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CONSTANTINO DIANELLO AND OTHERS v. KING'S ADVOCATE

King's Advocate. It appears by that case that in English law interest cannot be recovered by way of damages for the wrongful detention of a debt. The only cases in which interest on a debt may be allowed in English law, in an action for the debt, are three:

1. Where a contract provides for it.
2. Where there is a debt or a certain sum payable at a certain time by virtue of some written instrument.
3. Where a demand has been made in writing for the amount with notice that interest will be claimed.

Clearly therefore interest is not payable in this case under English law.

I agree therefore that the application must be allowed, without prejudice to the right of the Appellants in any subsequent proceedings to show any circumstances establishing a right to interest, which were not brought before the District Court in this case.

Application granted.

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[TYSER, C.J. AND BERTRAM, J.]

PHOKION TANO AND EUGENIA TANO
v.
GEORGI TANO AND OTHERS.

FAMILY LAW—SUCCESSION—ADOPTION—RIGHT OF SUCCESSION OF FOREIGNER TO MULK IMMOVEABLES—STATUS—PRINCIPLES OF OTTOMAN LAW GOVERNING STATUS OF NON-MOSLEM SUBJECTS AND FOREIGNERS—INTERPRETATION OF LAWS—PRINCIPLES GOVERNING INTERPRETATION OF WILLS AND SUCCESSION LAW, 1895—"LAWFUL CHILDREN"—WILLS AND SUCCESSION LAW, 1895, SEC. 43—HISTORY AND SOURCES OF THE LAW—REFERENCE TO OFFICIAL TRANSLATIONS OF LAWS AFFECTING SPECIAL COMMUNITIES.

The adopted child of a French father, though legally adopted according to the law of France, is not entitled to succeed to the mulk immoveables of his father situated in Cyprus as a "lawful child" under the provisions of the Wills and Succession Law, 1895.

According to Ottoman law, on the death of a non-Moslem Ottoman subject, or (in the case of immoveables) of a foreigner, questions as to the categories of heirs upon which his property devolves are determined by the law of the Ottoman State, i.e., the Sher', but questions as to whether any person possesses the status of any such category are determined by the law of the subject's religious community, or by that of the foreigner's State.

The decision of the Privy Council in Parapano v. Happaz (1894) 3 *C.L.R.*, 69, *considered and explained.*

According to the same principle, in the application of the Wills and Succession Law, 1895, *to estates of deceased foreigners expressions importing status are to be construed according to the law of the foreigner's State.*

The expression "lawful children" construed according to the law of France must be considered as equivalent to "les enfants légitimes," *and consequently as excluding* "les enfants adoptifs," *who in French law constitute a distinct category.*

The history and sources of the Wills and Succession Law, 1895, *considered and explained.*

PER TYSER, C.J.: *In interpreting a law of the Cyprus legislature affecting a particular community, where there is any ambiguity in the terms used, it is legitimate to have regard to the official translation of the law in the language of the community in question.*

This was an appeal from the District Court of Larnaca. The action being a foreign action, the Court was constituted by the President.

The only question in the case was whether the adopted son of French parents duly adopted according to the law of France, was entitled to inherit the mulk immoveables of his father as a "lawful child" under Sec. 43 of the Wills and Succession Law, 1895.

The President in giving judgment said:

"The Ottoman Civil Law seems to know nothing of adoption, "but it may be that Ottoman Courts would recognise such a doctrine, "if proved to exist in the ecclesiastical law of one of the subject races "of the Empire, as applicable to persons of that race and faith, and "if not in collision with some other law. But that is not the way "in which Phokion claims. He is presumably a Frenchman and a "foreigner and he claims as such. He cannot go beyond the Ottoman "Civil Law, and the Cyprus Statute Law, and in my opinion Sec. 25 "of the order in Council, 1882, and Sec. 4 of Law 20 of 1895, intended "to exclude the law of the domicile altogether, even on such a question "as Status." . . . .

"But Mr. Pascal goes beyond this and he says that Sec. 43 of the "above law, using the words 'lawful children' admits the inclusion "of adopted children, if such are lawful children by the law of their "domicile. Yet the same section goes on to say 'if there are no "descendants' living at the death of the deceased the parents and "collaterals come in. If an adopted child may be described as a lawful "child, I do not think he can be described as a descendant. This "law is expressed in English legal language and in that language an "adopted child is never called a descendant."

"I hold that the *lex situs* applies to the exclusion of any question "of status dependant on the law of a foreign domicile, and that the "*lex situs* applicable does not contemplate the succession of an adopted "son."

