ADOPTION IN THE CONFLICT OF LAWS

GILBERT D. KENNEDY*

Vancouver

I

The adoption by one person of another as his child is so widespread and accepted that nearly every country has made provision for legal adoption. Few laws provide the same results. In our very mobile world we are faced with an infinite variety of conflict-adoption problems. For example, what are the rights in Alberta of a child adopted in Scotland by parents domiciled in England? The child may well have been a German orphan domiciled in Germany. In fact, how did the Scottish court get jurisdiction, even for the purpose of Scots law, to make the adoption order?

In an earlier article, I examined the legal effects of an adoption within the territory where it was made. In this article I shall first discuss, in part II, the jurisdiction of a court to make an adoption order. Is domicile a condition precedent to jurisdiction and, if not, what connection between the parties and the territory where the order is made will give a court jurisdiction? Fortunately the rules are still in process of development and can be shaped to meet today's concept of adoption, in which the best interests of the child are considered to be paramount.

In part III, I shall attempt to suggest a basis upon which we should recognize foreign adoptions, and shall point to the important place which the domestic jurisdiction discussed in part II

*Gilbert D. Kennedy, Professor of Law, University of British Columbia.
plays in shaping rules for our acceptance of adoptions made abroad. But recognition is not an end in itself. What does recognition mean? This is the most difficult of all conflict-adoption problems today. In part IV I shall suggest that when we recognize the status acquired upon adoption we accord to that status the incidents of the local or other proper law being applied by the forum. The important distinction made between status and the incidents applicable to it will become a feature of the solution of conflict-adoption problems. Occasionally legislation has intervened to help us determine what recognition means by selecting the appropriate law governing the incidents. The statutory interventions in Canada and New Zealand are discussed and criticized in part V.

The problems would be much simpler if all countries had adoption legislation comparable to British Columbia’s 1956 revision, under which the adopted person becomes the child of the adopting parents as if born to those parents in lawful wedlock and ceases to be the child of his former parents. In British Columbia the adopted person does not acquire a new status, different from that of lawful child. He merely becomes the lawful child of someone else in the same way as by divorce and remarriage a man becomes the husband of someone else. Both before his divorce and after his remarriage the man has the same status—married. But his status with respect to each of the women involved has changed. Equally the adopted person in British Columbia who ceases to be the lawful child of his natural family and becomes the lawful child of his new family has changed his status in relation to certain people, but has himself acquired no new status in the abstract. He is merely a lawful child. Of course, if he was an illegitimate child of his former parent, the adoption will change his status to the extent that he becomes a lawful child in his new family. But we see the same thing in legitimation.

Unfortunately, outside British Columbia, and New Zealand where the statute is similar, the adoption legislation of few jurisdictions does so complete a job. The usual approach is to give rights and obligations, item by item, sometimes more, sometimes less. Does an adoption of this type make the adopted person a lawful child of the new parents entitled, wherever he may go, to the incidents applicable to a lawful child of these parents? Or has he a new status as their “adopted child” entitled to the incidents accorded to an adopted child? This distinction is important so long...
as an adoption statute effects only a partial union between the child and new family. In all too many countries the status acquired will be that of adopted child rather than lawful child. The distinction is fully explained and discussed in part IV.

II. Jurisdiction to Make an Adoption Order

Adoption legislation in Canada has paid little attention to jurisdiction. In this we may be fortunate. Any attempt to accept what many earlier writers have suggested as a basis of jurisdiction—domicile—in the early stages of statutory adoption might have prevented the elasticity needed within a federation such as the Canadian, American or Australian. Movement across provincial or state boundaries is almost as free as crossing the street. This freedom within a federation merely accentuates what is, however, an international problem. We need a basis for jurisdiction that is less formal and artificial than domicile.

A parent-child relationship is altered. The status of the natural parents, of the child and of the adopting parents undergoes change, not to mention all the changes in kindred consequent upon the initial change. What possible bases are available for adoption jurisdiction? Does change of status depend solely upon domicile and, if so, domicile of how many of the affected parties? Is residence or presence of some or all of the parties sufficient?

Fortunately most of the Canadian adoption statutes antedate England's first Adoption Act of 1926, where both domicile and residence were required for jurisdiction. Only Ontario has attempted to copy the English model. Elsewhere, if the legislation refers to jurisdiction at all, the emphasis is upon residence. Even here, only three legislative jurisdictions in Canada specifically require residence.

In almost all twelve Canadian provinces and territories some investigation by a child welfare officer and a period of residence together of child and proposed parent are contemplated before application to a court for an adoption order. Neither the investigation nor the residence together necessarily contemplates residence within the province or territory as a condition precedent to the court's power to make an adoption order. But they do suggest one other important factor to be considered—one to which greater attention is being, and will be, paid in modern adoptions

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3 Ontario: s. 67; U.K.: The Adoption Act, 1926, c. 29, s. 2(5); see now 1950, c. 26, ss. 1(1), 2(5). The citations for the Canadian statutes are set out post, footnotes 9-11, 15, 19, 135 and 139.
— the best interests of the child. In fact, as the bases of jurisdiction widen, the court will, in the exercise of its discretion, rely more and more upon that major consideration.

The varied views of legal scholars upon adoption in the conflict of laws have been discussed recently in two excellent articles by Taintor and O'Connell. Legal writers have directed attention largely to recognition of foreign adoptions. The question of domestic jurisdiction has not been thoroughly canvassed. To a large extent, those writers who have discussed jurisdiction suggest that, apart from statute, the domiciliary law of both the child and new parents must be satisfied.

It is obvious that such a rule is unworkable in Canada or the United States. Even in the United Kingdom, the legislation has now been altered. The domicile of one party only, the new parent, is required. And, for adoptions in England and Scotland, that domicile may be in either England or Scotland. But there must be residence of both child and new parent in England for English adoptions and in Scotland for Scottish adoptions. The unreality of the dual or triple domicile test is noticed by Taintor in his discussion of the cases in the United States. He notes the emphasis which courts seem to have placed upon one consideration—the best interests of the child. United States courts today have clearly rejected domicile of both child and new parent as the sole test of a court's jurisdiction.

In Canada the statutory provisions are few and far between. Ontario requires domicile of the applicant-parent anywhere within Canada and residence, for an unstated period, of both child and new parent within Ontario. Saskatchewan and the two territories require residence of the applicant within the province or territory of application “for a period of one year immediately preceding the date of the application.” In the case of Saskatchewan the

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6 It seems to me unnecessary to make a distinction between the jurisdiction of a court to make an adoption order as such and the jurisdiction of the court by making the order to change the status of the parties to it and their relationship to each other and to others (see Taintor, ante, footnote 4, at p. 228). The one follows from the other.
7 See Taintor’s summary of English and United States writers, at pp. 242-244.
8 See ante, footnote 3.
9 1954, c. 8, s. 67. Before January 1st, 1955, when this section came into force, the Ontario statute required the applicant to be domiciled in Ontario: R.S.O., 1950, c. 7, s. 2.
10 R.S.S., 1953, c. 239, s. 68, as re-enacted 1955, c. 55, s. 4; N.W.T.:
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legislation does permit the court to make an order without proof of residence in two special cases: (a) adoption by a parent and his or her new spouse; and (b) in circumstances where the director of child welfare deems the proposed adoption to be in the best interests of the child. In the case of the territories, the requirement of residence, first introduced into the Yukon in 1954, is not stated by way of a condition precedent to jurisdiction. The written application is merely required to contain “a statement that the applicant has lived in the Territory . . .” for the required period. So long as the statement is made, jurisdiction may not be destroyed by any inaccuracy in it. Further, in the territories the term used is “lived in” not “resided in” or “residence”.

Elsewhere in Canada, only Quebec requires some connection with the province for adoption jurisdiction. Applications may be made to the court in the district within Quebec where the applicant is domiciled, where the last institution to have charge of the child is situate or where, in the case of petitioners who have “no domicile in the Province”, the child is domiciled. It may be that domicile of one party is not required in all cases: an application to the court of the district where the last institution to have charge of the child is situated may involve a child not domiciled within Quebec. Whether, in this case, the applicant must be domiciled in the province is not clear.

For Quebec, one further problem enters. The marginal note to both the English and French versions of the paragraph dealing with non-domiciled petitioners refers to a “non-resident petitioner” or “requérant non-résident”. The text of both versions uses the word “domicile”. Which is intended? And if domicile is intended, has the word its usual common-law meaning? One of Quebec’s scholars in the conflict of laws has suggested to me that domicile is intended and that the word is “used in the strict and international sense, as defined in article 79 of the Civil Code”. But this may not be the common-law sense. The illustrations given by Roch of the application of the Quebec provisions show that domicile, not residence, is the ordinary interpretation, but that.

1948, c. 35, s. 5(1)(f); Yukon: 1954, 3rd sess., c. 13, s. 5(1)(f); the words in italics might have been omitted in each jurisdiction to avoid confusion.
11 R.S.Q., 1941, c. 324, s. 5.
12 Walter S. Johnson, Q. C., Montreal: private correspondence in August 1955. Mr. Johnson has now put his views into print: The Quebec Adoption Act and Domicile (1956), 16 Revue du Barreau 5, at pp. 7-8.
13 H. Roch, L’Adoption dans la Province de Québec (Montreal, 1951) pp. 98-100. Some of the illustrations are drawn from unreported cases.
in Quebec there is greater freedom in selecting a domicile for an infant than at common law. In any event, it is clear that Quebec does grant adoption orders in cases where one or other of the applicant or child is not domiciled in Quebec.14

In Prince Edward Island no basis for jurisdiction is prescribed. But the legislation does recognize that applications for adoption may be made by non-residents of the province.15 And it seems that judicial practice in that province sanctions applications by nondomiciliaries. In Re M,16 Campbell C. J. made an adoption order in favour of applicants who were not domiciled in the province. The applicants and the child had been “resident” in the province for seven months. “As the question of domicile has never been raised the practice of the Court has been to grant orders ex parte even where the applicants are domiciled elsewhere.”17 It is clear that the court appreciated the nature of the jurisdictional problem in relation to status when it noted that, if occasion arose, the order could be annulled “by the Court, and presumably by the Court having jurisdiction in the future domicile of the parties”.18 Campbell C.J., without stating directly what basis or bases of jurisdiction the court would use, may have relied not only upon the residence of child and applicants but upon “the welfare of the child”. The discussion of the child’s welfare may not have been directed to the question of jurisdiction, but it is clear from his lordship’s remarks that, so far as Prince Edward Island might do so, this adoption should proceed. The child’s welfare would be advanced “through her immediate adoption by the petitioners”.

One other legislative provision in Canada should be mentioned, even though it is doubtful whether it is of any help in ascertaining jurisdiction. In Ontario and four other provinces there is a provision designating the court or courts within the province to which application is to be made. In each case the residence of one of the parties is the basis of selection. Thus in Ontario19 the legislation gives jurisdiction to the supreme court of the province or to the county or district judge in the county or district where either the applicant or the child resides at the time of the application. The provision merely designates which of the various courts within Ontario may exercise the jurisdiction conferred by

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15 R.S.P.E.I., 1951, c. 3, s. 4(1)(f).
16 [1944] 4 D.L.R. 258 s.c. sub nom., Re Davis (1944), 17 M.P.R. 305 (P.E.I., Campbell C.J.). The inference from such facts as are stated is that the child was not domiciled in the province.
17 Ibid., at p. 259 (D.L.R.); 306 (M.P.R.). The italics are added.
18 S. 66(1).
the statute and has nothing to do with the problem whether or not any Ontario court has jurisdiction to make an adoption order. Ontario’s other statutory provision, already discussed, makes domicile of the applicant in Canada and residence of both applicant and child in Ontario a condition precedent to the jurisdiction of any Ontario court.

In Alberta, New Brunswick, Newfoundland and Nova Scotia, the application is to be made to a particular court, depending upon the residence of either the applicant or child or, in Alberta, of the present guardian. The application in Newfoundland is to be made to the supreme court or, at the option of the applicant, to a court of summary jurisdiction where either child or applicant resides. Apparently residence is not a condition precedent to the supreme court’s jurisdiction. In Alberta, New Brunswick and Nova Scotia residence of one of the two or, in Alberta, three parties specified may be a condition precedent to jurisdiction. A court may find that, because the only provision giving a court jurisdiction ties jurisdiction to residence, residence has become a condition of the court’s exercise of its powers. But in none of the four last-mentioned provinces is domicile of any person required. And, if residence is a requirement, residence of one interested party only is sufficient. The natural parent or guardian is an interested party in Alberta. There are no jurisdictional provisions in British Columbia and Manitoba.

In summary, neither the residence nor domicile of any person is required by statute in British Columbia, Manitoba, Newfoundland and Prince Edward Island. Alberta may require residence, but only for any one of the three interested parties; in New Brunswick and Nova Scotia residence may be required, either of applicant or child. In Quebec, “domicile” of either applicant or child is required in most cases. In Saskatchewan and the two territories one-year residence by the applicant is necessary. Ontario requires domicile in Canada for the applicant and residence in Ontario of the child and applicant. Nowhere in Canada is domicile within the province or territory where the order is granted a statutory condition precedent to jurisdiction, with the possible exception of Quebec; but even there the extension of the requirement to all cases is uncertain. And in Quebec the domicile of both applicant and child is clearly not required.

Canadian legislators have been wise not to prescribe domicile.

19 R.S.N.B., 1952, c. 3, s. 7; R.S.N., 1952, c. 60, s. 148(1); R.S.N.S., 1954, c. 4, s. 3(1, 2); Alberta: 1944, c. 8, s. 86(a).
with all its technicalities and artificialities. Has residence been substituted for domicile? To what extent do Canadian courts use domicile, residence or some other basis of jurisdiction? Many orders are made by a court which is not that of the child's domicile. Ontario's legislation clearly permits this. British Columbia is frequently faced with the illegitimate child of a prairie girl who has left her baby for adoption in British Columbia, the province of the child's birth, and has then returned to her prairie domicile. Yet an order for adoption is made in British Columbia. More recently, in three unreported cases, the court in that province made adoption orders in favour of residents of the state of Washington. The child, though resident with the proposed adopting parents in Washington for a year before the adoption, was born in British Columbia, where its natural parents were resident and probably domiciled. In one of the three cases the adoption was by the close relatives of the child. If the primary consideration in these cases is the child's welfare, questions of domicile, legal residence, international or interprovincial boundaries, can only be matters to be taken into consideration. They cannot finally determine jurisdiction.

