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JURISDICTIONAL AND SOCIAL ASPECTS OF ADOPTION

By JOSEPH W. NEWBOLD*

THE adoption of children, having to do, as it does, with the question of the general interest in the individual life, is not receiving, apparently, the legislative and judicial attention which such a subject deserves. The clamor of classes for recognition of particular interests,—shipping interests, manufacturing interests, labor interests, is made by strong coöperating organizations maintained to force a continual recognition of their demands from the legislatures and courts. In this day of high pressure legislation and tremendous volume of litigation, it is natural that those demands which are most powerfully expressed are given first attention. There is no question but that the greater number of these demands are legitimate, and this fact, in itself, furnishes added weight to the claims of the various interests. Workable rules affecting the transportation of articles of commerce, the manufacture of goods, the number of hours that an employee works, are engendered first in the minds of those most closely connected with transportation, manufacture and labor. These are the ones who appreciate the changes in conditions which make impossible the application of a rule of long standing. The first intimation of such a change seldom impresses the legislature or the court, but the insistence with which the claims are asserted gradually wears away the conservative considerations opposing the change, and the demands are given judicial and legislative attention. The general interest in the individual life does not produce a demand of sufficient definiteness and power to compete with the other more forcefully exerted claims. Adoption of children is a definite conception but does not have the sponsorship, and consequently, the consideration which a subject of such importance requires. As a result of this failure of legislative and judicial consideration, the adoption laws in the United States are (1) improperly interpreted. (2) inadequate.

Adoption laws are usually misinterpreted in two main aspects: (1) A failure on the part of judges to recognize the importance

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of the discretionary powers given them by the legislatures; (2) Failure of courts to apply fundamental principles of law recognized in analogous cases.

Nearly every statute which provides for the adoption of children gives the judge before whom the application is made discretion in the matter.[1] If he is not satisfied by the evidence which is submitted that the interests of the parties are advanced by the adoption he is supposed to refuse a decree. Judges are very favorable toward adoptions. Their attitude apparently is that most adoptions are good ones. This, however, is not the opinion of those whose work keeps them in close contact with adoption cases. The judge's impression of adoption is prone to be the popular conception; that well-to-do persons, wishing to share their good fortune, take a child to rear as their own. This altruistic conception of adoption has been thrown over by the welfare agencies who now report that the only safe presumption to indulge is that the child is better off in a children's home than in the home of an adoptive parent. This they deduce from the statistics which they have gathered and the cases which they have followed. A few examples of the kind of cases which have led the agencies to this belief will be instructive.

A white woman appeared in a Boston court seeking the adoption of a fourteen year old girl who accompanied her. The judge, after asking the *usual* questions, decreed the adoption. Social case workers later found this girl being abused by the woman's negro husband and they had the adoption set aside. One month later the same woman, bringing with her another girl, appeared before the same judge, and he decreed another adoption. Again the case workers made the discovery of the negro husband's abusive use of this girl and were instrumental in having the adoption set aside. When this situation was called to the attention of the judge his excuse was that no sufficient records of adoption were kept which would enable him to detect anything amiss in decreeing the second adoption by this woman within a month.[2]

[1]See for example: Montana, Rev. Code, 1921, sec. 5862; New York, Consolidated Laws (Birdseye, Cumming & Gilbert), 1918, ch. xv, art. 7; Illinois, Rev. Stat., 1925, ch. 4; Wisconsin, Stat., 1923, sec. 4021-4023; Colorado, Comp. Laws, 1923, sec. 252-254.

[2]The writer is indebted to Miss Ida R. Parker, Associate Director of the Research Bureau on Social Case Work, Boston, for this case. Miss Parker believes that the reason no records of adoptions are kept is to prevent the adopted child and parents being embarassed by persons who could obtain information from such records. Miss Parker stated that

Again, a woman who has five children, all under ten years of age, does laundry work to support them and her drunken husband. She has repeatedly sought, in the last two years, the adoption of a baby and it is because of the energy of social workers that her attempts have been frustrated. The social agencies in the locality are constantly on the watch for this woman in order that they may get to the court before she has an adoption decreed and tell the judge the true situation. No doubt if she were not thus closely observed she might persuade a judge whose attitude toward adoptions is altruistic that the best interests of her family and of the child would be furthered by decreeing the adoption.[3]

Such cases are by no means uncommon, in fact, in large centers of population, they are the rule rather than the exception. Why a woman who slaves to provide for her own children should wish to adopt another child passes the bounds of ordinary reason, and yet the fact remains and should be an example to judges of the kind of thing which they must expect when they are called upon to exercise their discretion in decreeing only those adoptions which will make for the future welfare of family and child.

That such examples have not made some courts cautious in adoption cases is evidenced by the tone of some of the decisions:

"The adoption of friendless, dependent or orphan children tends to conserve the best interests of society and the state. All states of the Union now have adoption statutes. The right of adoption is not only beneficial to those immediately concerned, but likewise to the public. It is not the duty of courts to bring the microscope to bear upon such a case in order that every slight defect may be magnified, so that a reason may be found for declaring invalid the proceedings under a beneficial statute of this character. . ."[4]

It apparently would take a "preponderance of the evidence" to convince this court that an adoption should not be decreed. The attitude of mind with which judges of this type view adoptions seems to have set firmly, with results which already we have seen. Thus one of the obstacles which must be encountered by those seeking to secure the interests of adopted children, adoptive parents, and of society, is this misuse of judicial discretion. The remedy lies in the hands of those who have the opportunity of

almost every day persons come to her asking her to help them find out who their parents were. Since no records of their adoption were kept it is impossible to discover this information for them.

