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Louis Quarles

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THE LAW OF ADOPTION—A LEGAL ANOMALY

LOUIS QUARLES*

We all know, if we stop to think, that the law of adoption in Wisconsin is purely statutory. Have we ever considered why this should be the case, or whether it is in line with or out of line with the law on this subject in the various countries of the world? An attempt is here made to answer this question.

The fundamental law of the State of Wisconsin, aside from the written constitutions of the United States and the State itself, is of course taken from the common law of Great Britain. The procedure and practice of our circuit courts, Wisconsin being a code state, is taken from the State of New York. The probate practice of our county courts does not stem from the common law but from the ecclesiastical law, and the procedure there is taken from the State of Massachusetts. In matters of adoption we have no heritage from either the common law, the ecclesiastical law, nor from the civil law, but the matter is entirely statutory. Our statutory procedure in turn was likewise borrowed from Massachusetts.¹

The history and development of the practice of adoption of children is of extreme antiquity and great interest. In view of the antiquity and universality of adoption throughout the world, it is extremely surprising to discover the anomalous situation in England and the United States.

One of the best authorities we have on the practices and laws of ancient peoples and societies is Sir Henry Maine's "Ancient Law." He strips his analysis of primitive society of assumed theories of origin, such as "social contract," etc., and analyzes the facts objectively. He refers to the excellent description of the legal characteristics of mankind as found at the dawn of history in Homer's *Odyssey*:

"They have neither gathered for counsel nor oracles of law * * * and each one tells the law to his children and his wives, and they pay no regard to one another."²

*A.B., University of Michigan; senior partner of Lines, Spooner and Quarles, Milwaukee, Wis.; Member of Wisconsin Bar.

¹ *Hole v. Robbins*, 53 Wis. 514, 521, 10 N.W. 617 (1881); *Lacher v. Venus*, 177 Wis. 558, 567, 188 N.W. 613 (1922).

² Maine, *Ancient Law*, page 120. What has been rendered as "oracles of law" is the Greek word *θεμιστεις*, "themistes." These are separately given, isolated, divinely inspired judgments, or "dooms." See *ibid.*, pp. 3, 4, 7.

In trying to visualize the situation existing in primitive times, we must firmly realize that society then was not what it is assumed to be at present, to-wit: an aggregation of individuals, but was an aggregation of families. The unit for custom and juridical purposes was the family, not the individual. The family was considered as a continuing entity, one that never died. The patriarchal group was perpetual. If one member of the family committed sin, his children and his fellow citizens must suffer with him: the sin was that of the family. Evidences of this are clearly discernible in the Biblical punishment of "visiting the iniquity of the father upon the children, and upon the children's children, upon the third and upon the fourth generation."³

The family, being the primordial and indistinguishable unit, was formed of groups of citizens who claimed membership as founded on common lineage, but wherever we look (with the notable exception of Great Britain) we find the custom of admitting men of alien descent into and amalgamating them with the family. This constant adulteration of the unit seems to have caused no surprise whatever but to have been taken as a matter of course; in fact, as Sir Henry Maine says:

"... what it really illustrates is the efficiency with which Legal Fictions do their work in the infancy of society. The earliest and most extensively employed of legal fictions was that which permitted family relations to be created artificially, and there is none to which I conceive mankind to be more deeply indebted. If it had never existed, I do not see how any one of the primitive groups, whatever were their nature, could have absorbed another, or on what terms any two of them could have combined, except those of absolute superiority on one side and absolute subjection on the other. No doubt, when with our modern ideas we contemplate the union of independent communities, we can suggest a hundred modes of carrying it out, the simplest of all being that the individuals comprised in the coalescing groups shall vote or act together according to local propinquity; but the idea that a number of persons should exercise political rights in common simply because they happened to live within the same topographical limits was utterly strange and monstrous to primitive antiquity. The expedient which in those times commanded favour was that the incoming population should *feign themselves* to be descended from the same stock as the people on whom they were engrafted;"⁴

If any historical proof were necessary of the correctness of the maxim: "*In fictione juris semper aequitas existit*," it is found in the history of adoption. The effectiveness of this fiction is further expressed by Maine:

"... We must look on the family as constantly enlarged by the absorption of strangers within its circle, and we must try to re-

³ *Exodus* 34:7.