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The Plaintiff, Phokion Tano, appealed.

Neoptolemos Paschales for the Appellant.

Rossos for the Respondent.

The Court dismissed the appeal.

Judgment: THE CHIEF JUSTICE: I have read the judgment of Bertram, J., and I agree that it is purely a question of the construction of the law of 1895, and of ascertaining the meaning of the legislation.

The term "lawful children" in my opinion means "legitimate children." If there is any ambiguity in the term it is permissible to look at the translation in the language of those members of the Council whose constituents are affected by the law.

In this case the only persons affected are those who are not Moslems and the language of the members of the Legislative Council who represent them is Greek. In the Greek translation of the law the term "lawful children" is translated into "*νόμιμα τέκνα*". It is quite clear from a perusal of Armenopoulos and the other authorities that the term *νόμιμα τέκνα* does not include "*θετὸν τέκνον*"

It follows that an adopted son is not a lawful son within the meaning of the law.

BERTRAM, J.: The question which we have to determine in this case is whether in the application of Sec. 43 of the Wills and Succession Law, 1895, to the estate of a deceased French subject owning mulk immovables in Cyprus, the expression "lawful children" is to be construed as including an adopted child, and the word "descendant" as including an adopted descendant.

The answer to this question depends upon the principles according to which the law of 1895 is to be interpreted.

The law contains a great number of words and expressions indicative of status—"lawful children," "father," "mother," "brothers and sisters of the full and of the half blood," "husband," "wife," "nearest of kin," etc., etc. According to what law are these various expressions to be construed?

In *Parapano v. Happaz* (1894) 3 C.L.R., 62, we have already, on a question nearly related to that now under consideration, a decision on the principles governing the interpretation of the Intestate Succession Law, 1884. That law (with various modifications) has now been embodied in and forms part of the law of 1895. It is necessary therefore in the first place to enquire what is the effect of the decision in *Parapano v. Happaz.*

In *Parapano v. Happaz* the Court had to interpret the expression "legitimate children" in Sec. 23 of the Law of 1884 (now in the law

of 1895 changed to "lawful children"). The parties in the case in question were Latin Christians. "The first step in the contest" said their Lordships, "is to find out what is the law applicable to the "case; the Christian or the Mahomedan. The only Statute Law "bearing upon this point is that of the 11th April, 1884. By Sec. 16 "of that Law it is provided that the property of the deceased shall "devolve on all his legitimate children. This seems to narrow the "contest down to the one point of legitimacy. If legitimacy is "proved the right to succession follows. By what law then is the "legitimacy of a Christian Ottoman subject in Cyprus to be ascertained? "By Christian law or Mahomedan law?" Their Lordships finally held that the question was to be decided by the Canon Law of the Latin Church, and that accordingly the expression "legitimate children," incuded a child legitimised by subsequent marriage. In the head note of their judgment, its principle is stated to be that "by the Hatti "Humayoun of 1856, and the Cyprus Statute Law of 11th April, "1884, *succession is regulated by creed.*"

I confess that at one time I held the view that the effect of this judgment was that according to the law of the Turkish Empire among Christian subjects of the Porte the law of succession was in all respects not the Sher' law, but the law of the religious Community of the deceased person. My view was based partly upon certain unqualified expressions in the judgment of their Lordships, partly on certain observations in Savvas Pasha's "Théorie du droit Musulman," and Mr. George Young's "Corps du Droit Musulman," partly on statements in the works of Mr. Karavokyros that in all the four Patriarchates of the Greek-Orthodox Church the law in practice applied to questions of succession is the Byzantine law. On closer consideration of the subject however I have come to the conclusion that the judgment of the Privy Council must receive a somewhat narrower interpretation, and any expression of opinion of a wider nature which may appear in any of my previous judgments (more especially in the case of *Hypermachos v. Demetri*, 8 C.L.R., 53) must be regarded merely as *obiter dicta.*

The real scope of the judgment of the Privy Council may best be understood by a consideration of the actual practice which at the date of the British Occupation existed in Cyprus and still exists in the Turkish Empire. In the course of a recent visit to Jerusalem I made personal enquiries on this subject at the Sher' Court of Jerusalem, at the Orthodox Patriarchate, and among persons conversant with the practice in vogue among other communities. The result of these, no doubt imperfect, enquiries was as follows:—When any person dies