[3]This case was discovered by Miss Stannard in her social work at 1000 Mass. Ave., Cambridge, Mass.

[4]Hopkins v. Gifford, (1923) 309 Ill. 363, 141 N. E. 178.

pointing out to courts the actual facts of cases in which this misuse of discretion has been the cause of suffering on the part of adopted children and adoptive parents and has; in turn, reacted to the detriment of the interests of society as a whole.

The second way in which adoption laws are misinterpreted by the courts is in their failure to apply in adoption cases the fundamental principles of law recognized in analogous cases. For example, it is hornbook law that adoption implies the changing of a status.[5] It has been defined as the act by which relations of paternity and affiliation are recognized as legally existing between persons not so related by nature.[6] Not known to the common law, in the United States it derives its existence solely from statutes.[7] In the United States, "adoption" is a technical term which does not have the broad, unrestricted meaning which it had in the civil law, which was that a personality was destroyed and in its stead the creation of a new person as the natural son of the adopting father.[8] The fact remains that an adopted son is not a natural son, but something less, and consequently, the status which is created by an act of adoption must be the status of *adopted child* and not the status of *natural child*.[9]

It is a general rule that status is controlled by the law of the domicile.[10] It follows, then, that the change of status which is

[5]Stearns v. Allen, (1903) 183 Mass. 404, 67 N. E. 349. "Personal status is a vested personal condition or relation; a condition or relation created and destroyed by an act of law, not by the mere consent of the parties, and of legal importance to all the world. The quality of permanence distinguishes status from consensual relations, such as those of master and servant, or of principal and agent, where the relation depends upon the mere will of the parties; and the close analogy between status and property is shown by the fact that these two kinds of rights possess in common the above stated characteristics of static rights." 1 Beale, Treatise on the Conflict of Laws, 169.

[6]Morrison v. Estate of Sessions, (1888) 70 Mich. 297, 38 N. W. 249; Woodward's Appeal, (1908) 81 Conn. 152, 70 Atl. 453.

[7]Woodward's Appeal, (1908) 81 Conn. 152, 70 Atl. 453; Ross v. Ross, (1880) 129 Mass. 243, 37 Am. Rep. 321; Chehak v. Battles, (1907) 133 Ia. 107, 110 N. W. 330; Keegan v. Geraghty, (1881) 101 Ill. 26; Morrison v. Estate of Sessions, (1888) 70 Mich. 297, 38 N. W. 249.

[8]See In Unforsake's Succession, (1896) 48 La. Ann. 546, 19 So. 602.

[9]Keegan v. Geraghty, (1881) 101 Ill. 26; but see Brewer v. Browning, (1917) 115 Miss. 358, 76 So. 267, 519. "A relation similar to that of fatherhood and sonship may be established between persons not naturally related in the blood. Although this has many qualities analogous to that of blood relationship, it is nevertheless not the same thing. The process by which such a relation is established is called adoption; . . ." 1 Beale, Treatise on the Conflict of Laws, 147.

[10]Ross v. Ross, (1880) 128 Mass. 243, 37 Am. Rep. 321; Dunham v. Dunham, (1894) 57 Ill. App. 475. "In the middle ages, the sovereign who by convention had control of personal status was the sovereign of

involved in adoption may be effected by the proper agencies within that jurisdiction where all of the parties, i. e., adopting parents, adopted child, and natural parents, are domiciled. A proper consideration of the question whether it is necessary that all of the parties be domiciled within the jurisdiction which changes the status leads to an examination of the effect of adoption with reference to each of the parties.

As to the effect of adoption upon the status of the child, there can be no doubt but that he has a different status after he has been adopted than he had before. A child owes his parents certain duties by virtue of the relationship of parent and child.[11] No legal transaction is needed to bring these duties into being; they exist as incidents to the relationship.[12] Adoption destroys this relationship, as much as it is physically possible, and creates, to a like degree, such a relationship between the child and some other person. It is impossible to alter the natural fact of parentage, but the incidents which inhere in that fact are taken away and are created, as a legal phenomenon, between the child and a person who is not his parent by nature. Legally, after adoption, the child owes his natural parents no other duty than that which he owes a stranger. Legally he owes a person who yesterday was a stranger so much of the duties which a child owes his parents as the law sees fit to provide.[13] Thus the status of the child is changed by the adoption.

It has been indicated that status is controlled by the law of the domicile and that adoption effects a change in the status of the child. Therefore only the state of the domicile of the adopted child would have the proper authority to decree an adoption. The cases, however, do not bear out this assumption. Much is

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the domicile of the person concerned. This has continued to be the rule in common law jurisdictions and in several civil-law states . . . ." 1 Beale, Treatise on the Conflict of Laws, 174.

[11]Cooley v. Stringfellow, (1909) 164 Ala. 460, 51 So. 321. See also Chaloux v. International Paper Co., (1909) 75 N. H. 281, 73 Atl. 301.

