

## CHAPTER 17

# Adoption

### I. PRELIMINARY OBSERVATIONS

#### 1. Definition of Adoption

IN some archaic civilizations, including the Greek, Roman, and Japanese, adoption has been the means of continuing a house and ancestor cult threatened with extinction. Hence, the original type of this institution implies that the adoptive son be considered exactly in the position of a veritable legitimate male issue (Greek: *υἱὸς θετός*, made son). In much later periods, adoption was used with the primary object of securing the welfare of a child. In this application, the class of persons capable of participating in the transaction was considerably enlarged (e.g., to include female adopters), and new varieties of adoption were introduced, with restricted effects, particularly in that the rights to be acquired by the adopter would be limited to care and education.

As a result, the national legislations present a much varied picture. In a number of countries, such as Scotland, the Netherlands, Portugal, Argentina, Chile, and Paraguay, adoption has never been introduced. The recent Civil Code of Guatemala abolished the formerly existing institution of adoption, because it had led to misuse by despoiling the assets and exploiting the labor of minors.<sup>1</sup> In most of the world, however, adoption in one form or another has been recognized by statute. The common law countries, including England, finally have followed this trend. However, many legislators have thought that they had to surround the institution with

<sup>1</sup> MATOS 394 no. 277.

formidable obstacles, while a strong modern current favors adoption as the best means of caring for destitute children. New adoption laws in France<sup>2</sup> and many other countries,<sup>3</sup> which facilitate adoption through careful investigations by advisory offices, evidence this tendency.

The variety of policy considerations behind the national legislations is amazing. The Roman requirements implied by the saying, "*adoptio imitatur naturam*," have suggested many rules regarding age and family conditions of the parties, but these rules often also have been rejected, as for instance in the *Code Napoléon* which prohibited any adoption of minors in order to protect infants against exploitation. This rule, recently repealed in France and Belgium, still exists in other countries. On the other hand, only infants may be adopted in England, Sweden, and some of the United States. South-west Africa requires that the sixteenth year be not completed. Other fundamental differences characterize the effects of "adoption." In this country, some statutes declare that the adopted person is to be considered a legitimate child to all legal intents and purposes, but others follow the French method of enumerating the specific rights and duties affected. Although the latter method is generally accompanied by broad construction of the statutory texts,<sup>4</sup> the results are not necessarily in favor of a standard of full legitimacy. Contrary to general custom, by some laws the natural father retains parental power, and by American and some foreign statutes adoption does not preclude marriage with the adopter. The child's name is subject to many variations. The statutes also exhibit the greatest diversity with respect to the rights of in-

<sup>2</sup> France: Law of June 19, 1923.

<sup>3</sup> Belgium: Law of March 22, 1940.

Chile: Laws No. 5,343 of 1934, and No. 7,613 of 1943.

Italy: C. C. (1942) arts. 291ff.; etc.

<sup>4</sup> 4 VERNIER 406, §§ 261ff.

terstate inheritance from and by the adopted parent, the child, and the natural family.

An important difference consists in the fact that in many laws the private contract effecting an adoption is construed as the very core of the transaction, the state acting only to authorize the agreement, while in other statutes the official decree ordering adoption on a party's application constitutes the essence of the act. In the latter case, the decree may be granted either as an act of discretionary power or as corresponding to a right of the parties who have complied with the legal conditions of adoption. Validity and revocability of the transaction depend largely upon these premises.

Finally, the state agencies intervening differ, and official action either precedes or follows the private agreement.

Thus, adoption forms an exemplar of the difficulties that may present themselves in formulating a uniform definition. As a matter of fact, the description of adoption given in the Restatement as a "relation of the parent and child created by law between persons who are not in fact parent and child,"<sup>5</sup> is certainly too narrow, since in a number of legislations parents may adopt their natural children. If taken literally, this definition seems also to exclude all those institutions bearing the name of adoption that do not grant as respects both parties the full status of parent and child. Is this the real meaning, and, if so, is it right?

A clear answer to these questions would facilitate the discussion of certain problems concerning succession upon death by and from foreign adopted children. In the midst of this confused discussion, a well elaborated American decision ventured to proclaim that "A person is either adopted or not; a woman is either married or not. . . . there is no such thing as a limited status of adoption."<sup>6</sup> This is manifest error and

<sup>5</sup> Restatement § 142 comment a.

<sup>6</sup> *In re Riemann's Estate* (1927) 124 Kan. 539 at 542, 545, 262 Pac. 16-18, confirming the view held in *Bilderback v. Clark* (1920) 106 Kan. 737 at 742, 189 Pac. 977, 980.

a very prejudicial one. A woman is indeed either married or unmarried, and, likewise, a child is legitimate or illegitimate, but there are adopted children of totally different kinds. It is of primary importance that each type should be understood and recognized according to its merits.

No wonder that it is hard to know what is meant by adoption in every one of the national *conflicts* rules. At any rate, the concept of adoption held in the municipal law of the forum is of no direct avail. Instead, a sound construction of the existing rules depends to some extent upon their own character. Where a conflicts rule emerges from the patriarchal thinking still characteristic of most family laws and therefore simply refers to the law of the adopter, especially the father, it is logical to assume that this rule is to be applied only to transactions creating a rather complete parent-child relation and not to an act exclusively conferring a right of inheritance upon the child. Again, if a conflicts rule calls for the law of the child only, this rule may embrace those kinds of adoption that contemplate only quasi-familial care and education. Quite reasonably, a German draft of 1929 provided for the application of the national law of the child to govern foster parenthood,<sup>7</sup> though the primary German rule determines adoption according to the national law of the parent. Thus, the scope of conflicts rules dealing with "adoption" may vary. One limit, however, exists; no institution can be designated as adoption, unless it makes the child legitimate in relation to the adopting parent. An "adoption by the Nation" of French war orphans is, of course, not recorded in a Swiss register of civil status.<sup>8</sup>

## 2. Jurisdiction and Choice of Law

American writers and the Restatement speak of the "law governing adoption as a status";<sup>9</sup> they probably mean the

<sup>7</sup> See RAAPE 601 VIII no. 4.

<sup>8</sup> Swiss BBl. 1924 II, 29 no. 15.

<sup>9</sup> Restatement § 142 (within "status," not "jurisdiction"). Similar MINOR

law of the forum at the domicil of a party. However, in his treatise, Beale exclusively discusses jurisdiction for adoption. American and English courts, in fact, appear not to be concerned with choice of law problems but only with the question what courts have the power to create adoptions with extra-territorial effect. If so, common law is again in opposition to civil law, which sharply distinguishes between jurisdictional and conflicts rules and in principle applies foreign statutes.

In the civil law countries, jurisdiction for adoption does not offer much of a problem, since for this purpose foreigners usually enjoy the "hospitality" of the courts. It is true that access of foreigners to the courts for the purpose of adoption was questioned in France,<sup>10</sup> but it now seems assured everywhere. A number of countries, however, refrain from taking jurisdiction, if the homeland does not approve of it.