⁴ Maine, *op. cit.*, pp. 125-6.

gard the fiction of adoption as so closely simulating the reality of kinship that neither law nor opinion makes the slightest difference between a real and an adoptive connection. On the other hand, the persons theoretically amalgamated into a family by their common descent are practically held together by common obedience to their highest living ascendant, the father, grandfather, or great-grandfather. The patriarchal authority of a chieftain is as necessary an ingredient in the notion of a family group as the fact (or assumed fact) of its having sprung from his loins."⁵

One of the civilizations that has retained its primitive customs longer than most is that of the Hindus. With them the concept of wills and of adoption were closely interwoven:

"... Among the Hindoos, the right to inherit a dead man's property is exactly co-extensive with the duty of performing his obsequies. If the rites are not properly performed or not performed by the proper person, no relation is considered as established between the deceased and anybody surviving him; the Law of Succession does not apply, and nobody can inherit the property. Every great event in the life of a Hindoo seems to be regarded as leading up to and bearing upon these solemnities. If he marries, it is to have children who may celebrate them after his death; if he has no children, he lives under the strongest obligation to adopt them from another family, 'with a view,' writes the Hindoo doctor, 'to the funeral cake, the water, and the solemn sacrifice.'"⁶

The same concept shows up in Japan. The Emperor is the direct descendant of the sun and the male line is unbroken for thousands of years. You may ask: "How is this possible?" The answer is simple: "When there failed to be an heir one was adopted."

Adoption was practiced at a very early time among the Jews. We find that an abandoned Jewish baby was adopted by Pharaoh's daughter and named Moses.⁷ Also Esther was adopted by Mordecai.⁸

Adoption was well known to the Greeks. Thus Aeschines has given us an example where a man says: *ἰὸν ποιῶσθαι τινα* — "To adopt him as as son." At Athens adoption could be accomplished either during the lifetime of the adoptor or by his will. None but the independent citizen of responsible character could be an adoptor and then only when he was as yet without any male heirs.⁹ At first no special procedure other than consent was required, but, as usual, the state ultimately stepped in and regulations were made.

⁵ *Ibid.*, p. 128.

⁶ *Ibid.*, p. 185.

⁷ *Exodus* 2:5-10.

⁸ *Esther* 2:5-8.

⁹ Nettleship, *Dictionary of Classical Antiquities*, "Adoption."

"In Greece, in the interests of the next of kin whose rights were affected by the case of adoption, it was provided that the registration should be attended with certain formalities, and that it should take place at a fixed time, the festival of Thargelia."¹⁰

The Romans practiced adoption very generally and very widely. At Rome there were two kinds of adoption, but both required that the adoptor be male and childless. The first was known as *arrogatio* and applied where the person to be adopted was *sui juris*. In such cases the adoption must be sanctioned by the *comitia curiata*. The second form of adoption was adoption proper. That applied to those that were still under the rule of the father, the *patria potestas*, and were thus *alieni juris*, and was accomplished by the father going through the form of selling his son by a formal *mancipatio* to the adoptor, which was followed by the rendition of a judgment of adoption. As time passed many other limitations developed; e.g., women could be adopted but could not be arrogated. Neither could they adopt.¹¹ Finally codification took over.

"In Rome the system was in vogue long before the time of Justinian, and the ceremonies to accomplish the result were cumbered with much formality, but he reduced the system to a code, which simplified the proceedings. * * * The effect of adoption was to cast the succession on the adopted in case the adopting father died intestate."¹²

Probably the earliest record that we have of adoption, but which emphasizes its extreme antiquity because even at that period (over 2000 B. C.), it had become codified, is Art. 185 of the Code of Hammurabi: "If a man take a child in his name, adopt and rear him as a son, this grown up son may not be demanded back."¹³

Turning our attention now to more modern times, there are two European jurisdictions that provided for adoption and which have had direct import on the law in parts of the United States. The first of these is the French and the second the Spanish. The French is found in the Code Napoleon, Art. 350, which provides in substance that inquiry must be made by a court, the adoptor must be of good reputation and the act of adoption must be published and registered. Oddly enough the adoptive parent must be fifty years of age and the adopted child must be under twenty-one.¹⁴

¹⁰ *In re Session's Estate*, 70 Mich. 297, 38 N.W. 249. "Thargelia" was the principal feast of Apollo in Athens and was held on the seventh day of Thargelian (May or June). The celebrated birthday of the god was originally connected with the ripening of field produce.

