SUIT NO. P. 355 of 1963

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE HIGH COURT OF JUSTICE

IN PROBATE AND ADMINISTRATION

IN THE ESTATE of LINLEY AEOLA McCARTHY late of Clancarthy in the parish of Saint Andrew, Spinster, deceased intestate.

BETWEEN GLADYS RONA McCARTHY & KENNETH ROY McCARTHY (Administrators of the Estate of Linley Aeola McCarthy, deceased) PLAINTIFFS

A N D AILSA DAVIES
AMIE JOAN CONNOLLEY
MURIEL LILLENFIELD
JUSTIN OSCARD McCARTHY
AEOLA LOUISE RODD DEFENDANTS

Mr. David Coore, Q.C. and Mr. Emil George for the Plaintiffs.
Mr. V. Blake, Q.C. and Mr. M. Sloly for the First and Second Defendants.
Mr. R. Henriques for the Fourth and Fifth Defendants.

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- J U D G M E N T -

The Plaintiffs are the administrators of the estate of Linley Aeola McCarthy (hereinafter called "the deceased) who died intestate on the 26th December, 1961. The deceased was the daughter of Justin William McCarthy and his wife Louise Matilda both of whom died prior to the 26th December, 1961. The deceased, who died a spinster and without having borne any children, was one of eight children, another being Justin Byron McCarthy (hereinafter called "Byron"). On the 3rd October, 1903 Byron entered into a ceremony of marriage with Bertha May Hower in the State of New Jersey, U.S.A. At this time, however, he was lawfully married to Louise Henrietta McCarthy who had instituted an action in Divorce against him in the County of Philadelphia in 1901. This action was finalized on the 2nd October, 1905 when a Final Rule for Divorce was made absolute. The "union" between Byron and Bertha Hower produced two children, Justin Oscard McCarthy (hereinafter called "Oscard") born 30th January, 1904 and Aeola Louise McCarthy (hereinafter called "Louise") born 29th September, 1907, the fourth and fifth defendants respectively. It is with respect to the right, if any, of Oscard and Louise to share

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in the deceased's estate that the problem arises in this case.

Their entitlement to share in the deceased's estate depends solely on the answer to the question: are they to be regarded as the legitimate issue of Byron having regard to the provisions of Section 4(i)(v) and Section 5(i)(ii) and sub-section (3) of the Intestate's Estates and Property Charges Law, Cap. 166? As it so often happens it is a relatively simple matter to pose the question. What is not so simple, however, is to arrive at the right solution.

It is common ground that Oscard and Louise were of illegitimate birth. It is also assumed, I think, that they were legitimated as a result of an Order of the Court of Common Pleas No. 2 of the County of Philadelphia in the Commonwealth of Pennsylvania. I say "it is also assumed, I think", that they were so legitimated, in spite of the fact that there are certain aspects of the Order of Court that are far from clear, notwithstanding the expert evidence of Mr. Ginsburg contained in his affidavit sworn to on the 18th October, 1965. I set out three only of these matters:

(1) It appears that Section 17 of an Act of August 22, 1953 Pamphlet of Laws 1344 in Pennsylvania provides that the parties to a bigamous marriage shall, in the circumstances therein defined, be held to have been legally married from and immediately after the removal of the relative impediment. Nothing is mentioned as to the resulting status of any children whether born before or after the date from which the parties are to be held to be legally married except (1) in Mr. Ginburg 's affidavit wherein he says "that the import of the said Decree is that the children born of the union of Bertha Hower McCarthy and Justin Byron McCarthy are as a result thereof legitimated"... and (2) in the Order of Court itself where there appear these words, "and that the issue of the said marriage be, and they are hereby so declared and recognized and decreed to be t he legitimate offspring of the said Bertha May Hower.... and the said Justin Byron McCarthy...." In other words the marriage is held to be a legal and valid marriage from a particular date, namely, the 2nd October 1905 - at a date subsequent to the birth of Oscard.

/(2) It does.....

