ADOPTION, THE MARSHALL CASE, AND THE CONFLICT OF LAWS

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> Now I saw in my Dream, that just as they had ended this talk, they drew near to a very *Miry Slough*, that was in the midst of the Plain, and they being heedless, did both fall suddenly into the bogg. The name of the Slow was Dispond. Here therefore they wallowed for a time, being grievously bedaubed with dirt; and *Christian*, because of the burden that was on his back, began to sink in the Mire.
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> True, there are by the direction of the Lawgiver, certain good and substantial steps, placed even through the very midst of the *Slough*; but at such time as this place doth much spue out its filth, as it does against change of weather, these steps are hardly seen; or if they be, Men through the diziness of their heads, step besides; and then they are bemired to purpose, notwithstanding the steps by there . . . .
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> —John Bunyan, THE PILGRIM'S PROGRESS.

In a letter to the Editor of this Review, written a few days before this article was commenced, the present writer expressed the hope that the Court of Appeal, if it came to consider the decision of Harman J. in *Re Marshall*,[1] would apply the law as Dr. Gilbert D. Kennedy and the writer believe it stands.[2] The Court of Appeal has now delivered its judgment,[3] dismissing the appeal from Harman J., and far from finding the good and substantial steps through the mire with which this topic is surrounded, and safely reaching the wicket gate on the other side, it has sidestepped and

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[1] *Re Marshall, Barclays Bank Limited* v. *Marshall*, [1957] Ch. 263; 2 W.L.R. 439; 1 All E.R. 549.

[2] See Gilbert D. Kennedy, Adoption in the Conflict of Laws (1956), 34 Can. Bar Rev. 507, and the present writer, Adoption and Succession in Private International Law (1957), 6 Int. & Comp. L.Q. 202, and note (1957), 35 Can. Bar Rev. 571.

[3] [1957] 3 All E.R. 172 (C.A.). The writer is indebted to the solicitors for the adopted child for making a transcript of the judgment available to him prior to the publication of the report.

gone headfirst into Bunyan's bogg. The law is now "bemired to purpose".

It is hoped that this can be said without disrespect to the learned and able Lords Justice who heard the appeal and whose views were voiced by Romer L.J.[4] It is, however, surprising and alarming to notice in reading the judgment that not one of the prior cases dealing with succession or status or adoption was referred to at any length, nor referred to at all in connection with what the court regarded as the main issue, and that not one in the growing list of learned monographs on the subject[5] was in any way considered.

For this unhappy[6] state of affairs it seems that counsel must be held largely to blame. Their arguments in the Court of Appeal are not, of course, at present available, but the arguments before Harman J. in the court below were briefly discussed in earlier pages of this Review,[7] where it was pointed out that as neither argument on either side faced the real issue, it was hardly surprising that the real issue should apparently have escaped Harman J.'s attention also. There is no reason to believe, in reading the judgment of the Court of Appeal, that the arguments of counsel were any more cogent than in the court below. It is not in the least astonishing, therefore, to find that the Court of Appeal's decision should appear to fly in the face of prior authority, and to find that what appears plainly to be the adopted child's legal position is totally disregarded.

It is perhaps necessary to restate the facts in *Re Marshall*. The testator died domiciled in England in June 1945, by his will made in April 1945 bequeathing his estate to his trustee in trust for his widow for life, and on her death to a number of beneficiaries, of whom Charles Stansfeld Jones was one. The testator's widow died in 1955, but Charles Stansfeld Jones had died in 1950, leaving a son, whom he had legally adopted in British Columbia in March 1945, and an adopted daughter, whom he had "adopted" in British Columbia some years previously.[8] Both children claimed

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[4] Who, it will be remembered, as Romer J., delivered the illuminating decision in *Re Bischoffsheim*, [1948] Ch. 79.

[5] O'Connell, Recognition and Effects of Foreign Adoption Orders (1955), 33 Can. Bar Rev. 635; Jones, Adoption in the Conflict of Laws (1956), 5 Int. & Comp. L.Q. 207; Kennedy, *op. cit.*, *ante*, footnote 2.

[6] This may not be an understatement as far as the effect of the Court of Appeal's decision on the law itself is concerned; as far as the adopted child is concerned, the effect of the decision is catastrophic.

[7] (1957), 35 Can. Bar Rev., at pp. 572-573.

[8] Dr. Kennedy points out that the form of adoption used in the case of the daughter, viz., by agreement and without a formal court order, at

to take as their adoptive father's "issue" under a substitution clause in the testator's will. At all relevant times all parties to the adoptions had been domiciled in British Columbia. In 1945, British Columbia law denied an adopted child the right to succeed as the "child" of the adopter within the meaning of a British Columbia will made by someone other than the adopter.[9]

It is now of some interest to examine the manner in which the Court of Appeal dealt with these facts. After observing that Harman J.'s view was largely based upon the application to adoption of principles which had become well established in relation to legitimation by such cases as *Re Goodman's Trusts*[10] and *Re Andros*,[11]

> that is to say, that the relevant inquiry in such cases as the present is as to the status of the adopted child, and that it can only be answered by reference to the domiciliary law of the child and the adopter which, when proved, will be accepted and applied by our courts. This has been regarded as the right approach to the problem in, for example, *Re McGillivray*, *Purcell* v. *Hendrick*,[12] *Re Brophy*,[13] . . . and *Re Pearson*[14] . . . .