So long as people may move about as freely as they do in this modern world, some new criterion for jurisdiction is required. May we not say that the court, assuming it is satisfied about the child's welfare, has adoption jurisdiction when there is some appropriate connection with the territory by at least one of the parties? No time need be wasted by suggesting that all three parties —natural parents, child, proposed new parents—must be connected with the territory. Preferably the order should be made by a court where the new parents reside—parents with whom the child will in most cases be residing. That court can more easily judge the child's welfare.

But that court should not be the exclusive court. There may be cases where, for one reason or another, the court of the natural parents' residence, child's domicile or child's present whereabouts might be a proper court. No one court will have, or should necessarily have, exclusive jurisdiction. The possibility of conflicting decisions of courts of different jurisdictions is reasonably remote.

20 Two of these cases were heard by Wilson J.: No. 058/55 and No. 184/55, both in the New Westminster Registry.

21 Reference may usefully be made to Roch, ante, footnote 13, where the author attempts to justify the absence of a strict requirement of domicile in Quebec: "La charité chrétienne et humanitaire semble être universelle, le bien et l'avenir d'un enfant ne devant pas avoir de limites de frontière" (p. 99).
when we consider modern adoption procedures, under which full investigation of the merits of the new home and a trial residence together are normally required. It is largely because of the investigation and trial residence features, based on the child’s welfare, that we can to-day accept bases less than the domicile of all parties. A court which has technical jurisdiction on the basis suggested—some connection of one of the parties with the territory—will properly decline to make an order where the adoption cannot be adequately investigated or where the adoption is not a real attempt to give the child a new home. Thus adoptions of adults in Ontario merely to lessen succession duty should have more connection with Ontario than, say, domicile of the natural parent in the province.

New Zealand now recognizes that domicile, as a mandatory requirement, is out of place in adoptions. The latest legislation, enacted late in 1955 in the form of a new and comprehensive Adoption Act, 1955, provides in section 3(1):

Subject to the provisions of this Act, a Court may, upon an application made by any person whether domiciled in New Zealand or not, make an adoption order in respect of any child, whether domiciled in New Zealand or not.

No jurisdictional requirement is substituted for domicile and the courts will have to work out their own. There is nothing to prevent the use of the basis suggested in the last paragraph—some appropriate connection of one of the parties with the territory. A child welfare officer and the court make proper investigation into the suitability of child and new parents. There is a trial residence period together of six months, unless the period is shortened by court order. But neither the investigation nor trial residence provisions make residence within New Zealand mandatory. In most cases there is an interim order under which the child may not be removed from New Zealand without leave of the court. These provisions of the interim order may contemplate the presence of the child in New Zealand. But the statute clearly provides that an interim order need not be made if there are special circumstances. Special circumstances might well include a case where the child is not within New Zealand. Some reasonable connection with New Zealand should be sufficient.

The suggestion has been made that, because status is involved,

Adoption Act, 1955, No. 93 (N.Z.), enacted October 27th, 1955. I am indebted to Miss Patricia M. Webb of New Zealand's Department of Justice for a copy of section three. For further comments upon the legislation, see (1956), 34 Can. Bar Rev. 356.
only the court of the domicile should have jurisdiction. Not only
does domicile provide an unworkable test, but its presence is not
required, under present law, for adoption or for other forms of
status.

In divorce, it is true that domicile is the only common-law
basis now accepted for local jurisdiction, though any basis re-
cognized by a foreign domicile is equally good at common law.
But by statute in many lands, including Canada, England, Scot-
land and the Australian states, other bases have been added. Domi-
cile is no longer the sole one. In nullity of marriage, even where
the marriage is voidable and not void, domicile is not exclusive.
Quite apart from statute, residence is sufficient in England and
in British Columbia,23 and possibly elsewhere. In Northern Ireland
and in British Columbia the place of celebration of the marriage
suffices.24 In legitimation the domicile of the mother and of the
child are ignored in common-law recognition, yet status is changed.
In Canada there may be no requirement of domicile at all under
some of the legitimation statutes. In effect, status may be changed
by proceedings in more than one jurisdiction. And the law to be
applied by the different courts is not necessarily the same law.
Some apply the law of the forum even though some or all of the
parties are domiciled elsewhere.

Legal adoption is wholly statutory in Canada. Fortunately
we have built up no common-law basis of jurisdiction which might
require statutory modification. I suggest that, despite the change
in relationship from one family to another, domicile of all parties,
or even one of them, is not and should not be necessary for adop-
tion. Neither analogy with other status questions nor the issues
involved in adoption itself require it.

The suggestion has also been made that because a domestic
adoption order might not, in the absence of domicile, be recog-
nized abroad it should not be made locally. In Hawkins v. Addi-
son,25 an adoption order had been made in Alberta in favour of
the child’s mother and her new husband. All parties were domi-
ciled out of Alberta. An appeal by the natural father was allowed
by a majority on the ground that there was insufficient basis in the
material for the order dispensing with his consent. His marriage

the case of a voidable marriage; Shaw v. Shaw, [1946] 1 D.L.R. 168
24 Shaw v. Shaw, ante, footnote 23; Gower v. Starrett, ante; Addison
to the mother had ended in divorce in Texas. The court, recon-
stituted as a court of five judges because little attention had ini-
tially been paid by counsel "to the considerations affecting the
status of the child which flow extra-territorially from an adoption
order", did discuss jurisdiction. Porter J.A. said:

Evidence of the domicile of the parties, and particularly, the adopter
Hawkins, and the child was an element for the learned Judge to have
weighed in considering the issue before him. In any event, neither the
adopter Hawkins nor the child Kathleen are domiciled in Alberta.
The adoption order would have, therefore, little prospect of general
extra-territorial validity. . . . Her right of succession will be in con-
fusion extra-territorially. What status will she have under foreign laws
dealing with degrees of consanguinity in marriage?

These remarks are clearly obiter, and the concurrence of three other
members of the court with his lordship's judgment is not to be
taken as agreement with any suggestion that foreign recognition
affects jurisdiction. Indeed, in his dissenting judgment, O'Connor
C.J.A. notes that the jurisdiction of the Alberta court to make the
order was not and could not be questioned. His lordship admits
that the effect of the order outside Alberta "is a serious question"
and refers to authorities cited by counsel which suggest that this
particular order might not have had extra-territorial effect.

No ruling on validity abroad was given in the Hawkins case. Not
only was none needed for the decision, but, as O'Connor
C.J.A. correctly notes, foreign validity depends upon the law of
other places. His lordship suggests, for the case before him, the
law of Texas where all parties were apparently domiciled. Even
this suggestion may not be an absolute answer. The Alberta order
may have a different effect in different jurisdictions. It is enough
to say of the case at this stage that the Alberta statute contem-
plates something less than domicile as the basis for jurisdiction,
that any suggestion that the order would not have been recog-
nized abroad was obiter, and that the reasoning upon which the
court assumed that the order might have no effect abroad was
probably wrong. I shall suggest in the next part of this article that
the Alberta adoption order in Hawkins v. Addison would have
been recognized in most parts of Canada and the United States,
notwithstanding the absence of domicile in Alberta of any of the
parties. In any event, want of foreign recognition does not de-
prive a court of jurisdiction. The court may decline to exercise

26 Ibid., at p. 442, per Porter J.A.
27 Ibid., at p. 447.
28 Ibid., at p. 437.
its undoubted jurisdiction for this reason if it chooses, but the area of discretion is probably small.

The distinction between a court's domestic jurisdiction to make an order valid within its territory, and its jurisdiction to make an order with international validity (one that will be recognized abroad) was emphasized in the well-known Australian decision in *Re an Infant* and explains statements, found occasionally in other cases, that only the court of the domicile of both applicant and child may make an adoption order. Thus in divorce and custody proceedings in Saskatchewan, Taylor J. said:

The question must arise in such cases as this case, as it has to be determined in divorce proceedings, as to the jurisdiction of the provincial Court to make adoption orders. I would infer from the reasons for judgment of Haultain, C.J., in the Burnfiel case, that in his opinion an order for adoption can effectually be made only in the Court of the country in which both the adopting parent and the adopted child are domiciled at the time of the order.

In the context, it is clear that Taylor J. referred not to the jurisdiction of the Alberta court in this case to make an adoption order valid within Alberta, but to the jurisdiction of that court to make an order which will be recognized as valid in Saskatchewan or other "foreign" territory. This is a problem of recognition not of jurisdiction.

The legislation, the cases and the practice of the courts all point to the conclusion that domicile is not the only basis of a court's domestic jurisdiction to make an adoption order. Residence of one of the parties appears to be one alternative.

This is not the place to attempt a definition of "residence". It is sufficient to note that in Canada the legislation in the two territories uses merely the words "live in", and in seven of the provinces speaks in one form or another of "residence" or "resident". Some reasonable connection with the jurisdiction is required—more than mere presence. But how substantial should the connection be? Should we accept the opinion of Harman J. in England that an applicant who had lived in England with the child during the required three months was not "resident" in England because she intended as soon as the order was made to take the child and join her English civil-servant husband in Africa, where he was stationed?

29 (1933), 34 S.R. (N.S.W.) 349 (Davidson J.).
31 [1926] 2 D.L.R. 129 (Sask. C.A.); see text to footnote 116.
32 *Re Adoption Application*, [1951] 2 All E.R. 931; [1952] Ch. 16 (Harman J.).
In England such a decision causes difficulties. The couple were English, had purchased a house in England for use during their leave (three out of every eighteen months) and for their retirement seven years hence. They continued to be domiciled in England. Any adoption order, if available to them, made in Nigeria where the husband was stationed would not be recognized in England if the Wilson case, to be referred to later, is correct. In result they cannot adopt a child effectively. Their homeland and place of normal residence says they are not "resident" there, yet refuses to recognize any adoption obtained abroad because they are domiciled in England.

The correctness of the decision of Harman J. on the meaning of "resident" was expressly not decided by the English Court of Appeal in Matalon v. Matalon, where, however, Hodson L.J. for the court says: "I am not for one moment to be taken as throwing any doubt on the correctness of that decision". The court's language seemed to approve of the case and especially the earlier court's reference to the proposition that "residence" has no "actual definite technical meaning, but that you must construe [the words] in every case in accordance with the object and intent of the Act in which they occur". I agree: no word has an actual, definite, technical meaning apart from its context. But what is there in the context in the case of adoption legislation that requires something beyond three or four months in your normal homeland, the land of your domicile, and the land to which you intend to return regularly as well as ultimately after public service abroad? Harman J. said: "'Resident' denotes some degree of permanence". He had said earlier that it did not connote mere presence or absence, so that an applicant absent on the day of the application would not be a resident of England. But has his lordship not gone too far in the other direction?

We should remember the difficulties and uncertainties of "residence" in the laws of wills and matrimonial causes. Do we want to import comparable difficulties into adoption law? It is

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33 Ante, footnote 14; discussed later in text to footnote 109. Even if they were domiciled in Nigeria, England might under the most recent case give no effect to the Nigerian order: Re Wilby, post, footnote 112.
35 Ibid., at p. 237, quoting from James L.J. in Re Bowie (1880), 16 Ch.D. 484, at p. 486 (C.A.), and quoted by Harman J. in Re Adoption Application, ante, footnote 32.
36 Re Adoption Application, [1951] 2 All E.R. 931, at p. 936.
for this reason I suggest that residence should be neither a necessary basis of jurisdiction in all cases nor, if it is, so strictly construed as to amount almost to domicile. Some reasonable connection with the territory for the purpose of the statute—effective investigation into the suitability of new parents and child—should be the prime concern. The connection will be satisfied in most cases by the mere presence of the parties for a reasonable period before the order is made. We are not trying to retain a control over the parties after the order is made. Our duty is to investigate before it is made. If we are satisfied, should it matter that the parties propose to live elsewhere?

The real problem is to interpret and administer a wide, important and very beneficial jurisdiction in a wise and flexible manner within the spirit of the legislation. Narrow and rigid construction of a statute's jurisdiction provision should not be allowed to impede the spirit of the act. What I fear is a law library of precedents upon the interpretation of an adoption statute's "resident" or "residence" or other word setting out a condition precedent to jurisdiction.39

In addition to some connection with the territory, it would be wise to remove doubts about the time when that connection is important—date of application, actual time of making application, date of hearing, date of making of the order.40 The date of filing the application—that is, the date the judicial machinery is set in motion—is probably most sensible.

I have deliberately throughout this part omitted any discussion of the choice of law once jurisdiction is found by the court. It seems totally out of place to suggest any other law than that of the forum. Graveson41 recognized the problem as it arises out of

39 Since the United Kingdom's Adoption Act of 1950, there is a growing number of Sheriff Court reports from Scotland upon "resident" and "continuously in the care and possession", both required for three months: e.g., Re Mrs. C (1955), 71 Sh. Ct. R. 44; Re A.B. (1954), ibid. 14; Re X.Y. (1954), ibid. 13. In the last case, the petition was refused because the male petitioner was no longer resident in Scotland: he had left Scotland a month before the hearing for permanent residence in Canada, and had lost both "residence" and "domicile". The loss of the latter did not matter because the court interpreted the domiciliary provision ("the court may, upon an application made in the prescribed manner by a person domiciled in . . ., make an order . . .") as of the making of the application. It held that the residence provision ("The adoption order . . . shall not be made in Scotland unless the applicant and the infant reside in Scotland") applied to the time of the making of the order.