The main question in these countries is concerned with choice of law, that is, primarily with selecting the law applicable to adoption of or by foreigners in the forum, but regularly the same conflicts rule suffices to determine recognition of foreign adoptions.

The difference of method between reference to a foreign personal law and simple application of the law of the forum seems fundamental. It is tempting to think that the personal law is more obviously to be complied with when the whole act is thought to be chiefly founded upon the contract of the parties. On the other hand, if the act of a governmental agency or court is the essentially constitutive part within the structure of adoption, the personal law of the parties may be neglected. However, distinctions are not so neat in actual practice. In this country, the personal law is never considered, although the civil law view emphasizing the significance of the private contract of adoption has left deep traces in many statutes.

221, 222 § 101; STUMBERG 307; Note, "Descent of Foreign Lands to Child Legitimated by Adoption," 36 Harv. L. Rev. (1922) 85.

<sup>10</sup> The controversy on which see WEISS, 2 *Traité* 234 was ended by the Law of June 19, 1923, amending C. C. art. 345 par. 1.

## II. ADOPTION OF OR BY FOREIGNERS WITHIN THE FORUM

## I. Law of the Forum

(a) *United States*. Although the cases are known to be rather scarce and confused and certainly are contradictory, a prevailing opinion seems to be forming to the effect that two different grounds for assuming jurisdiction are open to election.

In the first place, it is agreed that a child can be adopted in the state of its domicil, irrespective of the domicil and residence of the adopting parents.<sup>11</sup> In the second place, there is increasing authority for concurrent jurisdiction of the state where the adopting parents are domiciled. The Restatement does not approve of this view, except when this state has jurisdiction over the person having legal custody of the child or when the child is a waif and subject to the jurisdiction of the state.<sup>12</sup> But the consent of the natural parents or the guardian, wherever they may live, should suffice.<sup>13</sup> The few cases which may be looked to as authority seem to justify the unconditional jurisdiction of the adopter's domicil.<sup>14</sup>

The domicil of the child as a basis of jurisdiction<sup>15</sup> has, however, been questioned. Sometimes, a mere domicil by operation of law, locating the child with its natural father or guardian, has been held insufficient without actual residence at the same place.<sup>16</sup> Moreover, actual residence, particularly if habitual, has been preferred to a merely formal domicil, since the state where the child is dwelling is believed to have more ability to control the person of the child and to be more interested in its welfare.<sup>17</sup> In reality, neither domicil nor

<sup>11</sup> GOODRICH 383 § 142 n. 50, 51; Restatement § 142 (a).

<sup>12</sup> Restatement § 142 (b); cf. 2 BEALE 713 § 142.2.

<sup>13</sup> LORENZEN, 6 Répert. 349 no. 341.

<sup>14</sup> GOODRICH 383 § 142 n. 53.

<sup>15</sup> Strictly required by 2 BEALE 713 § 142.2 and Restatement § 142.

<sup>16</sup> *Blanchard v. State ex rel. Wallace* (1925) 30 N. Mex. 459, 238 Pac. 1004.

<sup>17</sup> See esp. STUMBERG 308ff., who invokes *Stearns v. Allen* (1903) 183 Mass. 404, 407, 67 N. E. 349 (child in Massachusetts with technical domicil in Scot-

residence, especially in large cities, guarantees that a court will be able to exercise effective supervision. On the other hand, every court, not excluding that of the adopter, will ordinarily be eager to safeguard the well-being of the child.<sup>18</sup> The modern means of communication and the social relief agencies facilitate obtaining information. The interest of the child's consanguineous family will be better cared for by the court of the formal domicile of the child.<sup>19</sup>

These principles determine equally the granting of an adoption and the recognition of a foreign adoption.

(b) *British Law.* Under the British Adoption of Children Act, 1926,<sup>20</sup> an adoption order is not granted, unless the applicant is domiciled and resident in England and the infant is a British subject and resident in England. No provision is made regarding adoptions by British subjects domiciled abroad nor for children of foreign nationality, except that they are excluded from adoption proceedings in England. It is difficult to believe that no foreign adoption would be recognized with respect to British subjects, as has been suggested.<sup>21</sup> The implication seems rather to be "that the domicile of the adopter at the time of the adoption is alone material."<sup>22</sup> But certainly hardships are caused by the tenacious reluctance of English courts to acknowledge that the adopter has transferred his domicile from England to a foreign country.<sup>23</sup>

land); *Rizo v. Burrue* (1921) 23 Ariz. 137, 202 Pac. 234; *Taylor v. Collins* (1927) 172 Ark. 541, 289 S. W. 466.

<sup>18</sup> See GOODRICH 383 § 142 n. 54.

<sup>19</sup> Cf. the propositions as to choice of law in England by MANN, "Legitimation and Adoption in Private International Law," 57 Law Q. Rev. (1941) 112, 123 n. 44.

<sup>20</sup> 16 & 17 Geo. V, c. 29 (1926).

<sup>21</sup> DICEY 535 n. u; 2 BEALE § 143.1.

<sup>22</sup> FALCONBRIDGE, "Conflict of Laws—Legitimation by Adoption or Recognition," 19 Can. Bar Rev. (1941) 37, at 39.

<sup>23</sup> KEITH, "Some Problems in the Conflict of Laws," 16 Bell Yard (1935) 4, 6 (a Scotchman resident but not considered "domiciled" in England cannot adopt the daughter of his deceased brother, even though the brother was domiciled in England and the daughter is resident there).

In Canada similar restrictions obtain. Indeed, a Canadian court has held that the adoption of a child domiciled with its natural parents in Alberta and adopted by order of an Alberta court, while the adoptive parents were domiciled in Saskatchewan, was invalid in the latter province.<sup>24</sup> Must all parties be domiciled in the same province? Falconbridge sees a solution of this strange conflict only in uniform and reciprocal legislation by the provinces grounded on the principle of the child's domicil.<sup>25</sup> But we may infer that the system of exclusive application of the law of the forum tends to absurd results, notably in the case where the different jurisdictions of the parties do not recognize each other's decrees. In Quebec, jurisdiction is granted, if one party is domiciled there.<sup>26</sup>

(c) *Scandinavian Countries.* The domicil of the adopter determines the state where adoption must be sought under the Scandinavian Convention on Family Law (art. 11), which also decides expressly that the law of the forum is applicable (art. 12). With respect to adoptions in other foreign countries, the law of the forum governs under the Danish adoption law of 1923, with certain exceptions for Danes adopting abroad and foreign children adopted in Denmark.<sup>27</sup> More consideration is given to foreign law by the conflicts rules of Norway<sup>28</sup> and Sweden.<sup>29</sup>

(d) *Law of the forum governing formalities everywhere.* It is in the nature of a state act, necessary in all countries to some extent to effect adoption, that all formalities required by the municipal law of the court (or other acting agency) must be observed. Also, recognition in another country de-

<sup>24</sup> *Culver v. Culver and Gammie* [1933] 2 D. L. R. 538, with reference to *Haultain, C. J. S., in Burnfiel v. Burnfiel* (Sask.) [1926] 2 D. L. R. 129.

