Alberta, British Columbia, Newfoundland, Nova Scotia and Saskatchewan. Elsewhere the answer would depend, in the absence of a sufficient definition, upon the purpose or object of the specific document or statute.

(d) *Effect of adoption upon special property rules*

The most obvious case where there may be some difficulty in introducing the adopted child into his new family for all purposes is the application of those legal rules which are dependent upon either the known inability of a woman to bear children or the presumption that a woman past child-bearing is incapable of having children. Thus, in the Nova Scotia case of *Re Thomson*,[244] a testator dying in 1930 left a gift to his daughter for life, then to her "children or issue" and, if none, to his sisters living at the daughter's death. By 1945 all the sisters were dead and the daughter, still alive, had undergone an operation as a result of which she was incapable of bearing children. The daughter claimed that an intestacy of the remainder interest had resulted and that she, as sole next-of-kin, was entitled to an immediate conveyance of the corpus. The court agreed with this contention: "in every possible contingency there is no other person entitled to an interest".

[243] [1928] 1 W.W.R. 168 (Man., Kilgour J.), discussed in text to footnotes 225-226.

[244] [1945] 4 D.L.R. 131 (N.S., Chisholm C.J.).

What if the daughter had adopted a child? Could that child have taken the gift to the daughter's children? In a will, in many jurisdictions, "child" or its equivalent includes an adopted child. I have already submitted that this provision applies to adoptions after the death of the testator where the class remains open, as the one in *Re Thomson* clearly did. It remained open to receive any lawful children born during the life tenant's life. So, too, it should include lawfully adopted children, who under the statute are included in the term children. This is a consideration which will need to be borne in mind in the application of any rule dependent upon a woman's inability to have children. In the *Thomson* case, the decision was not attackable on this ground because the case was governed by the law of Nova Scotia, the one province with a peculiar limitation upon its statutory definition of "child" or its equivalent in a will: the definition applies only to children adopted by the testator or settlor, not by others. Had there been, instead of a will, a trust settling property upon the settlor for life, then upon his children or issue and, in default, to his sisters, the statutory definition would have applied, even in Nova Scotia, to bring in adopted children and, probably, their issue. Ontario has no definition in the common form, but the usual benefits are given to adopted children under dispositions *by* the adopting parent or any kindred of the adopting parent.

A further illustration appears in *Re Spinkston*[245] where the gift was to *F* for life, remainder to her children. After she had passed the age of child-bearing, *F* applied, along with her adult child (the only other child being still an infant) for payment out to her and the adult child of one-half of the corpus of the gift. The request was granted. Here again, in most Canadian jurisdictions, the potential adoption of further children would probably prevent a successful application. As in *Thomson*, however, it was not necessary to raise the question of adoption in the *Spinkston* case because by a special exception in the local adoption legislation no child adopted after the date of a will can take under the will as a "child" of the adopting parent.

It is true that in the application of rules of law, for example the rule against perpetuities, no presumption against child-bearing is admitted. But Dr. Morris has suggested in his recent edition of *Theobald on Wills*[246] that even for perpetuities the child-bearing rule should be admitted. If it is in England, no adoption problem

[245] [1948] S.A.S.R. 112 (Napier C.J.).
[246] (11th ed., 1954) p. 495, footnote 47.

enters—"child" is defined to include adopted children only in wills made after an adoption order. But should the suggested interpretation be accepted in Canada, the position of possible adopted children will need consideration.

May *potential* adopted children alter the interpretation of "child" in a will where illegitimate children are involved? Under the old rule of construction, the courts held that the word "children" includes only lawful children unless either the testator has supplied another meaning or circumstances are known to the testator under which a beneficiary having only illegitimate children cannot have any legitimate children. Does the possibility of adopted children rule out the second exception to the rule of construction? I suggest that in this particular situation it does not. As a rule of construction, the rule and its exceptions are dependent upon the testator's presumed intention. If he knew of the existing child (who happened to be illegitimate) and knew of circumstances preventing the parent from having more children, he probably intended to benefit the child, regardless of his knowledge of the widespread practice of adoption and possible children through that means.

What is the effect of adoption upon the right to administration, with or without the will annexed, of a deceased person's estate? Is an adopted child a child for this purpose, thereby excluding other more remote, though lawful, kindred? The problem may involve merely the interpretation of the appropriate statute or rule of court. If it is, the child may have difficulty in establishing his right in New Brunswick, Ontario, Prince Edward Island, Quebec and the two territories where the child is not made the child of the adopting parents generally, but only for specific purposes, of which this is not one. In other jurisdictions no difficulty should arise, and did not in *Re Dzurman*.[247] Where there is no statute or express rule of court listing the order in which persons are entitled, and administration is in the discretion of the court, then I suggest that the court may quite properly grant administration to the adopted child in preference to more remote natural kindred, in whatever jurisdiction the question is raised.