(2) It does not appear from the section, nor indeed from Mr. Ginburg's affidavit, whether the scope of the Act is limited in its operation to the Commonwealth of Pennsylvania, or whether, in view of its provision that the subsequent "marriage" should be entered into "pursuant to the requirements of this Act" the fact that this subsequent marriage was celebrated in the State of New Jersey offends against the section.

(3) It does not appear from the section that the Act has any retrospective effect whatever in the sense that it embraces "subsequent marriages" occurring before 1953, although Mr. Henriques so assumes, and he based some of his submissions at no little length on that assumption. Indeed when one examines the language of the section the conclusion seems almost inescapable that it predicates a subsequent marriage which is subsequent in time to the 22nd August 1953. What the section says is: "If a person, during the lifetime of a husband or wife <u>enters into a subsequent marriage pursuant to the requirements of this Act</u>" and thereafter the parties thereto do certain things, certain consequences follow. The section does not say "if a person enters or <u>has entered</u> a subsequent marriage" as indeed it could not, since a person could enter "a subsequent marriage pursuant to the requirements of this Act" only if such subsequent marriage took place after the Act came into operation and proclaimed its requirements. This raises the further question, namely, was Byron's subsequent marriage in New Jersey on the 3rd October 1903 a subsequent marriage entered into pursuant to the requirements of the Pennsylvania Act /of 1953? What are the requirements of this Act? Do they touch on questions of domicile, form, residence or any of the multitude of other factors that may arise in the lex loci celebrationis? It is not without some significance that the one case (although he says "cases") cited in Mr. Ginburg's affidavit was decided in 1962.

It is clear that a Court in Jamaica is not entitled to conduct its own investigations into foreign law where it has the benefit of expert evidence. Where, however, an expert witness refers to a foreign statute or decision, it is equally clear that the Court is entitled to look at such statute or decision as part of the evidence of that witness. See Conchav Murietta (1889) 40 Ch. D. 543. It is also true that if an expert's evidence as to effect of a foreign statute or decision is

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uncontradicted, the Court, as a general rule, is normally bound to accept his evidence. There is, however, a clear line of authority which shows that there is no inflexibility about this rule, and where, for example, the uncontradicted evidence is extravagant or obscure, the Court may reject it and examine the foreign statute or decision to form its own conclusion as to its effect. See Burger v. New York Life Assurance Co. (1926) 96 L.J. K.B. 930. To describe Mr. Ginburg's affidavit as obscure would, in my view, be the kindest observation that a Court could make of it.

I now pose this question: Assuming that a foreign Court has jurisdiction in the international sense will a judgment in rem of that Court be recognized in Jamaica if it lacked competence in the internal sense? It is clear that in the case of a foreign judgment affecting status - as is the case here - an English Court may itself raise and investigate the matter of competence of the foreign Court. See Papdopoulos v. Papadopoulos (1930) p. 55. In Castrique v. Imrie L.R. 4 H.L. 414 part of the headnote (at p. 456 of Morris' Cases on Private International Law 3rd Ed.) of which reads:-

> "A foreign Court has jurisdiction to pronounce a judgment in rem against a chattel if the chattel was in the territory of the foreign state at the time of the action."

Lord Chelmsford said -

> "To sum up my opinion in the words of Mr. Justice Blackburn, and the other learned Judges who concurred with him, 'I think the enquiry is, first whether the subject matter was so situated as to be within the lawful control of the State under the authority of which the Court sits; and, secondly, whether the sovereign authority of that State has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the Court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world'".

That status is a res is made abundantly clear by Lord Dunedin in Salvesen v. Administrator of Austrian Property (1927) A.C. 641 where in dealing with the status of marriage he says -

> "Neither marriage nor the status of marriage is, in the strict sense of the word, a res, as that word is used when we speak of a judgment in rem. A res is a tangible thing within the jurisdiction of the Court, such as a ship or other chattel.

/A metaphysical......

> "A metaphysical idea, which is what the status of marriage is, is not strictly a res, but it, to borrow a phrase, savours of a res, and has all along been treated as such."