[12]See Porter v. Powell, (1890) 79 Ia. 151, 44 N. W. 295.

[13]"The adoptive parents may exercise precisely the same control over the child as though it were their own by birth, and are entitled to its services, and on the other hand the child is entitled to the care and maintenance of such parents. The purpose of the statute was to establish the relation of parent and child as completely as this may be possible between strangers in blood, ... The relations of the child are severed from its natural parents and affiliated with its adopted parents, so that the former may not interfere with its care or custody any more than as though a stranger." Ladd, J., in Chehak v. Battles, (1907) 133 Ia. 107, 110 N. W. 330, 334.

said in them concerning the presence of the child in court, but the question of domicile is usually ignored.

In *Stearns v. Allen*[14] the child adopted in Massachusettes was a resident of that state but was domiciled in Scotland by virtue of his father's domicile there. The adoption was held good, notice having been given the father by publication. The court said:

"Adoption involves a change of status. So far as the adopting parents are concerned, the change cannot be made without their consent. So far as the infant child is concerned, the state, as his protector, may make the change for him. The natural parents of the child should be considered and their natural rights should be carefully guarded, but their rights are subject to regulation by the state, and if these come into conflict with the paramount interests of the child, it is in the power of the state, by legislation, to separate children from their parents when their interest and the welfare of the community require it. Sec. 3 of this statute provided that the consent of parents to the adoption shall not be required in certain cases of imprisonment of the parent in the state prison or house of correction, of wilful desertion of the child by the parent, or if he has suffered the child to be supported for more than two years continuously by a charitable institution, or as a pauper, or if he has been convicted of being a common drunkard and neglects to provide proper care and maintenance for the child, or if he has been convicted of certain other offenses, and is guilty of such neglect."

But the court did not say that the father had been imprisoned or had deserted the child or brought himself in any way within the terms of this statute. What the court really does in this case is to argue by analogy *from the statute.*

"In many cases the state may exercise and ought to exercise jurisdiction over the child. If the child is actually dwelling in the state, although his father's domicile is elsewhere, the state may as well provide for his adoption as to provide for him in other ways. Although the status of natural parent in reference to the child is affected by the adoption, the jurisdiction which gives the right to decree adoption is jurisdiction over the adopted parents and the child, who are the parties whose status is directly decreed. The incidental effect upon the status of the natural parents is only in regard to certain rights of property and the right of control. From the necessity of the case, inasmuch as it has not always been possible to find all of the interested parties in the same state, it is enough to establish jurisdiction which is binding upon the natural parent if he is given reasonable notice

[14](1903) 183 Mass. 404, 67 N. E. 349.

of the pendency of the proceedings, and an opportunity to be heard. . ."[15]

The court admits that it must have jurisdiction over the child and adoptive parents, but asserts that it has jurisdiction over a child personally present within the state but whose domicile is outside the state, and this, for the purpose of changing his status. This is clearly contrary to the general rule that status is controlled by the law of the domicile. There have been other cases holding that jurisdiction in adoption proceedings was had if the child was in court, although he was a resident of another state.[16]

Adoption affects more than the status of the child adopted. It changes the status of the adopting parent, and so, according to the general rule that status is to be changed by the law of the domicile, only the state wherein the adopting parents are domiciled would have jurisdiction in the adoption proceedings. That the status of the adopting parent is changed by the adoption is demonstrable. Prior to the adoption the adopting parent owes no duty to the child which he does not owe to a stranger. After the adoption the law imposes certain duties on the adopting parent with regard to the child as a result of the new relationship into which they have entered.[17] Although some states may provide for adoption by contract, once the adoption is complete, the characteristics of contract cease. The duties owed are incident to the relation.[18] Thus the status of the adopting parent is changed.

The statutes of adoption with regard to adoption by residents or non-residents may be characterized as follows: (1) Statutes which provide that only residents of the state may adopt.[19] (2) Statutes which do not require the adopting parent to be a resident

[15]Ibid.

[16]See Hopkins v. Gifford, (1923) 309 Ill. 363, 141 N. E. 178, and Woodward's Appeal, (1908) 81 Conn. 151, 70 Atl. 453.

[17]"There are no limitations or qualifications as to the relationship created and no limitations as to the rights of each with respect to the other, which under the law grow out of the natural relation. Whatever rights the natural parent and child possess under the laws of this state are conferred and possessed equally by the adoptive parent and the adopted child, and we are unable to conceive of any refinements of reasoning which would warrant a distinction between the rights, duties and obligations of the natural parent and child, and the rights, duties and obligations arising between the adoptive parent and adopted child. . . ." Smith, J. in Calhoun v. Bryant, (1911) 28 S. D. 266, 133 N. W. 266, 274.

[18]An adoptive parent may sue in his own name for the earnings of the adopted child. Tilley v. Harrison, (1890) 91 Ala. 295, 8 So. 802.

[19]Minn. Gen. Stat., 1923, sec. 8624; Col. Comp. Laws, 1921, sec. 5512; Wash. Rem. Code, ch. 22.

of the state.[20] (3) Statutes which have been construed to require that the adopting parent be a resident of the state.[21] (4) Statutes which require the adopting parent to be a resident, but which are construed to include a temporary resident.[22] Courts cannot be held responsible for the first two classes of statutes, but they are responsible for the decisions made under the last two. That a court has construed "resident" to include a temporary resident shows plainly that the court either has not considered the question as to whether the status of the adopting parent is changed by the adoption or is purposely failing to adhere to the general rule that domicile determines status.

