ADOPTION OF CHILDREN.

By Mr. JUSTICE O'BRYAN.

The Adoption of Children Act 1928 which was assented to on the 27th December, 1928, and which came into operation on 1st June, 1929, marked a new departure in Victorian law in relation to the status of infants. Adoption in the sense in which the word is used in the Statute, and is now commonly understood, was not recognised by English law. As in the case of legitimation of an illegitimate child by the subsequent marriage of its parents, our law was slow to give recognition to relationship by adoption. As the status was one unknown to English law, our Courts would not recognise or give effect to a like status acquired under a foreign law, though the same result was in some cases reached in another way. For example when a person died domiciled in a foreign country leaving moveable property situate in England, his child by adoption under the law of the domicile might succeed to that English property, not because English law recognised the status of adoption, but because by English law succession to a person's moveable property on death is governed by the law of the last domicile, and because the law of the last domicile in the particular case said that the adopted child had the right of succession in the circumstances.

In England recognition of the principle of adoption was recommended in the Report of the Committee on Child Adoption 1921 and effect was given there to this recommendation by the enactment of the Adoption of Children Act 1926. Two years later the Victorian Parliament passed its Adoption of Children Act 1928. Prior to this Act though a '*de facto*' adoption of a child by a relative or a stranger might produce certain legal consequences by virtue of that person putting himself in '*loco parentis*' towards the child, the law did not recognise any transfer of parental rights and duties from the natural parent to the adopter.

The Adoption of Children Act enables a competent Court to make an Adoption Order, which, when made, changes the status of the child.

The consequences of an Adoption Order may be grouped under the following headings—guardianship and upbringing, succession to property and incorporation into the family of the adopters.

Guardianship and Upbringing.

Upon an Adoption Order being made, all rights, duties, obligations and liabilities of the parents and guardians of the adopted child in relation to his future custody, maintenance and education, including the right to appoint a guardian or consent to marriage, are extinguished. All these rights, duties, obligations and liabilities vest in, and are exercisable by, and can be enforced against the adopter. To this extent the child is treated as though he were born to the adopter in lawful wedlock. If a husband and wife are the adopters they stand towards the adopted child in relation to these matters as though they were its lawful father and mother. It is made an offence punishable with two years' imprisonment for a natural parent or guardian to entice away or detain an adopted child with intent to deprive his adoptive parent of the possession of the child.

Succession to Property.

After the Adoption Order, the child's right of succession to both real and personal Estate, and whether under an intestacy or under a disposition '*inter vivos*' or by will, change. He loses his right of intestate succession to the property of his natural parents and acquires a new right of intestate succession to the property of his adoptive parents. The Act treats a disposition of property, whether '*inter vivos*' or by will on the same basis and in each case the intention of the disposer will prevail. His natural parents may expressly include him in any disposition, but in the absence of such an expressed inclusion, he does not take under any disposition by them in favour of their children or such like expressions. He takes under dispositions by his adopters in the same way as if he were a child born to them in lawful wedlock. In the absence of an expression to the contrary, he is deemed to be included in a disposition by his adopters in favour of their children.

The change in the adopted child's right of succession does not, however, extend beyond the property of his natural and adoptive parents. He does not acquire any new right of succession on intestacy to the property of a relative of his adoptive parents nor does he lose any right of succession to the property of a relative of his natural parents who die intestate. A disposition of property by a relative of his adopters, or by a stranger in favour of the issue or children of the adopters, is not deemed to include him unless that intention appears from the instrument of disposition. On the other hand a disposition of property by a relative of his natural parents, or by a stranger in favour of the issue or children of his natural parents, is deemed to include him unless the intention to exclude him appears from the disposing instrument.

The Act preserves any right of property which the child may have acquired by virtue of any disposition made before the Adoption Order, or by virtue of a devolution by law on the death of any person who died before the making of the Adoption Order. When the adopted child succeeds to the property of its adopter, whether on intestacy or by virtue of a disposition, any duty payable thereon is assessed on the basis of his being a child born in lawful wedlock to the adopter.