The Court continued:

> As against this, counsel for the other beneficiaries argued before us that no adopted child in the position of the appellant adopted child can take under a gift *in an English will* [sic] to the 'child' of the adopter, however extensive the language of the relevant foreign legislation may be. Counsel's contention is that (apart from the provisions of the [English] Adoption Act, 1950, which are irrelevant for present purposes) under a gift to the child of A. in an English will, no one can take unless he can show that he is in fact the child of A., viz., the result of the procreative act of A. The adopted child, says counsel for the other beneficiaries, was not the child of Charles Stansfeld Jones in this sense and the legislation of British Columbia could not turn him into such a child. This way of looking at the matter has the unanimous support of the Supreme Court of Canada in *Re Donald*.[15, 16]

The court, however, found it "unnecessary . . . to express any concluded opinion on whether the adopted child or the other beneficiaries are right on this difficult question and we prefer to refrain from doing so". The court then discussed the British Columbia adoption legislation and continued

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the time operated under the law of the province as an adoption under the subsequent legislation, provided the agreement was filed with the provincial secretary. It is not clear whether this was done in this case. See (1957), 35 Can. Bar Rev. 880, at p. 883.

[9] See [1957] 2 W.L.R. at p. 443.
[10] (1881), 17 Ch. D. 266 (C.A.).
[11] (1883), 24 Ch. D. 637.
[12] (1925), 35 B.C.R. 516, also [1925] 3 D.L.R. 854.
[13] [1949] N.Z.L.R. 1006.
[14] [1946] V.L.R. 356.
[15] [1929] 2 D.L.R. 244.
[16] [1957] 3 All E.R. 172, at p. 176.

> . . . without deciding the question one way or the other, we are prepared to assume in the adopted child's favour, for the purposes of this appeal, that a child who has been adopted under the law of his domicil is not of necessity precluded from taking a gift under an English will to the 'child' of his adoptive parent by reason only of the fact that he was not procreated by the adopter. But the making of the assumption necessarily involves attributing to the testator, in using the word 'child', an intention different from that which he is presumed by our courts to have. It is established beyond controversy that when an English testator speaks of 'the children' of A. he is prima facie taken to be referring, and referring only, to those persons of whom it can be postulated that they are the lawful children of A. . . . Further than, and by analogy to, this we agree with the view which Roxburgh, J., expressed in *Re Fletcher*[17] to the effect that adopted children are prima facie excluded by the rule equally with illegitimate children. If, then, a different intention is to be attributed to a testator so far as adopted children of foreign domicil are concerned, the rule should not be departed from, in our judgment, further than is necessary; and it is neither permissible nor possible to suppose that the testator intended to bring into the category of children all persons who have been adopted under the lex *domicilii*, however limited the effect of their adoption may be. It seems to us that only those who are placed by adoption in a position, both as regards property rights and status, equivalent, or at all events substantially equivalent, to that of the natural children of the adopter can be treated as being within the scope of the testator's contemplation.[18]

The court held that the British Columbia adoption legislation, in 1945, did not put the claimant in such a position.

This (with all respect) rather astounding reasoning, which seems to form the *ratio decidendi* of the judgment,[19] is, of course, consistent with the decision in *Boyes* v. *Bedale*,[20] in which it was said

> The will must be construed according to the law of the testator's domicil. . . . here the testator, giving a legacy to the child of E. B. Clegg, must be taken to mean a child in the sense in which the law of England understands the term.[21]

In that case the testator had bequeathed the sum of £5,000 to his nephew, Edmund Burns Clegg, for life, the remainder to the nephew's wife for life, and the remainder among the nephew's "children" on their attaining the age of twenty-one years. After

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[17] [1949] Ch. 473, at p. 479.

[18] *Ante*, footnote 16, at pp. 178-179.

[19] The remainder of the judgment is concerned with the effect of the subsequent British Columbia legislation.

[20] (1863), 1 H. &. M. 798.

[21] *Ibid.*, at pp. 802 and 804. The "sense in which the law of England understands the term" is, of course, that the child must have been born to the parent through whom he claims in lawful wedlock.

the death of the testator, Edmund Burns Clegg acquired not only a French domicil, but also an illegitimate child by a Marie Anne Croc, whom he subsequently married in France, the child being legitimated according to French law by contemporaneous acknowledgement. It is seen that, on the type of reasoning adopted in this case, the adopted child in the *Marshall* case was as much a *filius nullius qua* his adoptive father as was the result of the premature union between Mr. Clegg and Mlle. Croc *qua* Clegg, for the purposes of taking under an English will as a "child".

The law has, however, not stood still since 1863, when *Boyes* v. *Bedale* was decided. Eighteen years later, James L.J. was moved to remark, in the process of overruling *Boyes* v. *Bedale*:[22]

> According to my view, the question as to what is the English law as to an English child is entirely irrelevant. There is, of course, no doubt as to what the English law as to an English child is. We have in this country from all time refused to recognize legitimation of issue by the subsequent marriage of the parents. . . . But the question is, what is the rule which the English law adopts and applies to a non-English child? That is a question of international comity and international law. According to that law as recognised, and that comity as practised, in all other civilized communities, the *status* of a person, his legitimacy or illegitimacy, is to be determined everywhere by the law of the country of his origin. . . .

Two years after the decision of the Court of Appeal in *Re Goodman's Trusts*,[23] Kay J., dealing with a precisely similar question in *Re Andros*,[24] said:[25]

> A bequest in an English will to the children of A. means to his legitimate children, but the rule of construction goes no further. The question remains who are his legitimate children. That certainly is not a question of the construction of the will. It is a question of *status*. . . . The law, as I understand it, is that a bequest of personality in an English will to the children of a foreigner means to his legitimate children, and that by international law, as recognised in this country, those children are legitimate whose legitimacy is established by the law of the father's domicil.