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in the Turkish Empire it is necessary that an inventory shall be made of his movables, and that both his movables and his immovables shall be distributed among his heirs according to law. If the person in question is a Moslem the regulation and administration of these matters is in the hands of the Qadi. If however he is not a Moslem—if for the sake of argument he is an Orthodox-Christian, and if he leaves no minor heirs ("the protection of the property of orphan minors "being indispensable to the dignity of the Imperial Ottoman Govern-"ment") the inventory is drawn up and the movables are divided by the Patriarch or the Metropolitan, or by persons acting by his authority. So far, to this extent, undoubtedly succession is regulated by creed. All this is settled in express terms by the well-known Vezirial Circular of 7 Safer, 1261. (Young, Vol. I. p. 323.):—

"The inventory of the succession of Christian-Ottoman subjects, "leaving major heirs, not being of the province or of the competence "of the Qadi and the Naib, these judges of the Sher' may not intervene, "nor interfere, for the purpose of drawing up the inventory according "to the Sher', so long as the major heirs of the deceased have not "themselves demanded the inventory and the partition of the estate."

The partition therefore of the estate remains in the first instance in the hands of the Ecclesiastical authorities. If any dispute arises in the course of the partition, it may, if the parties so desire, be determined by the Ecclesiastical Court established for the purpose of hearing such cases, or if the case has already been entered in the Civil Court, it may under the Hatti Humayoun on the request of both parties be referred to the Ecclesiastical Court. (See Hatti Humayoun, 1856, Art. 18.) But if it is not so referred the case is decided by the Qadi according to the principles of the Sher' law. Here too the Circular quoted is equally explicit:—

"Nevertheless if any one of the heirs complains of the manner "in which the partition is carried out, and has recourse to the Govern-"ment, in that case the Sher' Court has jurisdiction to enquire into "the matter *in accordance with the laws of the Sher'*."

There is one circumstance however which is of great importance. Before enquiring into the matter, the Qadi (if he has not been already furnished with it) requires from the Ecclesiastical authority a certificate stating explicitly who are the heirs left by the deceased, and (so I am informed) in ordinary circumstances he acts upon this certificate and distributes the estate according to the Sher' law among the persons indicated.

With regard to immoveables the case is somewhat different. The mulk immoveables are strictly speaking part of the "*tereke*," and

as such we should expect them to be divided among the heirs by the authority which partitions the moveables. In practice however the regulations in connection with the registration of mulk immoveables of 28 Rejeb, 1291, (See Ongley, p. 229, seqq.) seem to have altered this position. No inventory is made of the immoveables, but the heirs apply at the Land Registry Office for the registration of the immoveables in their names according to the irrespective shares. This application is (so I am informed) always referred to the Qadi, who then divides the immoveables of the various categories according either to the Sher' law or the Land Code, or other special legislation regulating their devolution. Here again if the deceased is a Christian, the Qadi (if he has not been already furnished with it) first requires a certificate from the Bishop or other Ecclesiastical authority enumerating the heirs left by the deceased and the distribution of the immoveables is based upon this certificate. If the deceased is a foreigner a similar course is followed.

This then (so far as I have been able to ascertain) is the historical position. The supposition that under Turkish law the distribution of property on death, so far as the actual partition is concerned, was governed by any other principles than those of the Sher' seems to be without foundation. It is true that the Turkish law allows disputes as to succession to be referred by consent to the religious authorities of the parties concerned, and when once a case is so referred the religious authority may by consent apply any law it chooses. The practice varies in different parts of the Empire. The statement of Mr. Karavokyros in his *Κώδιξ* and " Droit Successoral " that in such cases the scheme of distribution of the Byzantine law is applied in all the four Patriarchates of the Greek-Orthodox Church seems not to be correct. In the Patriarchate of Antioch (so I was informed by the Archbishop of Beirut) the Bishop applies the Sher' law, as the people prefer the principles of the Sher' law which only gives a half share to women, to the more enlightened principle of the Byzantine law which makes no distinction between the sexes. The same is true of the Patriarchate of Jerusalem. I was shown at Jerusalem the form of Commission there in use which is signed by the dragoman of the Patriarchate, and is addressed to a Committee charged with the duty of partitioning the estates of deceased Orthodox-Christians. This Commission directs the persons to whom it is addressed, in express terms, to proceed according to the Sher'. I have no information as to the actual practice of the Patriarchate of Alexandria, but in view of the provisions of the Egyptian Native Civil Code it is probable that the law applied is the Byzantine law. In Constantinople the Byzantine law (*i.e.*, the Roman law) seems

