CASE LAW

STATUS AND THE INTERNATIONAL CHILD

IN RE MARSHALL Decd.

The problem of recognition of the status bestowed by foreign legislation or customary law upon persons lacking, in some essential legal element, the complete capacity for the attribution of rights and duties has been one which, in the light of recent decisions, can only be regarded as highly controversial and the source of much confusion in the mind of the lawyer. Involved in such a problem is a consideration of the principles of reciprocity of recognition in private international law with particular regard to the fields of adoption and legitimation. It is also submitted that such a problem should involve an attempt to anticipate the direction the courts will take in applying these principles in the kindred field of artificial insemination. It therefore necessitates a deliberation of how far a person of foreign domicile, and subject to a foreign law, can receive rights or duties in another country as the member of a class of which he is not fully a constituent according to the law of his own country; and, the legal results, if any, which emanate from this lack of full status, where the benefits or restrictions are innocently conferred on the assumption that natural capacity will be possessed by the recipient as such, or as a member of a class when such rights or duties vest.

The question came under review in *In re Marshall*[1] where the Court of Appeal[2] had to consider the circumstances, if any, in which a child of a foreign domicile who is adopted by a person of the same domicile, can take under the gift to the "child" of that person contained in the will of a domiciled Englishman. However, it is submitted that the broader problem involved was one of the rights of a person of foreign domicile to bring himself within the benefits given to a class of persons by proving, by resort to the legislation of his domicile if necessary, that he is a member of the class designated in that he was within the contemplation of the donor of the gift, when under normal circumstances there would be a *prima facie* presumption rebutting his inclusion.

The facts of the case were that a childless couple, at all relevant times domiciled in British Columbia, had, by judicial order granted in pursuance of British Columbian legislation, adopted a child. By his will an English testator had given certain property so that, after the death of the life tenant, it was to pass to certain persons, one of whom was the adoptive father. However, if the adoptive father predeceased the life tenant, the property was to pass, by substitution, to the "issue" of the adoptive father. In the events that happened, the adoptive father did in fact predecease the life tenant. The adopted child then claimed that he was entitled to a share as "issue" under the will by contending that the British Columbian legislation conferred sufficient status on him to support such a claim. It is important, at the outset, to observe that it was agreed between the parties that the word "issue" in the will meant "children",

[1] (1957) Ch. 507.
[2] Jenkins, Romer, and Sellers, L.JJ.

and it was also agreed that the relevant British Columbian statutes should be construed as though they were English Acts of Parliament. The appropriate statutes[3] operating at the date of death of the testator conferred only very limited rights of succession and inheritance on an adopted child; however, subsequent to the death of the testator but prior to the date of distribution to the remainderman (at the death of the life tenant), legislation[4] was passed considerably widening the rights of adopted children to take through their adoptive parents. Nevertheless, it was not until after the date of distribution that the position of an adopted child was made equivalent to that of a natural child as regards universal rights of succession and inheritance.[5]

The Court of Appeal, in deciding whether it would grant the adopted child's claim, had to consider four questions; firstly whether the domiciliary law of the child was applicable for determining his rights and duties; secondly, whether an adopted child was necessarily beyond the testator's contemplation when he used the word "issue" in a will; thirdly, if the answer to the first question was in the affirmative, what was the relevant date for the application of the domiciliary law; and fourthly, by application of the statutes at such relevant time, was the status of the adopted child sufficient to produce the assumption that he could have been within the contemplation of the testator as a child of his adoptive father? Before discussing the reasoning of the Court it is prefaced that the history and course of decision has already received much attention.[6]

With regard to the first problem, the Court, in the ultimate result, considered itself bound by the decisions in *In re Goodman's Trusts*[7] and *In re Andros*,[8] cases in fact laying down principles as to legitimation. The principle applied by the Court in the present case, that questions of determination of the status of an adopted child can only be answered by reference to the domiciliary law of both the adopted child and the adopter, represents an extension of the principle laid down in the legitimation cases[9] and a complete reversal of the trend of the recent cases. Indeed, the present decision would seem completely to overrule the decision in *In re Wilson*[10] where Vaisey, J. held that the question of succession of an adopted child was to be determined by the law governing the succession and not the adoption. He had also rejected the idea of an analogy with the legitimation cases, which were applied, as above mentioned, by Harman, J.[11] the judge of first instance; *semble* that although the Court of Appeal refused expressly to decide the point, they proceeded on the basis that the conclusions of Harman, J. on this matter were correct.[12] This view would seem to lend support to the decision of Sugerman, J. in *In re McKenzie*,[13] who held that a child adopted in New Zealand was entitled to commence proceedings under the New South Wales Testator's Family Maintenance Act, 1916, on the grounds that the Court had jurisdiction to make an order under that Act in favour of a child who was adopted (by the testator) outside the jurisdiction, if both the adopting father and the adopted child were domiciled in the country according to whose laws the adoption was effected at