40 See, for a striking illustration, Re X.Y., ante, footnote 39.

41 Graveson, Conflict of Laws (2nd ed., 1952) p. 150. Unfortunately in his third edition, 1955, just received, Graveson has swung over to the view that the proper law is that of the domicile of both child and new
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the United Kingdom's Adoption Act. That statute permits adoption in England by parents resident in England and domiciled in either England or Scotland of a child domiciled anywhere but resident in England. It is unthinkable that the law of Scotland, as the law of the domicile, should apply to an English adoption just because the applicants were domiciled in Scotland. Equally the child's domiciliary law is irrelevant. The legislation seems to intend that, for adoption in England, the English pre-adoption requirements as well as the English effects of an adoption should be applicable even though the applicant, the child or both of them may be domiciled out of England. Thus a child adopted in England by parents domiciled in Scotland acquires in England property rights to his new parents' property upon testate or intestate succession which he would not acquire if the law of Scotland prevailed. The requirement of the residence makes this solution clear. In Canada, the same solution is even more abundantly necessary and clear from the emphasis upon residence. Ontario in fact provides an illustration comparable to that of England: domicile may be anywhere in Canada, but residence must be in Ontario. No one would suggest that anything but Ontario law applies in Ontario to an adoption within Ontario. The local investigations that are necessary and the differing results that prevail from one province to another, yet the absence of any mandatory requirement of local domicile, rule out any other law than that of the forum in determining what law applies to the making and effect of an adoption order.

III. Recognition of Foreign Adoptions

I have considered in part II the domestic jurisdiction of a court to make an adoption order valid within the territory of the court where the order was made. It is necessary now to consider how far such an order is valid outside the territory where it was made. Is the Alberta trial judge's order in *Hawkins v. Addison*, made on the basis of residence, to be recognized elsewhere in Canada where residence is also, to a large extent, the basis of domestic jurisdiction, or outside Canada in a state where residence may or may not be the basis of domestic jurisdiction? Is an order made by a court of the domicile of the child to be recognized abroad in cases where the new parents or the old parents, or both, are not

parent, subject, fortunately, to an overriding consideration for "the paramount welfare of the child": pp. 169-170. The change is regrettable.

42 Discussed earlier in the text to footnotes 25-28.
domiciled in the same territory as the child? And, if the answer is yes for any particular order, for what purposes is the order to be recognized? Is there any difference in recognition where the problem in one case involves parental duties of care and education and in another involves succession to property?

Too many unfortunate pronouncements by writers, and occasionally by judges, have beclouded the issue. The confusion is twofold. In orthodox vein, much has been said about changes of status depending upon domicile. Much has also been said about characterizing or classifying the conflict problem correctly, so that, for example, a question of succession to movables upon intestacy is held to be governed by the law of the intestate’s domicile, and that, if this law is the English common law, which does not know domestic adoption, persons claiming relationship under foreign adoptions are automatically excluded. I suggest that each of these statements is inaccurate: the first, for reasons already discussed in part II, because domicile is no longer the sole basis for changing status either domestically or internationally. The second is incomplete because it fails to take account of the recognition by English common-law conflict-of-laws rules of a status acquired abroad, something long recognized in other fields of status, for example, in legitimation and, more recently, in legitimacy. I propose to discuss briefly the views of the writers upon each of these two points and then to suggest what I believe is the sound rule for our courts today.

**Views of legal authors**

One of the most thorough analyses of the problems was made by Mann43 fifteen years ago. He effectively disposes of any suggestion that recognition should, as in the case of legitimation, be based upon domicile both at the time of the birth of the child and at the time of adoption. Domicile at birth is just as irrelevant to adoption as it is to marriage or divorce.44

Mann then goes on to suggest that the basis of recognition

43 F. A. Mann, Legitimation and Adoption in Private International Law (1941), 57 L. Q. Rev. 112.

44 In *Re McKenzie* (1951), 51 S.R. (N.S.W.) 293, at p. 299, Sugarman J. left the question open but expressed his own view that as a matter of first impression the legitimation rule should not apply to adoption. In *Re Brophy*, [1949] N.Z.L.R. 1006, at p. 1012, Gresson J. says that it is not necessary to refer to the law of Massachusetts, the child’s domicile at birth but not at adoption, “further than to note that the law of Massachusetts at that time permitted adoption in the fullest sense”. After quoting that state’s statute, his lordship says: “But it is the law permitting and governing the actual adoption which took place [New York] that is more relevant in this inquiry [testate succession in New Zealand]”. 
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depends upon the domicile at adoption of both child and new parent:

A review of foreign legal systems does not supply an unequivocal lead; while in many countries the personal law (nationality) of the adopter governs the question (although the child’s personal law is not entirely disregarded) and while the view has also been expressed that the child’s personal law is exclusively relevant the prevailing opinion in practice and theory is that the personal law of both child and adopter must be considered.

It is suggested that this latter view has much to commend it for acceptance in this country and that therefore an adoption effected abroad should be recognized in England, if it is valid according to, or is treated as valid by, the lex domicilii of both adopter and adopted child.

The learned author continues by saying that the child’s domiciliary law may be disregarded if there are some ties between adopting parent and child, such as the blood ties between putative father and child. He suggests that the interests of the natural family will be sufficiently protected in other cases by requiring approval under the child’s domiciliary law. Mann makes it clear that the Canadian cases which suggest that no order will be internationally recognized unless made by a court of the country or province in which both parent and child are domiciled are not, in his view, sound. He requires merely that the order be valid by the law of the domicile of each. A parent, or parents, and a child who come together for adoption may not be domiciled in the same place. To require domicile of both in one place before adoption would be impracticable.

But I question Mann’s requirement that for international validity an adoption must be valid by the laws of the domicile of both parent and child. Marriage, he suggests, depends upon the personal law of each of the parties and not just one of them. “Exclusive reliance on the adopter’s personal law would be equally unjustified.” It may be questioned, and has been by Cheshire, whether the suggested basis for the validity of marriage is the true one. But, even assuming the premise, is the analogy either a proper or a complete answer? I have suggested elsewhere that if territory A grants adoptions upon a jurisdictional basis of residence regardless of domicile, it is within the present spirit and scope of the conflict of laws for territory A to recognize as valid an adopt-

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45 Mann, op. cit., footnote 43, at p. 123.
46 Ibid., at p. 124.
tion granted in territory B on the same jurisdictional basis of residence. The well-known words of Somervell L.J. in *Travers v. Holley* bear repetition:48

On principle it seems to me plain that our courts in this matter should recognize a jurisdiction which they themselves claim.

Mann is not alone in his suggestion that (a) domicile is the basis and (b) domicile of both, not one of the parties, is necessary. Cheshire49 refers to and accepts these views, but interprets them for England as requiring an English court’s order if either party is domiciled in England. The only way to make an adoption order which will be “valid according to . . . the *lex domicilii*”, if one party is domiciled in England, is by the order of an English court. In effect an adoption of a child domiciled in a country other than that of the applicants must be effected by an order in both countries, unless the proposed parents are domiciled in England. Where the new parents are domiciled in England the child’s foreign domicile may be ignored.

These views were expressed, as were those of Löhning,50 also accepted by Cheshire, before the Court of Appeal’s decision in *Travers v. Holley* in 1953 and the concept of reciprocity in recognition. All fail to appreciate that, if an English court may make an order in the absence of domicile, England should be prepared to recognize foreign orders made in the absence of domicile if they were made upon a basis comparable to that used in England. They fail to notice, I suggest, that if an English domiciliary may have his marital status changed by an order abroad, and have that change recognized in England, the same thing ought to be equally true of adoption.

The first five editions of Dicey51 contained a rule that English courts will give no effect to a status unknown to English law. Adoption was unknown to English domestic law until 1926, but even the fourth and fifth editions, published in 1927 and 1932, repeat the rule and its illustration of adoption as such a status, stating that nothing in the English adoption legislation of 1926

48 [1953] P. 246, at p. 251; [1953] 2 All E.R. 794, at p. 797 (C.A.); and see discussion of this case in the article referred to in footnote 47.
49 Cheshire, Private International Law (4th ed., 1952) pp. 400-403. O’Connell, ante, footnote 5, does not take the same interpretation of Cheshire. Without dealing with Cheshire’s illustration or Mann’s rule in so many words, he states that Cheshire merely requires validity by both laws; see p. 637.
50 Löhning, Adoption under English and German Law (1950), 3 Int’l L. Quart. 267, esp. at p. 277.
had changed the rule. The present editors of Dicey have rightly discarded Dicey's rule as untenable. But the same editors adhere to the dual domicile test suggested by Cheshire as "the most convenient solution".

Schmitthoff also accepts the dual domicile basis for recognition of foreign orders. He believes, however, that domestic English jurisdiction is founded solely upon domicile in England, despite the statute to the contrary. His view as to recognition is therefore at least consistent with his view of the English court's jurisdiction. Graveson introduces his theories of recognition into his latest edition. He was one of the few English writers who recognized some of the implications of England's departure from domicile, limited though it may be, as the basis of domestic jurisdiction. Now, however, Graveson expresses preference for the dual domicile basis. But, in deference to Travers v. Holley, there is a suggestion that domestic jurisdiction may enlarge the basis of recognition.

In the United States, Beale prefers the view that if domestic jurisdiction exists the decree will be recognized elsewhere, and he suggests that domestic jurisdiction is based on the dual domicile of child and new parents. He views the effect of adoption, however, not as changing the child's status as a child of N and making it a child of A, but of giving it a new status, that of adopted child, which, if unknown domestically in some foreign territory, will not be recognized in that foreign territory, even though all parties were domiciled in the jurisdiction where the order was made. Dicey's now discredited theory that England will give no effect to a status (for example, adoption) not known to English law appears to be at the back of Beale's view.

Goodrich and Rabel both recognize that the dual domicile basis, besides being unsound and unworkable, is not used in practice in the United States. Both prefer the domicile of either child or new parent as a basis for domestic jurisdiction and therefore presumably for recognition. Rabel also notes that there are other
bases of domestic jurisdiction—nationality on the continent—and suggests that there may be other bases of recognition.

More recently, in the two articles earlier referred to, Taintor and O'Connell have reviewed some of these opinions. Taintor suggests that we should accept foreign adoptions that are valid in the foreign territory where they were effected. Some of the incidents may be questioned on grounds of public policy. So long as adoption requires a reasonable investigation into the suitability of child and parents and the consent of the natural parents, unless dispensed with, Taintor's view recognizes modern needs and is not out of harmony with the fundamental issues—a change of relationship in the interests of the welfare of the child. We recognize foreign divorces where notice to the defendant spouse has been dispensed with in circumstances not necessarily identical with those where we would dispense with it. Adoption proceedings are not identical in nature: consent in advance is normal in adoption and dispenses with further notice. But otherwise it is probably fair to compare the consent to adoption, or notice of application to dispense with consent, with the notice in divorce and other proceedings. The natural parents may always apply, as in other status proceedings, to set aside an order improperly obtained. If we exercise jurisdiction upon the basis of some reasonable connection of the parties with the territory where the order is made, we should recognize orders similarly made abroad. There may be the occasional type of adoption which, under our flexible rules, will be denied recognition on grounds of public policy.

Falconbridge's suggestion

O'Connell relies to some extent upon Falconbridge. Both men, as does Taintor, reflect the problems of a federation. Falconbridge was probably the first among the writers to see the possibility of

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50 Ante, footnote 4, at pp. 253-254.
51 Falconbridge, Adoption under Foreign Lex Domicilii (1940), 18 Can. Bar Rev. 491, at pp. 493, 495; (1941), 19 ibid. 37, at p. 39. The second comment is reproduced in the author's Essays in the Conflict of Laws (1st ed., 1947) pp. 595-596, but was dropped from the second edition (1954) by reason of a revision of the material in which the remarks occurred, a chapter dealing with the Luck case and legitimation by recognition rather than adoption in the proper sense. In its place in the second edition there is a short chapter on adoption (pp. 807-808) where approval is given to Dicey's dual domicile theory "as far as it goes". The learned author points out, however, that Dicey's rule fails "to deal with the more difficult problem which arises if at the time of the adoption the adopter is domiciled in one country and the adopted child in another". No solution is suggested.
basing recognition upon domestic jurisdiction. He noticed that only the parent was required to be domiciled in England under the legislation of 1926. The rule then in force in Ontario was similar—only the new parent had to be domiciled in Ontario. In each case, of course, residence of both parent and child within the territory was necessary. Falconbridge says that the Ontario legislation "impliedly suggest[s] a conflict rule by which adoption of a child elsewhere in accordance with the law of the adopter's domicile should be recognized in Ontario" and that the domestic English legislation suggests a comparable conflict rule for England. Unfortunately, O'Connell treats as English law today the result obtained by applying Falconbridge's suggestion to the original English legislation of 1926—that domicile of the new parent within the jurisdiction is the basis for recognition. After considerable further discussion of recognition problems, O'Connell comes back to Falconbridge in these words:

Perhaps the suggestion that the conflict of laws rule of the forum should, in the absence of competing considerations, reflect its own jurisdictional rule might find a fitting place in this context, in which case Falconbridge's deduction from the English adoption legislation might be sustained. The suggested rule would then be that English law will recognize any adoption recognized as valid by the lex domicilii of the adopter. Such a rule seems to commend itself by reason of its moderation and practicability.

And he submits as a tentative conclusion on the subject of recognition:

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

I suggest that O'Connell's conclusion does not follow from Falconbridge's statements. Falconbridge was dealing with the situation in England in the light of the English statute of 1926. The rule thus formulated for England is not necessarily applicable in other countries where English law is applied or today even in England. Falconbridge's suggestion, being based on local statutes in force at the time of recognition, may vary from time to time and from place to place, and would lead us to conclude that if domestic jurisdiction is based upon residence, as it is in most

62 (1940), 18 Can. Bar Rev. 491, at p. 495; and see p. 493. In 1941, Falconbridge noted the amendments by which the English court's domestic jurisdiction was extended to include applicants domiciled in Scotland: 19 Can. Bar Rev. 37, at p. 39. No comment upon the possible consequent widening of the conflict rule is made.

63 O'Connell, ante, footnote 5, at p. 636.

64 Ibid., at pp. 642, 653 (italics added).
Canadian provinces where anything at all is prescribed, then foreign adoptions on the same basis will be recognized in those jurisdictions. Our conflict rule will at least not be more severe than our domestic jurisdictional requirements.