to have been applied continuously from the date of the fall of the city. Thus Theotokos in his "*Digest of Decisions of the Oecumenical Patriarch*" (*Νομολογία τοῦ Οἰκουμενικοῦ Πατριαρχείου*) quotes Patriarchal decisions of the year 1721, 1850, 1863, and later, in which the Byzantine law is applied to questions of inheritance. How far this is the case in districts remote from the capital it is impossible to say but the practice by which all transmissions of mulk immoveables on death (except under wills authorised by the special privilege accorded to the Orthodox church) has to pass through the hands of the Qadi seems to interpose an obstacle of Byzantine law to the partition of immoveables. If any partition on these principles is registered it is presumably done on the basis of an agreement between the parties. So also among the very considerable Jewish community of Jerusalem. I am informed that in practice while the moveables are divided according to the Mosaic law, the immoveables are divided according to the Sher'.

Historically speaking therefore the law seems to have been this, that subject to any agreement which might be come to between the parties concerned, the law of succession to property in Turkey, for Moslems and non-Moslems alike, was the Sher', but that it was the practice of the Turkish authorities, in regard to non-Moslem Ottomans to refer to the religious chief for a certificate enumerating the heirs, and presumably to accept that certificate.

As confirming this account of the actual practice I may perhaps refer to two documents cited in Young's "Corps des Droit Ottoman" with reference to the Armenian church.

The first is a Vezirial Circular of April 1st, 1891, and the material passage is as follows:—

"The Sher' Courts in matters of succession having, *ab antiquo* "the practice of requiring from the Patriarchate information as to "the heirs, the same procedure will in this instance also continue to be "followed."

The second is a note of the Armenian Patriarch addressed to the Porte on February 15th, 1895, in which he complains among other things that this practice is not observed:—

"According to the Christian religion religious marriage is alone "legal, and the right of inheritance belongs exclusively to children "born of this marriage. The status of heir therefore can only be "established and certified by the Ecclesiastical authority to which the "deceased person belongs. Nevertheless the Sher' Courts are issuing "'hujets' of inheritance upon mere casual testimony whereas they "ought to found them on information furnished by the Patriarchate."

One may remark in passing that while the above statement that " the right of inheritance belongs exclusively to children born of the " marriage " may or may not be true of the Armenian church, it is certainly an inadequate description of the principles observed by other communions.

Now the decision in *Parapano v. Happaz* must, it seems to me, be taken to be given with reference to that practice (which was presumably familiar to their Lordships) and to mean this:—that it is a principle of Turkish law, that in cases of succession, where it is necessary to ascertain the status of a person claiming to inherit, as father, mother, husband, wife, son, daughter, or as the case may be, the question is to be determined by the religious law of the community concerned, and that consequently all expressions in the law of 1884, relative to these statutes must be interpreted not by the Moslem law but by the law of the religious community.

This is of course what one might expect. The domestic institutions of Christians and Moslems are so different, and involve such divergent principles, that it is impossible to express the one in terms of the other. According to the system of the Sher' " marriage is a " contract for the purpose of legalising sexual intercourse and the " procreation of children." (Wilson, 7). It admits of a plurality of wives and a limited form of concubinage. According to the Orthodox church marriage is a religious sacrament and is essentially monogamous. It is natural therefore that the law should allow the status of a person with reference to a Christian or other non-Moslem marriage, to be determined by the religious law of the community.

This seems to be the principle which is intended to be enunciated by Savas Pasha (who as an ex-Minister of Justice may be taken as an authority on the principles recognised by the Ottoman Government) in his " Théorie du Droit Musulman, Vol. I. (p. 54), where he says:—

" The Moslem conqueror . . . therefore, without any offence " against his religion (' sans pécher ') refers all questions relative to " the ' *statut personel* ' of his non-Moslem subjects to the religious " authorities of these latter."

and again (p. 55):—

" Questions relative to the ' *statut personel* ' . . . are religious " questions . . . The Moslem legislator . . . knows that they " must be resolved by the religious tribunals of his non-Moslem " subjects."

It is not easy to define the exact scope of the questions which the Turkish law in theory allows to be decided by the law of the religious

community. I have given elsewhere my reasons for thinking that the phrase "*statut personel*" is not an exact description of the scope of these questions. In the almost complete absence of any authoritative jurisprudence on the subject, and in view of the divergence between theory and practice which is so well known a feature of Turkish administration, it would be hazardous to attempt an exact definition, but I think it may be roughly said that the scope of these questions corresponds to the sphere of matters incidental to marriage and family status.