[3] Adoption Act 1920 (as amended 1936), ss. 7, 8, 10.
[4] Adoption Act 1920 (as amended 1948 and 1953).
[5] Adoption Act 1920 (as amended 1956).
[6] See e.g. P. E. Nygh, "Foreign Adoptions" (1957) 2 *Sydney L.R.* 363.
[7] (1881) 17 Ch. D. 266.
[8] (1883) 24 Ch. D. 637.
[9] "The law, as I understand it, is that a bequest of personalty in an English will to the children of a foreigner means to his legitimate children, and that by international law, as recognised in this country those children are legitimate whose legitimacy is established by the law of the father's domicile." *Re Andros* (1883) 24 Ch. D. 637, 642, *per* Kay, J.
[10] (1954) 1 Ch. 733. For a complete examination of this case and its implications see P. E. Nygh, *op. cit. supra* n. 6, and also G. D. Kennedy "Adoption in the Conflict of Laws" (1956) 34 *Can. B.R.* 507, 530.
[11] (1957) Ch. 263.
[12] (1957) Ch. 507, 520.
[13] (1951) 51 S.R. (N.S.W.) 293. *Cf.* Testator's Family Maintenance Act, 1957 (Tas.), s. 2(a) "adopted child", and the New Zealand legislation noted (1952) 6 *Int. Comp. L.Q.* 242.

the time both of the birth and of the adoption. If such conditions were fulfilled, the adoption should be recognised here and the adopted child could be included amongst the "children" of the testator within the Act.

However, the present decision would, at the same time, place doubt on the decisions of Barnard, J. in *In re Wilby*[14] and Townley, J. in *Bairstow* v. *Queensland Industries Pty. Ltd.*,[15] who both appeared to carry the judgment of Vaisey, J. in *In re Wilson* much further when they doubted whether the courts of a country would recognise any adoption except that recognised by the courts in that country.[16] However, it is submitted that the effect of this would be to place an onerous burden on an adopted person, in that it would be necessary, in order that he should take an interest under a will or settlement (subject to English law) made by the adopter or a third party, to have the adoption re-executed in England. This attitude would probably produce conflict in that it would strain the comity between nations, and also create doubt as to the jurisdiction of an English court to make an adoption order in respect of persons in fact adopted abroad. These difficulties would be removed by an acceptance of the principle laid down by Harman, J. as explained by the Court of Appeal. It is submitted that a rejection of the principles laid down in *In re Wilson* and *In re Wilby* and an acceptance of the principle suggested in *In re Marshall,* a position which had been anticipated by earlier writers,[17] would place the courts in the only position feasible.

In considering the second question, the Court had to contemplate an extension or rebuttal of the presumption that when an English testator speaks of "the children" of a person, he is *prima facie* taken to be referring only to those persons of whom it can be postulated that they are the legitimate children of that person. For the purposes of the appeal, the Court was prepared to make the assumption that a child who has been adopted under the law of his domicile is not of necessity precluded from taking a gift in an English will to the "child" of his adoptive parent by reason only of the fact that he was not procreated by the adopter. However, the Court readily realised that such an assumption involved attributing to the testator, in using the word "child," an intention different from that which he is presumed to have by English law. The Court then stated that the abovementioned presumption had been established beyond controversy and it should be adhered to except in the face of a clear contrary intention. It seems that the Court then proceeded to the question in issue (following Roxburgh, J. in *In re Fletcher*)[18] by affirming that adopted children are *prima facie* excluded equally with illegitimate children. It is also submitted, as will be shown later, that this *prima facie* exclusion may be applicable to children conceived by artificial insemination with certain factual conditions present. The question is, therefore, ultimately one of the testator's intention. However, as the Court in *In re Marshall* warns, if a contrary intention to that presumed by law is possible, caution should be observed in seeking to apply a gift to persons who, because of statute or otherwise, do not belong to the named class, the testator's intention being probably applicable to them as well as to members of the named class. If the testator's intention is clear and unambiguous these problems, of course, do not arise.