Adoption affects still another status, that of the natural parent. Natural parents owe certain duties to their children. When a child is taken from them by adoption to some other person, the duties incident to the relation of parent and child cease as between them. The position of the natural parents with reference to the child is changed legally from that of parents to strangers.[23] According to the general rule, then, only a court of the state in which the natural parents are domiciled would have jurisdiction to adopt. This question is related closely to that of the domicile of the adopted child because the domicile of the child is that of his parents except where by law he has been allowed to acquire a separate domicile.[24] But it is to be remembered that the Massachusetts court, in *Stearns v. Allen*,[25] admitting that the domicile of the natural father was not in Massachusetts, and without showing that the child had acquired a separate domicile, allowed the adoption.

The status of the child, of the adopting parents and of the natural parents, is affected by the adoption. Status is governed by the law of the domicile. Adoptions have been decreed in jurisdictions other than that of the domicile of the child, other than that of the adopting parents, and other than that of the natural parents. Many courts apparently make an exception in adoption cases to the general rule that domicile determines status. The reason they do this would seem to be because of the same

[20]Mass. Gen. Laws, 1921, ch. 210, sec. 1; Ill. Rev. Stat. 1913, ch. 4, sec. 1; Conn. Gen. Stat. 1918, 4881; Mich. Comp. Laws, 1915, sec. 14140.

[21]New Hampshire Gen. Stat., 1867 ch. 169, sec. 3-6.

[22]Appeal of Wolf, (1888) 10 Sad. (Pa.) 139, 13 Atl. 760.

[23]See Mitchell v. Brown, (1912) 18 Cal. App. 117, 122 Pac. 426. Contra, Taylor v. Deserve, (1891) 81 Tex. 246, 16 S. W. 1008.

[24]Ex parte Peterson, (D. C. Minn., 1908) 166 Fed. 536. In re Means, (1918) 176 N. C. 307, 97 S. E. 39.

[25](1903) 183 Mass. 404, 67 N. E. 349.

altruistic attitude which was mentioned under the subject of the exercise of judicial discretion. There, it will be remembered, courts failed to see the dire results which attended wholesale adoptions. Their failure to apply to adoption cases fundamental principles of Conflict of Laws must be attributed to the fact that they have not had the necessity of such application called to their attention. They have not taken into consideration all of the interests which are affected by adoption.

The interests to be protected by a scheme of adoption involve those of the adopted child, of the adopting parents, of the natural parents, of the community in which the child had his domicile, and the community in which the child is to have his domicile subsequent to the adoption. The first three are evident. The others have not been recognized generally.

The state of the domicile of the child has an interest in securing a suitable home for him. The problem involved is that of selecting proper persons to fill the rôle of parents. Certain standards should be required by the court decreeing the adoption. The court must know something about the persons petitioning for the adoption, something of their character, their motive for adopting, their relations with one another if it is a married couple seeking the adoption, and their financial ability and willingness to provide proper education for the child. In order to go into these questions the court must call in witnesses personally acquainted with the petitioners, must not only question those who are brought to testify by the petitioners, but others whom perhaps the petitioners are not anxious to hear testify. To reach such witnesses the court must issue its process. If the petitioners live in another state the most valuable witnesses would live in that state also. The process of the court is powerless to reach them. The adoption must proceed without all of the facts before the court and as a consequence there is no assurance that the purpose of the state in providing for adoptions is being carried out successfully.[26]

The domicile of the adopting parents which will be the domicile of the child after the adoption has an interest in the adoption. As soon as the child returns home with the petitioners the state assumes the risk of maintaining him should he be neglected. If the petitioners are not suitable persons the risk is great. If their financial resources are not such that the child can be taken care

[26]That the state of the domicile of the child has an interest in the adoption is entirely disregarded by Mr. Goodrich in his paper on adoption in 22 Mich. L. Rev. 637, 647.

of properly the burden falls on the state. If the child's education be neglected through financial inability or indifference on the part of the foster parents, the burden falls on the state. Any deficiency in the character of the adopting parents may produce a like deficiency in the character of the child. The consequences are suffered by the state. Another aspect is with regard to the child. While environment probably plays a greater part in molding character something must be said of heredity. Should one state foist upon another the offspring of criminals, drunkards, imbeciles, and indolents by the process of giving them as children to the residents of the latter? One state has an interest in examining the fitness of the child just as both states have an interest in examining the fitness of the foster parents.