<sup>25</sup> 3 *Giur. Comp. DIP.* no. 85 p. 171.

<sup>26</sup> Quebec: Adoption Act, R. S. Q. 1941, c. 324, s. 5; cf. 1 *JOHNSON* 349.

<sup>27</sup> *BORUM and MEYER*, 6 *Répert.* 221 no. 54.

<sup>28</sup> Law of April 2, 1917 as amended by laws of September 23, 1921, and May 24, 1935, §§ 29, 30.

<sup>29</sup> Law of June 14, 1917 with amendments, §§ 26, 27.

pend on compliance with the formalities prescribed by the law under which the act is alleged to have been performed.<sup>30</sup>

*Illustration:* An oral adoption agreement, completely performed by the adopted person and concluded within the state,<sup>31</sup> will be given effect as creating a status by a Missouri court of equity, but is regarded as ineffective by a Missouri court, if concluded in Rhode Island and invalid according to the laws of such state.<sup>32</sup>

Courts are naturally inclined to apply this principle with enhanced rigor when it comes to determining their own judicial procedure. Under the duty of applying foreign personal law, conflicts arise. Thus, German courts, in the case of a Soviet Russian adopter, refuse to confirm the contract because under the Soviet law adoption is created by mere state act.<sup>33</sup> In applying a foreign law requiring that the court examine the social advantages enuring to the child by the adoption, German courts even took it for granted that they were unable to intervene, because under the German Civil Code the courts (other than the court of custody) had only to inquire into the fulfillment of certain legal conditions. They refused, therefore, to authorize adoptions by French, Rumanian, and all other adopters whose personal law requires a substantive investigation of the child's benefit by the court.<sup>34</sup> If, however, a foreign personal law is to be applied at all, as prescribed by the German conflicts law, and jurisdiction is not doubtful, the

<sup>30</sup> It is sometimes asserted that the parties may constitute an adoption in any country according to their personal law, since the maxim *locus regit actum* is only of optional application. But there is no proof of actual force of this assumption which overlooks the significance of the administrative act.

<sup>31</sup> *Buck v. Meyer* (1916) 195 Mo. App. 287, 190 S. W. 997.

<sup>32</sup> *Mutual Life of New York v. Benson* (1940) 34 F. Supp. 859.

<sup>33</sup> KG. (April 7, 1933) IPRspr. 1934, no. 67; Bay. OBLG. (Oct. 31, 1934) JW. 1935, 1190.

<sup>34</sup> KG. (June 30, 1922) 42 ROLG. 188; KG. (Jan. 15, 1932) 6 Z. ausl. PR. (1932) 311, IPRspr. 1932, no. 98; KG. (March 10, 1933) IPRspr. 1933, no. 53, and still after a fundamental change of the adoption law by a law of November 23, 1933, see decision KG. (Sept. 6, 1935) 13 Jahrb. FG. 175. This practice was abandoned however by KG. (Nov. 8, 1935) JW. 1936, 53.

procedure should be adjusted so as not to frustrate the purpose of the institution.<sup>35</sup> This cooperative attitude has been recommended in France.<sup>36</sup> Remarkably, the Finnish statute directly provides that formalities essential under the national law of both parties should be observed so far as possible.<sup>37</sup>

## 2. Systems of Personal Law

(a) *Law of the adopter.* Still starting from the postulate that one sole law should govern a family, many conflicts rules determine the substantive requisites of adoption exclusively according to the personal law of the adopter.<sup>38</sup> As, according to the municipal laws, a married person generally needs some joint action or consent of the other spouse for adopting a child, the situation where the spouses have different personal laws raises difficulties. The principle of personal law is best applied to this case, each spouse being distinctively subjected to his or her own law.<sup>39</sup>

In this system, the child's interests are protected just as well or badly as the personal law of the adopter provides. In the prevailing construction of the German statutory rules, for instance, the personal law of the adopted person is not con-

<sup>35</sup> See RAAPE 597; RABEL, 6 Z.ausl.PR. (1932) 310.

<sup>36</sup> NIBOYET 776 no. 662.

<sup>37</sup> Finnish Law of Dec. 5, 1929, § 25.

<sup>38</sup> Germany: EG. art. 22 par. 1 (the father).

Poland: Law of 1926, art. 23 (the adopter); cf. SULKOWSKI, "Conception du droit international privé d'après la doctrine et la pratique en Pologne," 41 Recueil 1932 III 696ff.

Italy: C. C. (1938) Disp. Prel. art. 10 par. 2 and C. C. (1942) Disp. Prel. art. 20 par. 2, adding to the text of the final draft—"national law of the adopter"—the words: "at the time of the adoption."

Belgium: Trib. civ. Bruxelles (Dec. 21, 1926) Clunet 1928, 479 (a minor child of Belgian nationality adopted in France, where the prohibition in C. C. art. 346 of adoption of minors was abolished by a law of 1923 while it continued in Belgium).

France: App. d'Aix (March 16, 1909) Revue 1909, 642; SURVILLE 464 no. 316; 3 ARMINJON 55 nos. 53, 54.

Brazil (former law): Sup. Trib. Fed. (Jan. 16, 1940) 56 Arch. Jud. 421 (adoption made in Brazil; Italian law applied to capacity and consent of adoptive parent and natural mother of Italian nationality).

<sup>39</sup> See RAAPE 580, but also 589 (par. 4).

sidered, unless he be a German,<sup>40</sup> but it follows only that the provisions of the internal law of the forum, requiring the consent of the child or otherwise protecting it, are applicable.

*Illustrations:* (i) Where a German adopts a Danish child, the contract of adoption can be made, according to § 1750, par. 1 of the German Civil Code, by the child's guardian with authorization of the court. As the Danish principle of domicile refers to the local German law, the German court has jurisdiction. (KG. (June 7, 1929) IPRspr. 1929, no. 88.)

(ii) Adoption of a Swedish illegitimate child by a German depends on the consent of the illegitimate mother, according to § 1747 of the German Civil Code, but not subject to authorization of the Swedish king as required by Swedish law. (RG. (July 11, 1929) 125 RGZ. 265, IPRspr. 1929, no. 89.)

(b) *Consideration of the child's law.* In opposition to exclusive control of the law of the adopter, it has been postulated that the law of the child should govern those requirements which may be established for the protection of the child's status against hasty or dangerous alterations.<sup>41</sup> This category was understood to include those provisions that require a certain age<sup>42</sup> or full age<sup>43</sup> of the adopted person, or his consent or that of the persons and authorities charged with his personal care.<sup>44</sup> To the law of the adoptive parent are left the requirements concerning the adopter's age, any requisite difference in age between the parties, the absence of legitimate issue, or other interests of the family into which the adopted person is

<sup>40</sup> See the decision following in the text; and KG. (June 30, 1922) 42 ROLG. 188, 189; KG. (Oct. 29, 1926) IPRspr. 1926-1927, no. 81; LG. Dresden (Dec. 20, 1929) and OLG. Dresden (Feb. 18, 1930) IPRspr. 1931, nos. 90, 91. *Contra:* most writers, see RAAPE 550, 4 FRANKENSTEIN 174.