In 1948, Romer J. (as he then was), also dealing with a substantially similar question, echoed Kay J.'s words:[26]

> The only relevant rule of construction [of the English will in question] is that a bequest in an English will to the children of A. means to his legitimate children and that does not carry the matter very far, for the question remains who are his legitimate children and that is not a question of construction at all. . . .

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[22] In *Re Goodman's Trusts*, *ante*, footnote 10, at p. 296.
[23] *Ibid.* [24] *Ante*, footnote 11. [25] *Ibid.*, at pp. 639 and 642.
[26] In *Re Bischoffsheim*, *ante*, footnote 4, at p. 86.

It is seen, therefore, that before 1881, the position was, according to the principle enunciated in *Boyes* v. *Bedale*,[27] that the word "child" in an English will meant "legitimate child" in the English sense: accordingly any claimant who was not legitimate *within the meaning of English law* could not take as a "child". After 1881, and up to the present day, the position was and is that, while the word "child" in an English will means "legitimate child", a foreign claimant does not have to pass the test of English legitimacy: in other words, the English test of legitimacy in such a case is entirely irrelevant.[28] Accordingly, it is now too late to say that the testator's intention has anything whatever to do with the English test of legitimacy in regard to foreign claimants. What an English testator means by a "child" is a "child legitimate by the law entitled to fix its status." Indeed, it is impossible to believe that the Court of Appeal, in reaching a conclusion entirely inconsistent with this line of reasoning, can have had its attention drawn to the full effect of Kay J.'s judgment in *In re Andros*.[29] It will be recalled that in dealing with the decision of Lord Hatherley in *Boyes* v. *Bedale* Kay J. regarded that case as holding that "[t]he will and every term in it . . . must be construed according to English law. If in a Canadian will there were a gift of £100, that would mean £100 Canadian currency not £100 sterling. So the testator 'must be taken to mean a child in the sense in which the law of *England* understands the term.' " It will further be recalled that, after stating that he considered this illustration to be "inapt and wanting in analogy" the learned judge asked: "but how does it follow from this that a gift to the children of a foreigner means such children only as would be legitimate if he had been a domiciled Englishman. . . ? What did the testator intend by this gift? That is answered by the rule of construction. *He intended A's legitimate children.* If you ask the further question, Did he intend *his children who would be legitimate according to English law or his actual legitimate children? How can the rule of construction answer that?*"[30] There is no suggestion anywhere in the Court of Appeal's judgment that such questions were ever adverted to: in view of this prior authority, which the

[27] *Ante*, footnote 20. Note, however, *Re Don's Estate* (1857), 4 Drew. 194, at p. 197, per Kindersley V.-C.

[28] There are two decisions which appear to indicate the contrary. One is the oral decision of Bennett J. in *Re Paine*, [1940] Ch. 46, which cannot be supported on any basis: see discussion, (1957), 6 Int. & Comp. L.Q. at 212, 236 and 237. The other is the decision of Stirling J. in *Re Bethell* (1887), 38 Ch.D. 220, which is clearly distinguishable: see 6 Int. & Comp. L.Q. at 216, note 1.

[29] *Ante*, footnote 11.

[30] *Ibid.*, footnote 20, at pp. 639-640. Italics supplied.

Court of Appeal, it is to be noted, did not say or even suggest it was overruling, and as there is no question whatever that at the relevant time British Columbia law created the legal relationship of parent and child between the claimant in the *Marshall* case and his adoptive father, it is, with the greatest respect, highly inaccurate to say, as the Court of Appeal did, that "it appears . . . quite impossible to suppose that an English testator, in a bequest to 'children', could have in contemplation adopted children with such limited rights as these." What the claimant's rights of succession under a British Columbia will according to British Columbia rules of construction[31] could have to do with his rights of succession under an English will is almost beyond the power of comprehension. The limitations on an adopted child's rights of succession imposed by British Columbia law are quite clearly expressions of a British Columbia testator's implied intentions: again, what these have to do with an English testator's implied intentions is difficult to imagine.

It is, of course, possible that, in adopting the reasoning it did, the Court of Appeal in effect intended to reverse the line of authority established by *Re Goodman's Trusts*[32], and to reinstate *Boyes* v. *Bedale*[33] in the category of authoritative precedent. If this is the case, the Court of Appeal gave no indication whatever of its reasons for doing so; nor did it give any indication at all that the above authorities had even remotely entered into its consideration.

It is, however, far more likely that the effect of the above authorities was simply not drawn to the court's attention: if this were not so, it is inconceivable that the court would not have discussed them. It therefore seems that counsel must bear a considerable share of the responsibility for the resulting judgment, which is almost incomprehensible when viewed in the light of the existing law on the particular point under discussion.

It may be, however, that to view the Court of Appeal's decision in the *Marshall* case on the rather technical basis of prior precedent, is to approach the topic with a somewhat limited outlook. The reluctance of the English courts to follow, in adoption cases, the authority of the decisions on legitimation *per subsequens matrimoniam* and legitimacy, may not be entirely due to the lack of cogent argument on the part of counsel, but to the fact that no legislature or court can ever create a blood-tie between an adopted child and an adoptive parent who is not actually his parent. There

[31] As laid down in the British Columbia adoption legislation.
[32] *Ante*, footnote 10. [33] *Ante*, footnote 11.

may be a reluctance to allow rights of succession to a stranger in blood, brought into the family from outside, entirely equal to those enjoyed by children born into the family. In cases of legitimacy. and legitimation *per subsequens matrimoniam* this problem does not, of course, arise: adoption is, on the other hand, a means of creating a relationship which is in most cases entirely artificial.

