ADOPTION

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ADOPTION is the legalised recognition of the child of other parents as one's own. According to Berlier, Adoption is "un atto di consolazione per l'adottante e un atto di beneficenza verso l'adottato".

In olden times, adoption was known in several countries but its functions were different from those which it has nowadays, inasmuch as it was a political and religious institution. In Ancient Greece, it was necessary that the adoptor should have no *male* children and that he should be fourteen years older than the person to be adopted. A man could adopt during his lifetime or by provision in his will; if he died intestate, without leaving a son, his next-of-kin stepped in, for it was in the interest of the state that a family be not extinguished.

Adoption was also known in Roman Law, which considered it necessary as a means to prevent the extinction of great names and families, and to keep alive the cult of family ancestors. Roman Law distinguished between "adoptio" (adoption proper) and "arrogatio" (arrogation). The former referred to the adoption of a person "alieni juris", that is, the person adopted had to be still under the father's control (patria potestas); in the latter case, the person adopted was completely independent (sui juris). In both cases the adoptor had to be childless, and in either case the result was that the adopted person passed entirely out of the fathers authority into that of the adoptor by formal purchase (mancipium). The adopted person took the full name of the adoptor, to which was added an adjectival form of his own gentile name. Women could be adopted but only if they were under paternal control, and could not themselves adopt. According to the texts of Roman Law "l'adozione imita la natura", and so the person intending to adopt must have had the physical capacity to procreate. This, however, disappeared during the Empire, when also women were given the right to adopt, though they could not exercise "patria potestas". In all times, the interference of public authority was considered necessary for the validity of arrogation, because it altered the common law of

family, and this alteration could not be effected unless by means of a special law.

Legal adoption of children was unknown to English Law until the Adoption of Children Act, 1926. In this respect English Law resembled French Law. It is true that French Law recognised adoption, but under conditions rendering it impracicable: thus, the adoption of persons who were under age was inadmissible. Now, according to a French Law of 1923, persons under age may also be adopted. Under the Adoption of Children Act, above mentioned, only the adoption of a person under 21 is permitted. French and English Law differ from German Law inasmuch as in English and French Law, the Court, before granting adoption must be satisfied that it will be for the welfare of the person to be adopted, whereas such a requisite is unknown to German Law.

Several countries do not as yet recognise this institution, e.g. Holland and Portugal. In Russia adoption exists, but it is governed by rules which vary according to the different social classes. This institution of adoption exists also in our law, which includes under the denomination of adoption the act which according to previous law was called arrogation. According to our law, adoption is only allowed to those persons of either sex who have no legitimate or legitimated descendants, who have completed fifty years, and who are at least eighteen years older than those whom they intend to adopt. No dispensation is allowed as regards the condition that the adopting person must have completed fifty years. Such a dispensation may be allowed according to the German Civil Code. Our legislator has not allowed adoption in case of persons who have legitimate or legitimated descendants at the time of the adoption. Adoption in this case would be most detrimental to the rights of the legitimate or legitimated descendants, once that the law grants to the adopted child the same rights on the estate *of the adopted*, as those of a child born in wedlock. Moreover if a legitimate child is born to the adoptor after that the adoption has taken place, it would likewise be null, if the child had already been conceived at that time. This, at least, is the theory of Demolombe, Laurent, Aubrey and Rau, who state that in this case we should apply the rules "infans conceptus pro nato habetur, quoties de commodis ejus agitur". Thus, according to these authors, a child who is

only conceived is as much an obstacle to the adoption as a child born beforehand. Valette is contrary to this theory, for, as he states, the adopting person may be ignorant of his child's conception. As regards the manner of determining the time of the conception of the child, it is generally held that one should apply the rules of gestation, which are specified by law.

It is also noted that the law speaks only of "legitimate or legitimated descendants", and says nothing of "natural children". From this one can imply that adoption is allowed in case of a person who has a natural child.

Can natural children be adopted? The law in section 135 states that "the illegitimate children mentioned in Sections 129 and 130 may not be adopted by either of their parents". Sections 129 and 130 refer to adulterous, sacrilegous and incestuous children. Hence we may deduce that simple illegitimate children, that is, natural children who do not fall under Sections 129 and 130 can be adopted by either of either parents.