The Act makes no change in the law relating to the right of succession to the property of the adopted child. It is interesting to compare the Victorian Act in this respect with the English Statute on the one hand and the New Zealand Statute on the other. Under the English law there is an express provision (Section 5) that an Adoption Order shall not deprive the adopted child of any right or interest in property to which but for the Order he would have been entitled under any intestacy or disposition; nor does the Act confer on the adopted child any right to or interest in the property as a child of the adopter. The New Zealand Statute, on the other hand,[1] provides in general terms that with certain exceptions the adopted child is for all purposes to be deemed a child born in lawful wedlock to its adopters, and this provision has been interpreted as giving to the adopters a right of succession to the property of the adopted child on intestacy.[2] As our Statute provides *seriatim* what

1. Infants Act 1908, section 21.
2. *Re Carter*, 25 N.Z.L.R. 278 *re Goldsmid*, (1916) N.Z.L.R. 1124.

are the legal consequences of an Adoption Order and does not contain any provision that the adopters have any right of succession to the property of their adopted child who dies intestate, it seems that on the death of an adopted child intestate his natural next-of-kin have the same right of succession as if there had been no Adoption Order, and his next-of-kin by adoption (i.e. those who would be his next-of-kin if he had been born in lawful wedlock to his adopters) have no right of succession arising out of the adoption. This would appear to be an unexpected result of our Statute particularly in view of Section 7 (6) (b) which provides that when an adopter succeeds to the property of an adopted child under an intestacy, duties are payable at the same rate as if the child has been born in lawful wedlock to the adopter. The absence of a provision for succession to the property of the adopted child on his death intestate is out of accord not only with Section 7 (6) (b) but also with the whole scheme of the Act and in particular with Section 7 (1) which provides that in respect of the liability of a child to maintain its parents the adopted child shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock.

Some extraordinary results may follow from this apparently unintentional omission from the Statute. For example, an adopted child after living for years as a member of his adoptive family and after having acquired on intestacy or by disposition property of his adoptive parents or brothers, may die intestate and that property so acquired will, under the existing state of the law, pass not to his next-of-kin by adoption but to his natural next-of-kin with whom he may have throughout his life had little or no association and of whose existence he may not even be aware. I suggest that the legislature should consider whether this position should not be remedied by statutory amendment.

Incorporation into the Family.

The adopted child is incorporated into the family of his adoptive parents in certain other respects. Inter-marriage between the adopted child and its adoptive parent is prohibited, and any attempted marriage between them is void. For the purpose of the law affecting the validity of marriage by reason of the parties being within the forbidden degrees of consanguinity and affinity, the adopted child has two sets of relations—his relations by adoption, and his relations by blood. The same rule applies to those incestuous criminal relations which are punishable under Sections 48 and 49 of the Crimes Act 1928.

The Adoption Order.

The Statute has veen very careful to impose restrictions and conditions upon the making of an Adoption Order which has these very important consequences. Section 136 of the Marriage Act provides that where in any proceeding before any Court the custody or upbringing of an infant is in question, the Court in deciding that question should regard the welfare of the infant as the first and paramount consideration. Section 5 (b) of the Adoption of Children Act provides that an Adoption Order will not be made unless the Court is satisfied that such an Order will be for the welfare of the infant, and Section 13 provides that an

Adoption Order will not be varied or discharged unless the Court is satisfied that such variation or discharge of the order if made, will be for the welfare of the child. It follows that whether Section 136 of the Marriage Act applies to proceedings under this Act or not, the welfare of the infant has been expressly made the first and paramount consideration in proceedings under the Act.

