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The Ellis Case--Some Aspects of Adoption in the Conflict of Laws

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As the scope of the actions for interference with contract relations and prospective advantage increase, the corresponding scope for the use of the prima facie tort doctrine will probably be constantly diminished. Each case that deals with the doctrine seems to carve out some new area of privileged conduct or add a stricter interpretation of the elements of the prima facie tort. It would seem that the courts, in their zeal to insure that the doctrine would not get out of hand, have reduced it to relative impotency. If the doctrine of the *Reinforce* case is strictly followed, it is probable that the prima facie tort will be merely of historical significance.

THE ELLIS CASE—SOME ASPECTS OF ADOPTION IN THE CONFLICT OF LAWS

Introduction

Within the past year the Ellis adoption case has received nationwide publicity. After the Supreme Court of Massachusetts denied a petition by Mr. and Mrs. Melvin Ellis for adoption [1] of Hildy McCoy and rendered a custody decree in favor of the natural mother,[2] the petitioners removed the child from the jurisdiction and effected an adoption in Florida.[3] The case highlights certain aspects of adoption in the conflict of laws. This note will deal with two jurisdictional factors involved in the case. First, was the Florida court bound to accord full faith and credit to the Massachusetts decrees? Second, did the Florida court have the necessary jurisdiction to decree an adoption?

Facts of the Ellis Case

Pursuant to an agreement with Marjorie McCoy, upon the birth of her illegitimate child Hildy McCoy, the Ellises took the girl from the hospital with a view toward adopting her.

1955); Green v. Time, Inc., 147 N.Y.S.2d 828 (Sup. Ct.), *aff'd mem.*, 1 A.D.2d 665, 146 N.Y.S.2d 812 (1st Dep't 1955), *aff'd mem.*, 3 N.Y.2d 732, 143 N.E.2d 517 (1957); Dubourcq v. Brouwer, 124 N.Y.S.2d 61 (Sup. Ct. 1953), *aff'd*, 282 App. Div. 861, 124 N.Y.S.2d 842 (1st Dep't 1953); Lucci v. Engel, 73 N.Y.S.2d 78 (Sup. Ct. 1947).

[1] Ellis v. McCoy, 332 Mass. 254, 124 N.E.2d 266 (1955).

[2] See Ellis v. Doherty, 334 Mass. 456, 136 N.E.2d 203 (1956).

[3] *In re* Adoption of Hildy McCoy, Chancery No. 199852, N. Fla., July 10, 1957.

About one month later, on March 29, 1951, the Ellises filed a petition in Massachusetts Probate Court for her adoption. Marjorie McCoy moved that her prior written consent be withdrawn because of the difference in religion between the child and the Ellises. The court granted the motion and denied the Ellises' petition for adoption. In February 1954, the Massachusetts Supreme Court affirmed this decision and thereupon the Probate Court appointed Marjorie McCoy temporary guardian with custody of the child.[4] The Ellises did not obey the court decree but went to Florida with the child. Massachusetts requested extradition of the Ellises from Florida but Governor Collins refused.[5] Thereupon the Ellises petitioned the Florida Circuit Court of Dade County for adoption of Hildy McCoy. On July 10, 1957, the petition was granted.[6]

Full Faith and Credit

It was the contention of Marjorie McCoy that the Massachusetts decrees involving the same parties and the same subject matter were entitled to full faith and credit in the Florida proceedings.[7] The Constitution provides that full faith and credit shall be given in each state to the judicial proceedings of every other state.[8] Congress has implemented the clause [9] and the Supreme Court has further defined it. Full faith and credit must be accorded only where the original court had jurisdiction of the parties and the subject matter,[10] and where the proceeding was binding within that state and not subject to collateral attack.[11]

A decree of adoption results in a change of status.[12] As to such a decree full faith and credit requires that the forum recognize the effect of the decree on status and ascribe to it the res judicata effect it has in the state of rendition.[13] Although the Supreme Court has not expressly spoken on the subject, it appears that a decree of adoption, rendered with proper jurisdiction and without fraud on the court, is entitled to normal full faith and credit protection.[14] Many courts

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[4] For a complete account of the facts in this case and the proceedings in the Massachusetts courts, see cases cited in notes 1 and 2 *supra*.

[5] See N.Y. Times, July 9, 1957, p. 33, col. 1.

[6] *In re* Adoption of Hildy McCoy, note 3 *supra*.