Persons in Holy Orders, or bound by a solemn vow taken on religious profession, are not allowed to adopt. More persons cannot adopt one person, and this to avoid dangerous rivalries between the adopting persons. Nor can one person have more than one adoptive child unless they are adopted by the same act. In the case of a husband and a wife both have the right to adopt at the same time. Italian Law requires the mutual consent of both spouses in this case, but no such mention is made in our law. The adopted child assumes the surname of the adoptor and *adds* it to his own. Thus, if, say, Carmel Borg is adopted by John Pace, the full name which the adopted child assumes would be Carmel Borg Pace, and not Carmel Pace Borg.

Adoption is a solemn act, and so at all times the interference of public authority was considered necessary for its validity. In our case adoption can only take place with the authority of the Court of Voluntary Jurisdiction, at the demand of the persons who wishes to adopt, who is to file a "ricorso" to that effect in the Registry of the Court of Voluntary Jurisdiction. The requisite documents are also to be attached. If the application is upheld, a decree to that effect is delivered. Generally, adoption is effected, or rather executed, by means of a public deed. In this case, the draft deed of adoption is filed in the said Registry, in order that it may be examined by the judge, who then fixes a

day for its publication with his intervention. The decree of adoption would have no effect before the aforesaid deed is executed.

The Registrar of the Court above-mentioned is then to register the adoption in the Public Registry, within fifteen days from the date of the said act, and to deliver to the Director of the Public Registry an authentic copy of the public act and of the decree containing the adoption. The Director shall then register the adoption by means of a note in the margin of the register of the adopted child's Act of Birth. The request made by the Registrar, the copy of the deed and of the decree are to be attached to the Original of the Act of Birth of the adopted child. The necessary alterations and addenda are to be made in the Index of the said Act of Birth.

The adoption or legitimation of any person whose Act of Birth may not have been registered in the Public Registry is to be made in a book destined for that purpose; and in any such registration ,any particulars required for the formation of an Act of Birth or such of them *as may be known* are to be stated. In this case, the Registrar is also to remit the aforesaid authentic copies to the Director who has to make a true copy thereof in a book kept for that purpose. The expression "that may be known", which the law makes use of in this case, and which refers to legitimations and adoptions of persons whose Act of Birth may not have been registered in the Public Registry, is important. As a matter of fact, in the case of persons whose Acts of Birth have been registered in the Public Registry, all the particulars necessary for the formation of an Act of Birth, are essential, and the law itself provides the way how to obtain the said particulars. However, in the case of the legitimation or adoption of persons, whose Acts of Birth are not registered in the Public Registry, all such particulars as are required for the drawing up of an Act of Birth, or such of them as may be known, shall be stated, (para. 3, Sec. 325). Thus, in the latter case under consideration, it is enough to gather all the possible information which tends to establish the particulars required for the formation of an Act of Birth. Thus, the information given orally or verbally by one of the parents, or a declaration made by them in a public deed, would be acceptable. The words "that may be known" seem to imply also that the production of

the adopted or legitimated child's Act of Birth, duly authenticated, is not a requisite which is absolutely essential for the registration of the Act of Adoption or of Acknowledgemnt. A ruling based on these principles was given by the Court of Revision of Notarial Acts in a case raised by the late Notary L. Gauci Forno who had asked the Director of the Public Registry to annotate a Legitimation relative to a child whose Act of Birth had not been registered in the Public Registry.

Section 326 of the Civil Code states than when a request for an annotation is made, an authentic copy of the public deed, judgment *or* decree, relating to the adoption, judicial declaration of paternity or maternity, or legitimation, is to be delivered to the Director of the Public Registry *by the part making the request.* From the wording of the law, one may argue that any person can make the request for the annotation of an adoption, so long as he delivers to the Director the documents required by law: however, Section 326 is closely related to Section 153, and so both sections are to be jointly interpreted. In fact, in the latter section the law imposes the duty on the Registrar of the Second Hall to register the annotation in the Public Registry within fifteen days from the date of the deed of adoption. Thus the party who makes such a request is always the *Registrar of the Court of Voluntary Jurisdiction.*