It is useful to note the following provisions as to the relationship between the proposed adopters and the child :—

1. The only case in which the Court can entertain an application by two persons jointly to adopt a child is where those two persons are husband and wife. An adoption order can, and not infrequently is, made where one spouse is the natural parent of the child.[3]
2. If the sole proposed adopter is a male, and the infant is a female, an Adoption Order will not be made unless the Court is satisfied that there are special circumstances which justify, as an exceptional measure, the making of the Order.
3. The proposed adopter must not be under the age of 25 years, and must be at least 21 years older than the infant, unless the parties are within the prohibited degress of consanguinity or being of the same sex are of the same blood. Notwithstanding this prohibition the Court may, if it thinks fit, make a joint Adoption Order in favour of two spouses :
   (a) If one of the spouse is the natural parent of the child, notwithstanding that either applicant is under the age of 25 years or is less than 21 years older than the infant, and (b) in any case notwithstanding that the female applicant does not comply with these conditions or either of them.

An Adoption Order will not be made except with the consent in writing of every person or body who or which is the parent or guardian of the infant, or has its actual custody or is liable to contribute to its support. Different persons may in a particular case fill one or more of these relations to the infant. In such a case the language of the Section would seem to suggest that more than one consent may be necessary, i.e. that it would be necessary to obtain the consent of every person who comes within any of these groups. Rules of Court as to service of notice of the application seem to recognise this.

A consent can only be dispensed with in very special circumstances. The Court must be satisfied that the person whose consent would otherwise be required either—

(i) has abandoned or deserted the infant ; or
(ii) cannot be found ; or
(iii) is incapable of giving such consent ; or
(iv) is a person (not being a parent of the infant) with whom the infant is boarded out, placed or apprenticed under the provisions of certain statutes which it is unnecessary here to to enumerate ; or

3. See Act No. 4381, sec. 2 (*b*).

(v) being a person liable to contribute to the support of the infant, either has persistently neglected or refused to contribute to such support, or is a person whose consent in the opinion of the Court in all the circumstances of the case, ought to be dispensed with.

Sub-section (3) of Section 4 of the Act is so framed as to make it doubtful, were it not for two decisions to which I will refer, whether a Court may dispense with a parent's consent solely on the ground that in its opinion, such consent ought, in all the circumstances, to be dispensed with. As a matter of grammatical construction there is some difficulty in resolving that doubt in the affirmative. Paragraph (v) would appear to be confined to dispensing with the consent of a person whose only claim to object to the order is that he is liable to contribute to the support of the infant. In so far as that person's consent is required on that ground, it can be dispensed with for the reasons set out in Paragraph (v). If, in addition, he is a parent of the child, does this Paragraph apply to him at all ? Slessor, L.J., does not appear to have felt that difficulty[4], nor did Martin, J., in *In re B.*[5] The section is capable of this reading : " If a person is liable to contribute to the support of the infant, be he parent or not, or whatever his other relation to the infant may be, his consent may be dispensed with if he has persistently neglected or refused to contribute to its support, or is a person whose consent ought, in the opinion of the Court, and in all the circumstances of the case, to be dispensed with."

As the authorities at present stand, this is the correct reading of the Section.

The Court will of course always bear in mind that an Adoption Order is a serious invasion of a parent's rights, and will not readily conclude that a parent's consent to an Adoption Order ought to be dispensed with (see remarks of Martin J., in *In re B.*[5]

The language of Section 4 strongly suggests that the consent should be to the particular Adoption Order that is being sought, and the form of consent which is prescribed in the Rules made under the Act, is drawn on this basis. It appears to be not unusual in obtaining a parent's consent to an Adoption Order not to disclose to the parent the name of the proposed adopters. However desirable this may be in practice, it is at least questionable whether it is in compliance with the law.

I have been told that it is not unusual to get the parent to sign a form of consent, in which the name of the proposed adopter is not filled in and after he has signed the consent the name of the adopting parent is inserted. In such a case the Court has put before it a most misleading document. This practice would appear to be contrary both to the Statute and the Rules and was adversely commented upon by both Scrutton, L.J., and Slessor, L.J., in *In re Carroll.*[6] It is to be noted that the Statute has been very careful to provide that the Court before making an Adoption Order shall be satisfied, *inter alia*, that the consenting party has not only consented but understands the nature and effect of the Adoption Order

4. See *In re Carroll*, [1931] 1 K.B. 317, at page 361.
5. [1939] V.L.R. 42.
6. [1931] 1 K.B., at pages 319 and 329.

for which application is made. Those who think that all that should be required is a consent to the making of an Adoption Order without regard to who the applicants are should have the law altered and not adopt a course which results in a false and misleading document being presented to the Court.