Where, in the case of an adoption overseas, the foreign legislature had placed the adopted child in precisely the same position, in respect of all his capacities and rights, as a natural child, the problem of artificiality in the relationship between the child and the adoptive parent, while nevertheless remaining, provides far less justification for refusing to acknowledge the relationship. On the other hand, when the foreign legislature has itself placed the adopted child in a special category as far as his rights and capacities are concerned, the problem becomes considerably more acute. In such a case, whatever the strict legal position may be, it is impossible to say that the child is in a position substantially equivalent to that of the natural-born children of the adopter.

No amount of consideration of this particular point can, however, avoid the fact that it is one thing to say, as a matter of construction, that an English adopted child cannot succeed under an English will, or that a British Columbia adopted child cannot succeed under a British Columbia will, but another thing to say that a British Columbia adopted child cannot succeed under an English will, or an English adopted child cannot succeed under a British Columbia will. It is elementary in the conflict of laws that the law of a testator's last domicil governs questions of construction of his will in regard to succession to personalty. It is, one would have thought, equally well-settled that when a testator refers in his will to a "child", the law of his last domicil only goes so far as to construe the term to indicate what class of person was intended by the testator.[34] Whether the person concerned actually falls within that class has nothing to do with the testator's intention, or the meaning given to the term "child" by the law of the testator's last domicil, but is a question to be answered solely by the law governing the claimant's status.

What the precise limits of the concept of status are is a question of some difficulty.[35] It can, however, be said with a reasonable degree of certainty, in reference to the case under discussion, that

[34] In addition to the cases already cited, see, *e.g.*, *Re Fergusson's Will*, [1902] 1 Ch. 483.

[35] This topic is fully discussed in (1957), 6 Int. & Comp. L.Q., at pp. 221-233.

status does not flow from its incidents, but the incidents of status flow from the status itself. Thus a man is not married because he is bound to support his wife; he is bound to support his wife because he is married. A bankrupt is not a bankrupt because he cannot deal with his property with complete freedom; he cannot deal with his property because he is a bankrupt.[36] It is also clear that an adopted child, who is deemed, under the appropriate statute "to be the child born in wedlock of the adopting parent" is, without more, fully in the position of a legitimate child as far as rights of succession are concerned.[37] He is not in the position of a legitimate child *qua* his adopting parents because he has a right of succession as a "child": he has that right of succession because he is in the position of a legitimate child.

If this is the position, and there has never been any suggestion in the English cases that it is not, it would seem to follow that any statutory provision limiting an adopted child's right of succession does not affect or diminish his status. There can be no doubt that the British Columbia adoption statute, as it stood in 1945, providing that the adopted child and the adoptive parent are, upon adoption, to assume toward each other the legal relationship of parent and child, *and to have all the rights and be subject to all the obligations and duties of that relationship*, confers a status of legitimacy, *qua* the adoptive parent, upon the adopted child. Can it possibly be said that the subsequent provisions of the legislation, restricting the rights of succession of children whose status has been changed by the legislation, reduces that status in any way? On the authority of *Ford* v. *Ford*[38] it is submitted not. It was held in that case by the High Court of Australia that "a variation . . . of the rights and obligations of a person having a particular status does not necessarily affect the status of that person."[39] It was even more strongly stated in *Thompson* v. *Thompson*[40] in the Supreme Court of New South Wales that "Legitimacy, in the relevant sense, is not merely a bundle of capacities, such as the capacity to inherit, but, predominantly, the condition of being

[36] See the thoughtful judgment of Latham C.J. in *Ford* v. *Ford* (1947), 73 C.L.R. 524, at pp. 529-530 (High Court of Australia).

[37] The quoted words are from the New Zealand Infants Act 1908, s. 21(1), now superseded, but considered in *Re Allen*, [1948] N.Z.L.R. 1236, in which it was held that the term "grandchildren" in a New Zealand will, which term the testator had expressly limited "to include only the lawful issue of any son or daughter of mine" included a child adopted in New Zealand under the Act.

[38] *Ante*, footnote 36. [39] *Ibid.*, at p. 530.

[40] (1950), 51 S.R.N.S.W. 102, at p. 107. This case and *Ford* v. *Ford*, *ante*, footnote 36, are discussed at length in (1957), 6 Int. & Comp. L.Q., at pp. 225-230.

in a personal relationship to other persons . . . what is called in *In re Goodman's Trusts* the 'family relation', the 'relation of father and child' and 'kinship' as 'an incident of the person'[41]".

On this view, if it is correct, the claimant in the *Marshall* case was quite clearly a legitimate child in every relevant sense, and entitled to be regarded as such: his position under a British Columbia will had nothing whatever to do with his status.

There are therefore two lines of reasoning following which it might be said that the Court of Appeal in the *Marshall* case was in error. The first is based on the elementary rule of conflict of laws that the construction of a will is governed by the testator's *lex domicilii*. This was English law. The law of British Columbia was on this basis in no sense relevant to assist the court in determining whether, by "child", the testator meant any more than "legitimate child". The question whether the term "child" in a British Columbia will could, in the light of the relevant statutory provisions as they stood in 1945, be construed to include the claimant was therefore entirely immaterial.

The second line of reasoning is based on the equally elementary conflict of laws rule that questions of status were in this case governed by British Columbia law, which, as far as status was concerned, clearly placed the claimant fully in the position of a legitimate child. His disability to succeed in certain special cases was not a matter of status, but a question of construction of British Columbia wills, and was thus on no basis relevant.

In its judgment, the Court of Appeal referred to, but apparently did not rely on, the decisions of four commonwealth courts.[42] For various reasons none of these decisions can be regarded as satisfactory, but it is perhaps helpful to consider them at some length.