O'Connell's conclusion from Falconbridge may have followed for Ontario in 1940 and 1941 when Falconbridge first advanced his suggestion, because Ontario's jurisdictional basis was, in addition to residence, the domicile of the new parent. And his conclusion may also have followed for England from 1926 until 1940 when a wider basis was introduced. But Ontario has now widened its basis from domicile in Ontario to domicile anywhere in Canada. On the basis of Falconbridge's suggestion, Ontario ought to recognize other Canadian adoptions granted to an adopting parent who was domiciled somewhere in Canada, even though not in the province or territory of adoption. England has widened its requirement to domicile in either England or Scotland. The application in 1940 to England or Ontario of Falconbridge's original suggestion may have resulted in a view that the conflict rule for the recognition of a foreign adoption looked to validity by the law of the new parent's domicile and ignored the child's. The rule elsewhere, or even in Ontario and England today, is not necessarily the same. I suspect that Falconbridge would be the first to admit a wider basis of recognition following the wider domestic rules. It is clear by 1956, with the domestic rules so different throughout the Commonwealth; and with Ontario alone among the Canadian provinces or territories in its requirement of domicile of the adopting parents in a particular area, that O'Connell's deductions from Falconbridge's suggestion have no present-day foundation.

The position today

Falconbridge's foresight in suggesting that recognition may depend upon domestic jurisdiction has important consequences. In the first place, it meant a major departure, even in 1940, from the suggestions of other scholars that domicile of both child and parent is necessary. But, today, even domicile itself is no longer the basis of domestic jurisdiction. In part II I said that residence has become the generally accepted factor connecting parties to an adoption with the court's domestic jurisdiction. Residence is not exclusively accepted, but it is much more in keeping with the nature of the proceeding than domicile. And, despite the changes in Ontario and England to a wider domiciliary provision, residence
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has remained throughout. You may be domiciled anywhere in Canada, but you may only adopt a child in Ontario if you and the child are resident in Ontario. Or you may be domiciled in either England or Scotland, but you may adopt a child in England only if you and the child are resident in England. If domestic jurisdiction has changed, then on the basis of Falconbridge's view that domestic jurisdiction impliedly suggests the conflict rule for recognition purposes, our recognition of foreign adoptions has expanded. And Falconbridge's view is receiving acceptance in a much wider field—recognition of foreign divorces. There is no reason to suppose that it will not be applied to adoption. Any Canadian adoption will be recognized in other parts of Canada, including, I suggest, Ontario and Quebec, where despite some emphasis upon domicile the real emphasis is suitable connection with the province, usually residence. If the domestic jurisdictional basis is now one of reasonable connection with the place where the order is made, be it residence, domicile or other connection of some or all of the parties, will not our recognition rules follow suit? We have reached, in large measure, Taintor's solution by an additional route.

Just this year Walter S. Johnson has very realistically put forward the view that Quebec will recognize any foreign adoption made according to the jurisdictional requirements of the country where it was made. Whether that basis be domicile, of one or both parties, of residence or of mere presence does not matter. The best interest of the child is emphasized. The stricter rules applying in the case of divorce are not necessary, he suggests, in adoption. What is important is certainty—that where possible we recognize the adoption in the child's interest. Johnson's whole approach to this aspect of recognition is most refreshing.

One other point, a small one, needs consideration in this part.

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66 Ante, footnote 12, at pp. 11-15. This writer makes one exception—foreign adoptions purporting to deal with a child domiciled in Quebec. The exception is based upon the view, I suspect, that for Quebec adoptions the child must be domiciled in Quebec. With respect, I do not believe that this requirement is necessary for Quebec adoptions. I am also advised by counsel in Quebec that on more than one occasion a Children's Aid Society in Ontario has supplied Ontario illegitimates to Quebec parents for adoption in Quebec, and that the order was made without difficulty by the Quebec court, which would appear to have had before it material showing the child's connection with Ontario.
Must the foreign adoption be by court order? Today in most common-law jurisdictions adoptions are by court order. But in some they are effected by administrative order or occasionally by special legislation. Thus in portions of Australia orders are made by a registrar of vital statistics or by a director of a child welfare department after the usual inquiries. In Quebec and New Brunswick we find a number of special acts of adoption. In Manitoba and British Columbia general adoption legislation gives legal effect to the old ineffective agreements for adoption. In some countries, such as Burma, the old method of adoption by agreement may continue as the present legal method of effecting adoption. I see no reason to discriminate against any of these adoptions. All should be dealt with on a comparable basis for purposes of recognition. In fact in the Wilby case, to be dealt with in part IV, there is no suggestion that the Burma adoption agreement was refused recognition in England because it was not a judicial order. It was in fact treated as effective for some purposes in England.

IV. Application of Recognition Rules

The bases upon which we may recognize adoptions made abroad have just been discussed. What does recognition mean? What did it mean when we recognized as legitimate the child born in England in lawful wedlock to his parents domiciled in England? It meant that outside England the child was treated as a lawful child of its parents. The English effects of that status as lawful child were irrelevant to us outside England. So long as the old system of succession to land known as primogeniture prevailed in England he would not and could not inherit land in England if an older brother survived to take it all. When his parents moved to British Columbia, bought a home there and died intestate there, the “lawful child” inherited the British Columbia home equally, under British Columbia law, with his brothers and sisters, even though he could not inherit equally with them land still owned by his deceased parent in England because of the English rule of primogeniture. So, too, today the child born in lawful wedlock to parents domiciled in Manitoba does not carry with him for life and wherever he may go Manitoba’s rule which gives a person no right to inherit from collateral relatives who die intestate leaving a surviving spouse. If an uncle dies domiciled in British Columbia or owning land in British Columbia, and leaving a widow but

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67 I am indebted to Taintor for this illustration: op. cit., footnote 4, at p. 264.
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no issue, our Manitoba-born lawful nephew, whether still domiciled there or not, may inherit part of the estate as lawful next-of-kin. The inheritance rule of the nephew's original domicile, which would have given all to the uncle's surviving spouse, is inapplicable. Our lawful child carries with him the status but not the incidents of his original jurisdiction. Let us first consider, therefore, what recognition means in the case of two better known categories — legitimate and legitimated children.

Effect of recognition of foreign legitimacy or legitimation

To repeat, what does recognition mean? When our law accepts the status of legitimacy, illegitimacy, marriage, divorce or other relationship created abroad, it gives to persons having such a status abroad the rights and obligations applicable to persons having the same status under our own laws. We say that intestate succession to moveables of a person dying domiciled in territory $X$ is governed by the law of $X$. If the law of $X$ gives an intestate's moveables to his lawful children, we look, to determine who are "lawful children", not merely to the domestic law of $X$, but also to $X$'s conflict-of-laws rules to bring in persons who have acquired that status abroad. If $C$ claims to be a lawful child, we look to the law under which $C$'s status may have been created. If he claims to be a lawful child by reason of birth in lawful wedlock, we look to the law of his parents' domicile at the time of his birth, and if by that law he was born in lawful wedlock we recognize him as a lawful child notwithstanding that we may not recognize his parents' marriage as valid.\(^{68}\)

If, instead, $C$ claims to be a lawful child by reason of the subsequent marriage of his parents, we look to the appropriate law governing recognition of such a person's status and, if he is legitimated by that law, we recognize him as a lawful child and give him the local rights and obligations of a lawful child. The fact that the territory where he acquired his status as lawful child may withhold some of the incidents normally applicable to that status is irrelevant. Thus, if he claims to be a lawful child by reason of a subsequent marriage of his parents under the law of, for example, Ontario, he is treated outside Ontario as a lawful child, even though within Ontario he could not, if the child of an adulterous union, inherit in competition with children born in lawful wed-

\(^{68}\text{Re Bischoffsheim, [1948] Ch. 79; [1947] 2 All E.R. 830 (Romer J.), a decision which, despite much criticism, I have suggested elsewhere is sound: (1952), 30 Can. Bar Rev. 952, at pp. 953-954.}\)
lock. Or if he is legitimated under, for example, the law of England, he could not inherit in England property under a disposition coming into force before his legitimation or inherit land associated with a dignity of honour. These incidents applicable to the status acquired upon legitimation under English law are ignored outside England in the same way that we ignored the incidents attaching in England before 1925 or in Manitoba today to persons born in lawful wedlock.

Recognition implies status but not the incidents applicable to that status. To a recognized foreign status we apply our own local incidents. Occasionally this has strange results. The status as lawful child may be acquired in a number of ways. Persons legitimated abroad have been given in England the full status of lawful children even though persons legitimated in England may be under some disabilities. A person legitimated in England does not inherit property under a disposition coming into effect before the legitimation. If legitimated abroad, he does so, equally with children born in lawful wedlock. Whether it is proper to accord greater incidents to a foreign status than are accorded to a local status acquired in the same way may be open to debate. If England by statute limits the effect of local legitimation, it might be wiser to construe the legislation as indirectly modifying England's earlier conflict rule under which some foreign legitimations were given full recognition. *Re Hurll*\(^6\) decides otherwise, but that case may not be sound on this point—I pass no opinion for the moment. The problem is important for adoption. Perhaps *Re Hurll* is an indirect expression of disapproval of the limits England has placed upon domestic legitimation.

Recognition raises a further problem. An impediment preventing a particular individual from acquiring locally the status he acquired abroad is irrelevant. Let us look at English law again. Before 1926 there was no domestic legitimation. Yet a foreign legitimation was recognized in England by according to the legitimated person the incidents applicable to lawful children. He could, for example, inherit equally with lawful children.\(^7\) And today in England we find a further illustration. Domestic legitimation by subsequent marriage does not include children of adulterous

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\(^7\) E.g., *Re Goodman* (1881), 17 Ch. D. 266 (C.A.); *Re Grey*, [1892] 3 Ch. 88 (Stirling J.). It is not necessary to decide in this article whether the old rule for intestate succession to land which went to the "heir-at-law" either still exists or is a true exception.
unions—children born while one of the parents was married to another person. Yet such children legitimated abroad are quite properly treated in England as lawful children.\footnote{Re Pozot, [1952] 1 All E.R. 1107, at p. 1109 (C.A.). The report in the Law Reports omits any reference to this point: [1952] Ch. 427.}

**Summary of effect of recognition of foreign legitimations**

The illustrations from legitimation emphasize three things. In the first place we recognize the status acquired abroad, but do not import with it the incidents attaching to it in the place of acquisition. Secondly, a recognized foreign status receives the incidents of the local or other proper law even though, had the status been acquired under the proper law applicable, it might have been subject to some disability. Thirdly, in the application of the proper law to any question, we recognize the foreign acquired status even though locally there was in the particular circumstance some impediment to the acquisition of that status.

These are the effects of recognition at common law. We may, of course, alter these effects by statute and provide that all children claiming status, whether acquired locally or abroad, as lawful children by reason of legitimation by the subsequent marriage of their parents will be subject to certain disabilities. Such legislation would merely alter the normal effect of recognition. A change of this nature has probably been effected in Ontario for persons legitimated by subsequent marriage. It is possible to read Ontario’s Legitimation Act\footnote{R.S.O., 1950, c. 203.} as meaning that, whether legitimated in Ontario or abroad, legitimated children born of an adulterous union may not inherit in competition with children born in lawful wedlock. If this interpretation is correct, it merely represents a statutory alteration of the normal application of local incidents to a recognized status.

**The status conferred by adoption**

Where does adoption fit into this picture? A preliminary difficulty arises. Is a child adopted abroad, whose adoption is recognized locally, to be treated as having a new type of status different from that of lawful child—namely, the status of an “adopted child” of his new parents? Or is adoption really a method of acquiring status as a legitimate or lawful child in addition to birth in lawful wedlock, legitimation by subsequent marriage and legitimation by recognition?\footnote{The third method is illustrated in Re Luck, [1940] Ch. 864; [1940] 3 All E.R. 307 (C.A.).} The second approach
is clearly to be preferred. Social policy today and the trend of adoption legislation make the adopted child to all intents and purposes a member of his new family, as if he were born to his parents in lawful wedlock, and cut him off from his old family. A few adoption statutes say so in so many words. A large majority of the remaining statutes attempt to give item by item most of the incidents of legitimate status to the new relationship, and attempt to cut off, also item by item, many of the incidents of that status from the old relationship. Under both types of statute, the trend is to put the adopted child to all intents and purposes in the position of a child born to his new parents in lawful wedlock.

**Effect of recognition of adoption**

Therefore I should prefer to treat a child adopted abroad, whose adoption is recognized locally, as a *lawful child* of his new parents, with all the incidents that go with the relationship locally, and none of the incidents or restrictions from his foreign place of adoption. If this is done, no problem arises where adoption is not a local practice.

But temporarily there may be a hurdle which prevents full realization of this suggestion. The trend just referred to is present. Yet in too many jurisdictions the adopted child is not yet, in the full legal sense, the lawful child of his new parents. Until a jurisdiction makes him a lawful child, fully or in very large measure, it may be difficult to accord children adopted abroad more rights and obligations in relation to their new family, or less rights and obligations in relation to their old family, than are accorded to locally adopted children. There is in effect in many jurisdictions a status distinct from "lawful child"—namely of "adopted child"—with somewhat different incidents from a lawful child. Occasionally any difference has disappeared, as in British Columbia this year and probably in New Zealand. Where, as in British Columbia, the adopted child is locally treated as a lawful child of his adopting parents, then adoption, at home and abroad, becomes merely another way of acquiring status as a legitimate or lawful child of another person. Except in British Columbia and the few comparable jurisdictions, the better solution is to treat an adopted child as having a new status—that of "adopted child"—and to give him locally, if adopted abroad, such incidents as go

75 For the more recent British Columbia and New Zealand legislation see, ante, pp. 357-363.
with adoption locally. The absence of a local adoption statute is not likely to be a difficulty today when almost no territory is without one. We are justified in basing our solutions of what is essentially a new form of an old problem upon existing known conditions.

It follows that whether we give foreign adoptions the incidents given to local adoptions or treat foreign adoptions as providing in a new form for lawful or legitimate status and give the local incidents of that status, the incidents of the place or law of adoption are irrelevant. In either case, it is the incidents of the proper local law which apply. If the problem before the court is succession to land in Ontario, the incidents of Ontario law applicable to adopted children apply; if succession to land in British Columbia, the incidents of British Columbia law applicable to either lawful or adopted children — there is little if any difference in that province. It does not matter where the person was adopted. It is to be assumed throughout this part, of course, that the foreign adoption is one that is recognized locally under the rules suggested in part III.