In all proceedings under the Act not only is the welfare of the infant considered but it is a statutory requirement that for the purpose of any application the Court shall appoint some person to act as a guardian '*ad litem*' of the infant. It is the duty of that person on the hearing of the application to safeguard the interests of the infant before the Court. The Rules under the Act throw a duty upon that guardian to make certain investigations, and if so required, to report to the Judge the result thereof (see Rule 6). The Act also makes it a punishable offence for any adopter, or for any parent or guardian without the sanction of the Court to receive any payment or other award in consideration of the adoption of any infant, or for any person to make or give, or agree to make or give to any adopter, parent or guardian any such payment or award. The Court before making an Adoption Order must be satisfied that this provision of the Act has not been contravened.

The Court in an Adoption Order may impose such terms and conditions as it thinks fit and this may include the making for the adopted child such provisions as in the opinion of the Court is just and expedient.

An adopted child may be the subject of a second Adoption Order and upon an application for such an Order the original adopters are, if living, deemed to be the parents of the child for all the purposes of the Act.

Discharge or variation of the Adoption Order.

The Supreme Court may in its discretion vary or discharge an Adoption Order subject to such terms and conditions as it thinks fit. An application for such an Order however can only be made by a Law Officer who must in the first instance satisfy himself that owing to the exceptional circumstances of the case the application should be made. The Court in considering such an application not only must be satisfied that the Order if made will be for the welfare of the infant but should give due consideration to the wishes of the infant having regard to his age and understanding. Difficult questions of law can arise in the hearing of an application to vary an Adoption Order. Suppose the case of an illegitimate child in respect of whom an Adoption Order has been made in favour of two persons, husband and wife. Suppose the wife dies and after some time her husband re-marries and is desirous of being discharged from the obligations of the Adoption Order. The circumstances may be such as to make it desirable that he should be relieved of his obligations under the Adoption Order. In such a case there may be two claimants to custody whom the Attorney-General may deem fit to make respondents to his application for discharge of the Adoption Order, the *de facto* guardians in whose custody the infant had been since the death of the adopted mother and the natural mother. Such a case was before the Courts recently and the *de facto* guardians were in this difficulty that they did not have the consent of either the natural mother or the adoptive father to an Adoption Order in their favour. They opposed the discharge

of the Adoption Order as that would have restored the child and its natural mother for all purposes to the same position *inter se* as existed before the Adoption Order was made. The natural mother's right to the custody and upbringing of her child would have been thereby revived.[7] They therefore asked that the Adoption Order should be varied by substituting therein their names in lieu of the names of the adoptive parents. This was opposed by Counsel for the mother who objected that such a variation of the Adoption Order could not be made under Section 13 of the Act. This objection would appear to be well founded. A variation of an Adoption Order in the manner suggested would operate to destroy the legal status created by the original Order between the child and its adoptive parents in the same way as a discharge of the Order; indeed such result was the principal purpose of the variation asked for. Though such an Order, if it is permitted under Section 13, would avoid the statutory consequence of a discharge, viz: the restoration of the relationship between the child and its natural parent, it would create a new status by adoption for both the child and its new adoptive parents, and it would do this in a proceeding other than is contemplated by the Act (Section 3). Such a variation does seem to amount to a discharge of the existing Adoption Order and not to be such a thing as is contemplated under the power to vary contained in Section 13. The case in question went off for other reasons and the interesting question raised was not decided.