The same principle would apply to the status of legitimacy or illegitimacy.

In Pemberton v. Hughes (1899) 1 Ch. 781, Lindley M.R. said -

> "English Courts look to the finality of the judgment and the jurisdiction of the Court, in this sense and to this extent - namely, its competence to entertain the sort of case which it did deal with, and its competence to require the defendant to appear before it. If the Court has jurisdiction in this sense and to this extent, the Courts of this country never enquire whether the jurisdiction has been properly or improperly exercised..."

Pemberton's case involved a foreign decree of divorce which is analogous to a judgment in rem as affecting status. It is clear that both Lord Chelmsford and Lindley M.R. regarded the internal competence of the foreign court as material, and as a fact to be established by evidence, and this accords with other authorities.

What assistance can I derive from Mr. Ginburg on the question whether the Pennsylvania Court was competent in the above sense to pronounce a decree validating a "subsequent" bigamous marriage which in the terms of the Act of 1953, on which the decree purports to be founded, is required to be entered into in pursuance of the requirements of that Act, when that subsequent bigamous marriage took place some fifty years prior to the passing of that Act, and in another jurisdiction, and, what is decidedly important, when the decree is made some twelve years after the death of the husband? The answer is precisely none. Mr. Ginsburg may well be an expert on the laws of Pennsylvania but I regret that his supreme vagueness and silence on this aspect of the case has not been to the advantage of either Oscard or Louise, as I am not at all satisfied as to the competence of the Pennsylvania Court to make the decree that it did make in 1964.

There is exhibited to the affidavit of Gladys Rona McCarthy, one of the Plaintiffs herein, sworn to on the 5th February, 1966, a letter dated April 30th, 1925 and written by Oscard to the deceased. An examination of this letter, among other things, compels me to question whether, assuming Byron to have been alive when his "second" wife filed her petition, he (Byron) would have sat by in silence and allowed the subsequent marriage to be declared valid with the resulting change in the status

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of his illegitimate son. Taking this view of the expert evidence, as I feel constrained to take, it follows that I must hold that I cannot recognize the Declaratory Order of the Court of Common Pleas. It follows further that Oscard and Louise cannot be held to qualify to share in the deceased's estate.

There are several other aspects of Mr. Ginburg's affidavit and of the Order itself that are quite unsatisfactory but I do not pursue them.

If, however, my conclusion is wrong I deem it advisable to go on to consider the problem in the light of the submissions made and the arguments advanced.

The truth is that it is not Section 17 that is retrospective. It is the Order of the Court of Common Pleas that would appear to have some retroactive effect but in the context of the main issue of the case before me the question arises - to what point of time does this retroactive effect extend in terms of the legitimation of Oscard and Louise? Does it, for example, extend in the case of Oscard to the date of his birth when the "subsequent marriage" is held to be valid only from the 2nd October 1905? The Order itself is silent. If Mr. Ginburg's affidavit is examined closely it becomes arguable from the words "are as a result thereof legitimated" that the legitimation takes effect from the date of the Order. It is also arguable that since the subsequent marriage is declared to be valid from the 2nd October 1905 that legitimation takes effect from that date in the case of Oscard and from the 29th September 1907 in the case of Louise. It is a most remarkable state of this case that the expert evidence should be so strangely silent on these relatively important matters. The result is to becloud certain vital issues that I am called upon to resolve.

Assuming, however, and contrary to the conclusion at which I have arrived, the proof of this competence of the foreign Court to m[illegible] the Decree, and assuming further, that Mr. Ginsburg means that the effect of this Decree is to legitimate Oscard and Louise at any rate from the 2nd October 1905 and the 29th September 1907 respectively, the vital question now posed is: Must this Court recognize this legitimation so as to qualify Oscard and Louise to share in the deceased's estate?

/Mr. Henriques........