<sup>41</sup> This theory was prominently developed by BAR 547 § 199 and NIBOYET 775, 776 no. 659. In different manner: BATIFFOL, 1 Répert. 252 nos. 3, 5; 4 FRANKENSTEIN 171.

<sup>42</sup> WEISS, 4 *Traité* 1#3.

<sup>43</sup> When minors could not be adopted in France, before the Law of June 19, 1923, adoption abroad was considered void; see Trib. Valenciennes (*infra* n. 47).

<sup>44</sup> ROLIN, 2 *Principes* 167, 168 nos. 634, 635; PILLET, 1 *Traité Pratique* 651, 652 no. 319; Greece: C. C. (1940) art. 23 par. 1; Germany: EG. art. 22 par. 2 (as to German children).

to enter. For instance, adoption of natural children by their parents was forbidden by the Italian Civil Code of 1865 (art. 205) but permitted by French practice.<sup>45</sup> As this matter concerns the adopter's family, under this principle, an Italian could not adopt his own illegitimate child in France. A Frenchman would be permitted adoption of his natural child in Italy, if it were not considered contrary to public policy.<sup>46</sup>

(c) *Exclusive application of the child's personal law.* In some recent opinions, the law of the child governs exclusively all conditions of adoption.<sup>47</sup> This thesis is based on the unwarranted identification of the child's law with the law best securing its welfare.

(d) *Both laws cumulatively applied.* Finally, in one of those well-known attempts to cumulate the laws where a choice between them seems hard, adoption is said to depend on all the requirements stipulated in each law of both the parties.<sup>48</sup> Such a mechanical addition results in not applying any one of the statutes and in impeding a transaction that all students of juvenile welfare wish greatly to foster.

Consideration of the law of a foreign party is accomplished

<sup>45</sup> Cass. (May 13, 1868) D.1868.1.249.

<sup>46</sup> 2 FIORE 310ff. no. 761; SURVILLE 464ff. no. 316.

<sup>47</sup> France: Trib. civ. Valenciennes (June 18, 1914) Clunet 1919, 242 (a minor girl of French nationality adopted by German parents; the decision may have rested also upon French public policy); Cour Paris (Jan. 14, 1926) Clunet 1927, 641. Writers limit themselves generally to the application of French law to French children.

Italy: App. Milano (May 9, 1910) Clunet 1913, 243.

Egypt: Trib. Alexandria (1926 no. 184) Clunet 1928, 1112 (American woman adopting a Greek child; Novella 17 of Emperor Leo applied).

Soviet Russia: Law of January 4, 1928, art. 6 (see MAKAROV 421): where adopting and adopted parties belong to different Soviet Republics, the consul shall apply the law of the child, if known, otherwise the law of the adopter, or, last, what law the adopter demands.

<sup>48</sup> Austrian OGH. (April 15, 1930) Zentralblatt 1931, 130 no. 33, Clunet 1932, 198. Probably of this type Japan, Law of 1898, art. 19; China, Law of Aug. 5, 1918, art. 14; Treaty of Montevideo on international civil law, text of 1940, art. 23 (difficult to understand). Advocated by BROCHER 333, DESPAGNET 848, 849 no. 284; BARTIN in 9 Aubry et Rau § 555 at 176, and n. 2; BARTIN, 2 Principes § 276 at 166; DIENA, 2 Princ. 186; CAVAGLIERI 247; 2 ZITELMANN 883; 4 FRANKENSTEIN 171 n. 4; LEWALD 153; *contra*: RAAPE 549.

in a much sounder way in those statutes that prohibit authorization of adoptions, unless these are recognized as valid by the laws of both parties.<sup>49</sup> That is, this rule has a proper place, provided that recognition is granted in the foreign country in a broad-minded spirit without insisting on the fulfillment of peculiar domestic requirements.

In the Finnish enactment, it is added that the adoptive relationship, if the adopter is a foreigner, cannot be rescinded in Finland, except if the adopter is there domiciled and the rescission is recognized in his national country.<sup>50</sup>

(e) *Special rules on the effect of adoption.* In those jurisdictions where the personal law of the adoptive father governs the act creating adoption, the same law of the adoptive parent may govern the effect of adoption<sup>51</sup> at any later moment, in the same way as a parent's law governs creation and effect of a legitimate parent-child relation. This means that, in the case of a change of personal law, later events are governed by the personal law of the time being. Where, however, the law of the child is influential in the constitution of the family relationship, this law is not appropriate to regulate the ensuing relationship within the adoptive family.<sup>52</sup> Therefore, the statutes involved have mostly restricted the child's law to the creation of adoption and applied the parent's law to its effects.<sup>53</sup> In another, not more attractive, opinion advocated by Italian and

<sup>49</sup> Finland: Law of Dec. 5, 1929, § 24 par. 2.

Norway: Law of April 2, 1917 with amendments of September 23, 1921, and May 24, 1935, § 29 par. 1.

Sweden: Law of June 14, 1917 with amendments, § 26 par. 1.

Switzerland: Just. Dept. June 30, 1928, 25 SJZ. 80.

<sup>50</sup> Finland: Law of 1929, § 24 par. 2.

<sup>51</sup> See for example, Germany: EG. arts. 22 and 19; Italy: C. C. (1942) Disp. Prel. art. 20 par. 2.

<sup>52</sup> This however has been proposed by WEISS, 4 *Traité* 126; BATIFFOL, 1 *Répert.* 255 no. 23.

<sup>53</sup> Japan: Law of 1898, art. 19 par. 2; China: Law of 1918, art. 14 par. 2; Finland: Law of 1929, § 26; France: 6 LAURENT 77 no. 39; SURVILLE 464ff. no. 316; PILLET, 1 *Traité Pratique* 652 no. 320. Poland: Law of 1926, art. 19 par. 2, and Greece: C. C. (1940) art. 23 par. 2, extend their reference to the last common nationality to the effects of adoption.

French writers, the law of the child governs the child's position in its natural family, including reciprocal inheritance rights, while the adoptive relationship is determined by the parent's law.<sup>54</sup> Pillet has, in despair, suggested that the judge be allowed free choice of law.<sup>55</sup>

### III. RECOGNITION OF FOREIGN ADOPTION

#### I. Conditions of Recognition

The above described English and American jurisdictional rules seem to imply that a foreign adoption will be recognized, if the jurisdiction assumed by the foreign state is based either on the adopter's domicile or, in the American view, on the domicile of the child. It is true that, not even among the sister states, does this principle appear clearly settled. The Supreme Court of the United States has had occasion to proclaim that the Federal Constitution did not oblige a state to recognize legitimations and adoptions made in another state.<sup>56</sup> The underlying doubts are connected, however, with the specific effect of adoption upon inheritance rather than with the principles of recognition. It seems that there is no serious question respecting recognition in general.