It also follows that the new relationship which flows from adoption extends not only to the parent-child relationship but to the new lineal and collateral relationships created upon adoption. So, too, the old relationship with members of the natural family will cease. Where the foreign adoption is given the same incidents as are given to a local adoption, there will be exceptions in so far as the new relationship has not completely replaced the old.

Let me illustrate the application of the recognition rules in cases where the local rules for adoption, rather than those for legitimate status, are applied. A child is adopted by $H$ and $W$ in Scotland\(^76\) where all three are resident. $H$ and $W$ are domiciled in England. In every part of Canada, the order of the Scottish court founded upon the residence in Scotland of all three parties would receive recognition. But “recognition” in what sense? If, for example, $H$ and $W$ move to and establish domicile in a Canadian province where one of them then dies intestate, the adopted child may then inherit moveables as if he were a lawful child. Under the law of the twelve provinces and territories of Canada a locally adopted child may inherit from his adopting parent on

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\(76\) The Scottish court has domestic jurisdiction under the U. K. Adoption Act where the new parents and the child are resident in Scotland and the new parents are domiciled in either Scotland or England. See text to footnote 8.
the parent’s death intestate. Succession to moveables upon death intestate is governed by the law of the intestate’s domicile at death. Under conflict rules his child, adopted abroad, is granted recognition of his adopted status and is accorded the same rights locally as a child adopted locally. The child adopted in Scotland obtains these rights notwithstanding the law of Scotland, which says that a child upon adoption obtains no right of succession to the property of his new parents or kin.

The same example, carried into collateral relationships, illustrates what I suggest is the present rule. The child’s aunts by adoption, X and Y, die intestate; X domiciled in Nova Scotia, Y domiciled in Saskatchewan; each leaving as nearest-of-kin, for succession to moveables, nephews and nieces. Is the child entitled to inherit as one of the nephews? No, in the case of X who died domiciled in Nova Scotia; yes, in the case of Y who died domiciled in Saskatchewan. The child’s adoption in Scotland is in each case recognized, and he is given in all parts of Canada the status of an adopted child. But an adopted child does not inherit in Nova Scotia from the collateral next-of-kin of his new parents; he does in Saskatchewan. The adopted child is accorded the same position as is accorded to a person locally adopted. Other relationships by adoption are similarly treated. The solutions suggested in this paragraph do not depend upon the present domicile of the child or of H or W, who may have remained in Scotland or moved elsewhere.

77 Except in Manitoba where he may not take land limited to heirs of the body: see Kennedy (1955), 33 Can. Bar Rev. 751, at pp. 814-817, 820; (1956), 34 ibid., at pp. 361-362.

78 The illustrations in this part are subject, for Canada and New Zealand, to the statutory modifications discussed in part V of the conflict rules in eleven Canadian jurisdictions and in New Zealand. The statutory provisions do not affect the result discussed in this paragraph except possibly in British Columbia where the child might not take; the legislation needs clarification; see text, post, to footnotes 139-143. There is a question whether in Ontario, Quebec and Manitoba, by reason of the specific legislation, the common-law rules set out in the text are excluded. See the discussion in the text following footnote 143.

79 The Adoption Act, 1950, c. 26 (U.K.), applies to both England and Scotland, but in relation to property rights the effects in the two countries differ greatly. No change is brought about by adoption in Scotland; in England the new relationship is substituted for the old to a large extent.

80 Or in Alberta, Newfoundland, New Brunswick, Prince Edward Island or Quebec. Manitoba probably falls in this group also: see (1955), 33 Can. Bar Rev. 751, at pp. 824-825.

81 Or in British Columbia, Ontario or the two territories.

82 Other than descendants of the new parents, in Nova Scotia, the other three Atlantic provinces and Alberta.

83 The statutory modification of the common-law conflict rules (see ante, footnote 78) makes no difference to either the case of X or Y as set out in this paragraph.
A third situation involves inheritance from the natural family. Let us assume an adoption in England where, as one of the effects of an adoption, a child loses his right to inherit from his natural parents. If, after the adoption, the parents move to Canada and one of them dies domiciled somewhere in this country, the child will inherit as a lawful child of his natural parents in all Canadian jurisdictions, except British Columbia and Prince Edward Island. In all but these two provinces inheritance from the natural family is preserved.

The remarks in the immediately preceding paragraph assume that we give a child adopted abroad the same rights as a child adopted locally. If the English adoption legislation is to be interpreted as putting the child in the position of a lawful child of his new parents and no longer of a child of his former parents, as it largely does in a piecemeal fashion, should we treat children adopted in England as lawful children of their new parents and no longer the children of their former parents? Should we say that a child adopted in England has the status of a lawful child of his new parents, and treat him in Canada or elsewhere on that basis? If the answer is yes, the child mentioned in the preceding paragraph would not inherit from his former parents.

In summary, I submit that persons whose relationship to another is the result of a recognized foreign adoption receive locally the incidents applicable either to local legitimate status or to a local adoption. To give them the incidents of legitimate status is preferable and applies when the law of the adoption creates not the status of adopted child but the status of legitimate child of the new parents. British Columbia law does so. On the other hand, we will give the incidents of adopted status so long as the adoption is something less than legitimate status. It is desirable in either case to apply the incidents of the local or other proper law being applied by the forum. All persons with legitimate or lawful status will be treated equally, whether the status was acquired locally or abroad; all persons with adopted status, acquired locally or abroad, will receive the incidents of the proper law applying in the forum.
abroad, will also be treated equally. The same approach was noted earlier for legitimation.87

**Views of legal writers**

What do the writers and the cases suggest is the effect of recognition of a foreign adoption? The views of legal scholars in England are influenced by the history of domestic adoption in their country. Some writers do not appreciate the significance of the important change in policy made in 1950. Domestic adoption legislation was passed in England at a comparatively late date—1926—and provided no change in relationship from old to new family except for custody, maintenance and education. In particular, the child was not put in any new position for inheritance of property. From January 1950 the property rules were changed to make the child a child of his new family and no longer a member of his old family, with exceptions for instruments executed before the adoption and for property associated with a dignity of honour. Up to 1950, the tendency of writers on English law was to suggest that a foreign adoption, even though recognizable in England, was accorded no rights under English law. Property rights were used for illustration. Unfortunately many writers, while correctly applying English law to a question of succession, failed to appreciate that the reason why persons claiming under a foreign adoption should receive no rights in England was not because English law ignored their status but because English law gave to persons claiming through an adoption, whether foreign or local, no property rights. When in 1950 the local rules were changed, a corresponding change for foreign adoptions should follow from the application of regular conflict rules.

The last edition of Dicey appeared in 1949 just before the change in England. The editors reflect a hesitancy to give children adopted abroad under more advanced legislation greater rights than children adopted in England. They do suggest, both in Rule 123(2) and in Illustration 3,88 that the law governing the adoption does not determine rights, for example, to succeed to property on an intestacy. They recognize that the *status* of adoption may be governed by the law governing the adoption, and suggest that to this status the law of succession or other law in question attaches the appropriate rights and obligations. In application of their suggestions to England they say:

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87 Discussed *ante*; see text to footnote 73.
If, therefore, X dies domiciled in England bequeathing moveables to the ‘children of Y,’ Y’s adoptive child will have no claim thereto, even though the child is recognized by his own lex domicilii as being legitimate in all respects.

When this statement was made an English adopted child did not inherit as the child of his adopting parent. In the light of the English domestic changes in 1950, it is doubtful whether the statement remains valid.

The last portion of the sentence just quoted raises a different problem. If a child is by the law governing his adoption given the full status of a legitimate child, and not merely the status of an adopted child, should we not recognize that status as such, as we do legitimations, and give to it in England whatever rights English succession law gives to legitimate, not adopted, children? The present editors recognize that the analogy of the legitimation cases may be sound, and cautiously speak “with great hesitation”. Since 1949, the general editor, Morris, in a review of the second edition of Falconbridge’s Essays on the Conflict of Laws, has hinted that a foreign adopted child might acquire greater rights than a locally adopted child. Here is a change from the Dicey of 1949, though it is not clear on what basis Morris would proceed. If he would apply the law of the adoption, even to a question of incidents, we are in for trouble. If he treats the foreign adopted child as legitimate, the statement will be true. If the foreign adopted child is accorded the status of an adopted child with English incidents, the foreign adopted child will receive the same incidents as English adoptees.

Cheshire, writing after 1950, would treat foreign adoptions on a basis comparable to foreign legitimations, provided in each case that the foreign status is recognized in England—that the particular adoption or legitimation falls within English conflict recognition rules. But he treats the incidents applicable to both adoption and legitimation as “determinable by the foreign lex domicilii”. There is, however, no real discussion of the separation of status from incidents in the section either on adoption or on legitimation.

Graveson, in the second edition of his book on conflicts, deals only with status, not with the specific effects of its recognition. An application of the general rules stated for intestate succession could suggest the result advocated in this article:

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whether any particular claimant bears such relationship to the deceased as to entitle him to succeed... depends... on the rules of English conflict of laws dealing with [for example] legitimacy.91

A cross-reference is then made to his chapters on the recognition of foreign status. If a foreign status is recognized, it would seem to follow from the approach in the passage quoted that the incidents of the proper law are applied—that is, the law of the intestate’s domicile at death in the case of moveables. The passage remains unaltered in the third edition,92 but the chapter on recognition of foreign status now includes a section on the recognition of foreign adoptions. It does not deal with the effect to be given to a recognized adoption. The author’s comments on the recent Wilson case, to be discussed shortly, shed little added light. That case, he says,

would appear to involve the surprising consequence of denying recognition for the purpose of succession under English law to any foreign adoption, on whatever basis it was made, unless in addition an English adoption order has been obtained.... One is justified in regarding Re Wilson purely as a refusal to recognize a particular incident of a foreign status so far as that incident (capacity to succeed under an English intestacy) is sought to take effect in England. The case does not deny recognition generally to the status of adopted child conferred by the law of the child’s domicile.93

Schmitthoff, writing in 1954,94 accords to the foreign adoption recognized in England “the same effect as is accorded to it by the law of domicile of the adopter at the date of the adoption order because it is that law which defines the new status of the infant”. But the author modifies this submission somewhat when he illustrates intestate succession:

With respect to intestate succession, English law which, in the municipal sphere, accords full effect to an adoption order, will treat the parties to a foreign adoption as if the adopted person was the legitimate child of the adopter unless it is proved that the law of the domicile of the adopter at the date of the adoption order limited the effect of the adoption; but even in that case the interest of the claimant may be enlarged—though, it is believed, it cannot be diminished—by the law governing the distribution of the estate of the deceased.... Where in a will an interest is given to the ‘children’ of the adopter, it follows from the recognition of the foreign adoption order creating a new status of the infant, that the adopted infant prima facie falls within the class of children but that presumption is rebutted if it is shown that the testator had a contrary intention.

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91 (2nd ed., 1952) p. 333.
92 1955, at p. 368. Cf. also this author’s Status in the Common Law (1953) pp. 102-110.
Adoption in the Conflict of Laws

Schmitthoff is struggling with a problem: how, on the one hand, to accord legitimate status and the incidents applicable to it under the proper law (English succession law in his illustration) to persons claiming under a foreign adoption which provides full legitimate status and, on the other hand, to accord some measure of recognition and appropriate incidents to adopted persons who have not acquired abroad full status as legitimate children of their new parents. Recognition on the basis of adoption, not legitimacy, will solve the difficulty. It may give more or less rights and other incidents locally than the law governing the adoption, but I am sure the learned author does not really object to this. He does not limit other forms of status to the incidents under the law governing the acquisition of the status.

Wolff doubtst if any foreign adoption would be recognized in England. He indicates, however, that the effects, in cases where the adoptions would be recognized, are governed by the joint operation of the law of the domicile of both new parent and child: “only the effects common to both these laws can take place”. After adoption, the effects follow changes in the parent’s (and thereby the child’s) domicile except that the child’s rights may not be harmed by giving the new parent more extensive rights to the child’s property than the original adoption law gave, “for example, under English law before 1950”. If the new domicile has no adoption law, “as was the case in England before 1926—the adoption becomes ineffective for the time being, though not void”. These obviously harsh rules are out of keeping with the modern concept of adoption.

Mann, writing in 1941, says that a person whose foreign status is recognized at common law receives no rights in situations governed by English law, for example, succession to moveables. English succession law both before and after 1926 took no notice of relationship by adoption. Yes, until 1950. But the author makes it clear in his discussion of legitimation that his conclusions would continue after 1950. The English common-law rules of succession included lawful children only. Legislation would be required to bring in foreign adopted or legitimated children. Legislation did bring in foreign legitimated children in 1926, but not adopted children. I suggest, however, that, at common law, English succession law included persons whose status was acquired abroad, not merely in the case of legitimation, where Mann thinks the

96 (1941), 57 L. Q. Rev. 112, at pp. 124-141.
English cases are wrong, but also in the larger area of legitimacy, as illustrated in the opening paragraphs of this part. So, too, the status of being married. The local incidents of the proper succession law, whether that law be English or not, are accorded to persons whose status, whether acquired locally or abroad, is recognized.

In the United States, Taintor\(^97\) puts forward the view I have suggested in this part, and concludes:

Once the status of adoption has been created the incidents thereof should be found in the law governing the incident demanded. If the law of the state \([X]\) which governs the incident demanded contains a statute of adoption, the mutual rights and duties of children adopted in other states and of their adoptive parents should be found in its \([X]'s\) laws concerning the adoptive status.

Taintor notes that Goodrich and other American writers, as well as the vast majority of the United States cases, follow this view. An exception is Rabel, whose views are examined and criticized by Taintor.\(^98\)

In parts of the Commonwealth other than England,\(^99\) Falconbridge\(^100\) gives hesitant approval to Dicey’s current rule 123(2) as “in accord with the principle . . . that the status of a person and his right to claim as successor are two separate issues”. But no explanation of the effect of the distinction appears for either adoption or legitimation.\(^101\) In his earlier writing\(^102\) he had moderately criticized the Donald case\(^103\) in Canada, which had refused to include a person adopted abroad under the law of the domicile of both parents and child as within “children” of the adopting parent in a testamentary gift. Saskatchewan, whose succession law applied, had no adoption law at the time.