Mr. Henriques contends that there are three ways in which a person may be legitimated, namely, by subsequent marriage, by recognition, and by adoption. He contends further that the problem arising on the facts of this case brings it within the second, and not the first or third means of legitimation. I agree entirely with Mr. Henriques that there is no question here of legitimation by subsequent marriage. Whether or not there is, in the field of Private International Law, a place for a means of legitimation by adoption as Professor Cheshire argues, I do not regard as having any relevance here although I have my own reservations. What is indeed of paramount importance is whether this is a case of legitimation by recognition t all. I confess to very grave difficulty in appreciating that the problem here is one of legitimation by recognition. I do not propose to catalogue the several reasons which compel me to the view that the question in this case is a simple question of legitimation by Decree and no more, except to observe that the only form of legitimation by recognition discussed in the several text-books on Private International Law under this head is legitimation by parental recognition. Indeed, In Re Luck's Settlement Trusts (1940) Ch. 864 is the only reported English case on which the Court has had to consider the effect of legitimation otherwise than by subsequent marriage. Re Luck, in spite of Mr. Henriques' submissions as to the confused thinking of Green M.R. and Luxemore L.J., was clearly a case of legitimation by parental recognition notwithstanding the use of the word /adoption. In fact, in his article at 57 L.Q.R. 119, Mann demonstrates quite clearly that the Californian process was not adoption but legitimation by recognition. Cheshire adds this footnote on p. 518 of his 3rd edition:

> "The unwary might assume from the judgments in the Court of Appeal that it was equivalent to adoption in the English sense."

With respect, Mr. Henriques, though citing Mann, chose to ignore Cheshire's advice.

Taking this view, I pass on to consider what system of law must determine whether legitimation by the Decree of a foreign Court is effective or not. I have been unable to find any reported case in which this problem has arisen.

/I pause here.......

I pause here to make three observations, namely:-

(i) That there is not the slightest suggestion in the affidavit of Mr. Ginsburg that the legitimation of Oscard and Louise was effected by Section 17 of the Act of 1953. What he appears to say is that the legitimation resulted from the Decree of the Court of Common Pleas. For this reason I can extract no real assistance from the dissenting judgment of Scott L.J. in Re Luck's Settlement - so strongly urged by Mr. Henriques. The problem with which Scott, L.J. and his brothers were concerned was a foreign statute, as distinct from the Decree of a foreign Court, which specifically operated to legitimate from birth a child whose father had signed a declaration by which he publicly acknowledged the child as his and had adopted him as his legitimate son.

(ii) That our Legitimation Law Cap. 217 makes no provision whatever for the conflict of laws. It merely declares, without reference to any question of domicile that legitimation is to follow in certain circumstances. It differs fundamentally, therefore, from the English Legitimacy Act of 1926.

(iii) That the legitimation claimed in this case more closely approximates the legitimatio per rescriptum principis of Roman Law than any other method of legitimation recognized by our Law.

With these observations in mind I now refer to that part of the majority judgment of Greene M.R. and Luxemore L.J. in Re Luck (supra) at pp. 883-884:-

> "We may conclude this part of our judgment by a reference to the views of the late Professor Dicey. In the 3rd edition of his Conflict of Laws - the last in which his name appears as an editor - the following passage appears (at p. 532): 'What is the effect, according to English Law, of a person being made legitimate by the authority of a foreign sovereign? Suppose that a person born illegitimate is legitimated by a decree of the King of Italy, or under an Act of an American State, will such a person be held legitimate here? There is no English authority on the subject. The most probable answer is (it is conceived) that the effect of such a decree would, like the effect of a subsequent marriage of the parents, depend on the domicil of such person's father at the time of his birth and at the time when the decree was issued. Suppose, that is to say, that the child's father were domiciled in Italy at the time of the child's birth and at the date of the decree, then the decree would have the effect of making the child legitimate in England. If, on the other hand, the father were domiciled in England,

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"either at the time of the birth or at the date of the decree, the child would apparently not be legitimated in England thereby'. The view which he favours is the same as our own. In the 5th edition of the same work the learned editor, Professor Berriedale Keith, has altered this passage. The question which he formulates (at p. 570) is: 'Suppose that a person born illegitimate is legitimated by a decree of the Government of Italy, or under an Act of an American State, through declaration made by a parent or otherwise, will such a person be held legitimate here?' He says that 'very possibly the answer is simply "negative" and he then goes on to describe Professor Dicey's answer as a "possible" one, adding that "in view of the adoption by the Legitimacy Act, 1926, s.i., of the time of marriage as the decisive moment, it may be that the time of recognition would alone be deemed of importance and the domicil of the father at the time be deemed decisive.' We prefer the view of Professor Dicey and we cannot see that the terms of the Legitimacy Act can affect the matter."