Whether in addition to the two grounds for jurisdiction mentioned above, adoptions occurring in the national state of the adopter are to be recognized, may be questioned. There is no compelling reason for recognition, for instance, where an American child resident in the United States is adopted in a

<sup>54</sup> 2 FIORE 296, 297, 298 no. 752; DESPAGNET 850 no. 286; VALÉRY 1153 no. 814; NIBOYET 778 no. 665. This solution has been reproduced in Código Bustamante art. 74 with the modification that the adopter's law governs "in so far as his estate is concerned," and that of the adopted person "in respect to the name, the rights and duties which he retains regarding his natural family, as well as to his own estate in regard to the adopting person," while the right to maintenance is left to public policy (art. 76).

*Contra*: see RAAPE 594.

<sup>55</sup> PILLET, *Principes* 324 no. 154, renouncing any rule.

<sup>56</sup> *Hood v. McGehee* (1915) 237 U. S. 611.

German court<sup>57</sup> pursuant to German law by a German domiciled and resident in the United States.<sup>58</sup>

Exclusive jurisdiction is claimed over nationals by the frequently cited Austrian and Hungarian traditions<sup>59</sup> and by the Scandinavian states. Swedes and Norwegians cannot be adopted abroad without permission of the king.<sup>60</sup> Finns need the permission of their Minister of Justice.<sup>61</sup> Other states generally reserve judicial activity in status matters of nationals to their own tribunals. France and Belgium require that nationals should seek supplementary authorization at their home court.<sup>62</sup> Italy subjects recognition even to the procedure of *exequatur*.<sup>63</sup> Recently the National Socialist innovations in German adoption law have inspired the view that a foreign adoption of a German always needs confirmation by a German court in order to have effect in that country.<sup>64</sup>

Opposition of public policy to foreign adoptions has formed a natural problem in countries in which no form of adoption has been instituted. In England, which until recently belonged in this category, no case has occurred, but Dicey pronounced his decided opposition to the recognition of any foreign adoption and impressed Beale and the American Restatement with this theory. This influence, together with the common law tradition, repugnant to adoption, was strong enough to prevent recognition of an American adoption in Canada even after the Canadian reform laws, on the ground

<sup>57</sup> § 66 par. 2 of the German Law on Voluntary Jurisdiction.

<sup>58</sup> KIPP, in KIPP-WOLFF, *Familienrecht* § 99 n. 12.

<sup>59</sup> Austria: *supra* p. 398; Hungary: SCHWARTZ, 41 *Z.int.R.* (1929) 107 at 182.

<sup>60</sup> Sweden: Law on Adoption of June 14, 1917 with amendments, § 26 par. 2; Norway: Law on Adoption of April 2, 1917 as amended by laws of Sept. 23, 1921, and May 24, 1935, § 29 par. 2.

<sup>61</sup> Finland: Law of 1929, § 24 par. 1 sentence 2.

<sup>62</sup> ROLIN, 2 *Principes* 171 no. 637; *Novelles Belges*, 2 *D. Civ.* 659 no. 149.

<sup>63</sup> *Cass. civ.* (June 24, 1932) *Monitore* 1932, 929, *Clunet* 1933, 454; *cf.* *App. Genova* (Dec. 16, 1932) *Monitore* 1933, 225.

*Contra* for France, WEISS, 4 *Traité* 130.

<sup>64</sup> RAAPE, 2 *D. IPR.* 220.

that this legislation had no retroactive effect.<sup>65</sup> The court, using this argument, overlooked that not the reform law but the strength of the present public policy was in question. In the Netherlands, foreign adoptions seem to be recognized when the national laws of both parties permit it, but naturally not when one party is of Dutch nationality.<sup>66</sup>

Remarkably, the opposite liberal view has been taken in Portugal,<sup>67</sup> Argentina,<sup>68</sup> and Guatemala.<sup>69</sup>

In countries with adoption, the domestic law is frequently applied to a foreign adoption to which a subject of the forum is a party, at least insofar as it is thought that this individual must be protected. In France and in Latin countries,<sup>70</sup> public policy is invoked in such cases for almost all internal conditions of adoption as being of "international public order."

Adoption between foreigners in their own national states should be and is regularly recognized without any such limitations.<sup>71</sup> But a French decision was concerned with the following case: A Russian married couple, the husband forty-nine, the wife forty-five years old, adopted in 1912 in Russia a child of twelve years. The transaction was perfectly valid under Russian law; it would not have been allowed under article 343 of the French code, as it stood at that time, requiring a fifty-year age of the adopter and full age of the adopted per-

<sup>65</sup> *Burnfiel v. Burnfiel* [1926] 2 D. L. R. 129; Haultain, C. J. S., in this strange decision acknowledged that the case was absolutely similar to that contrarily decided in *In re Throssel* [1910] 12 W. L. R. 683. In both cases the adoption had been made by decree in Iowa.

<sup>66</sup> VAN HASSELT, 6 *Répert.* 635 no. 203.

<sup>67</sup> See *Sup. Trib. Lisbonne* (May 15, 1934) *Nouv. Revue* 1935, 424; *supra* pp. 177-178.

<sup>68</sup> See 2 *VICO* 128, no. 172.

<sup>69</sup> MATOS 394 no. 277.

<sup>70</sup> France: *Trib. civ. Valenciennes* (June 18, 1914) *Clunet* 1919, 242. Italy: *App. Palermo* (June 12, 1931) 24 *Rivista* (1932) 563, *Clunet* 1933, 1091. VALÉRY 1151 no. 812.

<sup>71</sup> Denmark: BORUM and MEYER, 6 *Répert.* 221 no. 56.

The Netherlands: *Rb. Amsterdam* (April 7, 1920) *W.* 10632 (child of foreign nationality born in the Netherlands).

son. Instead of simply recognizing the foreign act, the court of Paris declared it effective only because in the meantime the French provision had been changed so as to require forty years of the adopter and fifteen years of age difference.<sup>72</sup> The implied claim to control an entirely foreign act by the municipal law of the forum is absurd.

## 2. Effects of Recognition

Where no obstacle arises from jurisdictional considerations or public policy of the forum, it may yet be dubious to what extent the foreign created adoption is effective at the forum. The only consistent solution of this question is given in such statutes as that of Quebec:

“A person resident outside of the Province who has been adopted according to the laws of the United Kingdom or any part of the British possessions other than the Province of Quebec or of any foreign country, shall possess in this Province the same rights of succession that he would have had in the said United Kingdom or part of the British possessions or in the said foreign country in which he was adopted.”<sup>73</sup>

The French-Belgian doctrine has always supported the clear principle that the effect of adoption is governed by the applicable foreign law.<sup>74</sup>

The Swiss Federal Tribunal in a quite recent case has left no doubt on the application of the Swiss intestate portion for legitimate children (including adopted children), to a girl adopted in Moscow in 1912. It expressly states that her adoption had taken place according to the then Russian law “not

<sup>72</sup> Cour Paris (Jan. 2, 1936) *Gaz. Pal.* 1936.1.551, 7 *Giur. Comp. DIP.* 159 no. 83, criticized by *BATIFFOL*, *Revue Crit.* 1937, 427, but apparently approved by *COSTE-FLORET*, 7 *Giur. Comp. DIP.* 160.