The law in the same section speaks of "judgment *or* decree". Once the law speaks of decrees, one has necessarily to understand decrees of our Court of Voluntary Jurisdiction. Should we interpret Section 326 extensively? If we were to do so, then the party making the request for an annotation of an adoption executed abroad, can produce an authentic copy of the act of adoption. However, that would be going too far, for the provisions of the law, in this matter, should be interpreted "strictissime". It is true that the law mentions "a copy of the judgement" in this section, but it is submitted that these words are to be connected with the following words of the same provision of the law, that is, "judicial declaration of paternity or maternity, or legitimation", and not with the word "adoption". It is the copy of the deed and the copy of the decree which refer to the adoption: the copy of the judgment refers solely to the judicial declaration of paternity or maternity, or legitimation.

Of course, we are not implying that an adoption which is

valid abroad, may not be valid also in Malta. However, because it is valid it does not necessarily follow that its annotation can be made in the Public Registry, by producing a document testifying to the adoption executed abroad. Our law, on this point, mentions only those documents required by the procedure prescribed for adoption in these islands; it does not state "or any other documents which may prove the adoption". Hence it is quite evident that Section 326 of our Code refers only to adoption in Malta. However, in my opinion, it might be possible, in cases of adoption executed abroad, to apply to our Courts asking that the necessary "exequatur" be given in order that the registration of such an adoption may be effected in Malta.

The law requires that the adoption be brought to the knowledge of the third parties, and it is for this reason that certain formalities are prescribed for the purpose of rendering it public. According to the Italian Law "l'adozione è *senza effetto*, se non è stata inscritta nel termine segnato dalla legge". No similar provision is to be found in our law.

Before concluding this survey on adoption, it may not be amiss to mention two cases thereon, which cropped up in Malta, and which fall within the field of Private International Law.

The first case (in which the writer happened to be the Notary appointed by the Court to draft the deed of adoption) concerns the adoption of an Italian child who was brought to Malta by a married couple when in Sicily some months ago. As soon as they reached Malta with the child, born of unknown parents, the married couple applied to the Court of Voluntary Jurisdiction in order to be authorised to adopt the child in question. The Judge of the said Court appointed Prof. V. Caruana to state his views on the matter. The learned lawyer pointed out in his report that the child could not be adopted before attaining the age of 18 years, as required by Italian Law, which was the only law applicable to the child proposed to be adopted. Italian Law, in fact, provides that "l'adozione non potrà in nessun caso aver luogo prima della maggiore età dell'adottato"; and this ,perhaps, owing to the fact that, if the law were to render persons under age capable of being adopted, it would have been necessary to reserve to the adopted person the right to renounce to the adoption, as soon as he will become of age according to law—which, of course, would render adoption very unstable.

Basing its ruling on the report of Professor Caruana, the Court of Voluntary Jurisdiction did not uphold the application. Eventually, the child attained 18 years, another application was filed, and the required authority was finally given.

As adoption affects the status of both the adopter and the adopted, the law which in practice is applied by most countries in cases of adoption which crop up in Private International Law, is that which refers both to the adopter and the adopted child. That means that both laws are to be taken into account; thus, capacity and formality are regulated by the personal law of both parties. If the law of the adopter and the law of the adopted child are conflicting, the adoption would be invalid, as in the case "Camenzuli vs. Camenzuli", in which our Civil Court held that an adoption purported to have been made in Ontario, Canada, by a Maltese domiciled in Malta of a child born in Canada was null and void, because the requisites established by Maltese Law were lacking. The Court quoted an article by F. A. Mann entitled: "Legitimation and Adoption in Private International Law", in which the writer held that "for the validity of an adoption, both the personal laws of adopter and person adopted must be satisfied".

Finally, it may be stated that in cases of succession, that is, if the adopting person dies, the law of the deceased's domicile at the time of his death should apply, and not the original law (the law of adoption).

KNOWLEDGE IS POWER

"My own experience convinces me that there is no branch of knowledge which does not at one time or another prove of service to the lawyer in his practice. Over and over again in the stress of advocacy I have found that information, which when I acquired it seemed to have no relation to my daily work, has suddenly come to my aid."

LORD MACMILLAN.