plication prescribed any particular mode of acceptance of his offer.

It is submitted that this is not the correct ratio of the case, for Parker, L.J., in dealing with cases where the parties to a contract are in each other's presence, or, though separated in space, communication between them is in effect instantaneous, says: "Though in both these cases the acceptor was using the contemplated or indeed the expressly indicated mode of acceptance, there is no room for any implication that the offeror waived actual notification of the acceptance."[43] Thus, the question whether or not actual notification has been waived depends not on whether there is a mode of acceptance, however prescribed, but on rules of what his Lordship calls "common sense".

To sum up, the following conclusions are advanced:

1. That the question of determining *where* a contract is made is one of private international law.

2. That the rules for determining *where* a contract is made need not necessarily flow from the rules of municipal law determining *when* a contract is made.

3. If they do, they are unsatisfactory, and will operate capriciously (a) because the location of the contract will depend on who is offeror and who is offeree, a question which is itself dependent on the mere accidents of negotiation, and (b) because the question of location will also depend on the further accident of the means of communication chosen by the parties.

4. Assuming the rule of municipal law as to acceptance of an offer to be that laid down in the *Entores Case*,[44] it is stated in a form both inconvenient and difficult of application.

R. W. GEE, Case Editor—Third Year Student.

FOREIGN ADOPTIONS: GOVERNING LAW AND EXTENT OF RECOGNITION

RE WILSON AND OTHER CASES

Though the institution of adoption was known in Roman law, it did not exist in the common law countries until quite recently when it was introduced by legislation, starting in Massachusetts in the middle of the last century. In England the principle of adoption was first introduced by the Adoption Act, 1926,[1] and the rights of adopter and adopted were later extended in the present Adoption Act, 1950.[2] In New South Wales the relevant statute is the Child Welfare Act, 1939-1952.[3] Adoption is now possible in most countries,[4] though standards and requirements vary in the extreme. In some systems only children can be adopted, in others only adults; in some countries an adoption needs judicial confirmation, elsewhere it is purely an administrative act, or even a simple contract between the parties concerned. The fact that adoption is a comparative newcomer to the common law world and the lack of uniformity in its standards and requirements generally have caused a great uncertainty about the private international law rules governing the circumstances in which foreign adoptions are to be regarded as valid and the purposes to which such validity is to be regarded as extending. It was left entirely to the text-writers to hazard their views on the subject and these differed greatly, with only slight and conflicting support from decided cases.

The importance of the decision of Vaisey, J. in *Re Wilson*[5] lies in the

[43] (1955) 2 All E.R. 493, 498.
[44] *Ibid.*
[1] 16 & 17 Geo. 5, c. 29. [2] 17 Geo. 6, c. 26.
[3] No. 17 of 1939—No. 9 of 1952 Part XIX. Adoption was first introduced in N.S.W. by the Child Welfare Act, 1923, No. 21 of 1923.
[4] With a few exceptions, e.g. Guatemala.
[5] (1954) 1 Ch. 733.

fact that there for the first time an English court was faced with the problem and had to make a choice between the various theories. The facts of the case were that a childless couple, both British subjects, and at all relevant times domiciled in England, obtained in Montreal, Quebec, an adoption order in respect of a child born in Montreal. There was no evidence as to the child's domicile. When the adopting father died intestate the administrator sought the direction of the court on the problem whether the two sisters of the deceased were entitled to share equally or whether the child was entitled as the deceased's issue.

In deciding whether the child was the lawful issue of the deceased, Vaisey, J. had to consider two questions, firstly, whether the adoption order was valid for any purpose, and if it was, secondly, whether such purposes included that of succession to property.