¹¹ Nettleship, *op. cit.*, "Adoption."

¹² *In re Session's Estate*, 70 Mich. 297, 38 N.W. 249.

¹³ Davis, *The Codes of Hammurabi and Moses*, p. 82.

¹⁴ *Encyclopedia Britannica*, "Adoption."

In Spain the proceedings were provided by Title 16 of the Spanish Code, the "Siete Partidas." They were very similar to the French rules as to procedure and specified that the person adopted succeeded as heir to him who adopted him.¹⁵

Adoption plays a most important part in German society and is regulated by a number of elaborate and carefully drawn code provisions, and as in the case of France, provides for the action of a competent court tribunal.¹⁶

Probably the most unusual provision is found in West Australia: "Adoption is also provided for in the legislation of the British dominions. In West Australia, for example, a male may be adopted by a man 18 years his senior, or by a woman 30 years his senior, or a female by a woman 18 years her senior or a man 30 years her senior."¹⁷

In view of the almost universal recognition of adoption throughout the civilized world, and undoubtedly the uncivilized as well, it is passing strange that in Great Britain there should be a complete *lacuna* in the common law. In fact, it was not until the passage of the British Adoption of Children's Act in 1926 that a definite system of legal adoption was introduced to and put in force in Great Britain. The procedure therein follows in general that of the Roman law.¹⁸

This analysis has already been extended to unwarranted lengths. One should not attempt to pile Pelion on Ossa. Hence to the moral that adorns the tale. The United States, as we all know, adopted the common law of Great Britain in force at the time of separation from the mother country in 1776. No provision being found therein for adoption, we have no common law on the subject in those states of the United States which, like Wisconsin, base their jurisprudence on the British common law. There are, however, two states — and two only — which do have provisions for adoption as part of their legal inheritance, to-wit: Louisiana, which follows the French civil law, and Texas — a former country which was united to us by treaty — which follows the Spanish law. In all the rest of the states the matter is purely statutory. Clearly so in Wisconsin!¹⁹

There was no general provision for adoption in Wisconsin prior to 1858 and up to that time no one could legally adopt a child, except through the enactment of a private law. The earliest public statute on adoption in Wisconsin is Chapter XLIX, R. S. 1858; now Chapter 322 of the Statutes.

¹⁵ *Vidal v. Commagère*, 13 La. Ann. 516, 518; *Hockaday v. Lynn*, 200 Mo 456, 98 S.W. 585, 8 L.R.A. (ns) 117 (1906).

¹⁶ *Enc. Brit.*, tit. "Adoption."

¹⁷ *Ibid.*

¹⁸ *Ibid.* "2 Poll. & Mait. 399. Charles Dickens, a great legal historian, in Chapter IX of *Our Mutual Friends*, says: 'The Buffins adopted Bella Wilfer.' He refers to no legal procedure, and it seems to be completely extra-judicial."

The constitutionality of our adoption statute has even been challenged. Our Supreme Court has held that a statute changing the line of descent of property from the natural to the adoptive parents was constitutional.²⁰

The absence of any common law background means that the statutes must be strictly construed or the proceedings fail. There is no give and take, for, as Mr. Justice Holmes once said: "We must turn square corners." Thus it has been held that failure strictly to comply with the statute cannot be cured by the application of principles of equity:

"In order to constitute one an adopted son of another there must be judicial proceedings to that end conformably to the statute. Equity has no power to declare an adoption. The common law was and is a stranger to adoption proceedings * * *"