The legal significance of artificial insemination in the field of recognition and status, and more particularly on problems of inheritance, depends to a large extent on whether the courts consider the child to be legitimate. If at the time of birth a child's biological parents are married to each other, the child is legitimate; however, if they are not married to each other, it is illegitimate. The presumption of legitimacy, in the case where the mother is

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[14] (1956) P. 174.
[15] (1955) Q.S.R. 835.
[16] *Cf.* H. Wolff, *Private International Law* (2 ed. 1950) 400-402.
[17] See articles cited *supra* n. 10.
[18] (1949) Ch. 473, 479.

At this point it would seem that, unless knowledge of the circumstances can be imputed to the testator, it would be difficult to find an intention on the part of the testator to include either adopted children[19] or, *a fortiori*, adopted children of foreign domicile. The Court, however, dealing with the situation where the intention of the testator does not affect the *prima facie* presumption considered above, concluded in the most important passage of the judgment:[20] "Only those who are placed by adoption in a position both as regards property rights and status, equivalent, or at all events substantially equivalent to that of the natural children of the adopter can be treated as being within the scope of the testator's contemplation." This infers that the child concerned in this case would not be said to be on an equal basis with natural children until the irregularities relevant to the issue had been removed; that is, until the 1956 amending Act, which was passed after the date of distribution. However, it is submitted that this statement has a much wider significance. It seems that it is applicable, in the appropriate situations, to any of the circumstances in which a right or duty is bestowed upon a child as a member of a class, that child not being procreated in lawful wedlock by the parent or parents through whom he takes the gift. In other words, unless a person, who has been adopted, legitimated, or conceived through artificial insemination, has been placed by legislation or otherwise[21] on an equal footing as regards rights of succession and inheritance with children born in lawful wedlock, it would be a fraud on the testator, in the absence of express reference or knowledge of the facts and the law being imputed to him, to enable such a person to share equally with natural children in a gift to the "children" of a named person. This observation would appear to be far beyond that contemplated by the Court; however, it is almost certainly applicable in the cases concerning foreign domicile.

The next question for the Court was a determination of the date at which the adopted child's status was to be decided. The choice was between the date of the testator's death and the date of distribution, times at which the rights of succession of the child differed substantially, but at no time had they, up to the date of distribution, reached equality with that of a natural child. In this instance, the Court of Appeal followed the first instance determination of Harman, J.,[22] that the legal status upon which depended the capacity of members to take, was to be ascertained once for all by reference to the state of affairs which existed at the testator's death. The Court of Appeal therefore refused to attribute to a testator the intention of extending his benevolence to adopted persons who did not acquire the rights and status equivalent to those of a natural child until after his death. An example, showing the ridiculous position produced by resort to the date of distribution as the relevant date, was offered by the Court in the denial of the proposition that it would be the intention of a testator to include all persons adopted subsequent to his death but prior to the death of the life tenant, and who by legislation passed within such period, became entitled to share equally with natural children. This, it is submitted, would apply equally to legitimation and artificial insemination and all other cases of restriction on capacity by lack of procreation in the normal manner by the person or persons through whom the gift is derived. It is important to dissociate this principle from the explanation offered by the Court on the distinction between adoption and legitimation. In the case of legitimation, a child who is illegitimate at the date of the testator's death has, subsequent to the death, the potentiality of achieving full capacity as far

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[19] Or children under some legal incapacity due to their not being natural children of parents born in lawful wedlock.

[20] (1957) Ch. 507, 523.

[21] In the case of artificial insemination the only course at present open appears to be by way of an analogy with legitimation and adoption.

[22] (1957) Ch. 263, 270.

as rights of succession and inheritance are concerned and cannot necessarily be excluded from the benefits of a gift to the children of his father. An adopted child who, at the date of death, only has limited rights of succession and inheritance, cannot be said to enjoy the same potentiality, as an increase in his status depends on the passing of further legislation. This distinction, with respect, seems valueless when it is observed that the Court was considering legislation at two different times in relation to the facts. The example should have been restricted to adoption in the case where prior to death the adoption had not been formal or fully effective, and where legislation prior to death could, by completion of the adoption subsequent to death, increase the status of the adopted child to that necessary to qualify for inclusion in the class.

The Court then considered the case of *Lynch* v. *Provisional Government of Paraguay*[23] and expressed the view that they felt bound by the statement of Lord Penzance[24] when he said: "Accordingly, we think that so far as adopted children are concerned their status and capacity to take under a gift to 'children' in an English will is fixed once and for all at the testator's death and that subsequent legislation in the country of their domicile enlarging their rights is to be disregarded."[25]

The Court in the final question for decision proceeded to apply these principles to the facts of the case. In doing so it stressed the nature of the British Columbian legislation, and decided that the status of the adopted child prior to the date of death was there so limited with regard to rights of succession and inheritance, that an English testator, in a bequest to children, could not be considered to have in contemplation adopted children with such limited rights. The Court then proceeded to an *obiter* consideration of the situation prior to the date of distribution and again determined that the status of an adopted child under the prevailing legislation, was not equivalent to that of a natural child. However, it did conclude that on the passing of the amending Act of 1956, which was after the date of distribution, all the inequalities that had existed between adopted and natural children as regards succession and inheritance, had been removed.