<sup>73</sup> Quebec: 14 *Geo. V*, c. 75 s. 14 (1924) as amended by 25-26 *Geo. V*, c. 67 s. 2 (1935), *R. S.* 1941, c. 324 s. 22.

Similar, Alberta, *Infants Act*, 1913 (2), c. 13, s. 33, and *Domestic Relations Act*, *R. S. A.* 1942, c. 300, s. 49; unification proposed by 1 *JOHNSON* 353.

<sup>74</sup> *WEISS*, 4 *Traité* 118; 6 *LAURENT* 75 no. 37; *ROLIN*, 2 *Principes* 172 no. 638.

only as a so-called contractual adoption without inheritance right, but as a fully operating one conferring rights equal to those of a legitimate child.”<sup>75</sup>

Indeed, foreign adoptions should be recognized, if at all, to exactly the extent to which they have been created as measured by the entire legislation of the state of adoption; they should not be given either more or less effect. One would think that in the United States the same solution must smoothly flow from the recognition of adoption orders rendered by the domiciliary court either of the parent or the child, but things have taken another course. The question has been much discussed in this country and recently also a little in German literature.

Before entering into the main subject of the controversy regarding inheritance rights, it may be permissible to indicate the points where disturbances seem to have set in.

(a) General attention has been devoted to the problems of recognition arising in the succession upon death to the adopted parents or sometimes to the adopted child, or to property of the natural parents. It should be noticed, however, that statutes on adoption differ widely also on other points such as alimentary support *quoad* the child's consanguineous family, the paternal power of the natural father, the name of the child, *et cetera*. In the United States, many statutes terminate the effects of the natural parent-child relation in the case of adoption, while others make it “exceedingly difficult to find in the legislative pronouncements any intent to work a complete severance of parental relationship and substitution of parent.”<sup>76</sup>

Again, the effect of adoption between the adoptive parties seems reduced in South Carolina to property rights,<sup>77</sup> and

<sup>75</sup> BG. (Oct. 21, 1943) 69 BGE. II 357, 363.

<sup>76</sup> 4 VERNIER § 261 at 406; *cf.* Suppl. 127ff.

<sup>77</sup> South Carolina: Code of Laws 1942, C. C. § 8679.

courts in Mississippi may limit the right of the adopted child to certain benefits.<sup>78</sup>

If we face this broad field, recognition of the foreign act with its proper effects appears to be the only suitable maxim. Certain countries, of course, headed by France, will indulge in large exceptions, also in this respect, on the ground of public policy.<sup>79</sup>

(b) The reluctance of the Dutch and English jurists in earlier periods to conceive an extraterritorial effect of judicial acts and to acknowledge a "status unknown to the forum," as we have seen, finally resulted in the similarity doctrine, expressed by the Restatement in § 143:

"The status of adoption, created by the law of a state having jurisdiction to create it, will be given the same effect in another state as is given by the latter state to the status of adoption when created by its own law."<sup>80</sup>

The foregoing section probably was exclusively influenced by consideration of inheritance problems. Another section, § 305, expresses a second time the same idea in application to distribution; the adopted person shall be treated "as if he were a natural-born legitimate child of his adoptive parent if the law that regulates distribution gives such effect to adoption."

Even in limitation to the problems of distribution, it is amazing, not only that no foreign adoption should be recognized in a country not knowing adoption, but also that every foreign adoption of whatever extent should be treated like a full adoption, if the law governing inheritance does so with respect to adoptions performed within the state.<sup>81</sup> This unexpected

<sup>78</sup> Miss.: Code Ann. (1942) § 1269, cf. 4 VERNIER § 261 at 406.

<sup>79</sup> Cf., for instance, on aliments: WEISS, 4 *Traité* 120; BATIFFOL, 1 *Répert.* 256 no. 25; prohibition to marry (C. C. art. 354): 2 FIORE 39 no. 539; BATIFFOL, 1 *Répert.* 256 no. 26; on C. C. arts. 343-346 (before reform): VALÉRY 1151 no. 812; BATIFFOL, *Revue Crit.* 1937, 427.

<sup>80</sup> 2 BEALE § 143.1 classifies, correspondingly, the cases along the distinction whether or not the adopted foreign child is treated like a child adopted at the forum.

<sup>81</sup> See the critical analysis by YNTEMA, "The Restatement of the Law of Conflict of Laws," 36 *Col. L. Rev.* (1936) 212.

dogma has certainly not found favor with American courts, but it does contribute to obscure the picture. It has caused, at least, more readiness to recognize an adoption similar to the domestic type than a dissimilar one, which is an unfortunate starting point.

Certain Canadian statutes avoid enlarging the rights created by foreign adoption, but they share the main rule of the Restatement. For instance, the Ontario statute provides that:

"A person . . . adopted in accordance with the laws of the province where he is domiciled, shall be entitled to the same rights of succession as to property in Ontario as he would have had in the province in which he was adopted but not exceeding the right he would have had if adopted under this Act."<sup>82</sup>

(c) Faced with their usual topic, viz., the share to which foreign adopted children are entitled in a succession, American courts have decided from case to case, as results seemed warranted by the circumstances, although in some instances they have been influenced by the formalistic arguments frequent in English and Canadian courts. Unfortunately, a theoretical point has been introduced. The courts and their annotators usually distinguish whether a right to inherit by or from an adopted person has been established by the state where the adoption has been performed and, if so, whether the statute giving the right is an adoption statute or an inheritance statute. To illustrate, it has been said in a remarkably explicit note that, if the right of inheritance has been limited in the state of adoption, the restriction may be imposed either upon the status or upon the right to succession. The first is to be presumed, if the child, by the statute of the state of adoption, has been granted the full position of a natural child in relation to the

<sup>82</sup> Ontario (1927) 17 Geo. V, c. 53 s. 13, re-enacted R. S. O. 1937, c. 218 s. 13. Similar, British Columbia, Adoption Act. R.S.B.C. 1936, c. 6 s. 11; Prince-Edward Island, Adoption Act, 1930, c. 12 s. 15 and Children's Act (1940) c. 12,

adopter, but not to his collateral relatives; this limitation, then, has to be recognized in the state of inheritance. Where, however, adopted children are placed in second rank, to favor the legitimate issue primarily entitled, the limitation concerns the hereditary right.<sup>83</sup>

It is submitted that the courts are facing an impossible task with this method. It suffices to observe what distinctions, verbal interpretations, and inferences a modern author has felt obligated to propose, "in order to decide whether a right asserted by a claimant should be treated as one which flows from status, if at all, or as one which is given irrespective of the existence or non-existence of status."<sup>84</sup> More appropriately, it has been repeatedly asserted that statutes of adoption and statutes of inheritance of the same state must be read together. In fact, the entire effect of adoption is either defined at one place in the laws, namely, in the chapter on adoption, or has to be deduced from both categories of statutory provisions taken together. Usually, there is neither any legislative intention nor any sound reason for presuming by interpretation, that one group of provisions should govern only domestic adoptions and the other foreign adoptions, or that one group should prevail in the domestic courts only and the other have extraterritorial effect. Nor is it the task of these internal provisions to make such distinctions. It is up to the law of conflicts to find the solution. As has been contended above, the entire legislation of the state of adoption defines the effects to be recognized.