There is plenty of scope for the operation of the power to vary in ways other than the substitution of new adoptive parents for the old. For example, the terms and conditions which the Court may impose in making the original Order (Section 6) are plainly matters which can be the subject of an order to vary. The power to vary may not be limited to such matters, e.g. an Adoption Order may probably be varied in a proper case by adding a second adoptive parent where either there was only one adoptive parent originally or where one of two adoptive parents has since died. For example, if a sole or a surviving adoptive parent were to marry, it may well be that the Adoption Order can be varied by adding the wife or husband as the case may be either as an additional parent or a new parent in substitution for the one who had died. The problem raised in the case above was whether both the persons in whose favour the adoption Order was originally made could by an order to vary be removed from the Order and in their place new adopting parents be appointed. That would appear to amount not to a variation of the original Order but to its discharge coupled with a new Order for Adoption. The proper way for such a result to be brought about would be by a fresh application by the proposed adopting parents under Section 3, which would be made in the prescribed manner as provided by that Section.

If an Adoption Order is discharged then subject to the conditions of the discharging order the child and its natural parents and the adopters are restored to the same position *inter se* as existed immediately before the Adoption Order was made, but such restoration does not affect anything lawfully done or any right or interest which became vested in the

7. See sec. 13 (2) and *Penwarden v. Gray*, [1931] N.Z.L.R. 780.

child while the Adoption Order was in force. I can see no objection to a natural parent being heard upon an application for a discharge of the Adoption Order. Although by the Adoption Order all the parent's rights in relation to future custody, maintenance and education of the child are extinguished, if the Court has under consideration on the application of a Law Officer a proposal to discharge the Adoption Order, the natural parents may well be heard thereon. Generally speaking it is for the welfare of the child that he should be in the custody of and subject to the control and guidance of his parents, and the common law rules as to rights of parents in relation to such matters are really based on the law of nature and it is only in extreme cases that the Court will interfere with the discretion of parents in relation to children. It is in the general interest of families and children and really for the interest of the particular child that the Court should leave with the parents the responsibility of exercising that power which nature has given them by the birth of the child.[8]

The effect of the Adoption Order is to alter the whole status of child and parent and the underlying principle both of Common Law and Equity that *prima facie* the natural parent is the proper guardian and upbringer of the child, disappears. The new parent, the parent by adoption, for most purposes, takes the place of the natural parent. In one sense the natural parent while the Adoption Order stands is as much a stranger to the child as any person who is not related by blood and who is not the adoptive parent. Nevertheless the natural parent may, in the proceeding for the discharge of an Adoption Order, stand in a better position than a mere stranger. The reason is this, the natural blood tie may render it probable (despite what has happened, and despite the consent which has been given to the Order, and despite possibly the separation of the parent from the child for a long period) that the affection of the natural parent for the child has continued, and if it exists and is fostered it constitutes a bond of great importance for the child's well-being. The question whether affection has continued is in each case one of fact; but in considering such question the natural relationship is an important matter to keep in mind.

The Court may in discharging or varying the Adoption Order do so subject to such terms and conditions as it thinks fit.

There is authority in the Supreme Court of New Zealand in the case of *Penwarden v. Gray*[9], for the proposition that it may make a discharging order subject to the condition that the child remain in the custody of its *de facto* guardians. This would prevent, in a case such as I have referred to, the order of discharge operating so as to revive in the natural parents their original rights of custody and upbringing, though it could not create a relationship by adoption between the child and its *de facto* guardians.

Registration of Adoptions.

There are a series of sections in the Act which provide for an Adopted Children Register and for the entries to be made there and the consequential

8. See *Re Agar-Ellis*, 24 Ch. D. at 334 and *Hume v. Hume*, [1926] S.C. 1008.
9. [1931] N.Z.L.R. 780.

provisions relating to entries in the Register of Births and an Amending Act of 1942 Act No 4903 has made provision for the registration in Victoria of adoption orders made in other States or Territory of the Commonwealth. I do not propose to discuss these provisions in this article and I may add that this article does not purport to give a complete survey of the provisions of the Act in relation to Adoption, but only to draw attention to the more important features of the Statute and matters which are of more general interest.