VII. *Life Insurance*

The problems that adoption raises for life insurance are no different from those discussed already, especially in Parts IV and VI.

[247] (1936), 44 Man. R. 151 (Surr. Ct.).

But, in the application of the solutions suggested, we find very elaborate statutory provisions in the life insurance legislation attempting in a three-fold way to make sure that adopted children come in. For more convenient analysis, I have therefore separated life insurance from the earlier discussions.

In Quebec, there is the adoption legislation's statutory definition of "child" or any other word of the "same" meaning, when used in any other act of the legislature, as including an adopted child. In so far as the life insurance legislation of that province may not be sufficient to bring in adopted children, this definition will provide an answer, and a better answer in that the adoption legislation is then doing the work it should do—providing a new status for the child for purposes of other statutes. It is to be hoped that the courts will hold that the definition is applicable to comparable words, such as "sons", "daughters", "issue", even though none has the "same" meaning as "child", for one reason or another.

In the other provinces the adoption legislation's statutory definition is not applicable to other statutes, but may, in some, be used to interpret the word "child", "issue" or its equivalent in the insurance contract itself. Thus in Alberta, Saskatchewan, the two territories, New Brunswick, Prince Edward Island and Newfoundland, the word "children" in the beneficiary clause of a life insurance contract includes adopted children, apart altogether from any provisions of the life insurance legislation. This is true also in Manitoba by reason of the general provisions of the adoption legislation. In British Columbia and Nova Scotia it may also be true, but only in the parent-child relationship in British Columbia and, in Nova Scotia, only in contracts entered into by the adopting parent. In Ontario, an adopted child and its issue will have the same rights as a lawful child would have had in a contract entered into by the adopting parent or any kindred of the adopting parent. These remarks are intended merely to recall the adoption legislation already discussed in Parts IV and VI and point to its application to life insurance contracts in the absence of provisions for adopted children in the life insurance legislation. Because of the possible inadequacy of that legislation, however, counsel may need to look to the adoption legislation.

There is in all Canadian common-law provinces a uniform life insurance statute[248] drafted by the Conference of Commissioners

[248] See, *e.g.*, R.S.B.C., 1948, c. 164, Part IV, ss. 77-137, as amended 1950, c. 33. There are slight variations in wording in Newfoundland: cf.

on Uniformity of Legislation in 1923. Uniform amendments have been made from time to time. This statute makes three attempts to bring in adopted children and other persons related by adoption. By its elaboration and specification it may have partially defeated its purpose. There is, initially, a definition of "child" and "issue" and of "parent" (I shall refer to the sections as they appear in the British Columbia statute):

> 77. In this Part, unless the context otherwise requires:—. . . 'Child' and 'issue' include an adopted child: . . . 'Parent', 'father', and 'mother' include an adopting parent of the same sex respectively.

The definition provides a *prima-facie* meaning for certain words when used in the legislation. A later section, for example, lists the beneficiaries who are "preferred" and refers to "children" and to "father" and "mother". Persons related by adoption would be included without more by reason of the definition in section 77.[249]

Does the definition in section 77 extend to *documents* entered into under the statute? A man has two policies on his own life, one payable to John Albert Smith, the other to his children. John Albert Smith is the insured's adopted son. John is clearly a beneficiary of the first policy. As such, he is, by reason of the meaning of "children" in the statute when used in reference to certain types of beneficiaries, a preferred beneficiary. But if John is not a beneficiary of the second policy, then the definition in section 77 making children include adopted children *for the purposes of the statute* will not help John become a preferred beneficiary. It is here that we may have to revert to the adoption legislation referred to in an earlier paragraph to interpret the contract itself. It is true that the insurance act by section 78 provides that "this Part" of the statute applies to all life insurance contracts made in the province. That is merely to say that the definition section, which is in the part referred to, provides a *prima-facie* meaning for words such as "child" *when used in the statute.* Is it fair to say that the legislature intended in section 78 to make the definitions in section 77 of words used in the statute applicable to the same words when used in the contract or other document? It is arguable either way. I

R.S.N., 1952, c. 238, s. 2 (1, 2). The statute is not yet enacted in either territory, both of which operate under legislation passed long before statutory adoption, and which does not refer specifically to adopted children. A draft ordinance to bring the uniform act into the Northwest Territories has been prepared.

[249] I am ignoring for the moment any other classes listed as preferred beneficiaries in order to illustrate the breadth and, at the same time, potential limits of the definition in section 77. Section 77 is, of course, "subject to context".

prefer to say that section 78 can be construed to make section 77 cover both statute and document. But clarification is needed and could be provided very simply by rewriting the opening line of section 77 to read, "In this Part and in any contract governed by this Part . . .".