Whatever may be said as to the inadequacy of the adoption laws it seems apparent that these interests could be at least partially secured by the courts applying general rules of law. For example, if courts refused to decree adoptions unless all of the parties were domiciled within the state, or if they refused to recognize adoptions which had been decreed in other states without all of the parties being domiciled in that state, they would merely be applying the general rule that domicile governs status and would be allowing all of the parties who had an interest, including the state, to be heard. It has been pointed out, however, that many adoption statutes do not require the petitioners to be residents of the state and many courts do not require the child and the natural parents to be residents of the state, relying only on the fact that some of the parties are before the court to give the court jurisdiction.[27]

The suggestion that courts of one state should refuse to recognize adoptions decreed in other states unless all of the parties were domiciled in the state of the adoption leads to an examination of the question of recognition. The status of a person is to be ascertained by the law of the domicile which creates the status when, in the state in which it is called in question, there exists neither positive rule nor public policy which would prohibit the recognition of the status.[28] As all of the states of the Union have

[27]The court has jurisdiction in proceedings to adopt if the child is in court, although he is a resident of another state. Hopkins v. Gifford (1923) 309 Ill. 363, 141 N. E. 178.

[28]Ross v. Ross, (1880) 129 Mass. 243, 37 Am. Rep. 321; Brewer v. Browning, (1917) 115 Miss. 358, 76 So. 267; Finley v. Brown, (1909) 122 Tenn. 316, 123 S. W. 359, 25 L. R. A. (N.S.) 1285; Calhoun v. Bryant, (1911) 28 S. D. 266, 133 N. W. 266; Woodward's Appeal, (1908) 81 Conn.

adoption statutes, all recognize the status when properly created in another state. "Properly created," however, has never been construed to mean that all of the parties must be domiciled in the state where the adoption is decreed unless such a requirement existed in the law of that state. Coercion in the form suggested cannot be relied upon to help cure the evils of adoptions which are decreed without all of the parties being domiciled in the state. So to rely upon it would be to upset the above rule concerning recognition of status. The question of recognition of status comes up most frequently in adoption cases where there is a question of inheritance of property by the adopted child or the adoptive parent. The decisions on this question are, on the whole, very satisfactory. It is well established that the lex loci rei sitae governs the distribution of the realty upon intestacy.[29] It is equally sound that the lex loci domicilii decedentis governs the distribution of personal property.[30] When a child adopted in one state seeks to be declared the heir of the intestate so as to inherit property in another state he must show the court two things: first, that he has been legally adopted and second, that the law of the state where the land is situated or the domicile of the intestate, as the case may be, permits one having such a status to take the property.[31] If the law of the two states is substantially the same the great weight of authority holds that the foreign-adopted child can inherit.[32] The court in *Ross v. Ross* said:[33]

152, 70 Atl. 453; Melvin v. Martin, (1894) 18 R. I. 650, 30 Atl. 467; Van Matre v. Sankey, (1893) 148 Ill. 536, 36 N. E. 628, 23 L. R. A. 665, 39 Am. St. Rep. 196; Shick v. Howe, (1908) 137 Iowa 249, 114 N. W. 916, 14 L. R. A. (N.S.) 980; Succession of Caldwell, (1905) 114 La. 195, 38 So. 140; Simpson v. Simpson, (1906) 29 Ohio Cir. Ct. 503; McColpin v. McColpin's Estate, (Tex. Civ. App. 1903) 77 S. W. 238; Gray v. Holmes, (1896) 57 Kan. 217, 45 Pac. 59, 33 L. R. A. 207; Keegan v. Geraghty, (1881) 101 Ill. 26.

[29]Hood v. McGehee, (1915) 237 U. S. 611, 35 Sup. Ct. 718, 59 L. Ed. 1144; Colvin v. Jones, (1917) 194 Mich. 670, 161 N. W. 847; McLean v. McLean, (1914) 92 Kans. 326, 140 Pac. 847; Calhoun v. Bryant, (1911) 28 S. D. 266, 133 N. W. 266, 274.

[30]Calhoun v. Bryant, (1911) 28 S. D. 266, 133 N. W. 266, 274; Colvin v. Jones, (1917) 194 Mich. 670, 161 N. W. 847; Anderson v. French, (1915) 77 N. H. 509, 93 Atl. 1042.

[31]Ross v. Ross, (1880) 129 Mass. 243, 37 Am. Rep. 321; Finley v. Brown, (1909) 122 Tenn. 316, 123 S. W. 359, 25 L. R. A. (N.S.) 1285; Van Matre v. Sankey, (1893) 148 Ill. 536; 36 N. E. 628, 23 L. R. A. 665, 39 Am. St. Rep. 196; Shick v. Howe, (1908) 137 Iowa 249, 114 N. W. 916, 14 L. R. A. (N.S.) 980; In re Williams Estate, (1894) 102 Cal. 70, 36 Pac. 407.

[32]Woodward's Appeal, (1908) 81 Conn. 152, 70 Atl. 453; Van Matre v. Sankey, (1893) 148 Ill. 536, 36 N. E. 628, 23 L. R. A. 665, 39 Am. St. Rep. 196; McNamara v. McNamara, (1922) 303 Ill. 191, 135 N. E. 410; Note, 36 Harv. L. Rev. 83; Shick v. Howe, (1908) 137 Iowa 249,

"But the status or condition of any person, with the inherent capacity of succession or inheritance, is to be ascertained by the law of the domicile which creates the status, at least when the status is one which may exist under the laws of the state in which it is called in question, and when there is nothing in those laws to prohibit giving full effect to the status and capacity acquired in the state of the domicile."