It is important to recognize that the Legitimacy Act, 1926 does make provision for the conflict of laws and to that extent may appear to lend some colour to the reservation of Professor Keith, and perhaps to Professor Cheshire's observation that to prolong the life of the common law rule based upon the child's capacity at birth is a retrograde step.

It is equally important to appreciate that English Private International Law has evolved somewhat fixed rules relating to legitimation by subsequent marriage if only because that method of legitimation has for a very long time been fairly well known throughout the world. The same cannot be said of legitimation by recognition which is much less known and indeed practised in relatively few countries. I think it is accurate to say that the English Courts have never had to consider the method of legitimation claimed in this case and this would naturally account for the absence of any judicial pronouncement thereon. It is for this reason that Re Luck is not in my view any authority, binding or otherwise, for the several propositions argued in this case. As already observed, Re Luck dealt with the operation of a section of the Californian Civil Code which by its terms dealt specifically with the legitimation of a child by public acknowledgement of its father. There is not the remotest resemblance between this case and Luck's case. The section of the Pennsylvania Act of 1953 on which the Decree of the Court of Common Pleas purports to be founded is silent on any question of legitimation. It is the Decree itself that purports to bring about legitimation after

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the death of the husband. In Luck's case the legitimating act was the voluntary act of the child's father. These and a number of other differences render the two cases poles apart. The question whether the majority judges in Luck's case were justified in extending the principles evolved by Private International Law to the case of legitimation by parental recognition is, therefore, in my view, only of academic interest. In answer to Mr. Henriques, I would say that it is true that much of what has been written and said by way of criticism of the majority judgment in Luck's case appears to stem from the failure to appreciate that the judgment is of but limited application. I observe too that what has been in many places described as the powerful dissenting judgment of Scott L.J. has not escaped criticism either. Nevertheless, I think the true ratio of Scott L.J's judgment may be summed up as follows:-

> "Legitimacy is just a particular kind of status of which universality is its basic characteristic in Private International Law. David Luck's father, through his status of a man domiciled in California, had full personal capacity to confer on David whatever status of legitimacy in California the California statute intended should be created for his son's benefit."

There is obviously, great force in this view but at least it predicates the personal capacity of the father to confer on his son a particular status which, if the learned Lord Justice is right, must carry with it universal recognition.

The crucial difference in this case is that there was no father living in 1964 with the personal capacity to clothe Oscard and Louise with the status of legitimacy. It was left to mother to set the court in motion. The whole body of authority, and more particularly the opinions of the several jurists examined by Scott L.J., reveal no principle of any legal system whereby the mother of an illegitimate child can, by any recognized method - by statute or decree or otherwise - invest that child with the status of legitimacy.

Forgetting for a moment the principles of Private International Law which admittedly form part of the common law of England, and indeed of Jamaica, the legitimation of an illegitimate child did not find recognition in England until 1926 and in Jamaica until 1909. This demonstrates

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a very fundamental difference between English law and those systems which recognized only one method of legitimation, namely, by subsequent marriage. An illegitimate child remained so until death. The only admitted qualification to this strict common law rule involved the introduction of the idea of legitimation by the subsequent marriage of the parents of an illegitmate child where the law of the father's domocil at the date of birth and at the date of the subsequent marriage recognized such a method of legitimation. It is on this background that the passage (supra) cited from Dicey must be read. When Luck's case came before the Court of Appeal in England, that Court was undoubtedly free to found its decision on much broader grounds but it stood somewhat steadfastly within the limited scope of the common law and refused to recognize the legitimation of the child in that case. The common law has never been so extended. I have come to the conclusion that no principle or cause has been advanced in this case that would enable me to do something which quite clearly would be contrary to the established principles of English Private International Law.