The life insurance statute's definition of "child" lacks that elasticity found in the comparable definition in the adoption legislation of many of the provinces. The latter legislation defines "child" *or its equivalent* or, in British Columbia, "child", "issue" or their equivalent. The life insurance definitions define merely specific words.[250] The difference is a pure accident in drafting and is, I suggest, not material. Some clarification would help, though, to make certain that, for example, children adopted by brothers and sisters are entitled to share in life insurance moneys payable to "nephews and nieces", assuming that the definitions apply to words in the contract. So, too, for sons, daughters, grandchildren, grandparents, cousins, daughters-in-law.

The second provision in the life insurance legislation appears when, apparently not content with the definitions just set out, the draftsmen specifically include in the list of preferred beneficiaries "adopted children" following "children", "children of adopted children" following "grandchildren", and "adopting parents" following "father" and "mother".[251] The subsection reads:

> 104 (2). Subject to section 113, preferred beneficiaries are the husband, wife, children, adopted children, grandchildren, children of adopted children, father, mother, and adopting parents of the person whose life is insured.

Two questions arise. Does the listing of some relationships by adoption (a) exclude others, and (b) cut down what otherwise might be the meaning of the definitions of "child" and "parent" in section 77? The legislative history does not help. The original act of 1923 contained no reference to adopted children. By an amendment in 1935[252] both sections 77 and 104(2) were amended to add for the first time a reference to relationships by adoption. Who is included in the list? There are six possible groups, for example, among descendants: children, adopted children, children of children (grandchildren), children of adopted children, adopted child-

[250] The plurals "children" and "parents" are brought in by the general Interpretation Acts in each province.

[251] These inclusions do not affect the earlier discussion, in the text to footnote 249, in which it was suggested that before a person can be shown to be a preferred beneficiary he must first be shown to be a beneficiary.

[252] 1935, c. 38, ss. 6, 16 and 21 (B.C.). The amendment was introduced into the other provinces either in the same year or very shortly afterwards.

ren of children and adopted children of adopted children. The section lists only four as preferred beneficiaries. The last two groups are not listed. Are they included? The specification of the first four would seem to exclude the last two unless it can be said that the definition in section 77 of "children" operates to make "children of adopted children" in section 104 mean both lawful and adopted children of adopted children. This would bring in the last class, but not the fifth. If the fifth is to come in it must be by a refinement, also by using section 77 and its definition of "issue", of the meaning of "grandchildren" in section 104. But the definitions in section 77 are only "unless the context otherwise requires". Does the context of section 104 otherwise require? I suggest that it does. Otherwise, why have we the specification, particularly to the extent of listing children of adopted children almost immediately after a separate listing of both children and adopted children? The point is open to argument; it should not be. All reference to adoption should be removed from section 104. If any reference to adoption is to appear in the insurance legislation at all, it should be confined to a suitable definition in section 77.

Does the fact that section 104 lists only certain types of persons related by adoption reflect the intention of the draftsmen to limit the definitions in section 77 to certain relationships and to exclude others? I suggest not. Section 104 lists persons of a certain relationship, whether natural or adopted, for a specific purpose only. There is no intention to be all inclusive. Nothing in section 104 applies to section 77. "Child" and "issue" may still help to define grandchildren, nephews, nieces and other words when used elsewhere in the act, or more probably, if section 77 extends that far, when used in the contract.

There is, in the third place, a section also enacted as part of the amendments in 1935, which sets out the effect of relationship by adoption upon beneficiaries, even though section 104 has already defined preferred beneficiaries as including, *inter alia*, "adopted children". Section 104 is made subject to section 113, which reads:

> 113. For the purposes of this Part, an adopted child and its adopting parent shall from the date of the adoption be deemed to bear towards one another the relationship of preferred beneficiaries, and an adopted child and its natural parents shall from the date of the adoption be deemed to bear towards one another the relationship of ordinary beneficiaries, and in either case this provision shall apply in respect of insurance effected both before and after the date of adoption.

The first part of the section makes no difference to section 104. Both are superfluous; section 77 was sufficient. And none of the three sections makes persons who are not beneficiaries preferred beneficiaries. None of the sections makes an adopted child a beneficiary under such general words in a policy as "children" unless the definitions in section 77 apply not only to the act but to the contract, or we go back to the adoption legislation in those provinces where it is helpful.