[7] See *In re* Adoption of Hildy McCoy, *supra* note 3, at 2.

[8] U.S. CONST. art. IV, § 1.

[9] 28 U.S.C. § 1738 (1952).

[10] Williams v. North Carolina, 325 U.S. 226, 229 (1945).

[11] New York *ex rel.* Halvey v. Halvey, 330 U.S. 610, 614 (1947). See also JACKSON, FULL FAITH AND CREDIT 11-17 (1945).

[12] RESTATEMENT, CONFLICT OF LAWS § 142 (1934); Newbold, *Jurisdictional and Social Aspects of Adoption*, 11 MINN. L. REV. 605, 608 (1927).

[13] Riley v. New York Trust Co., 315 U.S. 343, 349 (1941). See also Reese, *Full Faith and Credit to Foreign Equity Decrees*, 42 IOWA L. REV. 183, 186 (1957).

[14] RESTATEMENT, CONFLICT OF LAWS § 143 (1934); 1 RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 645 (1945). Zarlingo v. Facciolo, 135

base recognition of foreign adoption decrees upon the similarity of foreign adoption laws with the adoption laws of the forum and the fact that they are not opposed to local public policy.[15] More recently, however, courts have recognized the applicability of the full faith and credit clause to foreign adoption decrees.[16] At least two states have enacted statutes according full faith and credit to adoption decrees rendered in other jurisdictions.[17]

The inheritance rights of an adopted child, an incident arising from adoption, are generally determined by the law of the forum of the deceased parent.[18] The Supreme Court has stated that no violation of the full faith and credit clause results where a state denies the right to inherit its land to children adopted in other states.[19]

Where a court with proper jurisdiction over the parties and subject matter declines to decree an adoption, different considerations apply in the second forum. This situation would generally arise where the parties have not complied with the adoption laws of the state or where, in the discretion of the court, the adoption would not serve the best interests of the child.[20] Although the question was apparently first decided in *In re Adoption of Hildy McCoy*,[21] it appears evident that a decree denying adoption is not entitled to full faith and credit. It is not a final adjudication in the sense that the question may never be reconsidered by the court. A change in circumstances may render an adoption possible where it could not be decreed upon the prior petition. The Florida court made specific reference to this fact saying that Massachusetts ". . . could have entertained this petition for adoption as a new petition. Therefore,

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N.Y.L.J. No. 60, p. 8, col. 8 (Sup. Ct. March 28, 1956), is an example of a foreign adoption decree which was denied full faith and credit because of fraud practiced upon the rendering state.

[15] See, *e.g.*, Pyle v. Fischer, 278 Ky. 287, 128 S.W.2d 726 (1939); Phelan v. Conron, 323 Mass. 247, 81 N.E.2d 525 (1948); *In re* Finkenzeller's Estate, 105 N.J. Eq. 44, 146 Atl. 656 (Prerog. Ct. 1929), *aff'd on opinion below*, 107 N.J. Eq. 180, 151 Atl. 905 (Ct. Err. & App. 1930).

[16] See, *e.g.*, People *ex rel.* Osborne v. Hayes, 284 App. Div. 143, 130 N.Y.S.2d 450 (3d Dep't), *motion for leave to appeal denied*, 307 N.Y. 940, 121 N.E.2d 638 (1954); Wright v. Brown, 146 Fla. 572, 1 So. 2d 871 (1941) (per curiam); *In re* Zoell's Estate, 345 Pa. 413, 29 A.2d 31 (1942), *cert. denied*, 318 U.S. 778 (1943).

[17] IND. ANN. STAT. § 3-123 (Burns 1946); MD. ANN. CODE art. 16, § 80 (1957).

[18] See, *e.g.*, *In re* Youman's Estate, 218 Minn. 172, 15 N.W.2d 537 (1944); Anderson v. French, 77 N.H. 509, 93 Atl. 1042 (1915); Finley v. Brown, 128 Tenn. 316, 123 S.W. 359 (1909).

[19] Hood v. McGehee, 237 U.S. 611 (1915). By inference the Supreme Court hereby recognizes the applicability of the full faith and credit clause to foreign adoption decrees insofar as they affect status.

[20] Statutes which provide for adoption of children generally give the judge before whom the application is made discretion in the matter. *E.g.*, N.Y. DOM. REL. LAW § 114; ILL. ANN. STAT. c. 4, § 4-1 (Smith-Hurd Supp. 1957); MONT. REV. CODES ANN. § 61-133 (1953).