The first case was the decision of the British Columbia Court of Appeal in *Re McGillivray*, sometimes known as *Purcell* v. *Hendrick*.[43] A testator who died domiciled in British Columbia bequeathed the residue of his estate, consisting of personal property, to his sister "or her heirs". His sister died intestate during the testator's lifetime, leaving a daughter surviving her, whom she and her husband had adopted under the law of Massachusetts. It appeared that under the laws of Massachusetts "an adopted child is an heir of the adopting parent and has the rights . . . and

[41] *Ante*, footnote 10, at pp. 297, 299.
[42] *Re McGillivray*, *Purcell* v. *Hendrick*, *ante*, footnote 12; *Re Donald*, *ante*, footnote 15; *Re Pearson*, *ante*, footnote 14; *Re Brophy*, *ante*, footnote 13.
[43] *Ibid.*

status [of a child] born in [lawful] wedlock". It was argued for the child that by "the law of Massachusetts an adopted child is in the same position as one born in lawful wedlock .... As to [the] analogy between an adopted child and legitimacy see *In re Goodman's Trusts*[44]. An adopted child has *status* of next of kin: see *In re Lee Cheong*[45]".[46] It was held by a majority of three to two that the child was entitled to take under the testator's will.

Macdonald C.J.A. was of the view that the child was entitled to take on the ground "that the question is one of status, and that the appellant has, by the law of Massachusetts, the requisite status of heir or next of kin."[47] These are, it is submitted, the wrong reasons for the right conclusion:

> Here we have gifts to the heirs of Annie Ferden. Who are the heirs of Annie Ferden? Or to put it more accurately, in relation to the property bequeathed, who are the next of kin of Annie Ferden? Byrne, J. in *In re Fergusson's Will*[48] said that that ought to be ascertained by construction of the will. No doubt there was a question of construction here, but it has been well settled by previous cases, namely, that 'heirs' in a gift of personality must be construed 'next of kin.' He held, however, that the words 'next of kin' used in that will must be construed as meaning the nearest of blood in the ascending and descending line, thus excluding those entitled under German law. He held that the class was to be ascertained by construction of the will, not by the law of the domicil of the ancestor.
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> . . . I think, with great respect, that too much importance has been attached to the common law definition of next of kin where foreign *status* is concerned. An illegitimate child is not next of kin in any legal sense to its father, it is not of his blood in the eye of the law. When legitimated by foreign law it is the foreign law which gives him the *status* to inherit and succeed, a *status* recognized in all countries which adhere to the law of nations; *In re Goodman's Trusts*.[49, 50]

It is suggested that the defects inherent in the above reasoning arise from a misunderstanding of the effect of the decision of Byrne J. in *Re Fergusson's Will*.[51] Byrne J. in construing the will in that case was not, it is submitted, concerned to determine whether the *very persons* who were the claimants could take; he was concerned to determine the meaning of the term "next of kin", and it was not until that had been done that it could be determined whether the claimants came within the class of person included in the definition of the term. "Whether the claimant actually is a legitimate child, or actually is a nearest blood relation

[44] *Ante*, footnote 10.
[45] (1923), 33 B.C.R. 109.
[46] *Ante*, footnote 12, at p. 517.
[47] *Ibid.*, at p. 520.
[48] *Ante*, footnote 34.
[49] *Ante*, footnote 10.
[50] *Ante*, footnote 12, at pp. 518-519.
[51] *Ante*, footnote 34.

in the ascending or descending line is a question of status."[52] It is therefore correct to say (as Byrne J. did) that "the class was to be ascertained by the construction of the will, not by the law of the domicil of the ancestor."[53] The "law of the domicil of the ancestor" (whatever that may mean) was relevant only to determine whether the claimants came within the class so ascertained.

In a later passage of his judgment, Macdonald C.J.A. says:

> The subject is much discussed in *In re Goodman's Trusts*, *supra*, by Cotton and James, L.JJ., who were of opinion that so far as legitimacy is concerned, the law of the father's domicil at the time of the birth of the child and at the time of the marriage of its parents determines its *status* and its right to take under an intestacy.[54]

This reasoning is of course, with respect, inaccurate. The law of the domicil of the child does not determine its right to take under an intestacy. What the law of the domicil does is to determine that the child is a legitimate child: the child *thus* comes within the class ascertained by the construction of the will (or, in the case of *In re Goodman's Trusts*, the Statute of Distributions), and is for that reason entitled to take.

Martin J.A. followed somewhat the same line of reasoning[55] but concludes by saying:

> If the English testator's intentions can be . . . expanded to include as his next of kin one who would be a bastard in his own country, however repellant that unexpected result might be to him, because of the *status* such a child has acquired *ex juris*, I am unable to perceive why the same result should not follow in the case of a duly adopted child who has had conferred upon it all the rights of blood relationship as well as others: in both cases the Court is recognizing a child born out of wedlock, and unless it can be put on the ground that the Court will regard blood, whether base or pure, as the test of foreign legislation, the distinction cannot be legally sustained, and I have been unable to find authority to support that view, though I am disposed to welcome it.
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> I note, moreover, that Mr. Justice Byrne says in his conclusion, that his view is 'subject . . . to the question of *status* should any question of that kind arise.' It does, in my opinion, arise here, and therefore the appeal should be allowed.[56]

Galliher J.A.'s dissenting judgment is of interest, because, although the learned judge finally concluded that the child should not succeed on the ground that the child must be shown actually

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[52] (1957), 6 Int. & Comp. L.Q., at p. 209.
[53] Macdonald C.J.A., *ante*, footnote 12, at p. 519.
[54] *Ibid.*, at p. 520.
[55] *Ibid.*, especially at pp. 522-523.
[56] *Ibid.*, at pp. 523-524.

