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IN RE MARSHALL (DECEASED), BARCLAY'S BANK LTD. V. MARSHALL AND OTHERS — ADOPTION — FOREIGN ADOPTION — CONFLICTS OF LAW — RIGHTS OF CHILD UNDER ENGLISH WILL — Some confusion has been caused in the conflict of laws by the failure to distinguish between status and its incidents, especially when related to a question of succession. A striking example of this sort of confusion is to be found in the case of *In Re Marshall, Barclay's Bank Ltd. v. Marshall.*[1] A testator bequeathed his estate in England to trustees in trust for his widow for life, and on her death to certain named cousins of whom Charles Stansfeld Jones was one. The testator died domiciled in England in June 1945 and his widow died in January 1955. Charles Stansfeld Jones died in 1950 and was survived by a son whom he had adopted according to the law of British Columbia in March 1945. The son claimed as his adoptive father's "issue" under a substitution clause in the testator's will. A girl who had not been adopted by a court order also claimed as "issue" of Jones, but her claim was dismissed on the ground that she had not been "legally" adopted.[2] The parties to the adoption were at all relevant times domiciled in British Columbia. It was agreed by the parties to the action that "issue" was to be the same as "children" in construing the testator's will.

At the trial Harman, J. held that the relevant date for ascertaining the class of persons capable of taking under the substitution clause of the will was the date of the testator's death, June 1945. His Lordship considered the British Columbia law as it existed at that date and decided that according to that law " . . . the status of an adopted person is only equated to that of a natural born child so far as regards the legal descendants of his adoptive parents."[3] He held that the adopted son was not, in 1945, a person within the class of persons capable of taking under the clause in question.

Having decided the case on the basis that 1945 was the relevant date, his Lordship went on to consider what the result would have been had the relevant date been that of the death of the life tenant, the widow, in 1955. Examining the amendments to The Adoption Act[4] of British Columbia, and especially the 1953 amendment to Section 10(1)[5] of that Act, his Lordship was of the opinion that the deletion of the words "the legal descendants, but to no other of" from that section

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[1] [1957] Ch. 507, the appeal was from the judgment of Harman, J., [1957] Ch. 263; 1 All E.R. 549. The Chancery report incorrectly quotes s. 12 of the British Columbia Adoption Act, and the section is properly quoted in [1957] 1 All E.R. 549.

[2] Kennedy (1957), 35 Can. Bar Rev. 880 at p. 883 indicates, however, that the method of adoption used in the case of the daughter, *viz.* by agreement and not by a court order, at the time operated as an adoption under the laws of British Columbia, if the agreement was filed with the provincial secretary. The case does not indicate whether or not this was done.

[3] [1957] 1 All E.R. 549 at p. 553.

[4] R.S.B.C., 1948, c. 7.

[5] S. 10(1): As to inheritance and succession to real and personal property a person adopted according to the provisions of this Act shall, subject to the provisions of sub-section (2) of section 3, stand in regard to the legal descendants, but to no other of the kindred of his parent by adoption, in the same position as if born to that parent in lawful wedlock.

had the effect of placing an adopted person with "regard to the kindred of his parent by adoption in the same position as if born of that parent in lawful wedlock".[6] The adopted son would have succeeded, therefore, on this basis, "if the British Columbia legislation were to be followed in England".[7] It is submitted, however, that Section 10(1) here referred to by his Lordship was quite irrelevant, in that its purpose and effect was only to prescribe certain incidents of a status in British Columbia, *viz.* an adopted child's rights of inheritance and succession in British Columbia, under a British Columbia will.

The learned trial judge used the correct approach to the problem in this case but, with the greatest respect he was unable to surmount the final obstacle, the distinction between status and its incidents. His Lordship in discussing the recent cases of *Re Wilby,*[8] and *In Re Wilson, Grace v. Lucas*[9] was careful to disassociate himself from the view expressed by Vaisey, J. in the latter case and followed by Barnard, J. in the former, that the British Courts for the purpose of succession to an English estate will recognize an adoption only if effected under the English Adoption Act of 1950. His Lordship, in referring to the decision of Barnard, J., had this comment to make:

> "He, [Barnard, J.] was impressed with the difficulty for an English judge of estimating the effect of foreign systems of law. This is no doubt formidable, but it is a task often faced. It is in English courts a question of fact to be ascertained on proper evidence of skilled persons".[10]

Referring to the case of *Re Donald, Baldwin v. Mooney,*[11] a decision of the Supreme Court of Canada, which held that the legitimation cases were not applicable to a case of adoption, Harman, J. found that the case "has not received universal approval".[12] The Court in *Re Donald* was called upon to consider a substitution clause in a will in circumstance similar to those in *In re Marshall,* but at the relevant time in the Canadian case, which arose in Saskatchewan, adoption of children was unknown in the law of that province. The question in that case was whether a foreign legal relationship of a kind unknown in the province would put the child in question in the position of a legitimate child in the eyes of Saskatchewan law.