Such then is the position of the law with regard to non-Moslem Ottoman subjects. But this is not the case of an Ottoman subject. It is the case of a foreigner, a Frenchman. What then is the position with regard to foreigners?

By the law of 1867 (13 Safer, 1284) one of the conditions on which the privilege of holding immoveables in Turkey was accorded to foreigners was that the succession to any immoveables acquired by them should be governed by Ottoman law. Now what is the practice pursued in regard to a foreigner who dies owning immoveables in Turkey? In such a case the place of the Bishop is taken by the Consul.

In the case of a death of an Orthodox-Christian the Turkish authorities require the Bishop to present a certificate as to the heirs left by the deceased. In the case of the death of a foreigner under the circumstances indicated they require a certificate of the heirs from the Consul and register the succession of the immoveables in accordance therewith. So too if an Orthodox-Christian has left a will disposing of his mulk immoveables, and if any question arises as to the validity of the will, it is referred to the Ecclesiastical authority, and if the Ecclesiastical authority certifies it as valid, effect is given to it. Exactly the same course is pursued in regard to a similar will made by a foreigner, with this difference that the certificate in this case is given by the Consul. (See Vezirial Circular of March 3rd, 1881. Young, I., p. 331).

The conclusion which seems to follow from this identity of practice is this, that just as in regard to non-Moslem subjects, the Turkish law allows questions of family status to be determined by the religious law of the subject's community, so in regard to foreign subjects it allows such questions to be determined by the law of the foreigner's State.

I am confirmed in this conclusion by finding that it is also the conclusion adopted by a modern work on the Turkish Land System, which is the work of a lawyer who has practised in Turkey, and which I have always found to be both exact and serviceable whenever I have

had occasion to consult it. I refer to " De la Propriété immobiliére " en Droit Ottoman " by Nedjib H. Chiha. The opinion of this author is as follows:—

" C'est donc la loi Ottomane que fixera le degré successible, désignera " les héritiers et determinera la part à dévolue chaque héritier, suivant " les règles du droit successoral Musulman, et des lois spéciales."

" Notons cependant que s'il appartient à la loi Ottomane de régler " la succession immobiliére de l'étranger mort *ab intestat*, il n'en est pas " moins vrai que les questions de statut personnel lui échappent " complètement. Ainsi, les questions d'état, *de filiation*, de marriage, " &c., concernant un étranger ou ses héritiers sont regies par le statut " personnel du *de cujus*, et échappent absolument à la jurisdiction " des tribunaux Ottomans, même lorsqu'il s'agit d'une succession " immobilière. Par consequent à la mort d'un étranger propriétaire " d'immeubles, les autorités Ottomanes ne doivent reconnaître comme " héritiers que les personnes reconnues comme telles par les autorités " étrangères dont relève le defunt. Par example, si ce dernier laisse " un enfant qui d'après sa loi nationale n'est pas légitime, les tribunaux " Ottomans ne peuvent pas décider que cet enfant est légitime d'après " la loi Ottomane et lui attribuer une part quelconque dans la " succession."

Now by the Wills and Succession Law, 1895, the Ottoman law in regard to the succession to certain classes of immoveables belonging to foreigners and situated in Cyprus has been amended. The succession of foreigners to immoveables situated in Cyprus must be regarded as governed by Ottoman law as amended by the law of 1895.

Applying therefore the principles above explained to this law, it follows that all expressions importing domestic status contained in that law must be interpreted according to the law of the foreigner's domicile. Thus, to take for an example the case considered in *Parapano v. Happaz*, if the deceased belonged to a country which recognised legitimation by subsequent marriage (such as France, Germany, Italy or Scotland) a legitimised son would rank as a lawful child. If the deceased belonged to a State which did not recognise the principle of legitimation (such as England or New York), a legitimised son would not so rank. That is to say, the expression " lawful child " must be interpreted according to the law of the foreigner's State.

This is indeed a general principle of international law recognised in all civilised countries. It is a principle which has been repeatedly recognised in England. Thus in *Dalrymple v. Dalrymple*, 2, Hagg. Cons. R. 58, it was said by Lord Stowell that by the law of England

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" the status or condition of a claimant must be tried by reference to the " law of the country where that status originated," and by Lord Wensleydale in *Fenton v. Livingstone*, 3 Macq., 547, " the laws of the " State affecting the personal *status* of the subjects travel with them " wherever they go, and attach to them in whatever country they are " resident." The application of this principle to the interpretation of an English Statute was considered in the case of *In re Goodman's Trusts* (1881) 17 Ch. D., 266. The Statute there in question was the Statute of Distributions, and the point at issue was whether in the application of the word " child " in that Statute to a person domiciled in Holland, the word was to be construed according to English or according to Dutch law. The conclusion was that the word must be construed according to the law of the person's domicile. There are certain words in the judgment of James, L.J., in that case which apply so aptly to the present that I will quote them.