(d) Two practical considerations may guide us. On the one hand, it is inadmissible that an adopter could change the effect of an adoption by changing his domicile. He would be able to do just that, if the statute of distribution at his last domicile

<sup>83</sup> L. R. A. 1916 A 668; similar for legitimation 73 A. L. R. 958.

<sup>84</sup> TAINTOR, "Legitimation, Legitimacy and Recognition in the Conflict of Laws," 18 Can. Bar Rev. (1940) 589, 691, at 703. RAAPE 592 attempts similar distinctions.

were given predominance in construing the previously made adoption. On the other hand, an adopter who has not by the adoption created inheritance rights is free to maintain the effects of the transaction or to supplement them by gift or by will, so far as the statute of distributions allows him. It is no natural task of conflicts law to demolish these results of private law.

### 3. Effect on Inheritance Rights in Particular

In order to distinguish the scope of the conflicts rule on adoption from those concerning succession upon death, it is justly said that the law governing succession determines whether adopted children as a class are competent to succeed, and the law governing the creation of adoption determines whether a certain person is an adopted child.<sup>85</sup> This, however, does not answer all questions.

(a) *Construction of language.* Where a testator has devised or bequeathed property to his or other people's "children" or "issue," it was argued, especially in Canadian cases, that children or issue born in wedlock are meant. This was contended even after the introduction of adoption into the legislation, at least in construing older wills.<sup>86</sup> The traditional opposition of the common law to adoption was still effective, though in British Columbia the contrary opinion was followed even where a will used the term "heirs."<sup>87</sup> It may now be assumed that the intention underlying a will or deed is to be

<sup>85</sup> See for instance GOODRICH, "Legitimation and Adoption in the Conflict of Laws," 22 Mich. L. Rev. (1924) 637 and Handbook 384 ff.; LORENZEN, 6 Répert. 349 no. 342; Notes, L. R. A. 1916 A 666 and 65 L. R. A. 186.

Germany: RAAPE 591 ff. and RAAPE, "Les rapports juridiques entre parents et enfants," 50 Recueil 1934 IV 401, 508 no. 81.

<sup>86</sup> Supreme Court of Canada: Donald, Baldwin & Mooney [1929] 2 D. L. R. 244 (Washington adoption).

Ontario Supreme Court: *Re Skinner* (1929) 64 O. L. R. 245, [1929] 4 D. L. R. 427 (Ohio adoption). See FALCONBRIDGE, *Cases on the Conflict of Laws* (ed. 4, 1938) 170.

<sup>87</sup> *In re McGillivray, Purcell v. Hendricks* [1925] 3 D. L. R. 854.

construed according to the mere factual circumstances, and statutes are not to be deemed any longer to demand legitimate birth or blood relationship.

(b) *Major rights acquired by foreign act.*<sup>88</sup> A group of cases is characterized by larger rights granted in the state of adoption than in the state of distribution. In particular, the statute applicable to the succession may be wholly ignorant of the kind of adoption accomplished abroad. We have to distinguish as follows:

(i) *Law of situs of immovables.* A social and ethical background such as lay behind the famous Statute of Merton (A.D. 1236)<sup>89</sup> and still continued at the time of the English case of *Birtwhistle v. Vardill* (A.D. 1840)<sup>90</sup> may well have required birth in lawful wedlock as the sole title to succession to land. This conception, however, seems finally to have lost its hold in the English land law. But it survives strangely in the Alabama courts,<sup>91</sup> while in Florida foreign adopted children are excluded unless they become citizens of the state.<sup>92</sup> The Supreme Court of Mississippi overruled its former acceptance of this conception in 1917 with the express denial of a public policy preventing the adopted child from inheriting.<sup>93</sup> Surprisingly in one decision, the French Court of Cassation also applied the law of the situs rather than that governing adoption, as a pretext for sticking to French law.<sup>94</sup>

<sup>88</sup> See YNTEMA, 2 Giur. Comp. DIP. 358 sub (C).

<sup>89</sup> 20 Henry III, c. 9 (1236).

<sup>90</sup> 7 Cl. and F. 895.

<sup>91</sup> *Brown v. Finley* (1908) 157 Ala. 424, 47 So. 577; cf. on legitimation the *Lingen* case (1871) 45 Ala. 410, *supra* p. 585, n. 157.

<sup>92</sup> *Tankersley v. Davis* (1937) 128 Fla. 507, 175 So. 501.

<sup>93</sup> *Brewer v. Browning* (1917) 115 Miss. 358, 76 So. 267, overruling *Fisher v. Browning* (1914) 107 Miss. 729, 66 So. 132.

<sup>94</sup> Cass. (req.) (April 21, 1931) D.1931.1.52, S.1931.1.377, *Clunet* 1932, 142; *Revue* 1932, 526; *Contra*: BARTIN, "Adoption et transmission héréditaire," *Clunet* 1932, 5; NIBOYET, Decision note, *Revue* 1932, 541. Favorable to the decision, however, WENGLER, 8 *Z.ausl.PR.* (1934) 167 n. 1; LEWALD, *Règles générales des conflits de lois* (1941) 137.

(ii) *Local policy*. Apart from such peculiar prohibitive policy claimed for the laws of succession and leaving aside the bulk of the cases, which offer no problem because both states involved grant similar positions to adopted children,<sup>95</sup> there is authority denying that local policy should normally intervene.<sup>96</sup>

This view was applied to the problem of inheritance from natural parents. In *Slattery v. The Hartford Connecticut Trust Company*,<sup>97</sup> an individual adopted in Michigan claimed his share in his natural father's estate and was successful in Connecticut. The statute of Michigan maintains, that of Connecticut terminates, the right of inheritance of an adoptee from his native parents. The Supreme Court of Errors of Connecticut held that, as the right of inheritance of the child was not lost by the statute of Michigan, he could claim it; the legislature of Connecticut debarring a child from such a right "has not attempted to lay down any rule applicable in the case of children coming here from another state where they have been adopted under laws which do not take away that right."<sup>98</sup> This argument is equivalent to saying, as we did, that the extension of the inheritance rule to foreign cases with foreign elements is up to the conflicts rule, and that, under this rule, adoptions made in the domiciliary state must be recognized with their own effects. The restriction imposed on the statute by this conception is not only equitable and justified by the anomalous structure of the Connecticut type of adoption,<sup>99</sup> but consistent with the advisable general postulates.

<sup>95</sup> See YNTEMA, 2 *Giur. Comp. DIP.* 357 sub (A).

<sup>96</sup> For this opinion also FALCONBRIDGE, 3 *Giur. Comp. DIP.* no. 85 p. 171. *In re Finkenzeller's Estate* (1929) 105 N. J. Eq. 44, 146 Atl. 656; *Keegan v. Geraghty* (1881) 101 Ill. 26.