Smith, J. who delivered the judgment in the Supreme Court of Canada, held that the adopted child's claim ". . . 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."[13] It is difficult to understand how such a contention could have been asserted in the light of the authorities, and in view of the nature of status itself. The substitution clause in *Re Donald* directed a gift to "children", and

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6 [1957] 1 All E.R. 549 at p. 554.
7 *Ibid.*
8 [1956] P. 174; 1 All E.R. 27.
9 [1954] Ch. 733; 1 All E.R. 997.
10 [1957] 1 All E.R. 549 at p. 556.
11 [1929] 2 D.L.R. 244.
12 [1957] 1 All E.R. 549 at 555, citing *Re Pearson,* [1946] V.L.R. 356 at p. 361 and *Re Brophy,* [1949] N.Z.L.R. 1006.
13 [1929] 2 D.L.R. 244 at p. 247.

the only question to be decided was whether or not the claimant, who had been adopted under the laws of the State of Washington, was a "child" of the person through whom he claimed. It is submitted that this was clearly a question of status, going to the very root of the relationship between that child and his adoptive parent. The court was impressed by the view that "child" referred exclusively to the result of the procreative act. Unfortunately this view fails to comprehend the idea that "child" necessarily implies a relationship, that of parent and child. To say that this relationship can be achieved only by a person who is the result of the procreative act of the person with whom it is desired to establish that relationship is to disregard entirely the concept of adoption. The Court held that the claimant could not succeed under Saskatchewan law because he was not in fact the offspring of his adoptive parent.

The decision of the Court of Appeal in *In re Marshall* delivered by Romer, L.J., echoes the strict thinking of *Boyes v. Bedale*,[14] where Sir W. Page-Wood, V.C. said

> ". . . 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,"[15]

and further

> "If an intestate dies domiciled in England the division of his property is governed throughout by English law and no person could take by representation under that statute unless legitimate by the *law of England*."[16]

Perhaps one would not disagree with this reasoning if it were clear that the italicized references to English law were meant to include the English rules of conflict of laws as well as the local law. Unfortunately it would appear that "English law" as used in the passages quoted has been interpreted as referring only to the local law.

Romer, L.J. stated in *In re Marshall*,

> "It is established beyond controversy that when an English testator speaks of "the children" of A. he is *prima facie* taken to be referring only to those persons of whom it can be postulated that they are the lawful children of A. The rule is clearly stated in Hawkins on Wills, 3rd ed., at p. 102. Further than, and by analogy to this, we agree with the view which Roxburgh, J. expressed in *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 domicile 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 and status, equivalent or at all events substantially equivalent, to that of the natural

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14 (1863), 1 H. & M. 798; 71 E.R. 349.
15 *Ibid.*, at p. 804.
16 *Ibid.*, at p. 805.
17 [1949] Ch. 473; 1 All E.R. 732. It should be noted, however, that Roxburgh, J. left open the question as to whether or not an adopted child might have legitimate status according to the law of his domicil, and if so would be considered as a "lawful child" in an English court.

children of the adopter can be treated as being within the scope of the testator's contemplation."[18]

It would appear, according to Romer, L.J. that in order to take under a bequest to "children" in an English will, a foreign adopted child must be in a position equivalent to that of a legitimate child under English law. Again no objection is taken to this statement if what is meant is, according to the whole of English law including its conflict rules. An adopted child is not to be grouped with an illegitimate child as the quotation from *In Re Fletcher* would indicate. The similarity, if any, it is submitted, is closer to that of the position of a legitimate child, as was suggested by Harman, J. at the trial when he stated that adoption was "a kind of legitimation".[19] With great respect, it is the writer's submission that the learned Judge was wrong in suggesting that reference should be had to the position of an adopted child with regard to property rights as well as status in attempting to equate its position to that of a natural child. How a person's rights with regard to property in another jurisdiction can have any relevance to the question of whether or not that person is a child of its adoptive parent is, with respect, beyond the powers of the present writer's understanding.