" It must be borne in mind that the Statute of Distributions is " not a Statute for Englishmen only, but for all persons whether " English or not, dying intestate and domiciled in England . . . " And it was to provide for what was thought an equitable distri- " bution of the assets, as to which a man had, through inadvertence, " not expressed his testamentary intentions. And as the law applies " to persons of all countries, races, and religions whatsoever, the proper " law to be applied in determining kindred is the universal law, the "international law adopted by the comity of States."

Having determined the principle by which the law of 1895 is to be interpreted, let us now consider the law itself.

There can be no doubt that in enacting the law of 1895, the Legislature intended to create a Code at once new and complete. This Code was composed with scarcely any regard to the existing law, and its principles are eclectic. In so far as it relates to wills and administration it is based upon the law of England. In so far as it relates to intestate succession it is based upon the law of Italy. In so far as it excludes Arazi-Mirié and vaqf lands from its scope, it follows the law of Turkey. Yet in each of these cases it departs widely from its model, and makes throughout a number of alterations designed apparently to adapt the principles chosen as the basis of the measure to the special circumstances of the country. It is extremely unlikely that a legislature shaping a measure in this manner would have consciously left any point of importance to be supplied by implication. It seems clear that the measure was intended as a complete Code, exhausting the subject. This indeed is indicated by the words of Sec. 4: " This law shall regulate (*a*) the succession to property of all

" persons domiciled in Cyprus, (*b*) the succession to immoveable property " of any person not domiciled in Cyprus."

The only part of the Code with which we are here concerned is the Table of Intestate Succession, which is given in Sec. 43. We may perhaps be in a better position to interpret that Table of Succession if we review its history.

The task of composing a Code of the Law of Wills and Succession was in Cyprus accomplished in three stages. First, the Law of Intestate Succession was dealt with by the law of 1884. Secondly, the task was resumed by the law of 1894, which embraced the whole subject, and with certain modifications, embodied almost all the provisions of the law of 1884, re-drafting them in the process. Finally, for reasons unknown, in 1895 the law of 1894 was recast and redrafted throughout, but substantially re-enacted. The Law of 1895 is, in fact, simply the law of 1894, with a very few modifications of substance, but with very numerous changes in the drafting.

When the draft of the law of 1884 was first published in the Gazette, it was declared that the principles it embodied were those of the Roman law. (See *Cyprus Gazette* (Supplement) No. 129.) This is not quite accurate. The actual model for this part of the scheme, and indeed it would seem originally for the whole of it, was the Italian Civil Code. The Italian Law of Succession (embodied in Arts. 720, seqq. of the Code) is derived from the Roman, through the French, and not only is it much affected by the French customary law incorporated in the French Civil Code, but it also contains certain original matter of its own. Subject to these modifications, however, the scheme of the Italian Code in its main lines is based upon that of the Roman law, that is to say, upon the 118th Novel of Justinian.

The scheme of this Novel (and all modern Codes based upon it) is a series of successively exclusive Orders, and the first Order in all cases is the " Order of the Descendants."

Now in order to understand who are comprised in the " Order of the Descendants " we have to look at another department of law, namely the law of the family, and to a special branch of this department, namely the law of filiation.

Originally in Roman law only one class of son was recognised, the *filius familias*. A person might become a *filius familias* either by birth or by adoption, and in either case his status was exactly the same. Subsequent developments brought about a differentiation, and in modern times in all countries where the family law is based upon the Roman, the following categories of children are recognised,

(1) *Legitimate children, i.e.*, children born in marriage, (2) *Legitimised children, i.e.*, children who, though not born in marriage, have had the status of legitimacy conferred upon them by the subsequent marriage of their parents, (3) *Adopted children*, (4) *Natural children.*

Not only are all these categories recognised and provided for in all modern Codes, but they are also recognised by the religious law of the Orthodox Church, which is the family law of this Island. All these categories are definitely distinguished in Armenopoulos *Νόμιμα τέκνα, νομιμοποιηθέντα, θετὰ, φυσικὰ*. At one time the expression *φυσικὰ τέκνα* was confined to children born of a recognised concubine, but religious influences finally succeeded in extinguishing the status of the concubine, and in the modern Byzantine law the expression includes all children born out of wedlock.