In some of the states although the status of adopted child is recognized, the incidents of that status are not. Some of the courts hold that there is a rule of property which allows only a natural child to inherit.[34] These cases are based upon an English case[35] in which the court held that it required more than mere legitimacy, which was recognized as created by the law of Scotland, to entitle one to inherit land in England; it required legitimacy *and* being born in wedlock. On the analogy to this the cases noted hold that their laws of descent do not recognize adopted children. Very few American states attach such significance to their statutes of descent.[36]

Although most of the decisions on recognition and inheritance are satisfactory, some are very unsatisfactory and must be mentioned along with the rest. A peculiar decision, purporting to rest upon the English case,[37] was handed down by the Alabama court.[38] After deciding that the child adopted in Georgia was not eligible to inherit land in Alabama and resting the decision on the reason given in the English case, the court said,

". . . and it may be, had he been adopted in this state in pursuance to the statute authorizing the adoption of children, the

114 N. W. 916, 14 L. R. A. (N.S.) 980; Gray v. Holmes, (1896) 57 Kans. 217, 45 Pac. 59, 33 L. R. A. 207; Succession of Caldwell, (1912) 114 La. 195, 38 So. 140; Ross v. Ross, (1880) 129 Mass. 243, 37 Am. Rep. 321; Simpson v. Simpson, (1906) 29 Ohio Cir. Ct. 503; Melvin v. Martin, (1894) 18 R. I. 650, 30 Atl. 467; Finley v. Brown, (1909) 122 Tenn. 316, 123 S. W. 359, 25 L. R. A. (N.S.) 1285; McColpin v. McColpin's Estate, (Tex. Civ. App. 1903) 77 S. W. 238; James v. James, (1904) 35 Wash. 655, 77 Pac. 1082.

[33](1880) 129 Mass. 243, 37 Am. Rep. 321.

[34]Brown v. Finley, (1908) 157 Ala. 424, 47 So. 577; Smith v. Derr's Adm'r., (1850) 34 Pa. St. 126, 75 Am. Dec. 641; Lingen v. Lingen, (1871) 45 Ala. 410.

[35]Birtwhistle v. Vardill, (1826) 5 B. & C. 438; (1835) 2 Cl. & F. 571; (1840) 7 Cl. & F. 895.

[36]Smith v. Derr's Adm'r., (1850) 34 Pa. St. 125, 75 Am. Dec. 641; Lingen v. Lingen, (1871) 45 Ala. 410; Brown v. Finley, (1908) 157 Ala. 424, 47 So. 577. In Ex parte Cline, (1925) 213 Ala. 599, 105 So. 686, the court held that a child who had been adopted in Georgia was not a "child" or "orphan" within the meaning of the Workmen's Compensation Act. For a discussion of this and similar decisions see 24 Mich. L. Rev. 496 and 25 Mich. L. Rev. 189.

[37]Birtwhistle v. Vardill, (1840) 7 Cl. & F. 895.

[38]Brown v. Finley, (1908) 157 Ala. 424, 47 So. 577.

lands would have descended to him. But his adoption being under the statute of another state which conferred upon him the right of inheritance of the property of his adopting parent in that state does not confer upon him that right in this state."

Thus the court having used a valid reason upon which to base its decision, forthwith kicks the reason from under the decision and leaves it suspended with no means of support.

The mere fact that the procedure of adoption is different in two states should not keep one state from recognizing the status, nor should it lessen the applicability of the incidents of the status in the state in which those incidents are sought. In *Ross v. Ross,*[39] the leading American case on adoption, a difference in the statutes of Pennsylvania and Massachusetts with regard to the necessity of petitioner's wife joining in the adoption, the omission of any exception to the adopted child's capacity of inheriting from the adopting parents, and the omission of the words "as if born in lawful wedlock" did not constitute anything which was contrary to the laws or public policy of Massachusetts and did not preclude the child adopted according to this procedure from inheriting the lands of her adoptive father in Massachusetts.

A contrary view was reached in a Mississippi case.[40] The child was adopted in Kentucky in this way. The adoptive parents contracted with an orphans' home in Kentucky to adopt the child, whereby the child should sustain "the same legal relation to them as if she had been born unto them, and were their child, especially as to such property as would descend to her were she their child."[41] The orphans' home had been chartered and incorporated by an act of the general assembly of Kentucky by which it was empowered to allow any suitable person to adopt a child by executing the proper covenants in writing and having them proven in the county clerk's office. It was provided that when executed and recorded "such child shall become the heir at law of such person so adopting him or her, and be as capable of inheriting as though he or she were the child of such persons.[42] The supreme court of Kentucky has held this act of incorporation constitutional according to the facts brought out in the case; also that when this contract was executed it amounted to a complete adoption in Kentucky and authorized the child to inherit as if it were the natural

[39](1880) 129 Mass. 243, 37 Am. Rep. 321.
[40]Fisher v. Browning, (1914) 107 Miss. 729, 66 So. 132.
[41]Fisher v. Browning, (1914) 107 Miss. 729, 731, 66 So. 132.
[42]Ky. Laws, 1879-80, c. 108. Also amendment of 1880.

child of its foster parents. But when the adoptive father died, leaving land in Mississippi, the Mississippi court said:

"No such thing is known to the laws of Mississippi as adoption by contract, nor can it be done by special act of the legislature of Mississippi, . . . The proceedings for adoption followed in Kentucky by the contract, etc., if pursued in Mississippi, would undoubtedly be held to be null and void, and before a child adopted, even in Mississippi, can inherit lands here, the jurisdictional fact must be asserted in the petition that heirship is one of the benefits to be conferred by adoption."[43]

In this case, then, a difference in procedure was considered to be very material. Fortunately this case has been overruled. Unfortunately in its desire to become orthodox the court has fallen over backward. In *Brewer v. Browning,*[44] speaking of the same case, the Mississippi court said that it was not contrary to the laws of Mississippi for a person to adopt a child and make it heir even though the adoption was not the kind which would have been necessary in Mississippi. The ultimate question in the case was whether the adopting parent could inherit from the child and the court allowed it notwithstanding the protests of the dissenting judges who pointed out that neither the laws of Kentucky nor of Mississippi permitted such a thing. Thus the Mississippi court has gone too far. It has disregarded the fact that the status created is the status of adopted child, something less than natural child. The effect of the decision is to discriminate against children adopted in Mississippi in favor of children adopted in other states, for while the former are allowed only the incidents attaching to the adopted status, the latter are allowed the incidents attaching to the natural relation.

When the state of adoption places a limitation upon inheritance by adopted children, under which they may inherit, for example, as a natural child except that they may not take from the collateral kindred of the adoptive parents, two theories are presented concerning the right of the child to inherit property in another state where the laws allow adopted children to inherit as if natural children. The diversity is caused by the different fundamental conceptions of the exponents of the two views concerning the nature of status. One view is that the status of an adopted child is a known and invariable quantity. This status is created by the state in its adoption statute and by subsequent

[43]Fisher v. Browning, (1914) 107 Minn. 729, 738, 66 So. 132.
[44](1917) 115 Miss. 358, 76 So. 267, 519.

procedure in accordance therewith; whatever follows concerning the limitation of the right of inheritance of the adopted child is merely a rule of inheritance and does not subtract anything for the status of adopted child. The other view is that the status of adopted child is a quantitative relation and that anything which takes away from the incidents of the relation those rights which are usually associated with the status, thereby creates a different status, one in which the analogy to the natural relation is not carried out to its furthest possible extent. The former is the better view. The weight of authority favors the view that the adopted child be allowed to receive what the local rules of inheritance give even though he should receive less under the law in the state where he was adopted. For example in *Anderson v. French*[45] the child was adopted in Massachusetts under a statute which provided

"that a child or person so adopted shall be deemed for purposes of inheritance, and all other legal consequences of the natural relation of parent and child, to be the child of the parent or parents by adoption, as if born to them by lawful wedlock, except that he shall not take property from the lineal or collateral kindred of such parents by right of representation."

The New Hampshire statute provided that the adopted child should sustain the same relation to his adopting parents and their kindred in respect to inheritance of property as if a natural born child, with one immaterial exception. The sister of the adoptive father died in New Hampshire leaving personal property and the question was whether the adopted child could have it. If it be said that her status is limited by the words "except that he shall not take property from the lineal or collateral kindred of such parents by right of representation," then the New Hampshire court must, in recognizing this status, allow the devolution of the New Hampshire property within the bounds of this exception. If it be said that the status of adopted child was created by the Massachusetts statute, then the New Hampshire court can allow whatever incidents New Hampshire attaches to such a status. A majority of the judges took the latter view. Likewise in *Calhoun v. Bryant*[46] the court allowed an adoptive parent to inherit from the adopted child notwithstanding the fact that in Illinois, where the adoption took place, such would have been impossible. An

[45](1915) 77 N. H. 509, 93 Atl. 1042.
[46](1911) 28 S. D. 266, 133 N. W. 266.

Iowa case, *Estate of Sunderland*,[47] would seem at first glance to be contrary but that decision was apparently the result of the special Louisiana statute under which the child was adopted. It was a special adoption act allowing this one adoption and as such was construed by the Iowa court to create a delimited status, the intention being clear that the adopted girl was not to inherit from anyone except the adoptive parents.

If the situation is reversed, i. e., if in the state of adoption there is no limitation upon the inheritance of adopted children, but in the state in which the land is located or where the intestate was domiciled, as the case may be, there is a limitation upon inheritance by adopted children, the child adopted in a foreign state cannot take more than he could have taken had he been adopted in the latter state. The result is sound in view of the general rule that the law of the situs in the case of land and the law of the domicile of the intestate in the case of personality, governs the distribution of property. To allow the child to inherit as much as he would have inherited under the law of the foreign state where he was adopted would be giving that law extra-territorial effect. In an Illinois case[48] the child, adopted in Wisconsin, was seeking to claim as heir to a natural daughter of her adoptive father the property left by the natural daughter domiciled in Illinois. The Wisconsin statute would have allowed it. The Illinois statute, however, did not permit an adopted child to inherit property from the lineal or collateral kindred of such parents by right of representation. The court, laying down the rule stated above, held that the rights of inheritance acquired by adoption in another state would be recognized and upheld in Illinois only so far as they were not inconsistent with Illinois laws of descent. Since the child could not have inherited from the natural child of her adoptive father had she been adopted in Illinois, the court said that she could not do so by virtue of her adoption in a state where such inheritance would have been possible.