to be a blood relation, it contains a succinct and penetrating analysis of the present problem:

> The ones to take personalty as heirs mean statutory next of kin . . . and statutory next of kin means nearest blood relations in the ascending and descending line, including those of the half blood. Now, the children of a named person would be interpreted by English law to mean legitimate children, and by applying the foreign law which makes illegitimate children legitimate, you then have a child who answers the requirements of English law. But next of kin imports blood relationship . . . .[57]

It is unfortunate that the majority of the British Columbia Court of Appeal,[58] having come so near to what is believed to be the correct analysis of this class of case, should in the result have found for the adopted child on the ground that she had full rights of succession under the law of Massachusetts. This is due, as has been pointed out, to a misunderstanding of the effect of *Re Goodman's Trusts*[59] and *Re Ferguson's Will*.[60, 61]

On the other hand, far from misunderstanding the effect of these two cases, the Supreme Court of Canada in *Re Donald*,[62] completely failed to grasp their significance. The testator died domiciled in Saskatchewan, leaving personal property to one A. Speedie of Seattle, Washington, or, if he should predecease the testator, to any "children" of his. Smith J., delivering the judgment of the court, spoke as follows:

> The bequest in this case is to 'the children' of Andrew Speedie, and there is nothing in the will or the circumstances to indicate that these words 'the children' were used otherwise than in their ordinary sense. The judgment in *Re Andros*[63] . . . lays it down that English law (which is Saskatchewan law) 'requires that all who take under a gift to sons of a named father should be legitimate offspring.'
>
> Saskatchewan law therefore requires that the parties who take under this bequest . . . shall be the legitimate offspring of Andrew Speedie, and the simple question is, does this adopted child come within that description? It seems perfectly clear that he does not, for the reason that he is not in fact the offspring of Andrew Speedie. It is not a question of status, but a question of whether this adopted child is a person such as mentioned and described in this bequest.[64]

With the greatest respect, it is impossible to believe that the

[57] *Ibid.*, at pp. 527-528.

[58] McPhillips J.A., who concurred with Macdonald C.J.A. and Martin J.A., delivered no judgment.

[59] *Ante*, footnote 10.

[60] *Ante*, footnote 34.

[61] The importance of *Robertson* v. *Ives* (1913), 13 E.L.R. 387, relied on by Galliher J.A. for the greater part of his reasoning, must not be overlooked.

[62] *Ante*, footnote 15.

[63] *Ante*, footnote 11.

[64] *Ante*, footnote 15, at p. 247.

court can really have had the judgment of Kay J. in *In re Andros* in mind when preparing its decision (which appears to have been a written one; argument February 7th, judgment March 20th). And is it not possible to believe that the court did not entirely fail to appreciate the fact that the Washington adoption legislation declares that an adopted child "shall be to all intents and purposes, the child and legal heir of his or her adopters, entitled to all the rights and privileges and subject to all the obligations of a child of the adopter or adopters begotten in lawful wedlock."[65]

Equally unfortunate was, with respect, the oral judgment of Gavan Duffy J. in *Re Pearson*,[66] in the Supreme Court of Victoria. In that case, the testator, in his will, left his estate in trust for his widow for life, and thereafter to be divided among his four children, "and if any beneficiary under this will dies leaving issue such issue shall divide equally amongst themselves their deceased parent's share." One of the four children died during the life of the widow, having after the date of the will legally adopted a child in Tasmania, according to Tasmanian law. The testator died domiciled in Victoria. The learned judge held[67] that whether or not the adopted child was "issue" of the adopter for the purposes of the will must be determined by Tasmanian law, and the will being prior in date to the adoption order, *by reason of the Tasmanian Adoption of Children Act 1920*[68] the child could not take the bequest:

> I think that the authorities, and particularly *In re Luck's Settlement Trusts*,[69] to which my attention was drawn . . . show that if there is a gift to a child, and the question arises whether someone is a child, and he has a domicil other than Victoria, you decide that question according to the law of his domicil. The facts in this case are such that the adoption order in Tasmania would be given full effect in Victoria under the rules of private international law; and that being so, since the Tasmanian Act says that the infant is deemed to be a child born in lawful wedlock, I should, if nothing more appeared, have had no hesi-

[65] Adoption of Children Act, Compiled Statutes of Washington, 1922, c. 5, s. 1699, cited by the court, at p. 245.

[66] *Ante*, footnote 14.

[67] The question of the time when the children's shares were to vest is not relevant to this discussion.

[68] Section 8 of which provided that an adopted child (*i.e.*, a child adopted in Tasmania) shall "be deemed in law to be the child born in lawful wedlock of the adopting parent. Provided that such adopted child shall not by such adoption—1. Acquire any right, title or interest in any property which would devolve on any child of the adopting parent by virtue of any deed or instrument made prior to the date of such order of adoption, or by virtue of any will made prior to such date by any person other than the adopting parent, unless it is expressly so stated in such deed, instrument or will."

[69] [1940] Ch. 864.

> tation in finding that he was issue of his mother within the meaning of the will.
>
> But . . . if the child takes anything at all, he takes under a will which was made prior to his adoption . . . . On the whole I think the proper way is to look at the Tasmanian section as conferring on the child the full character and rights of a child born in wedlock except that he is not to have the character of a child capable of taking under a will made before the adoption order.[70]

It appears from the report[71] that counsel, not for the adopted child, but for the executor of the testator's will referred to the argument that, if this was a matter of status, the law of the domicil applied, and by that law the adopted child could not take under the will of a third party made before the order of adoption, and added that this argument "would appear to be correct unless it can be said that the proviso to section 8 of the Tasmanian statute excludes the adopted child only in respect of interests under a Tasmanian instrument, and gives him the status of a child for all purposes outside Tasmania."