<sup>97</sup> *Slattery v. The Hartford-Connecticut Trust Co.* (1932) 115 Conn. 163, 161 Atl. 79, commented by YNTEMA and DE NOVA in 2 *Giur. Comp. DIP.* 352 ff. no. 169.

<sup>98</sup> There follow excellent explanations why public policy is not contrary to recognizing such a provision "dissimilar" to the domestic regulation.

<sup>99</sup> See YNTEMA, 2 *Giur. Comp. DIP.* 359, against criticism of the decision in 81 U. of Pa. L. Rev. (1932) 213.

The case demonstrates with particular clarity the necessity of protecting by adequate conflicts rules those legal effects which the parties to a transaction were entitled to foresee.

Yet the contrary view was recently taken by the Superior Court of Pennsylvania<sup>100</sup> refusing intestate succession to grandchildren from their natural grandmother through their mother adopted by unrelated persons in Ohio. The Court construed section 16 (b) of the intestate statute of Pennsylvania, excluding adopted children from taking from or through their natural parents, to the effect of including all foreign adopted children and their issue. This thesis is not justified by the argument that "to hold otherwise would create a power in another state to limit and nullify the authority of this state to determine for itself how property shall descend on intestacy." The intention of the Pennsylvania statute cannot be changed by another state, but why should a statute intend implicitly to exclude foreign adopted children whose adoption did not abolish their status in their natural families where it was done? The only sound method is to leave the application of the intestate statute to the conflicts rule which should not be dubious.

The climax, so to speak, of incomity seems reached by *Frey v. Nielson*,<sup>101</sup> where an inheritance statute of New Jersey admitting adopted children was construed to be restricted to children adopted in New Jersey. Also, in the Netherlands, where a foreign party has acquired Dutch nationality, a former adoption of or by this party will not be recognized.<sup>102</sup> This refusal, however, is not ascribed to the Dutch statute of distribution; it denies the entire family law relationship by adoption and is based on public policy regarding Dutch nationals.

<sup>100</sup> *In re Crossley's Estate* (1939) 135 Pa. Super. Ct. 524, 7 Atl. (2d) 539; noted 24 Minn. L. Rev. (1940) 268.

<sup>101</sup> *Frey v. Nielson* (1926) 99 N. J. Eq. 135, 132 Atl. 765; the Note, "Conflict of Laws—Inheritance by Adopted Child," 25 Mich. L. Rev. (1926) 189 is uncritical.

<sup>102</sup> VAN HASSELT, 6 Répert. 636 no. 203.

Another outstanding case, *Brown v. Finley*,<sup>103</sup> has been sharply criticized by European writers.<sup>104</sup> The Alabama court refused a right of distribution to a person adopted in Georgia, because the adoption had not been registered at the probate court as required in Alabama, though not in Georgia. The refusal has been called a denial of international private law.

(c) *Major rights granted by the statute of distribution.* Where inheritance rights are conferred by the law of succession and denied by the law presiding over adoption, in a logical solution the original effect of the act cannot be enlarged by the law of another state. This some American cases state.<sup>105</sup>

Opposition, in part, is based again on the formal argument that a foreign statute depriving an adopted child of inheritance is a statute of distribution and as such not susceptible of extraterritorial application.<sup>106</sup> There is no proof for that assumption, and the result comes as a startling surprise to the parties. Where an English woman has adopted an English child in England, all parties, at least their solicitors, have understood that no right upon death was implied; why should the legal situation be reversed by the woman's moving to New Hampshire and dying there?<sup>107</sup>

Some decisions, however, are based on quite different considerations that flow from a sound policy. The statute of

<sup>103</sup> *Brown v. Finley* (1908) 157 Ala. 424, 47 So. 577, reproduced in 22 Z.int.R. (1912) 164.

<sup>104</sup> LEWALD, "Question de droit international des successions," 9 Recueil 1925 IV 75 n. 3; RAAPE, "Les rapports juridiques entre parents et enfants," 50 Recueil 1934 IV 509 n. 1.

<sup>105</sup> Estate of Sunderland (1882) 60 Iowa 732, 13 N. W. 665; Meader v. Archer (1889) 65 N. H. 214; Shaver v. Nash (1930) 181 Ark. 1112, 29 S. W. (2d) 298; Shick v. Howe (1908) 137 Iowa 249, 114 N. W. 916; Ross v. Ross (1878) 129 Mass. 243, 37 Am. Rep. 321; Boaz v. Swinney (1909) 79 Kan. 332, 99 Pac. 621, overruled in *In re Riemann's Estate* (1927) 124 Kan. 539, 262 Pac. 16, *infra* n. 110.

See Note, 73 A. L. R. 961, 973; YNTEMA, 2 Giur. Comp. DIP. 357; WENGLER, 8 Z.ausl.PR. (1934) 163 n. 2.

<sup>106</sup> This argument is invoked by STUMBERG, 310; also RAAPE, 50 Recueil 1934, IV 509 no. 82.

<sup>107</sup> Thus far of the same opinion RAAPE, 50 Recueil 1934, IV, 511 no. 85.

distribution may allow a share to all children, inclusive of illegitimates, so as to eliminate any discrimination among children.<sup>108</sup> Furthermore, courts have resorted to a permissive public policy in cases in which adoptive children were a class of persons entitled in the forum; explanation of the child's unfavorable treatment by the statute creating adoption is found in an antiquated prejudice against bastards.<sup>109</sup> Thus, in *In re Riemann's Estate*, the Illinois statutory provision, denying the child's relationship with the relatives of the adopter, was considered a "peculiar discrimination," repugnant to the "generous spirit" underlying the law of Kansas.<sup>110</sup> In *Pfeifer v. Wright*,<sup>111</sup> the progressive view was expressly directed against the tradition extending from the Statute of Merton to such cases as *Keegan v. Geraghty* and *Frey v. Nielson*.

But public policy should not be overdone. The Mississippi court says poignantly:

"It would be unjust to both parent and child, to hold that the mere fact of moving to another state would upset and unsettle this relationship. It is of the utmost importance that the status of this character should be maintained so far as it is possible. . . ."<sup>112</sup>

<sup>108</sup> *In re Crowell's Estate* (1924) 124 Me. 71, 126 Atl. 178 (an "adoption into the family" in Nova Scotia had no legal significance in this province, but fulfilled the conditions for inheritance in Maine).

<sup>109</sup> *Anderson v. French* (1915) 77 N. H. 509, 93 Atl. 1042 (estate of adopter); *Calhoun v. Bryant* (1911) 28 S. D. 266, 133 N. W. 266 (estate of adoptive child).

<sup>110</sup> *In re Riemann's Estate* (1927) 124 Kan. 539, 262 Pac. 16.

<sup>111</sup> *Pfeifer v. Wright* (1930) 41 F. (2d) 464.

<sup>112</sup> *Brewer v. Browning* (1917) 115 Miss. 358 at 369, 76 So. 267, overruling *Fisher v. Browning*, *supra* n. 93.