[21] Chancery No. 199852, N. Fla., July 10, 1957, p. 2.

it should follow that this State can do the same." [22] A judgment has no constitutional claim to a more conclusive or final effect in the state of forum than where rendered.[23] Furthermore, an analogous situation is presented in divorce cases. Although petitioners may have been denied a divorce in a sister state, another state with the required jurisdiction may apply its own laws and grant the same parties a divorce.[24]

One of the Massachusetts decrees granted the custody of Hildy McCoy to her natural mother, Marjorie McCoy.[25] Thus the Florida court was also presented with the question of interstate recognition of custody decrees. Recognition of the continuing effect of a foreign custody award involves the problem which arises from the fact that custody is never final.[26] The decree purports to make an award on the facts as they then exist and power is reserved to alter the decree as new facts arise.[27] Thus courts have most frequently based their decision to re-examine the merits of a foreign court's custody decree on a change of circumstance since the foreign decree was rendered.[28] Custody decrees, therefore, do not enjoy the same extraterritorial effect as do final judgments. Even in the absence of changed conditions, courts do not feel themselves bound by full faith and credit to accept the provisions of a foreign custody decree.[29] Mr. Justice Frankfurter has recently stated that an exception to the full faith and credit command should be made in the case of custody decrees because

> . . . the child's welfare in a custody case has such a claim upon the State that its responsibility is obviously not to be foreclosed by a prior adjudication reflecting another State's discharge of its responsibility at another time.[30]

The New York Court of Appeals has recently taken the unequivocal position that full faith and credit does not apply to custody decrees since the state's duty as *parens patriae* is primary.[31]

Although the Florida court appeared to declare a custody decree to be res judicata ". . . so long as facts and circumstances of the parties involved remain the same as when the decree was ren-

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[22] *Id.* at 3.
[23] New York *ex rel.* Halvey v. Halvey, 330 U.S. 610, 614 (1947).
[24] See RESTATEMENT, CONFLICT OF LAWS § 135 (1934).
[25] See Ellis v. Doherty, 324 Mass. 466, 136 N.E.2d 203, 204 (1956).
[26] Stumberg, *The Status of Children in the Conflict of Laws,* 8 U. CHI. L. REV. 42, 56-57 (1940).
[27] 2 VERNIER, AMERICAN FAMILY LAWS 194 (1932).
[28] See New York *ex rel.* Halvey v. Halvey, 330 U.S. 610, 613 (1947); Welker v. Welker, 325 Mass. 738, 92 N.E.2d 373, 378 (1950); RESTATEMENT, CONFLICT OF LAWS § 117, comment *c,* at 58 (Tent. Draft No. 1, 1953); Ehrenzweig, *Interstate Recognition of Custody Decrees,* 51 MICH. L. REV. 345, 352 (1953).
[29] RESTATEMENT, *op. cit. supra* note 28.
[30] May v. Anderson, 345 U.S. 528, 536 (1953) (concurring opinion).
[31] Bachman v. Mejias, 1 N.Y.2d 575, 136 N.E.2d 903 (1956).

dered . . . ," [32] it is clear that the court's view is in accord with the position adopted by the New York Court of Appeals. The Florida court said:

> . . . every sovereignty exercises the right of determining the status or condition of persons found within its jurisdiction. The State of Florida has a responsibility for minor children within its borders, and as to them its laws are controlling.[33]

However, in a number of cases the custody orders of foreign courts have been respected. In a large proportion of them the child had been abducted from the complaining parent or had been brought into the forum in defiance of the orders of the court of a sister state.[34] Thus, courts will frequently not re-examine decrees where a parent, who is dissatisfied with the first award, brings the child into the forum for the sole purpose of obtaining a redetermination of the custody issue.[35]

It is interesting to note that, so inseparably intertwined was the Massachusetts decree granting Marjorie McCoy custody of the child with the decree denying the Ellis petition for adoption, that the Florida court could not give full faith and credit to one without, in effect, according full faith and credit to the other.

Jurisdiction

As considered here, adoption is the act by which the relations of paternity and affiliation are recognized as legally existing between persons who are strangers in blood.[36] Adoption was unknown at common law.[37] In the United States today the process is regulated by statute and may be effected only by judicial decree.[38]

Adoption is a process which effects a change of status of the parties involved.[39] Status has been defined as ". . . a personal qual-

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[32] *In re* Adoption of Hildy McCoy, Chancery No. 199852, N. Fla., July 10, 1957, p. 3.