"It is admitted by the trial court and the respondent that the law relative to adoption has not been complied with, but it is sought to cure the defect by the application of an equitable principle. * * * But we have only one way of making an adoption, and that is to follow the statute. Clear mandatory statutory proceedings do not permit of equitable repeal."²¹

The statute providing that the child shall inherit from its adoptive parents has been strictly construed under the doctrine of *expressio unius est exclusio alterius* so as not to include inheritance by the child from the parent's kindred.²²

An illustration of the harsh effects of the application of the doctrine is seen in a case arising because of the statutory mandate which provides that the petition for adoption be made by the husband and wife. In this case the wife was an incompetent and it was held that the adoption was void.²³ Similarly, in a case where an order of adoption was made on the petition of a man who was in fact married but which fact was not disclosed. When it later appeared in connection with the devolution of title to property that he had been married at the time, the order of adoption was held to be invalid and without jurisdiction.²⁴

The statute is all-inclusive. For example, it has been held that adoptive parents can no more surrender rights in or modify the status of a child by contract than can natural parents under similar conditions.²⁵

Although the statute controls as to intestate succession it does not necessarily do so as to testate succession. Thus, the question arose in construing a will leaving a life estate to a granddaughter and remain-

¹⁹ *Hole v. Robbins*, 53 Wis. 514, 521, 10 N.W. 617 (1881); *Lacher v. Venus*, 177 Wis. 558, 567, 188 N.W. 613 (1922).

²⁰ *In re Hood's Will*, 206 Wis. 227, 239 N.W. 448 (1931).

²¹ *St. Vincent's Infant Asylum v. Central Wisconsin Trust Co.*, 189 Wis. 483, 206 N.W. 921 (1926).

²² *In re Bradley's Estate*, 185 Wis. 393, 201 N.W. 973, 38 A.L.R. 1 (1925).

²³ *Adoption of Bearby*, 185 Wis. 33, 200 N.W. 686 (1924).

²⁴ *In re Bresnehan's Will*, 221 Wis. 51, 265 N.W. 93 (1936).

²⁵ *Stickels v. Reichardt*, 203 Wis. 579, 234 N.W. 728 (1931).

der to her children and descendants of such. The granddaughter had no heirs of the body but did have one adopted daughter, adopted long after the decease of the testator. Held that the question was not the power of the adopted child to inherit but one of fact, i.e., could the testator have been expected to contemplate an act of adoption by the life tenant — in this case not.²⁶ Ergo, if adoption by a beneficiary is contemplated, or adopted children are to be included, that probability or fact should be provided for in the will.

Probably the extreme case illustrating the strictness of the rule is found where the curative act of 1929 was under construction. In that instance the adoption proceeding concededly failed to comply with the jurisdictional provisions, but was claimed to be validated by the curative act subsequently passed by the legislature. Our court held that no subsequent legislation could constitutionally cure the original want of jurisdiction and the whole proceedings were invalid and void.²⁷

Enough has been said to demonstrate the anomalous situation of our law of adoption, a law which has no direct background or roots in custom or history. The result here, as is the case in the adoption of codes, is to fix a body of law that cannot develop spontaneously. Development must come from without. So far as the courts are concerned, construction of words takes the place of resort to justice and equity. Semantics are substituted for reason. The results are often harsh and unfortunate.

Being purely statutory procedure, the Wisconsin cases point up forcibly the absolute necessity of adherence to the letter of the law, for that is all that there is to follow. There is no opportunity to resort to custom or history, or spirit. Of such it cannot be said: "Not of the letter, but of the spirit, for the letter killeth but the spirit giveth life."²⁸ The failure to strictly adhere may result in the breaking up of a family by the sudden removal of a child that has been reared from infancy by adoptive parents, or, again, many years later may invalidate the descent of real or personal property. Is it not passing strange that the two greatest English speaking countries should have been so long out of step with the rest of the world in such an important and fundamental matter, and with such unfortunate results?

²⁶ *Lichter v. Thiers*, 139 Wis. 481, 121 N.W. 153 (1909).

²⁷ *Will of Bresnehan*, 221 Wis. 51, 265 N.W. 93 (1936).

²⁸ 2 Cor. 3:6.