The middle part of section 113 makes a definite change in the law. It, in effect, accomplishes what I have suggested should be done in the adoption legislation itself for all but one or two purposes. By section 113 the child is cut off from its old family for one very limited purpose—the determination of who are, and are not, *preferred* beneficiaries. In a policy payable to "my children", Mary, the lawful daughter of the person whose life is insured, is now excluded as a preferred beneficiary upon her adoption by someone else. But Mary continues, as a child of the life insured, a beneficiary. The legislation might have gone the whole way and excluded her from the class of "children" of her natural parents.

The third and last part of section 113 merely puts in statutory form for this statute a principle which I have suggested earlier is applicable to all adoptions in Canada. Where a class or relationship is not to be determined until some date in the future, intervening adoptions, even though effected after the document came into existence, will be taken into account. The section's concluding clause does, however, show a disposition to treat the legislation, in its references to adoptions, as applicable not merely to the statute but to contracts of insurance made under it.

The real difficulty with section 113 is that it deals with two sets of relationship only. It places the adopted child and his adopting parent in the relationship to each other of preferred beneficiaries, and it places the adopted child and his natural parent in the relationship to each other of ordinary beneficiaries. Nothing is said in section 113 about other relationships, for example between children of the adopted child and either the adopting parents or natural parents. Section 104 includes, in its list of preferred beneficiaries, grandchildren and children of adopted children. Are children of adopted children, in relation to the adopting parent, one thing under section 104 and something different under section 113? And are they no longer grandchildren—that is, lawful children of lawful children—of the natural parents? On top of all this, section

104 is said to be subject to section 113. The sooner overindulgence in specification ceases, the better.

Finally, I should mention the definitions in section 77 of words which the statute has elsewhere been using. Sections 77, 104 and 113 each use the terms "adopted child" and "adopting parent". Section 77 provides one of the few statutory attempts to define these words:

> 77. In this Part, unless the context otherwise requires:—'Adopted child' means a person who has been adopted by another person as his child and by reason thereof is entitled under the law of the place of adoption to inherit real property from that other person if he dies intestate.

"Adopting parent" is similarly defined. These definitions are an attempt to specify exactly which adoptions, wherever carried out, will be recognized in Canada for life insurance purposes. By basing recognition upon the right to inherit real property upon intestacy, the occasional strange result may follow. Children adopted under the United Kingdom statute of 1950 and their adopting parents may not inherit anything from each other if adopted in Scotland, but if adopted in England may inherit most types of real property. In Queensland and Victoria the children may inherit from the parents but the parents may not do so from the child. Some persons adopted abroad would be excluded from the terms as defined in Canadian life insurance legislation. Fortunately, within Canada the right to inherit real property from each other is provided for in all jurisdictions. Except in Saskatchewan and the two territories, and possibly in Manitoba, the right, in so far as inheritance by adopting parents is concerned, is partial only in that the parent does not inherit the portion of the child's real property received from his natural family. In Manitoba neither may inherit from the other property limited to the heirs of the body. In all cases in Canada, each may inherit at least some real property from the other. That is probably sufficient to satisfy the life insurance definition.

The summary of the life insurance legislative provisions for adoption should make it clear that changes are needed to clarify the present law. Whether those changes should be made in the insurance legislation or in the adoption legislation will for the present depend upon how far the latter goes in making the child the child of his new family for all purposes and all relationships.

VIII. *Miscellaneous Problems*

(a) *Application of present legislation to earlier statutory adoptions*

Adoption legislation has been in force in some parts of Canada for many years, for example, in New Brunswick from 1873 and in Nova Scotia from 1896.[253] Over the years the legal effect of an adoption has changed. I have set out the law as it is today. What are the rights of a child adopted under earlier legislation which may have, to an extent greater or less than today's provisions, placed the child in a new relationship and cut off its old one?

In two provinces—Saskatchewan and Ontario—express provision is made in the adoption legislation. In Saskatchewan, a child adopted under earlier legislation is deemed to have been adopted under the present legislation. In Ontario, the "property and rights" of all persons adopted under earlier Ontario legislation is to be governed by the new act.[254] Elsewhere in Canada the adoption legislation is silent. The United Kingdom act of 1950 makes very detailed provision for the application of the new legislation to adoptions under the earlier legislation of 1926, with provisos that nothing is to affect intestacies occurring or wills drawn before the commencement of the new act.

In the absence of an express provision, I suggest that the ordinary rule of construction governs. A statute that deals with the effect of an order or provides rights for certain persons applies to all orders and to all persons falling within the scope of the statute, whether the orders were made or status conferred under that statute or an earlier one. A statute conferring rights upon all persons admitted to citizenship by an order under a citizenship act normally confers those rights upon persons admitted to citizenship under earlier versions of the legislation. Or persons adopted in 1925 will upon the intestacy of someone in 1955 receive the rights given to adopted persons by the legislation in force in 1955, not that in force at the time of adoption.[255] The same is true of other questions arising for decision from time to time, it being remembered that in cases under a will or other settlement where the beneficiaries are to be ascertained in the future, the determination of an adopted person's rights may depend upon a statute enacted after the settlement was entered into or the testator died.