[33] *Ibid.*

[34] Burns v. Shapley, 16 Ala. App. 297, 77 So. 447 (1917); *Ex parte* Livingston, 108 Cal. App. 716, 292 Pac. 285 (1930); Chapman v. Walker, 144 Okla. 83, 289 Pac. 740 (1930); Jones v. McCloud, 19 Wash. 2d 314, 142 P.2d 397 (1943).

[35] RESTATEMENT, CONFLICT OF LAWS § 117, comment *c* (Tent. Draft No. 1, 1953).

[36] N.Y. DOM. REL. LAW § 110. See *In re* Session's Estate, 70 Mich. 297, 38 N.W. 249 (1888). See also 1 RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 632-35 (1945) for a discussion of the various relationships involving adoption.

[37] Betz v. Horr, 276 N.Y. 83, 86, 11 N.E.2d 548, 550 (1937) (dictum); 2 BEALE, THE CONFLICT OF LAWS § 142.1 (1935); 4 VERNIER, AMERICAN FAMILY LAWS § 254, at 279 (1936).

[38] 4 VERNIER, *op. cit. supra* note 37.

[39] Stearns v. Allen, 183 Mass. 262, 67 N.E. 349, 351 (1903); Newbold, *Jurisdictional and Social Aspects of Adoption,* 11 MINN. L. REV. 605, 608 (1927).

ity or relationship, not temporary in its nature nor terminable at the mere will of the parties, with which third persons and the state are concerned." [40] Since a person's status involves the attribution to him of numerous rights and duties, it has been generally considered that questions concerning status should be determined by his domicile, the state with which he has the closest connection.[41] Adoption, however, affects not only the status of the child but also that of the adopting parents and of the natural parents.[42] If the jurisdictional basis for creating the status of adoption were to lie exclusively with the state of domicile, an adoption could be decreed only in a state where all the parties are domiciled. But adoptions have been decreed in jurisdictions other than the domicile of the child,[43] the adopting parents,[44] or the natural parents.[45]

The conflicts rules developed in the law of adoption make it clear that the child's welfare is of primary concern. The law has regard also, though in a lesser degree, for the rights of the child's natural and legal custodians and for those of his domiciliary sovereign.

The *Restatement* declares that

> [the] . . . status of adoption is created by either (a) the law of the state of domicile of the adopted child; or (b) the law of the state of domicile of the adoptive parent if it has jurisdiction over the person having legal custody of the child or if the child is a waif and subject to the jurisdiction of the state.[46]

There is no doubt that today the fact of domicile of the child within the state is a sufficient jurisdictional basis to permit a state to decree his adoption.[47] The substantial number of cases which uphold an adoption decreed in the state of the child's domicile where the adopting parent was a non-resident often emphasize the benefit that the adoption brings to the child.[48] Yet it is said that where the adop-

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[40] 1 BEALE, *op. cit. supra* note 37, at § 119.1.

[41] Dunham v. Dunham, 57 Ill. App. 475 (1894), *aff'd*, 162 Ill. 589, 44 N.E. 841 (1896); Ross v. Ross, 129 Mass. 243 (1880); 1 BEALE, THE CONFLICT OF LAWS § 54.1 (1935); Taintor, *Adoption in the Conflict of Laws*, 15 U. PITT. L. REV. 222, 225 (1954).

[42] Newbold, *op. cit. supra* note 39, at 612.

[43] See, *e.g.*, Appeal of Woodward, 81 Conn. 152, 70 Atl. 453 (1908); Hopkins v. Gifford, 309 Ill. 363, 141 N.E. 178 (1923); Stearns v. Allen, 183 Mass. 262, 67 N.E. 349 (1903).

[44] Van Matre v. Sankey, 148 Ill. 536, 36 N.E. 628 (1893); Succession of Caldwell, 114 La. 195, 38 So. 140 (1905); Appeal of Wolf, 10 Sad. 139, 13 Atl. 760 (Pa. 1888).

[45] Hurley v. St. Martin, 283 Mass. 415, 186 N.E. 596 (1933); Welch v. Welch, 208 Miss. 726, 45 So. 2d 353 (1950); Commonwealth *ex rel.* Teitelbaum v. Teitelbaum, 160 Pa. Super. 286, 50 A.2d 713 (1947).

[46] RESTATEMENT, CONFLICT OF LAWS § 142 (1934).