The Court of Appeal held that the claimant in *In re Marshall* was not in a position at least substantially equivalent to that of a natural child of Charles Stansfeld Jones, and hence he was not within the range of the testator's contemplation, with the result that his claim was dismissed. The *ratio* of the case may fairly be expressed as follows:

(1) English law (the lex successionis) *prima facie* interprets "child" as "legitimate child".
(2) Adoption establishes a statutory relationship between the adopted child and its adoptive parent, but the nature of this relationship depends on the statute under which it is created.
(3) Even if "child" in an English will may sometimes include "adopted child", nevertheless the testator was thinking of lawfully procreated children so that only those who are placed by adoption in a position, both as regards property 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 testators contemplation.

Prima facie, the question in the case was one of succession to an English estate, but this involved an investigation into to who were the children of Charles Stansfeld Jones. Unless an intention to the contrary on the part of the testator is established, the construction of a will of movables is governed by the law of the place which was the testator's domicil immediately before his death.[20] In *In re Marshall* the Court was not concerned with succession to immoveables, and it was agreed that the testator's domicil at the time immediately

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[18] [1957] Ch. 507 at pp. 522, 523.
[19] [1957] 1 All E.R. 549 at p. 556.
[20] *Beadford v. Young* (1884), 26 Ch. D. 656, and (1885), 29 Ch. D. 617. See also, Dicey's *Conflict of Laws* (7th ed.) at p. 614. Rule 118 refers to the domicil of the testator at the time the will is made. Cheshire, *Private International Law* (3rd ed.), at p. 705 refers to the law of the domicil of the testator at his death.

prior to his death was England. The question of succession, therefore, fell to be decided by the law of England, including the English rules of private international law. The Court had to characterize the question of who were the "children" of Charles Stansfeld Jones. If this problem were characterized as one of status, the matter would fall to be decided by the law of the claimant's domicile, British Columbia, since the English rule of construction interprets "child" as being "legitimate child" but goes no further.

That the matter is a question of status is difficult to deny in the light of the decision of the English Court of Appeal in *In Re Goodman's Trusts,* where it was stated by James, L.J.,[21]

> "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 recognized and that comity as practised in all other civilized communities, the *status* of a person, his legitimacy or his illegitimacy, is to be determined everywhere by the law of the country of his origin. . . ."

The point was considered also in *In re Andros,* a decision of Kay, J. in Chancery, where it was stated,[22]

> "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 recognized in this country, those children are legitimate whose legitimacy is established by the law of the father's domicil."

The passage quoted was considered with approval by Romer, J. in the *Bischoffsheim* case,[23] and one wonders whether Romer, L.J. in *In re Marshall* might not be guilty of some inconsistency in avoiding the issue when he says in the latter case,[24]

> "This view of the judge (Harman, J. at the trial) is largely based upon the application to adoption of principles which have become well established in relation to legitimation by such cases as *In re Goodman's Trust,* and *In re Andros,* that is to say, that the relevant inquiry in such cases as the present is as to the status of the adopted child and 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, *Purcell v. Hendricks*[25] and *In re Brophy*[26] and *In re Pearson.*[27] As against this, Mr. Baden Fuller (counsel for the heirs, other than the adopted son) argued before us that no adopted child in the position of the appellant can take under a gift in an English will to the "child" of the adopter, however extensive the language of the relevant foreign legislation may be. Mr. Baden Fuller's contention is (apart from the provisions of the 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 appellant, says Mr. Baden Fuller, was

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21 (1881), 17 Ch. D. 266 at 296.
22 (1883), 24 Ch. D. 637 at 639.
23 [1948] Ch. 79.
24 [1957] Ch. 507 at pp. 519, 520.
25 [1925] 3 D.L.R. 854 (B.C. C.A.).
26 [1949] N.Z.L.R. 1006.
27 [1946] V.L.R. 356.

> not the child of Charles Stansfeld Jones in this sense and the legislation of British Columbia could not turn him into one. This way of looking at the matter has the unanimous support of the Supreme Court of Canada in *In re Donald*.[28]

It is submitted that the problem elaborated in the passage which has just been quoted was at least the very question which fell to be decided in *In re Marshall*. The Court of Appeal held otherwise, however, and in the words of Romer, L.J., decided that,

> ". . . it is unnecessary for us to express any concluded opinion on whether the appellant or the respondents are right upon this difficult question and we prefer to refrain from doing so."[29]