The rules just suggested and the statutory provisions express-

[253] 1873, 36 Vict., c. 30 (N.B.); 1896, c. 9 (N.S.).

[254] R.S.S., 1953, c. 239, s. 87, as enacted by 1955, c. 55, s. 4; Ontario: 1954, c. 8, s. 82.

[255] See *Re Holibaugh* (1955), 113 A. 2d 654 (N.J. Sup. Ct.) for an excellent discussion of this point, affirming 109 A. 2d 706.

ly providing for earlier adoptions must, of course, be read as not affecting, despite their broad language, property rights already vested. And I suggest "vested" is proper in this context, not "transmissible".

Ontario's provision might be rewritten with advantage. It applies only to (a) the "property and rights" of (b) "persons heretofore adopted". The specification of (a) and (b) may cut down the breadth of the ordinary rule of construction, which would not have limited the new legislation to property and rights or to the adopted person. The status generally of an adopted person, and not just his property and rights, is sometimes important: see *Re Clark*.[256] The property, status and rights of other persons, for example children of a deceased adopted child in relation to the adopting parent, may be in question.

Occasionally an adoption statute provides for the effect of an adoption made "in accordance with this Act" or gives rights and status to "a person adopted in accordance with this Act".[257] To avoid a question whether "this Act" includes earlier acts, it is better to refer simply to "an adoption order" or to "an adopted child".

In rare instances today a child is adopted under a special or private act of the legislature. Usually there is an attempt to put him in the same position as if he were adopted under the regular adoption legislation of the province. But care should be taken to see that the attempt is fully carried out. In one recent New Brunswick statute,[258] the children are made the "lawful" children of the new parents and "shall enjoy all the rights, privileges and benefits and be subject to all the liabilities and responsibilities" as if adopted under the provisions of the Adoption Act, "and such adoption shall have the same effect as if made by an adoption order under the provisions of the said Act". The children only are specially given the rights and liabilities, not the parents. Yet the provision winds up with the "same effect" clause. Is the result greater or less than in a regular adoption? The child is made the "lawful child" of the new parents—apparently without restriction, and not just for the items specified in the regular adoption act.

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[256] [1947] 1 D.L.R. 371; 54 Man. R. 447 (Dysart J.), discussed fully in the text to footnotes 240-242.

[257] *E.g.*, Nova Scotia, s. 10(1).

[258] An Act to Make Legal the Adoption of Norma Frances Scott *et al.*, 1948, c. 174 (N.B.).

(b) *Present effect of earlier informal adoptions*

"Adoptions" entered into by agreement between the two sets of parents or guardians had apparently, as we saw at the beginning of this article,[259] no effect at common law. Recently a court in Ontario has given effect indirectly to two such agreements. They were agreements entered into in 1915 by an "adopting" father, Edward Miller, with the children's natural guardian, Barnardo's Homes. Miller covenanted in each agreement not only to "adopt . . . as his own", bring up and educate the child, but also

> to make suitable and adequate provision for the [child], and in respect to any disposition that may take place of the property of [Miller], that the interests of the [child] shall be respected and his claims recognized in the same manner and degree as though he were a child by birth of [Miller].[260]

Miller died intestate in 1949, a widower with no relatives other than the "adopted" son, and the lawful children of the "adopted" daughter who had predeceased the intestate. Barlow J. held, in a very short judgment that refers to the parts of the agreement set out, that

> This agreement gives to the adopted child all the rights of a 'child by birth' of the deceased. The agreements secure a benefit to each of these children and they are entitled to enforce the contracts as *cestuis que trust*.[261]

After listing four cases dealing with enforcement by a beneficiary of a trust of a promise or covenant, his lordship declares: "I find that [the son] is entitled to one-half of the estate". The declaration is followed by a discussion of the rights of the children of the deceased daughter. His lordship then notes that there was no adoption legislation in Ontario in 1915, and that today in Ontario the children of a deceased adopted daughter would take upon an intestacy. He does not refer to the fact that they would *not* have taken upon intestacy under the legislation in force at the date of Miller's death (1949). His lordship then refers to earlier Ontario legislation regulating the bringing of children into Ontario (the children came from Ireland) and licensing Dr. Barnardo's Homes to place children in homes in Ontario, and concludes:[262]

> I therefore must come to the conclusion that both of these children *were legally adopted* by the deceased, and that the adopted son and the surviving children of the adopted daughter should take as if they were children born to the deceased.