So much for the cases on recognition of adopted children and their rights of inheritance. It is apparent that these cases, except those coming from Alabama and Mississippi showing some confusion on the subject, cannot and must not be overthrown in order to exert pressure on foreign courts to decree

[47] (1882) 60 Ia. 732, 13 N. W. 656.
[48] Keegan v. Geraghty, (1881) 101 Ill. 26.

adoption only where all the parties are domiciled in the state. The remedy will have to come from the states themselves either through their legislatures or their courts, perhaps both.

Not all of the fault lies with the court. Our adoption laws are surprisingly devoid of the modern mechanical devices which would make them operate smoothly and efficiently. Our recent administration methods have not been used to any great extent. Adoption laws in most states are substantially the same as they were when they were first enacted in this country. Four states still provide for adoption by contract.[49] Even this method, used in sparsely settled communities, would seem to give better results than the misuse of discretion by judges in more densely populated areas. If courts persist in decreeing adoptions with no substantial showing that the interests of children and parents are advanced, the only remedy is to prescribe by legislation better methods for adoptions. So also if courts refuse to apply the general rule that status is governed by the law of the domicile.

A few courts have made it a rule never to decree an adoption until the social workers in that district have been notified of the case and have had time to find out all of the circumstances which would have a bearing on the advisability of allowing the adoption.[50] As a rule the findings of the workers determine whether the adoption will be decreed. An act of the legislature incorporat-

[49]Iowa requires only that an instrument signed by the consenting parents, containing the names of the parents, child and adopting parents, and their places of residence, the name by which the child is to be called, and a statement that the child is given to the person adopting as his own, and signed by the person adopting, be acknowledged by all of the parties thereto in the same manner that deeds conveying real estate are acknowledged and recorded in the recorder's office of the county where the person adopting resides, indexed in the name of the person adopting as grantor and the original name of the child as grantee. Iowa Code, 1924 ch. 473.

In Texas the adopting parent files in the office of the county clerk a written statement showing in substance his intent to adopt. This statement must be acknowledged in the same manner as deeds and recorded in the county clerk's office. Texas, Rev. Civ. Stat., 1925, art. 42.

In Alabama and Vermont the persons desiring to adopt appear before the probate court with an instrument signed by witnesses and setting out the name of the child, the adopting parents and the natural parents. The court has no discretion, merely taking the acknowledgments and filing the same in its records. Ala. Code 1923, sec. 9302; Vt. Gen. Laws, 1917, ch. 170.

[50]In Cuyahoga County, Ohio, by special arrangement between agencies and the courts, all adoptions are investigated. All cases are reported by the court to the social service clearing house. If the case has not come already to the attention of the agency, an investigation is made and information regarding the child's family and prospective parents is filed with the court. See, A Study of Adoptions in Cuyahoga County, The Family, Jan. 1926, p. 259.

ing in it some such plan would be a great improvement over the usual methods prescribed.[51] Of course law is only one method of social control. One method, although inadequate, need not be altered if other methods are meeting the difficulties. Much good work has been done by the social agencies toward filling in the gaps left by the adoption laws. They have brought to light many astonishing facts concerning adoption. They have found that in a great percentage of the cases the petitioners are entirely incompetent to assume the duties of parents, that many of the children offered for adoption are from the first to the fourth illegitimate child of its mother. They have found that natural and adopting parent alike do not fancy the "red tape" connected with adoptions which are supervised by the agencies, and the result is that advertisements appear in the papers telling of children for adoption. These advertisements are answered and the adoption takes place the next day, sometimes even the same day the advertisement appears. They have found that the courts are of the belief that they are being humanitarian by decreeing as many adoptions as possible, insisting, perhaps, on seeing one of the adopting parents. But the experience of the agencies is that better results are obtained when children are "boarded out" under agency supervision than when they are adopted indiscriminately. Only a small part of the children who are placed with an agency for adoption are ever adopted. The agency finds few cases where the interests of all concerned will be bettered by adoption.[52] The agencies are trying to fill the gaps left by the law, but it is impossible for them to do so entirely.

Voluntary submission of adoption cases to social workers is not practiced by a sufficient number of courts to justify the belief that it will become a general rule. Voluntary acceptance of advice of social workers by adoptive parents is not to be expected in a very large number of cases in view of the various motives of those who seek to adopt. Those who believe that the interests of society as a whole depend largely on the furtherance of the interests of the individual see in adoption cases an oppor-

[51]A few states have provided for special investigation. See for example Minn. Gen. Stat. 1923, ch. 73. This statute provides that when a petition for adoption is presented the court must notify the state board of control. The board verifies the allegations of the petition, investigates the condition and antecedents of the child, if the proposed foster home is suitable, and reports in writing to the court with a recommendation as to the granting of the petition.

[52]Miss Ida R. Parker, Associate Director of the Research Bureau on Social Case Work, Boston, provided these enlightening facts.

tunity for great improvement over existing methods. There are interests which are not protected by existing laws and methods of administration. There are existing claims which because of the very nature of such cases remain inarticulate. The forceful expression of these claims no doubt eventually will attract legislatures and courts and it can then be anticipated that administrative methods will replace the existing inadequate laws and courts will be apprised of facts which will lead them to abandon their improper interpretation of those laws.