A child is not legitimate in the air, so to speak. It is legitimate in relation to another person, its father, and it is the relationship which must be looked to to determine its status. In the legitimation cases the courts have been concerned with the question of whether or not a person was the legitimate child of another. The fact that that particular child was the result of the procreative act of that person could not have been of any assistance to the court in deciding upon its status for in all of the cases it was assumed that this state of affairs existed. What did, however, concern the courts was the relationship of the child in question to its alleged parent. In effect it was the relationship itself which constituted the essence of the child's status in such cases. Why Romer, L.J. and the Supreme Court of Canada should refuse to look to the relationship between an adopted child and its adoptive parent is difficult to understand. The relationship can be taken one step further and be described as that of parent and legitimate child. It will be observed then that the relationship may be established in one of three ways *viz.* by birth in lawful wedlock, by legitimation, or by adoption. Once this relationship exists the status is established and persons who have entered into it in any one of the three ways are properly described as "children."

It has already been stated that "child" in an English will means "legitimate child", but in attempting to ascertain the intention of an English testator it is difficult to go much further than his rule of construction. Did the testator intend to refer to children legitimate by the local law of England or children in fact legitimate by their own personal law? How can the answer to this question be found "within the scope of the testator's contemplation?"[30]

In deciding that it was unnecessary to give a concluded opinion on the argument that the question of the position of the claimant in *In re Marshall* was one of status, the Court of Appeal in effect decided the fate of the adopted child's claim. It is surprising to note how little reference is made to the authorities in arriving at this conclusion. Having stated in *In re Marshall* that the position of the adopted child could not be argued on the strength of the legitimacy cases, Romer L.J. discussed the construction and effect of the British

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28 [1929] 2 D.L.R. 244.
29 [1957] Ch. 507 at p. 520.
30 *Ibid.*, at p. 523.

Columbia adoption legislation at the various times in question. Particular reference was made to those sections of that legislation. Dealing with the proprietary right of an adopted child in that province. It is understandable that reference might properly have been had to the British Columbia law to ascertain whether or not by that law the relationship of parent and child between the claimant and Charles Stansfeld Jones had been established. It can hardly be denied that this relationship did exist. What relevance the property rights of that child in British Columbia may have had to its rights of succession in England is difficult to comprehend.

It has been stated at the outset of this article that questions of succession to movables must be decided according to the *lex successionis* or the law of the domicil of the testator at his death.[31] Surely this child's property rights on the succession in issue should have been decided by that law and not by the law of his domicil. The soundness of this assertion becomes clear upon examination of a hypothetical situation. Suppose that A dies intestate in country X, survived only by a nephew B and a niece C, and that B is domiciled country X, and C in country Y. Suppose further that according to the law of Y, on the intestacy of an uncle a nephew takes to the exclusion of a niece, and that according to the law of X both would share equally. Would it be in accordance with rules of private international law for the courts of country X, to decide that because C is encumbered as to succession in this situation by the law of her domicil, therefore she cannot take by the law of country X, the *lex successionis?* It is submitted that such a result would be obviously wrong. It is to be noted, however, that both B and C in the example have the same "status" by their respective personal law, but they do not have the same rights as to property within their respective countries.[32] It is difficult to avoid the conclusion that this was the sort of reasoning used by the Court of Appeal in *In re Marshall.* The tendency appears to have been to look to its incidents to determine a status, rather than to look to a status to determine its incidents where they are relevant. One writer[33] has analyzed the fallacy of this approach, in stating that it is not because a man must maintain his wife that he is married but rather it is because he is married that he must maintain his wife.

In looking to the law of British Columbia, the Court should have endeavoured to ascertain whether or not the relationship of parent and child existed between the claimant and Charles Stansfeld Jones. If such a relationship did exist, as was apparently the case, the Court should have held the claimant to be properly described as a "child" in terms of the substitution clause. The Court might then have

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31 See *ante* footnote 20.

32 See *ante* footnote 18.

33 Inglis, Adoption, The Marshall Case (1957), 35 Can. Bar Rev. 1027 at p. 1035. For a discussion of the decision of Harman, J. at the trial, see Inglis (1957), 35 Can. Bar Rev. 571 and p. 884.

inquired as to whether or not there existed in English law (the *lex successionis*) a rule of succession which precluded a "child" who has become such by adoption from taking under a gift to "children" in an English will.[34]

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[34] The difficulty in this case might now be overcome in Ontario by virtue of the provisions of The Child Welfare Act, 1958, c. 11, especially sections 74 and 75. See also *Re Milestone,* [1959] 15 D.L.R. (2d) 546.