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[259] See text to footnotes 1-4; and *Re Walker*, [1954] O.W.N. 653 (Gale J.).

[260] *Re Miller*, [1954] O.W.N. 897, at pp. 897-898; [1955] 3 D.L.R. 404 (Barlow J.).

[261] At p. 898.

[262] At p. 900 (italics added).

In the absence of any change in the English common-law rule that a third-party beneficiary has no right to sue under the contract, the finding in the early part of the judgment in favour of the children, based upon the trust of a promise, has merit. But, with respect, I cannot accept the later conclusion that the children "were legally adopted" and should inherit "as if they were children born to the deceased". They were not legally adopted and they have no right to inherit. But that terminology may have been used with respect to their right to sue as *cestuis que trust* of a trust arising out of the agreements. The amount they take may be measured by what they would have inherited as lawful children upon an intestacy. The agreements provide that, in "any disposition" of Miller's property, their claims are to be recognized in the same manner and degree as though they were lawful children of Miller. There may be a question whether an intestacy is "any disposition". It is not within the definition of "disposition" in the Ontario Adopton Act to which, for other purposes, his lordship made reference.

To give the children adopted by agreement apart from modern adoption legislation a share based upon a trust arrangement is one thing. To call them "legally adopted" is something entirely different. They were not legally adopted in Ontario.

But some provinces have provided that children adopted under earlier agreements are to be treated as if they were adopted under the adoption legislation of the province. In Manitoba agreements for the adoption of a child made before September 1924, within or without the province, are "made absolute and the child shall be deemed to have been adopted under this Part".[263] A number of the Manitoba cases already referred to in this article dealt with children who were treated as legally adopted under this provision.[264] In Saskatchewan, every agreement made before May 1922 is made absolute and the child is deemed to have been adopted under the adoption legislation.[265] In neither province does there appear to be a requirement that the agreement must have been in writing.

In British Columbia, there was provision[266] until 1949 under which the provincial secretary might issue a certificate of adoption

[263] R.S.M., 1954, c. 35, s. 99(2).

[264] *E.g.*, *Re Lawther*, [1947] 2 D.L.R. 510 (Man., Williams C.J.K.B.); *Re O'Connor*, [1946] 1 D.L.R. 38 (Man., Dysart J.); *Re Scott*, [1928] 1 W.W.R. 168 (Man., Kilgour J.).

[265] R.S.S., 1953, c. 239, s. 87, as renumbered s. 87A by 1955, c. 55, s. 4.

[266] See Adoption Act, R.S.B.C., 1936, c. 6, s. 14. The section was dropped from the revision of 1948, which came into force on February 7th, 1949.

for children "adopted" by agreement under seal executed before April 17th, 1920. The consent of the natural parents, if available, and the report of the superintendent of child welfare were required. The certificate had "the same force and effect" as a regular court order for the adoption of a child. The section was dropped from the 1948 revision of the statutes as "spent".[267] Perhaps those revising the statutes thought that the provision for certificates applied only to infant children and that, as more than twenty-one years had elapsed since 1920, no further applications with respect to agreements made before 1920 could be made. The language of the statute may be open to this interpretation, although I suggest that the phrase "unmarried minor", a term used throughout the legislation in British Columbia in place of the usual word "child" or "person", refers not to the time of the application for the certificate but to the time of execution of the agreement: "Where in respect of any unmarried minor an agreement . . . was executed . . .".[268] In any event, the provisions for the effect of a certificate, when issued by the provincial secretary, were not spent, and are, I suggest, in full force and effect. A person to whom a certificate was issued in the period between 1920 and 1949 received a status as the lawfully adopted child of his adopting parents. Suppose these parents die intestate in 1955. The effect of the certificate as set out in the earlier legislation has not ceased. He is still the lawfully adopted child of the new parents. At least that portion of the old legislation which set out the effect of a certificate should be restored to the present statutes.

The other provinces have no provision of a comparable nature. But, in one or two jurisdictions, the usual court procedure is slightly simplified for children subject to *de facto* adoptions at the time the adoption legislation was first introduced.[269]

Occasionally adoptions entered into by agreement executed after the adoption legislation is enacted are converted by special act of the legislature into adoptions under the regular adoption act. Thus in New Brunswick in 1953[270] certain adoption agreements were validated and declared to have the same effect from their "respective dates" as an order under the adoption act, except that the property provisions of the regular legislation applied only from 1953.

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[267] See R.S.B.C., 1948, vol. 4, p. 5469.
[268] R.S.B.C., 1936, c. 6, s. 14(1).
[269] See R.S.N., 1952, c. 60, s. 150.
[270] An Act to Validate Certain Adoptions, 1953, c. 27 (N.B.).