In 1933, Johnson\(^104\) suggested the enactment of a uniform rule in each Canadian province which would apply the incidents of the law of adoption to successions within the province. But, in 1937, we have a suggestion that the capacity or right of the legatee

\(^98\) At pp. 264-265.
\(^99\) The views expressed in chapter 17 of Campbell, The Law of Adoption in New Zealand (1952), are omitted. Dean Campbell advises me that he is completely rewriting this chapter in his new edition.
\(^100\) Essays (2nd ed., 1954) p. 808.
\(^101\) See the discussion of this distinction in legitimation cases at pp. 751-754.
to receive depends in general, for moveables, upon the law of
the testator's domicile at death. Much change has taken place
in our thinking since Johnson wrote and his views may have changed.

In the most recent discussion, O'Connell puts forward,
generally, the views suggested in this part. He does not draw the
distinction between the two types of status—legitimacy and adoption—which may for practical reasons have to be drawn until
a more general grant of full rights upon adoption is given to
persons claiming through adoption. In a tentative bow to the
recent Wilson case in England, O'Connell provides an exception:
where English law is the proper law of a succession, the domestic
rules govern and they exclude a child adopted abroad. It would
have been simpler to refuse to accept the Wilson decision.

In result, Rabel and Wolff, and possibly Cheshire, Schmitthoff
and Johnson, would attribute to the law governing the adoption
control of the incidents. The opening paragraphs of this part show that such an approach is not sound. Most of the other
writers do not differ materially from the view I have suggested,
that, if we recognize the status, we give to persons with that status
such incidents as are given the comparable status domestically
by the proper law governing the incident sought to be enforced.

Cases on effects of recognition

What do the cases do? There are only two English decisions,
both very recent and both unsatisfactory. They arose after the
Adoption Act, 1950, under which property rights, with one or
two exceptions, are transferred from the old to the new family.
The child inherits from his new parents upon their death intestate;
they inherit from him. Yet, in both English cases, the court looked
to the literal language of the statute—the act applied to adoptions
in England and Northern Ireland—and neglected to examine the
position at common law. Both cases involved succession to an
English intestate's moveables following a foreign adoption. In
both cases the claim of relationship by adoption was denied. Per-
haps it is fortunate that both went off on side issues and did not
really grapple with the question of the effects in England of a
recognized foreign adoption.

105 Ibid., vol. 3 (1937), pp. 78-81. Johnson does not consider this aspect
of the problem in his recent article (see footnote 12), apart from the
special statutory provisions for intestate succession, discussed post in
part V.


107 Post, footnote 109.

108 Ante, text to footnotes 67 and 68.
In the Wilson case, a husband and wife domiciled in England adopted in Quebec, after the appropriate residence period together, a child born and resident in that province, and probably domiciled there. On the husband’s death intestate, while still domiciled in England, Vaisey J. held that the child might not share. The Quebec adoption was perfectly valid in Quebec, and would be recognized in England for some purposes, for example, custody. But it was not to be recognized, his lordship said, for succession purposes because the order was not made by the court of the domicile of both child and new parents. The latter had been domiciled in England not Quebec. Some of the Commonwealth cases are reviewed and the remarks of some of the writers referred to. Cheshire is accepted for the ultimate decision on non-recognition. Otherwise no conclusions are drawn from the cases or the writers, except to suggest that Dicey leaves open the question whether English courts will give any effect to an adoption abroad where the issue is one of succession to moveables governed by English law. This suggestion was obiter, but confirms my view that Dicey is not to be taken as excluding in succession questions the recognition of status acquired abroad. Apart from this obiter, the case is of no help upon the effects of a foreign adoption in England. The decision rests on recognition, not the effects to be given if the foreign adoption is recognized.

Why recognition is denied for succession purposes and admitted for some others is not made clear. Whether Vaisey J. was sound in his refusal to recognize the Quebec order is open to question. It was made by a court of the domicile of one of the parties after an appropriate residence together. English courts daily make orders based upon the domicile of one of the parties plus a shorter period of residence together; sometimes neither party is domiciled in England. Vaisey J., without discussing this aspect of the problem, merely seized upon Cheshire’s dual domicile rule.

It is fair to say that the court proceeded upon that assumption: see p. 741 (Ch.); p. 1000 (All E.R.). Why custody should have been singled out by Vaisey J. as an incident for which a foreign adoption will be recognized in England is difficult to determine. Custody is one area where the “rights” of parents
Vaisey J. did suggest that, if the intestate adopting parent "had been domiciled in Quebec at the time when the infant defendant was adopted, the case of the latter would have been different and very much stronger". Barnard J. faced this situation in Re Wilby, where all parties had been domiciled in Burma at the time of the adoption in Burma under the law of that country. Some years later, the new family moved to England, where they became domiciled and where the child died intestate in 1954. The adopting mother, her husband having predeceased his daughter, applied as next of kin for administration of her adopted daughter's estate and was refused. Barnard J. quotes the passage from Re Wilson just set out, refers to the authorities as affording no clear guidance and declares:

If I were to accede to this application, it would have to be on the basis that the English courts recognized any foreign adoption, provided that the adopter and the adopted were domiciled in the country where the adoption was completed, for the purpose of succession to property under English law. For it could not, in my view, be left to a judge to grant or refuse any application such as I have before me, according to how close the law of adoption in such foreign country approximated to our law of adoption. Such a task would be an impossible one. . . .

Unfortunately, the supposed difficulty of comparing adoption laws may have been at the back of his lordship's reasoning when he decided not to recognize any foreign adoption, not even this one. We may look to the foreign adoption law to determine whether the adoption resembles adoption as we know it. In cases of foreign marriage, of which there are many forms, we examine the nature of the foreign institution. If it is in substance marriage as we know it, we accept it and treat the parties to it as married. Even if it is polygamous we accept it for succession purposes. So, too, in adoption it is neither necessary nor proper to go beyond the question of substance. Rituals called "adoptions" but which are in substance something else—for example, a form of ancestor are very much submerged in the child's best interests. What is best for the child irrespective of the parents' rights? And custody is a matter in which local rules seem to be just as strong, if not stronger, than succession rules: foreign guardianship and custody rights and orders are subject to local rules: Re Snyder, [1927] 3 D.L.R. 151, a decision of the British Columbia Court of Appeal which two years earlier had displayed readiness to accept foreign status for succession purposes. The Synder case did not involve adoption, but it helps to suggest our courts' attitude to claims for guardianship and custody arising out of a foreign adoption. Cf. also R v. A, [1955] V.L.R. 241 (Herring C.J.).

112 [1956] 1 All E.R. 27 (Barnard J.). The passages quoted are from page 30 (my italics).
worship—will not be accepted. On the other hand, where we have what is in substance an adoption, differences in detail do not matter. In both marriage and adoption differences in the age limits, residence periods, consents necessary, and other details do not prevent our acceptance of the foreign institution.

The court then considered the question of succession involved. English intestacy law applied. That law, as amended by section 13 of the Adoption Act, brought in persons related by adoptions effected in England and Northern Ireland. "I therefore find it impossible to bring an adoption made under some foreign jurisdiction within the scope of s. 13 of the Act." Few will quarrel with the application of English succession law or with the interpretation of section 13 of the adoption legislation. But it is not impossible, by an application of the common-law conflict rules, to bring in persons claiming under foreign adoptions. Here was a golden opportunity. An adoption made under the law of the domicile of all parties to it could not have had higher claims to recognition. His lordship ignored in his solution everything other than domestic English law. He noted that under that law the mother could have taken had the adoption been in England, and that she could have taken under Burmese law had that been the succession law. He failed to realize that in English law we daily bring together a status acquired abroad and a succession in England. Our rules of the conflict of laws declare that English succession law governs the succession to moveables of an intestate dying domiciled in England. But in applying that law we regularly look to a status acquired abroad, whether it be legitimate status acquired through birth in lawful wedlock, through subsequent marriage of the parents or otherwise.

Why did Barnard J. reach such an obviously wrong conclusion? There is a note running through both Re Wilson and Re Wilby, and to be found in some of the cases discussed by Vaisey J. in the former case: adoption brings together strangers while in legitimation the ties of blood are present. In legitimation, the children are "offspring" in fact, even if not in law until legitimated. Thus in the Donald case the Supreme Court of Canada, in interpreting a gift to the "children" of the testator's son, said that that word meant "legitimate offspring", that an adopted child was not "offspring", therefore the child adopted by the son under

113 The same error is repeated by "ABC" in his comment on the Wilson and Wilby cases (1956), 100 Sol. J. 101; but see Jones, Adoption in the Conflict of Laws (1956), 5 Int'l & Comp. L. Quart. 207, at p. 213.
the law of the domicile of both parent and child did not fall within
the gift to "children". Barnard J. in the Wilby case refers to Wolff,
who notes that the parties are strangers and who suggests that
probably no foreign adoption could be recognized in England. Is
his lordship in effect saying that he cannot treat adoption as cre-
ating legitimate status? This may well be true. But it does not
prevent the English court from recognizing a separate status—
that acquired by adoption—and giving to that status the same
rights as are given in the case of English adoptions. The Donald
case misses the whole point when it says simply that an adopted
child is not "offspring". It is not a question of who is in fact par-
ent of whom, but who in law is given that status, by legitimacy,
legitimation or otherwise. We have known for years that "legiti-
mate offspring", to which the Donald case refers, are not neces-
sarily offspring of the father at all. What was important in the
phrase was not the word "offspring" but the word "legitimate"—
the status which that word connoted.

In result, in the Wilby case Barnard J. suggested that those
persons who would take because of his unfortunate order—the
natural brothers and sisters—should turn the estate over to the
adopting mother. This is an extraordinary and unsatisfactory
way of disposing of a case. If the natural family do heed the court's
suggestion, there will be no appeal, and if there is no appeal we
cannot know whether it was because these "relations" did bow
to what should have been the order of the court.

Neither Re Wilson nor Re Wilby helps to solve the question,
What does recognition mean? The former discusses, but refuses,
recognition. The latter says in effect, after the reference to Wolff,
that we do not need to discuss adoption recognition at least for
succession purposes. Yet, while Wolff may doubt the recognition
to be given any foreign adoptions, he suggests, as we have seen,115
that the effects are those of the domicile from time to time. In the
Wilby case, whether domicile be Burma or England, an effect of
adoption is that the adopting parent has a right of succession to
the child. This portion of Wolff was not referred to by his lord-
ship, even though it was closely associated with the passage to
which he did refer. Neither case is any help for the future.

In Canada there are the Donald and Burnfield116 cases cited by
Vaisey J. in Re Wilson. In both cases the governing succession

115 Ante, in text to footnote 95.
law was that of Saskatchewan, at a time when that province had no domestic adoption legislation (in the Donald case the death was fourteen days before the first legislation came into force). The adopted child was excluded from a gift to the “children” of the testator’s son in Re Donald, and from intestate succession to the adopting parent in Burnfiel. In each case the adoption had been in the jurisdiction where both parent and child were domiciled. Despite the varying lines of reasoning followed by the courts, the result does not violate the principle suggested earlier in this part—that today we give to foreign adoptions which we are prepared to recognize the same incidents as we give to local adoptions. None was given locally. Whether that explanation would have done in 1922 is another point. I am considering the position today when legal adoption exists in almost every part of the world. It is no longer an unknown status. From another point of view, discussed in the next paragraph but one, the two cases may be open to criticism. Was the child under the law of his adoption given full status as a legitimate child of his new parents, or only that of an adopted child?

There were four earlier cases in Canada, all referred to in Re Donald, and all giving effect to the foreign adoption. Neither Burnfiel nor Donald suggests that they are overruled. The McGillivray and McAdam cases, both in British Columbia, fit into the pattern for today which I have already proposed—that we give to foreign adoptions the same effects as are given locally. There was adoption legislation in that province at the relevant dates which would have provided the same results had the adoptions occurred in British Columbia. In the McGillivray case the testator left the residue of his estate to his sister Annie “or her heirs”. Annie predeceased the testator, leaving a daughter Mary whom she had adopted under the law of Massachusetts, where she was domiciled both at the time of adoption and at death. The testator died domiciled in British Columbia. The proper law to construe the will, which disposed of moveables only, was therefore the law of British Columbia. The court agreed that under the proper suc-

117 Re Throssel (1910), 12 W.L.R. 683 (Alta., Scott J.—adoption in Iowa); Re McGillivray, [1925] 3 D.L.R. 854, s.c. sub nom., Purcell v. Hendrick, 35 B.C.R. 516 (B.C.C.A.—adoption in Mass.); Re McAdam, [1925] 4 D.L.R. 138 (B.C., W. A. Macdonald J.—adoption in California); Robertson v. Ives (1913), 15 D.L.R. 122 (P.E.I., Fitzgerald J.—adoption in Mass.), affirmed, sub nom., Forbes v. Bailey (1914), 14 E.L.R. 514 (P.E.I. C.A.). In the Forbes case the deceased’s domicile was found to be in Massachusetts, but the court in obiter said it would have recognized the foreign adoption had the domicile been in P.E.I.
cession law “heirs” is to be read as “next of kin” and that Mary’s status as the child of Annie should be recognized in British Columbia. But only a majority would give to Mary. The result would seem to be correct. Under the proper succession law the first class of persons to constitute next of kin was lawful children—children born in lawful wedlock and such other children as came within the term “lawful children”. All members of the court agreed that children legitimated abroad came within the class provided that the legitimation was according to the proper law of legitimation. Only three members were prepared to include an adopted child whose status they recognized. The minority distinguished adoption from legitimation on the ground that adopted children are not blood relations. On the minority’s reasoning, adopted children would be included if the parents had adopted their own illegitimate child. Both dissenting judges made it clear that, if Mary had been legitimated by subsequent marriage rather than adopted, she would have been included in the gift to heirs. “It is in accordance with the tenets of Christianity” to do so; “it would be iniquitous to hold otherwise”. The same principle did not apply to adopted children:

They are not blood relations. To withhold [the principle’s] application from children adopted abroad does not carry any stigma nor does it offend against the sanctity of family life.