In framing a new Code of succession therefore the legislature would naturally take all these categories into consideration. Let us now consider how it treated its Italian model.

The Italian Code confers certain right of inheritance upon all four categories. The legitimised child is assimilated in all respects to the legitimate child. The adopted child, so far as succession to the property of the adopting father is concerned is also in the same position as the legitimate child and transmits his own rights to his children, but has no right of succession to the property of his adopting father's kindred. The natural child (legally recognised) takes in concurrence with the legitimate children and their descendants, but is only entitled to a half share. He has also certain defined rights in concurrence with the other kindred, in cases where the deceased leaves no legitimate children at all.

How did the Cyprus legislature deal with these provisions? Influenced doubtless by the fact that in Cyprus the status of adoption is in practice obsolete, it cut out the reference to adopted children. Influenced perhaps by moral considerations, it also cut out the reference to legitimised children and eliminated altogether the articles defining the rights of the natural child (743-752). So far did it go in this direction that it even destroyed the right of the natural child to succeed to the property of its mother and we thus have the singular result that in Cyprus, as in England, the natural child is "*filius nullius*"—except, (so far as Cyprus is concerned) as regards arazi mirie.

The action of the Cyprus legislature, so far as adoption is concerned, may be clearly seen by exhibiting the Italian original and its Cyprus adaptation in parallel columns:

736. Al padre, alla madre a ad *ogni altro ascendente* succedono i figli legittimi, o i loro descendenti, senza distinzione di sesso, e quantunque nati da matrimoni diversi.

Essi succedono per capi, *quando sono tutti in primo* grado; per stirpi quando tutti o alcuni di essi succedono per rapresentazione.

16. The property of the *deceased shall devolve on all* his legitimate children though issue of different marriages, and on their descendants, *per capita* if all the heirs are of the first degree of kindred, but *per stirpes*, if any or all of them are of *a more remote degree*. In case of inheritance *per stirpes* those of a more remote degree take by representation (that is to say, etc., etc.)

737. Sotto nome di figli legittimi s' intendono anche i figli legittimati, gli adottivi e i lore discendenti.

Pero i figli adottiovi e i loro discendenti succedono bensi all' adottante in concorso anche dei figli legittimi, ma sono estranei alla successione di tutti i congiunti dell' adottante.

(Omitted in the Cyprus Law.)

738. A colui che muore senza lasciar prole, ne fratalle o sorelle, ne discedente da esse, succedono il padre e la madre in equali porzione o quello dei genitoric he sia superstite.

18. If a person dies without children and leaving neither brother nor sister, nor descendant of brother or sister his father and mother shall take the property in equal shares, or the survivor of them shall take the whole.

It will be clear to any one considering these parallel extracts that the legislature (or at any rate the draftsman) was closely following the Italian Code, and deliberately eliminated the words in the Italian Code, which secured the rights of adopted children. The inference is that under the Cyprus law adopted children were not intended to have any rights at all. As no such children exist in Cyprus, it was not thought worth while to make provision for them, and the facts *that the law was to apply to persons of foreign domicile as well as to* Cypriots, and that the families of such persons sometimes include adopted children, no doubt escaped attention.

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This inference however is not conclusive. Such was no doubt the intention of the draftsman. But the intention of the legislature can only be determined by the words it uses. The legislature cut out the words assimilating legitimised to legitimate children. Nevertheless the Privy Council has decided that the expression "legitimate children" is wide enough to include children on whom the status of legitimacy has been conferred by subsequent marriage of their parents. The question we must therefore ask ourselves is, whether the expression "legitimate children" is wide enough to include also adopted children.

Now according to the principle worked out in the earlier part of this judgment, in the application of the law to the estate of a deceased Frenchman we must interpret the expression "legitimate children" according to the law of France. The question therefore resolves itself into this, would the expression "legitimate child" in French law include an adopted child, or in other words, in French law has an adopted child the status of a legitimate child, or special status of its own?

Investigation of the French Civil Code (which was referred to by the experts on the French law called in the Court below and to which therefore we may perhaps refer) puts the matter beyond all questions.