(c) *Revocation of adoption orders*

I have not discussed in this article the making of an adoption order. I shall not, therefore, discuss when or where an order may be revoked. But in a jurisdiction where an order is revoked, what are the legal effects? The New Zealand legislation makes provision for "discharge" of the order, in which case "the relationship to one another of all persons (whether the adopted child, the adoptive parents, the natural parents, or any other persons)" is to be determined as if the adoption order had not been made.[271] The court may, in the discharge order, give the child a new name; otherwise the child's name is not affected by the discharge order. "Anything lawfully done or the consequences of anything unlawfully done while the [adoption] order was in force" is not affected by the new order. There is no suggestion that the adoption order is a nullity from the very beginning. Only for the future does the discharge order restore the child to his natural family. Detailed provision is also included, largely carrying out the main principle just set out, for wills, intestacies, deeds, vested and contingent rights.

No comparable provisions exist in Canada. In the two territories, however, any person aggrieved by the granting of an adoption order, may, in lieu of an appeal, apply to the court for a review of the order. The court has power to make any order that ought to have been made and "to make such further or other order as the case may require".[272] Similar power exists in Saskatchewan upon an appeal.[273] May the power given in the three jurisdictions be used, when an adoption is being set aside, to preserve in proper cases the effect of the adoption during the period of its existence? Quebec and Prince Edward Island give the court power to decree the annulment of the adoption order on "very grave grounds".[274] No provision is made for the effect of an annulment order. Nova Scotia provides for an appeal and for an application to the trial judge to set aside the order. But no attack "in any direct or collateral proceeding" may be made upon the order and, after the expiry of one year from its date, it may not be set aside. The one-year provision also applies in Newfoundland except in cases of fraud.[275]

[271] Infants Act, 1908, No. 86, s. 22, as amended 1950, No. 18, s. 4. An earlier version of this legislation was discussed in *Penwarden* v. *Gray*, [1931] N.Z.L.R. 780 (C.A.).

[272] 1948, c. 35, s. 9(5) (N.W.T.); 1954, 3rd sess., c. 13, s. 9(5) (Yukon).

[273] R.S.S., 1953, c. 239, s. 79(2), as enacted by 1955, c. 55, s. 4.

[274] R.S.Q., 1941, c. 324, s. 19; R.S.P.E.I., 1951, c. 3, s. 11.

[275] R.S.N.S., 1954, c. 4, ss. 13, 14; R.S.N., 1952, c. 60, s. 151.

The ordinary rules of court, together with the inherent power of the courts to correct abuses, will in all cases be available. The problems arising out of the "annulment" of orders of the court may in the case of adoption need clarification in Canada.

IX. *Conclusions*

The trend in adoption legislation is to recognize what is true socially. The adopted child is the child, for all purposes, of his new family and is no longer the child of his old family. My discussion of the existing Canadian legislation leads only to one conclusion: that, to avoid present difficulties and anomalies, new legislation is required. The draft provisions that follow cannot satisfy the particular desires of every legislature in Canada. They do, I suggest, provide a pattern to which exceptions may be added or subtracted. My proposal is based upon the present New Zealand legislation, now also used in England for property purposes, and moves the child from one family to the other for all purposes subject to a few specific exceptions.

Effects of Adoption

(1) For all purposes an adopted child becomes upon adoption the child of the adopting parent, and the adopting parent becomes the parent of the child, as if the child had been born to that parent in lawful wedlock.

(2) For all purposes an adopted child ceases, upon adoption, to be the child of his existing parents (whether his natural parents or his adoptng parents under a previous adoption), and the existing parents of the adopted child cease to be his parents.

(3) The relationship to one another of all persons (whether the adopted person, the adopting parents, the natural parents, or any other persons) shall be determined in accordance with the foregoing provisions of the section.

(4) Subsections two and three of this section shall not apply, for the purposes of the laws relating to incest and to the prohibited degrees of marriage, to remove any persons from a relationship in consanguinity which, but for this section, would have existed between them.

(5) This section is to be read subject to the provisions of any act which distinguishes in any way between persons related by adoption and persons not so related.

(6) The adopted child shall have such Christian name or names as the court may specify, in the adoption order, and shall assume the surname of his adopting parent unless the court otherwise orders.

Further exceptions may be added in any province if desired. It does not seem to me desirable, though, to add any limitation for

existing documents. Ordinary rules of construction will not interfere with rights already vested. No definition of words such as "child" or "issue", and no special provision for property interests, are needed if the recommended proposals are adopted. Subsection four preserves the old relationship for purposes of incest and prohibited degrees of consanguinity (but not affinity) in marriage. The subsection does not prevent the new relationships being established for these purposes. Some jurisdictions may desire to do so, especially for incest and for adopted relationships by affinity in marriage. No reference to persons related by adoption need appear in other statutes, federal or provincial, unless it is proposed to make a distinction between persons related by adoption and persons not so related. I propose to suggest, in a separate article, one further clause or section for foreign adoptions.