[47] Waller v. Ellis, 169 Md. 115, 179 Atl. 289 (1935); GOODRICH, CONFLICT OF LAWS § 142 (1934).

[48] See, *e.g.*, Matter of Voluntary Adoption of Minor, 130 Misc. 793, 226 N.Y. Supp. 445 (Surr. Ct. 1927); Farnsworth v. Goebel, 240 Mass. 18, 132 N.E. 414 (1921); *In re* McQuiston's Adoption, 238 Pa. 304, 86 Atl. 205 (1913).

tive parents are not residents of the forum, the court has not proper opportunity to determine their fitness to adopt the child.[49] A number of states, including Florida, have enacted statutes which permit only residents of the state to adopt.[50] Yet in some such states the term residence has been liberally construed to permit the adoption.[51]

It is clear that Hildy McCoy's status as adopted child of the Ellises was not created by the law of Florida as ". . . the law of the state of domicile of the adoptive child." The court made no express finding regarding the domicile of Hildy McCoy but simply said the ". . . minor is within the jurisdiction of this Court." [52] It is evident, however, that Hildy McCoy was a domiciliary of Massachusetts when the Florida court entertained jurisdiction. An infant is assigned a domicile by operation of law. If the child is legitimate, the domicile of his father at the time of his birth is assigned to him. If he is not legitimate, the domicile assigned is that of his mother at the time he is born.[53] Therefore, when the Florida court assumed jurisdiction of the Ellis adoption petition, Hildy McCoy was a Massachusetts domiciliary unless her release to the Ellises operated to change her assigned domicile. In *Haney v. Knight* [54] a Maryland court found that the Virginia domicile of a child was not affected when the mother gave custody of the child to a Virginia County Board which in turn placed the child in a Maryland home for adoption. An Alabama decision indicates that the act of a mother in placing her child for adoption in another state changed the child's domicile, at least for purposes of adoption.[55] Since it is generally held that the domicile of an adopted minor does not become that of the adopting parent until the moment of adoption,[56] the former view seems correct.

Obviously, Hildy McCoy's status was created by the law of Florida as ". . . the law of the state of domicile of the adoptive parent." That the Ellises had established a Florida domicile appears from the finding of the Florida court, that they were residents and

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[49] See Newbold, *Jurisdictional and Social Aspects of Adoption,* 11 MINN. L. REV. 605, 613 (1927).

[50] DEL. CODE ANN. tit. 13, § 903 (West Supp. 1956); FLA. STAT. ANN. § 72.11 (West Supp. 1957); OKLA. STAT. ANN. tit. 10, § 46 (Supp. 1957).

[51] Van Matre v. Sankey, 148 Ill. 536, 36 N.E. 628 (1893) (held to include temporary residence); Succession of Caldwell, 114 La. 195, 38 So. 140 (1905); Appeal of Wolf, 10 Sad. 139, 13 Atl. 760 (Pa. 1888) (held to include temporary residence). In all these cases the child was actually a resident of and apparently domiciled in the state where the proceedings took place. *But see In re* Goodman's Adoption, 49 Del. 550, 121 A.2d 676 (1952).

[52] *In re* Adoption of Hildy McCoy, Chancery No. 199852, N. Fla., July 10, 1957, p. 1.

[53] RESTATEMENT, CONFLICT OF LAWS § 14 (1934).

[54] 197 Md. 212, 78 A.2d 643 (1951).

[55] Kugle v. Harpe, 234 Ala. 494, 176 So. 617 (1937).

[56] See, *e.g., In re* Pratt, 219 Minn. 414, 18 N.W. 2d 147 (1945); Commonwealth *ex rel.* Teitelbaum v. Teitelbaum, 160 Pa. Super. 286, 50 A.2d 713 (1947); RESTATEMENT, CONFLICT OF LAWS § 35, comment *a* (1934).

citizens of the state of Florida.[57] Without such a finding, there would have been no basis for exercising jurisdiction since the child was still domiciled in Massachusetts. Although mere presence of the child within a state will permit a court to regulate his custody, something more is required for adoption.[58]

It seems that the Florida court's finding, that Hildy McCoy is "within the jurisdiction of this Court" did not mean that she was a domiciliary of Florida but merely that she was present before the court. Courts, however, have frequently held that the child need not be a domiciliary in order for the court to have jurisdiction to decree an adoption if the adopting parents are domiciliaries of the forum state and the court has jurisdiction over the child's legal custodian.[59] ". . . [J]urisdiction to adopt . . . is a concept, the American contours of which have not as yet been definitely drawn." [60] However, so long as the adoption is decreed in the state of domicile of either the child or the adopting parent where the court has jurisdiction of the child's legal custodian there is sufficient authority for recognizing the existence of jurisdiction.