The first Chapter of Title VII dealing with (*"paternity and filiation"*) is headed: "De la filiation des enfants légitimes, *ou nés dans le mariage.*" "*Les enfants legitimes*" are never spoken of as including "*les enfants adoptifs.*" The Chapter of the next Title, which defines adoption and its effects, nowhere says that adoption confers upon the adopted child the status of a legitimate child. It appears from a standard work on French law (Planiol, Droit Civil, 1569, seqq.) that the status acquired by adoption was a statutory creation of the French Civil Code, as adoption was altogether obsolete at the date of its completion, and that, speaking generally the adopted child has only such rights as are conferred upon it by the Code, though the Courts have shewn a disposition to extend them in one direction. That Mr. Planiol himself considers the adopted child as distinct from the legitimate child is shown by the following sentence from that part of his work dealing with the law of succession:—

A—*Ordre des descendants: Composition.* "Cet ordre, appelé "le premier à l'exclusion de tous les autres, se compose des enfants "et descendants légitimes, ou légitimés, et des enfants adoptifs."

That Mr. Planiol's use of the words is in accordance with that generally observed is also shown by the following extract from Mr. Karavokyros "Droit Successoral"—Droit Byzantine.

"Art. 216. A la mont de quelqu'un ses descendants, a savoir "ses fils et filles *légitimes ou adoptés legalement* sans la puissance "paternelle ou non, viennent en première ligne à sa succession."

It seems clear therefore that in French law an adopted son is not a "legitimate son."

But this does not entirely dispose of the question. In the law of 1894 (which embodies the law of 1884) the expression "legitimate children" is changed to "lawful children." Does this make any difference? In other words, was the word "lawful" intended to have a wider scope than "legitimate." At one time I confess that I was disposed to think that it was, but on further consideration I have come to the conclusion that the change (like many other changes in the law of 1894 and the law of 1895) was nothing more than a caprice of the draftsman. It does not seem that the judgment in *Parapano v. Happaz* can have had much to do with it, for the change first appears in the law of 1894, and the law of 1894 was passed before that judgment was delivered. I observe that in the Greek versions both "legitimate children" and "lawful children" are translated by the same words *νόμιμα τέκνα*, and I have no doubt that the Greek-Christian members of the Council regarded the words as synonyms. If we were to interpret the expression "lawful children" as meaning "children recognised by law" then we should have to hold that in many cases it would include "natural children" and this was clearly not the intention of the legislature.

The result is that the appeal in my opinion fails—but I wish to say that in so holding I speak solely with reference to French law. If the appellant had been a German I think that the result might have been otherwise. The common law of Germany is the Roman law. The status of adoption is not the creation of statute, and Art. 1757 of the German Civil Code expressly says: (I quote from the French version.)

"Par l'adoption, l'enfant acquiert la situation juridique d'enfant "légitime de l'adoptant."

I am disposed to think therefore that if the Appellant were a German he would have succeeded.

I have come to this conclusion with a certain regret. In the first place, I think it is a misfortune that our legislation, in its application to foreigners, should not recognise the domestic institutions of their countries. In France an adopted son is to all intents and purposes a son. He bears his father's name; his adoptive relationship is treated as a real relationship as an obstacle to certain marriages; he shares in the inheritance of his father's property. He is a real member of

the family. Even in Cyprus he takes his share in any of his father's moveables that may be in the country. Why then should our law refuse to recognise his sonship for the purpose of his father's mulk immoveables?

In the second place, I think it is to be regretted that the law of Cyprus in this particular should be out of harmony with the law of the Orthodox Church. Adoption is no doubt in practice obsolete in Cyprus, but it is still ecclesiastically possible. The *Μέγα Εὐχολόγιον* of the Orthodox Church contains a regular adoption service, the *Ἀκολουθία τῆς Υἱοθεσίας*. Any man who goes through the ceremony of being adopted according to this service becomes in the eye of the Church a son in the fullest sense of the word. The relationship is recognised as real relationship by all provinces of the Orthodox Communion, and is part of the family system of the Churches of Constantinople, Alexandria and the Kingdom of Greece. If the adopted son of a person domiciled in any of these places claimed to inherit the mulk immovables of his father in Cyprus, his sonship, though recognised by the Church, could not be recognised by the law.

I agree with Mr. Rossos however that in a codifying law of this kind the recognition of such a relationship cannot be implied—but must appear by the express words of the law—as the words of the Law seem to me insufficient for this purpose I am of opinion that the appeal must be dismissed with costs.

Appeal dismissed.

The case of *Rex v. Ianni Papa Antoni, Ex parte Georghi Haji Panagi*, reported in pages 107-111 of the original edition is no longer of any importance.