Unless the whole question of the status and incidents of adoption is not thoroughly canvassed soon—if our present piecemeal and inadequate adoption legislation remains in its present state —more and more anomalies will appear daily as more and more adopted children grow up, marry, have their own children and then die. We shall be met, for example, with cases of illegitimate children of teen-age girls, long since adopted out, entitled many years later to a legal share in their natural mothers' intestate estates. And what of the social adjustments as a share of a natural relation's estate is paid to the adopted child? Will one family begin visiting (and interfering) with the other? I mention only one problem here to illustrate. Adoption is a widespread practice, carefully regulated to prevent abuses, and fully accepted today as a beneficial measure, especially in the interests of the child, be it an infant in arms or a child somewhat older. The adopted child is treated, if not in law, certainly in practice, in all respects as the child of his new family, and no longer a member of his old. This practice, coupled with the secrecy of origin and destination generally prevailing, is not designed to allow the new parents to pass off the child as their own: the fact of adoption should be known by friends and neighbours and in time by the child. But the practice does permit the child to be brought up in the normal family surroundings without stigma or discrimination. Are we willing to let the law catch up with the practice? I am confident that the legislatures across Canada will shortly take the final steps to bring the child fully into the new family and take him completely out of his old one in law as well as in fact.

Books Received

The mention of a book in the following list does not preclude a detailed review in a later issue.

The History of Negotiable Instruments in English Law. By J. MILNES HOLDEN, LL.B., Ph.D., A.I.B. University of London Legal Series under the auspices of The Institute of Advanced Legal Studies, III. University of London: The Athlone Press. 1955. Pp. xl, 350. (42s. net)

Journeys to the Island of St. John or Prince Edward Island 1775-1832. Edited by D. C. HARVEY. Toronto: The Macmillan Company of Canada Limited. 1955. Pp. vii, 213. ($3.75)

Landlord and Tenant Act 1954. By T. J. SOPHIAN. London: Staples Press Limited. Toronto: British Book Service (Canada) Limited. 1955. Pp. 310. ($5.10)

Legal Etiquette and Court-Room Decorum. By S. TUPPER BIGELOW, Q.C. Toronto: The Carswell Company Limited. 1955. Pp. xiii, 140. ($4.75)

The Practice in Mortgage Actions in Ontario: Being a Detailed Description of the Procedure in Foreclosure, Sale and Redemption Actions, including the Proceedings Therein in the Master's Office with Appendices Containing a Chronological Guide to the Procedure and a Complete Collection of Forms. By ALFRED S. MARRIOTT, Q.C. Assisted by WILLIAM G. C. HOWLAND, Q.C. Second edition. Toronto: The Carswell Company Limited. Pp. xx, 483. ($15.00)

Press and Party in Canada: Issues of Freedom. Being the Seventh Series of Lectures under the Chancellor Dunning Trust Delivered at Queen's University at Kingston, Ontario, 1955. By GEORGE V. FERGUSON and FRANK H. UNDERHILL. Toronto: The Ryerson Press. 1955. Pp. vii, 46. (No price given)

Proceedings of the Standing Committee on Finance on the expenditures proposed by the Estimates laid before Parliament for the fiscal year ending March 31, 1956. THE HONOURABLE THOMAS A. CRERAR, P.C., Chairman. Ottawa: The Queen's Printer and Controller of Stationery. (No price given)

Report of an Inquiry into Loss-Leader Selling. By the Restrictive Trade Practices Commission, Department of Justice. Ottawa: Queen's Printer and Controller of Stationery. 1955. Pp. xxi, 278. (No price given)

Report Concerning an Alleged Combine in the Manufacture, Distribution and Sale of Beer in Canada. By the Restrictive Trade Practices Commission. Ottawa: Queen's Printer and Controller of Stationery. 1955. Pp. xi, 104. (No price given)

The Roots of Crime. Edited by the late SIR NORWOOD EAST, M.D., F.R.C.P. With a foreword by THE RT. HON. SIR DAVID MAXWELL FYFE, G.C. V.O., Q.C., M.P. London: Butterworth & Co. (Publishers) Ltd. Toronto: Butterworth & Co. (Canada) Ltd. 1954. Pp. ix, 181. ($6.00)

Rule of Law: A Study by the Inns of Court Conservative and Unionist Society. London: Conservative Political Centre. 1955. Pp. 64 and appendix. (2s.)