Yet the fact remains that Hildy McCoy was brought to Florida in violation of law. Under such circumstances courts have often declined to exercise jurisdiction.[61] In *Kugle v. Harpe* [62] an Alabama mother surreptitiously took her child from the home of Georgia people with whom she had placed it for adoption. Georgia decreed an interlocutory adoption. Alabama, on habeas corpus to determine custody of the child, refused to hear the case on its merits but said that ". . . Alabama cannot give sanction to the forcible withdrawal of the child from that jurisdiction, and the assumption of jurisdiction here to determine who should have custody of the child." [63] It is submitted that the Florida court also should have refrained from determining the question of Hildy McCoy's adoption in view of the Ellises' unlawful conduct.

Conclusion

The view that adoption may be decreed only in the state of common domicile of all the parties is clearly impractical. The benefits

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[57] *In re* Adoption of Hildy McCoy, Chancery No. 199852, N. Fla., July 10, 1957, p. 1.

[58] RESTATEMENT, CONFLICT OF LAWS § 117(2) (Tent. Draft No. 1, 1953).

[59] Garcia v. Superior Court, 78 Ariz. 351, 280 P.2d 270 (1955); Appeal of Woodward, 81 Conn. 152, 70 Atl. 453, 459 (1908); Haney v. Knight, 197 Md. 212, 78 A.2d 643 (1951); Stearns v. Allen, 183 Mass. 404, 67 N.E. 349 (1903).

[60] Stumberg, *The Status of Children in the Conflict of Laws*, 8 U. CHI. L. REV. 42, 59 (1940).

[61] Kugle v. Harpe, 234 Ala. 494, 176 So. 617 (1937); Shippen v. Bailey, 303 Ky. 10, 196 S.W.2d 425, 427 (1946); Chapman v. Walker, 144 Okla. 83, 289 Pac. 740 (1930).

[62] 234 Ala. 494, 176 So. 617 (1937).

[63] Kugle v. Harpe, *supra* note 61, at 619.

of adoption might be denied to a child whose domicile is merely a technical one established by operation of law and where his real contact is with another state. In cases where the child's domicile is more than a mere technicality, it is evident that the state of his domicile has a real interest in the child's welfare and in any proceedings which will affect his status. Under such circumstances an adoption decree rendered in a state other than the child's domicile may be justified on the theory that adoption is beneficial to the child and consequently his domicile will cooperate.

In *In re Adoption of Hildy McCoy* the adoption was decreed in a state to which the child had been brought in spite of court decrees from the state of her domicile. The state which was Hildy McCoy's domicile of origin had made the child's mother her legal custodian and had unequivocally disapproved the proposed adoption upon ground of its policy declared by statute. Although Florida was not required to give full faith and credit to the Massachusetts decrees, comity between sovereigns and the social need for stability of personal status seem to require that the policy, laws and decrees of a competent state should not be rendered nugatory unless evident and serious considerations of the child's welfare demand it.

THE ROBINSON-PATMAN ACT AND TREBLE DAMAGE SUITS

Background

The Sherman Anti-Trust Act of 1890 [1] was considered unsatisfactory in curbing monopolies. Its prohibitions were general in nature,[2] and courts interpreted it so as to stop monopolistic tendencies only when monopoly was present or imminent.[3]

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[1] 26 STAT. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1952).

[2] "As a charter of freedom, the Act has a generality . . . comparable to that found to be desirable in constitutional provisions." Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933). "The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself did not define them. In consequence of the vagueness of its language, perhaps not uncalculated, the courts have been left to give content to the statute. . . ." Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940). See Burns, *The Anti-Trust Laws and the Regulation of Price Competition,* 4 LAW & CONTEMP. PROB. 301, 302-03 (1937).

[3] See United States v. United States Steel Corp., 251 U.S. 417, 444 (1920); Standard Oil Co. v. United States, 221 U.S. 1, 99 (1911) (dissenting opinion); *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary,* 84th Cong., 1st Sess., ser. 3, pt. 1, at 125-26 (1955); Jackson & Dumbauld, *Monopolies and the Courts,* 86 U. PA. L. REV. 231, 242-49 (1938).