This argument, raised somewhat feebly and apparently at the last moment, was, it is submitted, the very point at issue, and it is astounding that it was not raised as forcefully as possible by counsel for the adopted child. It is difficult to see how it could possibly be said, if the point had been adequately argued, that a statutory provision of this nature could have extraterritorial effect. Questions of succession are, it is well established, governed by the law of the testator's domicil, not by the law of the beneficiary's domicil, and it was surely for Victorian law to say whether a child who came within the class of person entitled to take after the date of the will could succeed or not.

On the other hand, according to the view of status just advanced a disability to succeed under a will made before the date of adoption comes not within the concept of status itself, but is clearly one of the incidents of status, in the sense that it is a special disability placed on a particular class of person which in no way affects the status of persons within that class

The last, and possibly the most unsatisfactory, case is *Re Brophy*.[72] In 1923 Michael McMahon and his wife Bridget McMahon adopted a child, Howard Simms, who thereafter became known as Emmett McMahon.[73] At all relevant times the parties to the

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[70] *Ante*, footnote 14, at p. 362.

[71] *Ibid.*, at p. 358.

[72] *Ante*, footnote 13.

[73] The child was in fact formally adopted by Michael McMahon only: for the purposes of the decision it was assumed that the adoption order operated also as an adoption of the child by Bridget McMahon.

adoption were domiciled in New York, and the adoption order was effected under New York law. Emmett McMahon was deemed by virtue of that law to be the child of his parents as if born to them in lawful wedlock.[74] Bridget McMahon died in 1936, leaving no natural children; in 1943 her aunt, Bridget Lena Brophy, died domiciled in New Zealand, leaving under her will, made in 1934, (*inter alia*) an interest in her estate to her niece Bridget McMahon, or if her niece should predecease her, to her "issue then living and attaining the age of twenty-one years".

The question before the court was, of course, whether Emmett McMahon was "issue" of Bridget McMahon for the purposes of the will. Gresson J.'s answer to this question was negative.

The learned judge found, as a question of fact, that while the effect of the New York adoption order was to place Emmett McMahon in the position of a legitimate child *qua* his adoptive parents, New York law did not permit him to succeed as "issue" of his adoptive parents unless an express intention to that effect was shown in the will or other instrument conferring the benefit.[75] He further held that the provisions of New Zealand law relating to adopted children rendering an adopted child *prima*

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[74] The New York legislation under which Emmett McMahon was adopted (New York Domestic Relations Law, s. 114 (Art. 7, 14, *New York Consolidated Laws of 1909*, Cahill's Edition, 1923)) read as follows:

> *Effect of Adoption*: Thereafter the parents of the person adopted are relieved from all parental duties toward, and of all responsibility for, and have no rights over such child, or his property, by descent or succession . . . . The foster parent or parents, and the person adopted sustain toward each other the legal relation of parent and child and are subject to all duties of that relation, including the right of inheritance from each other . . . and such right of inheritance extends to the heirs and next-of-kin of the person adopted, and such heirs and next-of-kin shall be the same as if he were the legitimate child of the person adopting, but as respects the passing and limitation over of real and personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the person adopted is not deemed to be the child of the foster parent so as to defeat the rights of remaindermen.

[75] This finding was based on a memorandum prepared by a firm of New York attorneys, agreed by counsel to contain a correct statement of New York law. The writer has, through the courtesy of counsel, had the benefit of examining the memorandum, which dealt exclusively with the question whether Emmett McMahon could succeed *under a New York will*. This was apparently the only evidence as to New York law submitted to Gresson, J., and as Professor I. D. Campbell says in his *Law of Adoption in New Zealand* (1952), it was ample to justify the learned judge's preliminary finding of fact that there was by New York law no presumption that an adopted child was included in the terms "child" or "issue" *in a New York will*. However Professor Campbell does not appear to regard the latter point as relevant (at p. 178). Although the learned judge could hardly find that the provisions of New York law were not as stated in the memorandum, there was, of course, no need for him to have assumed that the memorandum contained any relevant information.

facie "issue"[76] applied only to children adopted in New Zealand and not elsewhere. New Zealand law (the *lex successionis*) could therefore not be resorted to in order to construe the provision of Bridget Lena Brophy's will in favour of Emmett McMahon, and the legal effect of the status conferred on him by New York law did not otherwise bring him, as a matter of interpretation, within the term "issue". His claim must therefore fail.

It is somewhat difficult to ascertain the exact grounds upon which the learned judge's decision was based. Phrases such as the following are inclined to create some difficulty:

> In the case of a child adopted in New Zealand pursuant to the provisions of the Infants Act 1908, the child so adopted, except in certain cases, acquires the status of a natural child, and will, *prima facie*, be included in the term 'issue'.[77]
>
> The question here . . . is a question of construction, but it is much more—namely, whether what happened overseas gave Emmett McMahon the status of 'issue'.[78]
>
> . . . what, under the adoption, was the status of Emmett McMahon *qua* his mother by the adoption?[79]
>
> . . . there must be an examination to ascertain whether such child has acquired, through the adoption, the same position as a child born in lawful wedlock, or whether its status, though that of a child, is of somewhat lower standard, not of an equal footing with a child born in wedlock.[80]
>
> The first step is to ascertain status—namely, whether the relationship of parent and child was validly created. That 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 . . . . My conclusion is that the status of [the child] is fixed by the law of his domicil; that under that law he was the 'child' of [his adoptive mother] . . . that his status as such child must be recognized by the courts of New Zealand; but that the legal effects of such status do not bring him, as a matter of interpretation, within the term 'issue' . . . .[81]

It is not only difficult to see what the learned judge meant by the term "status", but it is also difficult to appreciate why, having held that the child had the status of a legitimate child, and that such status must be recognized in New Zealand, he found it necessary to consider the question, and to hold as a fact, that the child's capacities at New York law did not include the right to succeed as "issue" under a New York will when the question was whether he could succeed as "issue" under a New Zealand will.