Fortunately, the majority recognized as long ago as 1925 that it was Mary’s status in law, not in fact, that was significant. The other two pre-Donald cases in Canada, the Throssel case in Alberta and the Robertson case in Prince Edward Island, arose before the first introduction of adoption legislation. Yet in all four of these early cases an adoption in the jurisdiction of the domicile was recognized and given effect to on the basis that the...
child was now in law by his change of status the legitimate child of his new parents. May it be inferred, then, that the courts in the four cases treated the foreign adoption as sufficient to give the child the status of a legitimate child of his new family? Are these cases prophetic of a stage we hope to reach? Have we an explanation of the Alberta and Island cases, if any is needed? The one difficulty is that, if legitimate status was the basis in the Alberta case, it ought equally to have been in the Burnfield case: both adoptions were under the law of Iowa. The fact is that in this early period there were bound to be conflicting decisions. It would be senseless to try to formulate a rule that would today justify or reconcile all the apparently conflicting decisions of the past. To make the attempt would be to ignore the changes that have occurred in the law's approach to adoption in the interval.

There are four Canadian cases since Re Donald in which the effect of a foreign adoption was considered. None of them, and none of the four just discussed, was referred to in the recent English cases where the “conflicting” authorities in the Commonwealth were discussed. In British Columbia, the court treated a child adopted in Saskatchewan as a lawful child entitled to apply for and obtain under the testators family maintenance legislation a larger share of his adopting father's estate: Re Ramsey.120 No reference is made here to any earlier cases except the pre-Donald case of Re McAdam, where the same point was raised in connection with a California adoption. There is no special provision in the testators legislation of British Columbia bringing in adopted children. Robertson J. looked to the Saskatchewan adoption legislation and noted the divesting of the natural parent of rights and obligations and their transfer to the new parent. Again the result is in accord with the rule suggested—that children adopted abroad receive the same treatment as children adopted locally. The court's approach, however, may well have been to look to his status as the legitimate child of his new parents.

In the Ontario case of Re McFaden,121 Hogg J. ruled that a child adopted in Kansas could not share in the estate of his intestate adopting parent. His lordship noted that had the adoption been in Ontario the child could have taken, and referred to the Donald case, but did not note that the child in that case, if adopted locally, could not have taken because no local adoption law existed at the time. His lordship also seems to have fallen into the same

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Trap which caught Vaisey J. recently in the Wilson case. He says that the local adoption legislation, in making provision for the inheritance rights of adopted children, refers only to children adopted under that legislation. This is true, but it is not the whole answer. Our conflict rules give the same local rights to persons with a status acquired abroad as are given to persons with a comparable status acquired locally. It will take careful work to undo the misconceptions of these Ontario and English cases.\(^{122}\)

There is, fourthly, a Quebec decision in Schwartz v. Schwartz,\(^{123}\) in which a daughter adopted in Ohio claimed aliment from her adopting father. On a demurrer by the father denying any relationship between the parties, the court ruled that there was a sufficient *lien de droit* between them and dismissed the demurrer. Johnson tells us that the action was subsequently settled. We do have, however, an apparent acceptance of a foreign adoption, if regularly made, as giving the local effects accorded to adopted children.

All these Canadian cases, except one Ontario decision, give to recognized foreign adoptions (and those made in the domicile of child and new parents clearly are recognized) the same rights and incidents as are given locally either to adopted children, in some cases, or, in others, to legitimate children. The Ontario case is probably explainable by the fact that the court, in purporting to follow Re Donald, did not see a major distinction between it and the situation in the Ontario case. The reasoning is to this extent defective. And in any event the Ontario court does not tell us very much about the Kansas adoption: was it recognizable at all?

The cases in Australia and New Zealand also vary in their approach. In one of the earlier ones, Masemann v. Masemann,\(^{124}\) a New Zealand court held that the New Zealand nationality legislation did not confer citizenship upon a child whose adopting parents had become naturalized under it. It is a fair inference that

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\(^{122}\) In another Ontario case, Re Skinner, [1929] 4 D.L.R. 427 (Ont.) (further proceedings (1930), 38 O.W.N. 201 (C.A.)), Orde J.A. held that a child adopted in Ohio was not within the words “lawful children” of a legatee under an Ontario will. The result would have been the same had the adoption been in Ontario, and the case therefore does not violate the rules suggested in this part.


\(^{124}\) [1917] N.Z.L.R. 769, at p. 771 (Chapman J.). It is believed that the terms of the adoption legislation in force at the time of the father’s naturalization (1899) did not exclude nationality or citizenship as did the amended section on “effects” enacted in 1950 and now appearing as s. 16(2)(e) of the Adoption Act, 1955, No. 93.
the child had been adopted by the parents while all were domiciled in Germany. Section 12 of the nationality legislation said in part:

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.

The court assumed that the German adoption gave "the child the status of a child born in wedlock to the adopting parent or parents", but said that:

Whatever international respect might be paid to such a status acquired in Germany, the terms of s. 12 of our Act do not extend to the case of parentage other than natural parentage, and our Infants Act . . ., defining the status of an adopted child, only applies to an adoption made in New Zealand by force of that statute.

The case affords another illustration of the use of the local adoption legislation to deny the normal application of conflict-of-laws rules to foreign adoptions. It may be true that the New Zealand Infants Act defines the rights of children adopted in New Zealand. But, as in the Wilson and Wilby cases in England, this is not an answer. Persons whose foreign status is recognized in New Zealand will receive the incidents given to New Zealand persons of comparable status.

The other point raised by the court in the Masemann case—the construction of the word "child" in the statute as meaning natural born children only—is probably not a true answer. The court was prepared, it would seem, to apply the legislation to New Zealand adoptees. In any event the whole discussion was obiter: even as an alien, the petitioner obtained the relief she sought.

More recently in Victoria a court, in recognizing a Tasmanian decree based upon dual domicile, gave to it the incidents of Tasmanian, not Victorian, law. In Re Pearson125 Gavan Duffy J. held that a child was not issue of its adopting parent under a Victorian will because of a restriction in the Tasmanian adoption law that prevented him from taking under wills executed before the adoption order. The opposite approach appears to have been taken in New South Wales in Re McKenzie,126 where an adoption made

126 (1951), 51 S.R. (N.S.W.) 293 (Sugarman J.); (1952), 1 Intl' L. Quart. 399-402. The much quoted earlier case of Re An Infant (1933), 34 S.R. (N.S.W.) 349 (Davidson J.), did not deal with the incidents to be applied to a recognized foreign adoption.
in New Zealand while all parties were apparently domiciled there was recognized in New South Wales, whose incidents were then applied to the recognized adoption. The litigation involved an application under testators family maintenance legislation.

There is one New Zealand case which goes into the matter fully, yet almost accidentally reaches the wrong result. In Re Brophy Gresson J. held that a gift by will to the issue of Bridget did not include a son adopted by Bridget under a New York adoption order at a time when the child and Bridget were both domiciled in the state of New York. After noting that the succession was governed by New Zealand law, as the law of the domicile of the testatrix (Bridget's aunt), the court declared that it should look abroad to the law governing the adoption, being the law of the domicile, to see whether the son was included:

The first step is to ascertain status—namely, whether the relationship of parent and child was validly created. This is a matter governed by the law of the domicil.

The next step must be to ascertain the attributes of that status—what legal rights and liabilities are incidental thereto. This, too, must depend on the law of the domicil under which the adoption took place. If it be found that the relations correspond to those between a parent and child born in lawful wedlock, with full right of succession, the adopted child may be regarded as having the same rights as a child adopted in New Zealand. It is refreshing to see a proper separation of status and the incidents that go with it. His lordship applied his rules to the son in question and held that New Zealand must recognize the son's status as a child of Bridget, "but that the legal effects of such status do not bring him, as a matter of interpretation, within the term 'issue' of Bridget ...". Yet, had he been adopted in New Zealand, he would have been within the term. Why the distinction? Because Gresson J. looked to the New York, not the New Zealand, incidents of adoption. His lordship was prepared to treat the New Zealand legislation as making the child the lawful child of the adopting parent. He inquired whether the New York law did so: it gave the child that status, but not the identical incident involved here. Yet equally the New Zealand legislation did not give all the incidents of legitimate status to adopted children. For one thing, the will had to be made after the adoption (as it was here) to bring in adopted children. If his lordship was worried about the slight difference in incidents given in the two jurisdictions to adopted children, this should not have led him to apply

New York incidents. Even legitimate children have different incidents attaching to their status in different jurisdictions. The New Zealand incidents were applicable for reasons explained at the beginning of this part. Once the court was prepared to recognize the son's status, it could and should have held that he was then to be treated in the same manner as either a legitimate child or an adopted child would be treated under the governing law—the law of New Zealand, as the law governing the succession. In either case the son would have taken.

In the United States the cases have recently been discussed thoroughly by Taintor, who concludes:129

An overwhelming majority of the cases in this country hold that the existence of the status of adoption is to be determined by the law of the state in which it was decreed or otherwise effected, but that the incidents thereof are those which are attributed to the status under the law of the state which governs the principal question.

It will thus be seen that the cases throughout the common-law world are not consistent. There is very little authority if any, however, to prevent the application of the rules suggested in this part in deciding what recognition means. Recognition, when accorded, entails the granting to foreign adoptions of at least the same incidents as we give to local adoptions and, if the foreign law makes the child a legitimate child of its new parents to a sufficient degree, then the same rights as we give to legitimate status acquired locally. We do not look to the incidents of the law of adoption, except to determine whether we are to recognize the foreign status solely as that of adoption or fully as that of legitimate status.

V. Statutory Recognition Provisions

New Zealand, many of the states in the United States and all but Newfoundland among the twelve Canadian jurisdictions have statutory provisions in one form or another for the recognition within the forum of foreign adoptions. Most of these recognition statutes are very poorly drafted. They apply only to some incidents of adoption and to some relationships following adoption. They

129 (1954), 15 U. of Pittsburgh L. Rev., 222, at p. 256. Cf. also annotations in (1931), 73 A. L. R. 964; (1944), 153 A. L. R. 199; (1945), 154 A. L. R. 1179. A more recent illustration is to be found in New England Trust Company v. Sanger (1955), 118 A. 2d 760, at p. 765 (Me. Sup. Ct.). It must be remembered, of course, that some states have legislation which for some purposes places persons adopted abroad in the same position as persons adopted within the state whose governing law is being applied.
are, in some cases, uncertain in meaning. None purports to question the jurisdiction of the foreign court or other authority which granted the adoption order, but some recognize the orders of some territories only. Only New Zealand purports to discriminate among adoptions on the basis of the effects of the order where made, and then only when dealing with an adoption which was made neither in the British Commonwealth nor in the United States.

I am indebted to New Zealand's Dean Campbell for a copy of that dominion's new provision:

17. (1) Where a person has been adopted (whether before or after the commencement of this section) in any place outside New Zealand according to the law of that place, and the adoption is one to which this section applies, then, for the purposes of this Act and all other New Zealand enactments and laws, the adoption shall have the same effect as an adoption order validly made under this Act, and shall have no other effect.

(2) Subsection one of this section shall apply to an adoption in any place outside New Zealand, if,—

(a) The adoption is legally valid according to the law of that place; and

(b) In consequence of the adoption, the adoptive parents or any adoptive parent had, or would (if the adopted person had been a young child) have had, immediately following the adoption, according to the law of that place, a right superior to that of any natural parent of the adopted person in respect of the custody of the person; and

(c) Either—

(i) The adoption order was made by an order of any Court whatsoever of a Commonwealth country or of the United States of America or of any State or territory of the United States of America; or

(ii) In consequence of the adoption, the adoptive parents or any adoptive parent had, immediately following the adoption, according to the law of that place, a right superior to or equal with that of any natural parent in respect of any property of the adopted person which was capable of passing to the parents or any parent of the person in the event of the person dying intestate without other next of kin and domiciled in the place where the adoption was made and a national of the State which had jurisdiction in respect of that place—but not otherwise.

(3) Nothing in this section shall restrict or alter the effect of any other adoption made in any place outside New Zealand.

(4) In this section the term 'New Zealand' does not include any territory in which this Act is not in force.

It will be seen that adoptions granted by a court in the Common-

130 Adoption Act, 1955, No. 93, s. 17 (N.Z.).
wealth or in the United States are given within New Zealand the same effect as New Zealand adoptions, provided that the foreign order gave the new parents, or would have given them in the case of a young child, a greater right to custody than the right of any natural parent of the adopted person. This proviso should occasion no difficulty in most Commonwealth countries or in the states of the United States. Apart from these "privileged" adoptions, adoptions in other countries are given equal effect if, under the law of the place of adoption at the time of adoption, the new parent would receive equal or greater rights to the child's property upon the child's death intestate, without other next of kin, and while domiciled in and a national of the place of adoption. It may be difficult to determine who has the superior right under those laws which give the natural parents a continued right to the portion of the child's property obtained from the natural family, and the new parents a right to the portion obtained by the child himself or from his new family. Alberta, Newfoundland, New Brunswick, Nova Scotia, Ontario, Prince Edward Island and Quebec, among Canadian provinces, have this split distribution depending upon source. It is fortunate that Canadian adoptions are brought in separately, as Commonwealth adoptions, and that in New Zealand they will not be dependent for recognition upon property rights. Perhaps if any distinction is to be made by statute for purposes of recognition between adoptions in some countries and adoptions in others, it would be better to list the countries whose adoptions receive the treatment accorded by section 17.

The New Zealand provision does illustrate recognition legislation that not only makes the governing law (usually the law of the forum) apply to the foreign adoption but also extends beyond intestate succession problems to all incidents of adoption.