The following principles, therefore, appear to be decided by *In re Marshall:*

1. When an English testator speaks of "the children" of a named person, he is, *prima facie*, taken to be referring and referring only, to those persons of whom it can be postulated that they are the lawful children of the named person.

2. Adopted children are *prima facie* excluded by this rule equally with illegitimate children.

3. If a different intention is to be attributed to a testator, so far as adopted children of foreign domicile are concerned, the presumption of exclusion should not be departed from further than necessary so as to include classes of adopted children who were beyond the testator's contemplation.

4. The status and capacity of adopted children to take is fixed once for all at the testator's death and subsequent legislation in the country of their domicile enlarging their right is to be disregarded.

5. Only those who are placed by adoption in a position, both as regards property rights and status, substantially equivalent to that of the natural children of the adopter can be treated as within the scope of the testator's contemplation.

However, it does seem that there is a general principle applicable to the far wider sphere of the incapacity of the non-natural child for taking gifts under a will. The general principle, therefore, deducible from the case seems to

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[23] (1871) L.R. 2 P. & M. 268.

[24] *Id.* at 271.

[25] It is suggested, as has been shown, that this statement is also applicable to legitimation and artificial insemination. It is part of the broader principle that the status of a child suffering some legal disability as opposed to a natural child depends on the state of the law of the domicile of the child at the time when the right or duty under consideration becomes effective.

be that the status of a child who is under some legal incapacity, as opposed to a natural child, depends for the purposes of inheritance and succession on the state of the law, both legislative and otherwise, at the time when the instrument under which it takes becomes effective, and all subsequent alterations as to status must be disregarded.

The application of the principle mentioned above to the laws of adoption and legitimation has, through the refusal to accept the decision in *In re Wilson* and *In re Wilby*, been considered and exhaustively discussed by the critics,[26] and in the light of *In re Marshall* some accurate observations have been realised. However, the sphere in which we can expect the most pronounced developments in the ensuing years is that concerning artificial insemination which, as will be shown, possesses the difficulties inherent in both adoption and legitimation and, therefore, may be used to illustrate all the possible contingencies which may arise as a result of the principles discussed in *In re Marshall*.

Contrary to popular belief, artificial insemination of human beings was not first discovered in the mid-twentieth century. Indeed, John Hunter, an Englishman, was the first known man to impregnate a woman by artificial means, about the year 1790. Though the cases were not frequent, artificial insemination was certainly practised in the nineteenth century, and by 1918 had become an established practice. It can now be considered, at least in the United States, that artificial insemination, where the circumstances warrant recourse to it, is a widely used practice and the law must be created or adapted to deal with the difficulties it produces.

Lord Wheatley in *Maclennan* v. *Maclennan*[27] defines artificial insemination as "the process whereby the seed of the male is extracted from the male body, enclosed in a receptacle and subsequently inserted into the female sexual organ, presumably by means of a syringe, thereby reproducing in the end the same result as follows from the natural and unrestricted act of full sexual intercourse." From this definition it may be observed that there are three possible forms of artificial insemination, namely, where the seminal fluid used is that of the husband (A.I.H.); where it is that of a third party donor (A.I.D.); and confused artificial insemination (C.A.I.), where the fluid used is that of both.[28] married to a person other than the father of the child may now, by statute, be rebutted by evidence of adulterous conduct or of non-access by the husband.[29] Clearly, provided the husband consents,[30] an A.I.H. child must be legitimate, and, it is submitted, no problems arise from this form of artificial insemination. It is also obvious that, as a C.A.I. child constitutes elements which may be considered both legitimate and illegitimate, it will often be necessary for the court to decide the question of legitimacy on factual evidence given by doctors, that is, blood tests; however, where a doubt appears, the child will probably be held illegitimate. It appears that an A.I.D. child must be held to be illegitimate. It is relevant at this stage to state that the present practice of artificial insemination is carried on in the utmost secrecy, and it is from this factor that we obtain a connection with the principles laid down in *In re Marshall*.

Where, under this cloud of secrecy, a husband consents to the A.I.D. of

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[26] See articles cited *supra* n. 10.