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[76] Infants Act, 1908, s. 21. This has now been superseded by the Adoption Act 1955.

[77] *Ante*, footnote 13, at p. 1011.

[78] *Ibid.*, at p. 1011.

[79] *Ibid.*, at p. 1014.

[80] *Ibid.*, at p. 1014.

[81] *Ibid.*, at p. 1017.

It may perhaps be said, with the greatest respect, that the judgment is comprehensible if one ignores established rules of private international law. The chain of logic running through the decision in *Re Brophy*, and indeed in all the adoption cases considered here, is that if a will governed by the law under which the child was adopted cannot be read to include that child, then a will governed by the law of the testator's last domicil cannot be read to include that child. This view is not in itself illogical or, perhaps, unduly harsh: but it is submitted that it is not the law. The definition of "issue" or "child" in an English will had never, up to the adoption cases, been construed to include only a child, legitimate or illegitimate by English standards, who could succeed as "issue" or a "child" under a will governed by the law of his domicil. It has never been suggested that an Italian or a Swiss claimant as a "child" under an English will was entitled to a *legitima portio* instead of the bequest awarded him because he was so entitled under Italian or Swiss law. It should be said, however, that this is so probably only because such a case has never arisen. Nevertheless it is submitted that it is clearly impossible to read into any of the accepted legitimation or legitimacy cases, which are, indeed, the only cases having any bearing at all upon the present issue, the slightest indication that the courts' decision that the respective claimants were entitled to succeed depended in any sense on their right to take under their relevant domiciliary law. The only way to make sense of the adoption cases is to read them as holding that a testator does not intend to include children adopted overseas in the term "issue" if, had he been an overseas testator, with his will governed by the *lex adoptionis*, he would not in that circumstance have intended an adopted child to take. If this is so, it appears that the courts, in the adoption cases, have in effect propounded a new rule for the construction of English wills, which resembles in no respect, and is indeed inconsistent with, the rules of construction applied in other cases. In a common law system, it is supposed that such developments may be expected: what is not to be expected, however, is that the courts should apply such a new rule, when that rule is radically different from the rule applied in closely analogous situations, without giving any reasons worth mentioning for such a radical departure.

There is no essential difference, it is suggested, between cases involving succession and legitimacy, succession and legitimation *per subsequens matrimoniam*, and succession and adoption. Each is basically a case of succession and status. No court has ever advanced reasons for regarding adoption cases otherwise. It is clear

that "child" in an English will means a legitimate child; the adopted children in all the cases we have considered were "by statute (the supreme authority) declared to be in all legal respects the same as one born in lawful wedlock"[82] and it is difficult to see what effect on their resulting status of legitimacy any special rule for the construction of wills in regard to them under their domiciliary law could have.

In the *Marshall* case, the adopted child clearly could not until 1948 have taken under a British Columbia will other than that of the adopter. The court was not, however, asked to construe a British Columbia will, but to construe an English will. If the court had applied the rules of the conflict of laws laid down in the prior cases involving succession and status, it is submitted that there is no doubt that the child could have taken. It may be that the rules of conflict of laws in this respect are somewhat rigid and technical, but that is no good reason for disregarding them. Not only because it disregarded these rules, but also because it failed even to indicate that it had considered them, the Court of Appeal's decision in the *Marshall* case cannot, it is submitted, be regarded as the last word on the topic.

Here, and elsewhere,[83] the writer has attempted to show that there are indeed (to borrow again from Bunyan) "good and substantial steps, placed even through the very midst of the *Slough*" with which this topic is surrounded. It seems, however, that in the latest adoption case the slough has again "much spued out its filth" and obscured the path of the Court of Appeal through it.[84]

[82] *Purcell* v. *Hendrick*, *ante*, footnote 12, at p. 522, per Martin J.A.

[83] In (1957), 6 Int. & Comp. L.Q. 202, and (1957), 35 Can. Bar Rev. 571.

[84] POSTSCRIPT: It has been suggested in the course of this article that the lack of cogent argument on the part of counsel may have been responsible for what the writer submits were the erroneous judgments in the divisional court and the Court of Appeal in the *Marshall* case. This suggestion now appears to have been ill-founded. After this article was in print, and shortly before it was due to go to press, the writer received word from the adopted child's Vancouver, B.C., solicitors that it was clearly argued before Harman, J. by senior counsel for the adopted child that once the status position under the relevant domiciliary law has been established, and once it has been established that the adoptive father and the adopted child assume toward each other by such law the relationship of parent and child as if born in lawful wedlock, all other matters are irrelevant, such as rights of inheritance under the domiciliary law and any limitations relating thereto: and see also the report of counsel's argument in [1957] Ch. at 266, which has just become available to the writer. As the above statement of counsel is believed to represent the correct legal position, it seems that the courts concerned (with respect) wandered away from the "good and substantial steps" through the mire surrounding this topic without the allurements of counsel. The writer is informed that, for financial reasons, it will not be possible to take an appeal to the House of Lords. This is regrettable, as the Court of Appeal's decision will now stand as what is submitted with respect to be an entirely erroneous authority to mislead the unwary.