In Canada, Newfoundland has no statutory provision and in that province the courts will look to the common-law rules discussed in parts III and IV. Elsewhere in Canada somewhat scrambled provisions exist. Only in Manitoba is there any attempt to make the recognition of the foreign adoption apply to the adoption generally, and thereby to all relationships flowing from it. In Alberta, New Brunswick, Ontario, Prince Edward Island, Quebec and the two territories the person adopted under the foreign adoption is the only person given the statutory benefits, while in Saskatchewan only that person "and his issue" are brought in. Thus the provision in the territories reads:

A person who has been adopted in accordance with the laws of any
of the provinces of Canada is, upon proof of the adoption, entitled to the same rights of succession to property as he would have had if he had been adopted under this Ordinance.\footnote{Yukon: 1954, 3rd sess., c. 13, s. 15; N.W.T.: 1948, c. 35, s. 15. In the territories and in British Columbia, “province” includes “territory”. The same thing is not necessarily true in the other provinces of Canada.}

The legislation in British Columbia and Nova Scotia refers to the child and new parent only. Obviously there is no merit in this limitation. All the Canadian statutes are an inheritance from the days when no changes in relationship occurred upon adoption except as between child and parent.

Two other limitations should be removed. The section already quoted for the territories illustrates the limitation of recognition to other Canadian adoptions. There is a similar limitation in New Brunswick, Ontario and Prince Edward Island. All the statutes are limited to questions of succession except those in Manitoba and Nova Scotia. In some cases, such as British Columbia, the provision is expressly confined to intestate succession. Elsewhere, it may be a question whether “rights of succession” extend beyond intestate succession.

In five of the provinces there are qualifications upon the residence or domicile required of the adopted person. New Brunswick, Prince Edward Island and Quebec speak of

A person resident out of the province, who has been adopted according to the laws of . . .

There is an obvious question as to when residence out of the province matters.\footnote{Cf. Johnson’s discussion of this problem under the Quebec section (1956), 16 Revue du Barreau 5, at pp. 17-18.} It would be much simpler to delete the italicized words. Ontario is even more restrictive in speaking of a person “domiciled in any other province” who has been adopted “in accordance with the laws of the province where he is domiciled”.\footnote{1954, c. 8, s. 78 (Ont.).} No adoption in a province other than Ontario is recognized unless the person adopted was domiciled in the province where the order was made both at the time it was made and at the time when the succession rights arose. If he has moved his domicile since adoption, even into Ontario, the statute does not include him. Nova Scotia’s legislation, on the other hand, is more indicative of the present Canadian trend of the law relating to adoption jurisdiction. Adoptions are recognized in that province if made according to the law of the then place of domicile or residence of either child or new parent.\footnote{R.S.N.S., 1954, c. 4, s. 19.}
Manitoba chooses which foreign adoptions it will recognize on the basis of reciprocity of adoption legislation:

Where another jurisdiction has legislation respecting adoption that provides, or substantially provides, that upon the adoption of a child all rights and duties as between the child and the natural parents are to cease, except the right to inherit from his natural parents or kindred, and the child is thereafter to be or to be deemed to be the child of the adoptive parent or parents, a child adopted in, and in accordance with the law of, that jurisdiction shall be deemed to have been adopted under this Part.135

There are so many difficulties with Manitoba’s attempt at recognizing only those foreign adoptions which are comparable to adoptions in Manitoba that it would be better to repeal the section and allow the common law to operate. The statute leaves it to a court in each individual case to determine whether the foreign law “substantially” provides the items listed. It would be better, if some foreign adoptions are not to be recognized, to have the section apply to adoptions in those foreign territories listed in the act or in regulations or orders made under the act. Then a person would know whether his adoption did or did not fall within the benefits of the statute. Otherwise endless questions arise. Is the reference in the statute to the legislation of another jurisdiction limited to foreign laws that provide for adoption of children only, not adults? In that event would an Ontario adoption fall outside the statute because Ontario permits the adoption of adults? Does an English adoption fall outside because in England the right to inherit from natural parents and kindred is lost except with respect to property associated with a dignity of honour or passing under an instrument made before a certain date? Would an Ontario adoption be excluded because “all rights” do not cease (in fact all are expressly preserved in Ontario except to the limited extent that some are removed)? I need not multiply illustrations.

Finally, I should point to a major difference in approach in the legislation of the various provinces. Manitoba’s is in this respect to be recommended: those foreign adoptions which are recognized under the statute are treated as if made under the Manitoba adoption statute. This approach does not single out one or two incidents of adoption for recognition, but treats the adoption precisely as if it were made under the local act. It is this approach which I suggest we would take at common law today; it is the same as New Zealand has adopted in the section already quoted.

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135 R.S.M., 1954, c. 35, s. 98. The italics are added.
Nova Scotia’s resembles it, but because of bad drafting limits the effects of recognition to the adopted person and his parent:

... he and his adoptive parent have for all purposes in Nova Scotia the same status, rights and duties as if the adoption had been in accordance with this Act.\textsuperscript{136}

A liberal court \textit{might} construe Nova Scotia’s section as benefiting, for example, nephews and nieces by adoption.

In the rest of Canada there are three approaches to statutory recognition. Quebec stands by itself in giving the child the same rights of succession

that he would have had in the ... foreign country, in which he was adopted.\textsuperscript{137}

This statutory provision is the opposite, I suggest, to the common-law rule. For the reasons set forth in the opening paragraphs of part IV it appears to be inconsistent with Quebec’s approach to other problems of status. In a federal nation where people move across boundaries as freely as they do in Canada there may be merit in uniformity of approach throughout the country. Ontario applies the same rule as Quebec except that the foreign rights may not exceed “the right [the child] would have had if adopted under” Ontario’s legislation. This puts in his way a double hurdle: he must find that he would be entitled under both Ontario law and the law of his adoption. British Columbia’s provision is comparable to Ontario’s, but not as clearly worded. All the other Canadian jurisdictions treat the foreign adoption as if it had been effected locally, subject to the limitations about place, persons and subject-matter already discussed. Alberta’s is typical:

\begin{quote}
A person who has been adopted according to the laws of any other country or any of the Provinces of Canada shall be entitled to the same rights of succession to property as he would have had if adopted pursuant to the laws of Alberta.\textsuperscript{138}
\end{quote}

British Columbia’s provision has been referred to as providing a double hurdle of both local and foreign laws. Because it is the only one in Canada that has so far been interpreted by the courts, and because it has a counterpart in some of the states of the United States where there has been considerable litigation, I shall refer to it separately for a moment. Section 11 reads:

\begin{quote}
Any person adopted elsewhere than in this Province and his parent by adoption shall, in the case of intestacy, have the same rights in respect of the property of each other in this Province that they would
\end{quote}

\textsuperscript{136} Ante, footnote 134.

\textsuperscript{137} R.S.Q., 1941, c. 324, s. 22.

\textsuperscript{138} 1944, c. 8, s. 102 (Alta.).
have if the property were situate in the country where the adoption took place, except so far as those rights are in conflict with the provisions of this Act.139

The persons adopted and their adopting parents are given in British Columbia the rights they would have in the place of adoption “except so far as those rights are in conflict with the provisions of” the local act. Is this a cumbersome way of saying that they get, as in Ontario, the rights they would have in the place of adoption provided those rights do not exceed the ones granted in British Columbia? What does “in conflict with the provisions of this Act” mean? In Re Niven,140 the British Columbia court was faced with the intestacy of a parent who had adopted a child under the Manitoba adoption legislation. Sidney Smith J. held, simply, that under section 11, an adopted child receives on the intestacy of his adopting parent “the same rights in respect of the property of such parent as he would have if the property were situate in [Manitoba]”, and that Manitoba law gave to an adopted child “the capacity of inheriting from the adopting parents as fully as their child by natural birth”. His lordship did not refer to the exception about a conflict with local provisions. In this case there was no conflict. His lordship also did not mention a limitation in the Manitoba statute under which the child does not inherit from his adopting parent land limited to the heirs of the body. This limitation was equally irrelevant in the Niven case.

Many states in the United States have recognition statutes. The majority, as in Canada, give to the recognized foreign adoption the same incidents as are given to a local adoption.141 But Massachusetts has a section comparable to British Columbia’s. The child is to receive in Massachusetts the same rights of succession to property as he would have had in the state where he was adopted, “except so far as such rights are in conflict with this chapter”. In Cobb v. Old Colony Trust,142 C had been adopted in Maine in 1905. She and her new family moved to Massachusetts in 1906, where the father died in 1925, the mother in 1935. Was C next of kin to the mother? No. Under the law of Maine when C was adopted, C acquired no right to inherit from his adopting parent. The change of domicile to Massachusetts made no difference. In obiter, the court suggested that, if the rights given in the state of

139 R.S.B.C., 1948, c. 7, s. 11.
141 E.g., New Hampshire, illustrated in Anderson v. French (1915), 93 Atl. 1042 (N.H.); Maine, illustrated in the Sanger case, ante, footnote 129.
142 (1936), 3 N.E. 2d 797 (Mass. Sup. Ct.).
adoption are greater than those in Massachusetts, the child would be limited to those granted in Massachusetts. The legislation cuts both ways: the claimant must establish a right to take under the law of adoption and under the law of succession (Massachusetts). This question arose in *Arnold v. Helmer*,\(^{146}\) where the Massachusetts court held that, whatever the rights in California, the state of adoption, the claimants were not "issue" of the testatrix's nephew under Massachusetts adoption law, and could not take the statutory gift over to the issue of the nephew. In effect, in British Columbia and Massachusetts, a child adopted abroad must satisfy two laws before he may succeed to property.

From an entirely different point of view, the legislation in the eleven Canadian jurisdictions which provides in one form or another for the recognition for some purposes of certain foreign adoptions raises an additional problem. Does the provision of some recognition legislation negative further common-law recognition? Does Ontario's statute, which provides for the recognition of adoptions made in other Canadian provinces, provided that the adoption was made in the province where the person adopted was domiciled both at the time of adoption and at the time a question of succession arises, prevent recognition at common law of adoptions from outside Canada or of adoptions made in other Canadian provinces where the adopted person was not domiciled? Does the provision in Ontario's statute for the rights of succession by the person adopted (in the circumstances just outlined) prevent the application of common-law rules in cases of succession to an adopted person? Does provision for succession rule out recognition for other purposes? To ask these questions for Ontario alone is enough not only to show the absurd limitations of the present legislation but to suggest that no court would interpret the legislation as impliedly repealing the common law except to the extent necessary to give effect to the express provisions of the legislation. Perhaps the example of the continued vitality in England of common-law recognition in another area of status, legitimation by subsequent marriage, despite partial statutory provision,\(^{144}\) will stand as an example for Canadian courts. The new New Zealand provision, quoted earlier in this part, expressly preserves the common-law position for all adoptions not given statutory recognition, and thereby removes doubts. As New Zealand's

\(^{146}\) (1951), 100 N.E. 2d 886 (Mass. Sup. Ct.), Cf. comment (1952), 28 N. Dak. L. Rev. 316, where some of the cases are collected.  
\(^{144}\) *Re Hurll*, discussed *ante*, footnotes 69, 73.
statutory provision for recognition gives to recognized foreign adoptions the same standing as if they had been made locally—the same effect as if they had been recognized at common law in my submission—there is no necessity in New Zealand to preserve the common law for adoptions other than those not recognized by the statute.

This part of my article should not be closed without a brief reference to a problem arising in federal states. In Canada, as already explained, eleven provincial and territorial jurisdictions have statutory recognition sections. But there are many occasions in the federal law where adoption becomes important. No federal statute provides for the general recognition or acceptance for federal purposes of adoptions made in a province or territory or elsewhere. Here is a vast area for the operation of the common-law rules outlined in parts III and IV. The whole problem needs thorough analysis. I have touched on it briefly elsewhere. Since then Doull J., in Nova Scotia, appears to have taken the wrong approach when asked to determine whether a child presumably adopted in Nova Scotia was a "child" of an insured within the meaning of a federal life insurance statute. In Flavin v. Baugild, there was no federal definition and the court looked, not to the general adoption law of the province to ascertain the adopted daughter's status, but to provincial life insurance legislation, which defined "child", solely for its own purposes, as including adopted children. By an accident of good fortune the adopted daughter received the benefits of the federal legislation by the wrong legal route.

Obviously all eleven Canadian statutory provisions need rewriting for one reason or another. Failing revision, it would be better to repeal them than to leave them as they are. The best solution is simple statutory amendment. I suggest something like the following:

An adoption effected according to the law of any other jurisdiction shall have the same effect as an adoption under this act.

The suggested clause does not discriminate against adoptions effected outside Canada. Those provinces that wish to continue to discriminate may do so by a simple substitution of "province" for "jurisdiction". If it is not thought desirable to recognize all foreign adoptions automatically, as is now done for limited pur-

147 Add "or territory" in those provinces where the word "province" has not been defined to include the territories.
poses in six of the provinces, the countries whose adoptions are to be recognized can be listed. In this case the section might read somewhat as follows:

An adoption effected according to the law of any province\textsuperscript{147} of Canada, of any part of the British Commonwealth, of any part of the United States of America, of France, Norway, Sweden or Denmark, or of any other country approved by order of the governor in council shall have the same effect as an adoption under this act.

Both of the proposed clauses extend beyond the parent-child relationship and also beyond mere succession to property. They treat children adopted abroad and children adopted locally on an equal basis.

VI. Conclusions

Adoption, now an internationally recognized mode of changing family relationships, is entered into in the best interests of the child, and usually under rules providing for both a thorough examination of the proposed home and a trial residence together. Most Canadian jurisdictions are more interested in the child and his future welfare than in the technicalities of domicile or residence. I suggest that there is no common-law barrier to the assumption of jurisdiction by any court which has some connection with the child, through, for example, the presence, residence or domicile of the natural parents, the child or new parents. And there are few statutory limitations in Canada upon this suggestion. For the moment it may be wise not to insert statutory limitations. In this healthy state of mind as to our own jurisdiction, we should approach recognition of foreign adoptions, and should recognize any foreign adoption made on a basis comparable to what we do in Canada.

And to those foreign adoptions which we recognize either under the common law or by statute, I suggest that we presently do give the same incidents as we give to our own adoptions, subject to the partial exceptions in British Columbia, Ontario and Quebec. All the statutory provisions for recognition of foreign adoptions presently in effect in Canada should be repealed forthwith and replaced with one of the suggested new sections. So long as nations approach adoption in the present spirit, which emphasizes the child’s welfare, we should give effect immediately to as many adoptions as possible. If in the course of time some abuses appear, we may then examine possible exceptions. In the meantime all of us do recognize and give effect to the status which has become so much a part of community thinking.