[27] 1958 Scots L.T. 12, 13. See G. W. Bartholemew, "Legal Complications of Artificial Insemination" (1958) 21 *Mod. L.R.* 236.

[28] See G. P. R. Tallin "Artificial Insemination" (1956) 34 *Can. B.R.* 1, 7-8.

[29] The rule in *Russell* v. *Russell* (1924) A. C. 687 has been abolished by statute; Matrimonial Causes Act, 1950 (Eng.), s. 32. See also Evidence Act, 1898 (N.S.W.), s. 14D (inserted Act No. 35, 1954); Matrimonial Causes Act, 1929 (S. Aust.), s. 40; Evidence Act, 1910 (Tas.), s. 95.

[30] Consent must not be gained by fraud or false pretences such as in the case where the husband believes his seminal fluid is being used for some purpose unrelated to insemination of his wife with a view to her conceiving a child, when, in fact, it is intended only for such use. Many other examples may occur which could cause problems through the husband's unawareness of A.I.H., e.g., the seminal fluid being taken while under anaesthetic.

his wife, can it be said that the resulting child is informally adopted by him? As the procedure of a formal adoption would involve a disclosure of all the parties, would the courts be justified, in a question concerning the rights of an A.I.D. child to inherit through its mother's husband, in giving the child the status of a formally adopted child? The argument that consent to A.I.D. is tantamount to a formal adoption and confers legitimate status on the resulting offspring, met with the approval of Greenberg, J. in the American case of *Strnad* v. *Strnad*.[31] However, turning to the *In re Marshall* principles, it would appear to be a fraud on the testator,[32] in facts similar to *In re Marshall*, for an A.I.D. child conceived with the consent of the husband, and not of the husband's blood, to take a gift expressed to be for the children of the husband. Can such a child, without legislative affirmation, be considered to be a member of the "husband's family" for the purpose of inheritance?

It would seem, in conclusion, with regard to children conceived by A.I.D. and C.A.I., that unless the consent of the husband is treated as creating a quasi-formal adoption in law, it will be necessary for the legislature to provide for such cases by bringing the law on artificial insemination[33] into conformity with that on adoption and legitimation as regards the application of general legal principles such as those raised in *In re Marshall*.

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MEASURE OF DAMAGES FOR NON-ACCEPTANCE OF GOODS

THOMPSON (W.L.) LTD. v. *ROBINSON (GUNMAKERS) LTD.*
CHARTER v. *SULLIVAN*
INTEROFFICE TELEPHONES LTD. v. *ROBERT FREEMAN CO. LTD.*

The state of the law concerning the measure of damages for non-acceptance of goods has been considerably clarified by a number of recent English decisions. In these the courts have examined the true meaning and scope of s. 50 of the Sale of Goods Act, 1893,[1] taking into account the effect of trade-protection and price maintenance agreements on the concept of an "available market", and also the applicability of the principles deduced from the section to cases of hiring as well as to the sale of goods.

The first recent decision is of Upjohn, J. in *Thompson (W.L.) Ltd.* v. *Robinson (Gunmakers) Ltd.*[2] Here the defendant company refused to accept delivery of a new Standard Vanguard car, which they had contracted to buy from the plaintiffs, who were dealers in motor cars. Under an agreement with the manufacturers, the plaintiffs were only permitted to sell new Vanguard cars at a price fixed by the manufacturers, the Standard Motor Company, and their profit on a sale was also fixed. At the time of non-acceptance there was

[31] (1948) 78 N.Y.S. (2d.) 390.

[32] See Lord Denning, "London Times", Feb. 27, 1958, p. 12. In the course of a discussion on A.I.D., Lord Denning said "that if this practice was done openly and without concealment there was no law against it, but if it was accompanied by secrecy and deception, it was unlawful. It was a criminal conspiracy. The child so produced was illegitimate. If the wife and doctor agreed to pretend the child was legitimate, they were guilty of a wicked conspiracy. If they did it without the knowledge or consent of the husband, it was a gross fraud on the husband. Even if the husband did know and consented it was no longer a fraud on him, but was it not a potential fraud on others?"

[33] See Debate in the House of Lords, "Artificial Insemination" (1949) 161 *Parliamentary Debates* (Lords) 386, 410.

* See the *In Memoriam* Notice *supra* p. 3.

[1] Section 50 of the English Act 56 & 57 Vic., c. 71 is reproduced in the Sale of Goods Act, 1923-1953 (N.S.W.), s. 52.

[2] (1955) 1 Ch. 177.