I think the true solution to the problem is to be found in the passage cited (supra) from Dicey, and I am driven to the view that if the Decree of the Pennsylvania Court is to command recognition here it must be shown that the domicil of the father of both Oscard and Louise was Pennsylvanian, both at the time of their birth and at the time of the Decree. It is agreed that Byron had been dead for some twelve years at the date of the decree, so that the question of his domicil at the date of the decree cannot arise. As to his domicil at the date of the birth of Oscard and Louise I have not the slightest hesitation in concluding that, on the facts of this case and in accordance with the tests laid down in such cases as Ramsay v. Liverpool Roayl Infirmary (1930) A.C. 588, and Winans v. A-G (1904) A.C. 287, Byron was domiciled in Jamaica.

I now examine the facts I find proved and admitted with reference to this question of domicil. Byron left Jamaica for England on or about 1893 - 1894. After what appears to be about one or two years in that country, he proceeded to the United States of America where he studied dentistry, graduating in 1899. In September 1896 he married Louise

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Atha. . He went through a ceremony of marriage with Bertha Hower and arrived in Jamaica in or about 1901. It is clear that he made at least two trips back to Pennsylvania between 1901 and 1903. Between 1904 and 1910 or 1912, he made his first start to practise his profession with some measure of permanence in Jamaica. This is perhaps the most significant period in his life from the point of view of his intention. It is this period that affords any reliable guidance in finding the answer. There is not a single fact I can find that demonstrates any intention to regard Jamaica during this period, as otherwise than his permanent home. The fact that he returned to Pennsylvania in 1910 or 1912 does not, in my view, affect this issue. Indeed I am far from accepting that he did in fact acquire a domicil in Pennsylvania after his ultimate return to that country. I will concede that he may have done, but no more. His early years abroad studying dentistry, cannot be regarded in any other light than that he was then seeking to achieve a very particular result. Having achieved it, he made no effort to practise his profession abroad. It is suggested that he held certain jobs, assisting registered dentists. He may well have done but what consequences follow from this? Certainly, none that necessarily reflect any positive intention to make his permanent home in Pennsylvania. As Lord Macmillan said in Ramsay's case (supra) - "The residence must satisfy a qualitative as well as a quantitative list." And Turner L.J. in Jopp v. Wood (1865) 4 De G.J. & S. 616, observed:-

> "The mere fact of a man residing in a place different from that in which he has been before domiciled, even though his residence there may be long and continuous, does not of necessity show that he has elected that place as his permanent and abiding home. He may have resided there for some special purpose."

I find no merit, on the argument, that Byron's Jamaican domicil of origin had been displaced by 1905.

In my view, the facts that he returned to Jamaica with his bigamous wife, had two children here, sought to establish and practise his profession here, made no attempt to qualify himself to practise in Pennsylvania, did not realize his assets in Jamaica until his final

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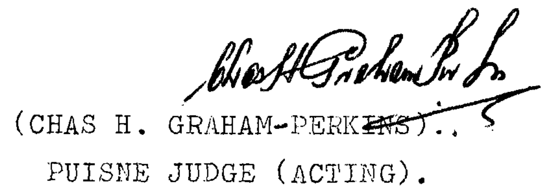
departure from this country cannot, in my view, be held to lead to any other conclusion than that up to 1910 or 1912 his domicil of origin remained unchanged. The peculiarly heavy onus of proving a change of domicil has not, I find, been discharged, and I hold accordingly.

The costs of these proceedings must be paid out of the estate subject to any previous order as to costs herein. There will be a Certificate for each Counsel who has appeared.

Dated this day of April, 1966.



(CHAS H. GRAHAM-PERKINS).
PUISNE JUDGE (ACTING).