As regards the first problem, it seems clear now that at the very least, the adoption must be valid according to the laws of the domiciles of both parties to the adoption. This was the view taken by Dicey[6] and approved by Cheshire.[7] It is even probable that both parties have to be domiciled in the *locus rei actae*, if only for the reason that the requirements of the various countries differ so greatly that it is virtually impossible to comply with two of them. This is the view of Beale[8] and is suggested by Rabel[9] as a basis for the British decisions.[10] Moreover, the proposition is supported by such case law as existed at the time *Re Wilson* was decided. In the Canadian decision of *Culver* v. *Culver*,[11] Taylor, J. seemed to be of the opinion that only the court of the Province where both parties were domiciled had jurisdiction to make an adoption order, and in the New South Wales case of *In re an Infant*[12] Davidson, J. said:[13] "I should think then, though with some doubt, that in order to give full validity to a change of status by the order, both the child and the adopting parent should at its date be domiciled in New South Wales." In the more recent case of *Re McKenzie*,[14] it was suggested by counsel that the adoption of a child in New Zealand should not be recognised unless it was shown that both parents and child were domiciled in New Zealand at the time of adoption and at the time of the child's birth, following the analogy of the legitimation cases. As Sugerman, J. found as a matter of fact that the persons concerned had been domiciled in New Zealand at the times suggested, it became unnecessary for him to decide this problem, though his Honour doubted whether the analogy of legitimation applied here. In *R.* v. *A. Ex parte W.*,[15] Herring, C.J. refused to recognise the decree of a German court made when all the parties concerned were domiciled in Victoria. His Honour quoted the above stated view of Dicey and Cheshire, and went on to say:[16] "According to the law of this state, status depends on domicile and consequently our courts cannot recognise the decree of the German Court affecting as it does the status of persons domiciled in Victoria and not in Germany when it was made." In the case of *Re Luck's Settlement Trusts*,[17] though they were actually dealing with legitimation, the Court of Appeal was generally of the opinion that the status of paternity could not be affixed on the father by the law of California while he was a domiciled Englishman, and it is submitted that the reverse would be equally true, namely that a person cannot be given the status of the child

[6] *Choice of Law* (6 ed. 1949) 511, Rule 123.
[7] *Private International Law* (4 ed. 1952) 401.
[8] 2 *Conflict of Laws* (1935) 76.
[9] *Conflict of Laws* (1950) 637.
[10] As regards the United States, Rabel suggests that the courts of the adopter's domicile as well as those of the adopted's domicile have concurrent jurisdiction and is therein supported by the *Restatement* (*Conflict of Laws*, para. 142). See also *Re Morris Estate* (1943) 133 Pac. 452 (California) where the court gave effect to an adoption valid by the *lex domicilii of the child.*
[11] (1933) 2 D.L.R. 535.
[12] (1934) 34 S.R. (N.S.W.) 349.
[13] *Id.* at 357.
[14] (1951) 51 S.R. (N.S.W.) 293.
[15] (1955) V.L.R. 241.
[16] *Id.* at 247.
[17] (1940) Ch. 864.

of another by the law of a country unless he is domiciled in that country.[18]

This is supported by some *dicta* of Vaisey, J. in *Re Wilson*.[19] His Lordship stated that the deceased was never domiciled in Quebec but "strayed within the jurisdiction for no other purpose than the adoption of the infant defendant"[20] and later went on to say:[21]

> But if this adoption was effective for the purposes of an intestate succession it would apparently be quite possible for would-be adopting parents to pay a short visit to any country, whose laws were less stringent than the laws of their proper domicile.

After his Lordship had rejected the child's claims on other grounds, discussed below, he finally remarked that had the testator been domiciled in Quebec at the time of the adoption the case of the child would have been much stronger.[22] On this test it is difficult to see how a person domiciled in England could ever adopt a child abroad, as the Adoption Act, 1950 only provides for the adoption by persons domiciled and resident in England of children resident in England,[23] and does not provide for the adoption of non-resident children. The view could be taken that the *lex domicilii* of the adopter did not allow adoption of non-resident children, and this could be the explanation of *Re Wilson*.[24] It is therefore most certainly advisable for both parties to the adoption to have a common domicile and in any event where the adopter is a domiciled Englishman for the adoption to take place in England.[25]

Notwithstanding the above indications that in his view the adoption order could be given no effect at all in the absence of a Quebec domicile, his Lordship also dealt with the question of to what extent effect should be given to the Quebec order, assuming that it was valid for some purposes. On this second point the confusion is even greater than on the first. Dicey[26] states that the question whether an adopted child can succeed as a child of the deceased is determined by the law governing the succession, i.e. *lex domicilii* of the testator for movables and *lex situs* for immovables. Cheshire,[27] however, holds it to be a question of status determinable by the *lex domicilii*.[28] These then are the two main lines of approach; either to regard the problem as governed by the law governing the succession, or as a question of status by the law governing the adoption.

Prior to *Re Wilson* there was some slight authority in favour of the latter proposition. The American position generally, as stated by Rabel[29] and the

---

[18] But *contra* F. A. Mann in (1941) 57 *L.Q.R.* 112, where he compares the change of status on adoption with that of marriage and points out that intending husband and wife are not required to be domiciled in the same country.

[19] (1954) 1 Ch. 733.

[20] *Id.* at 741.

[21] *Ibid.*

[22] *Id.* at 744.

[23] Though the Child Welfare Act, 1939-1952 does not contain any such restrictions, the constitutional limitations on the legislative powers of the N.S.W. Parliament would *semble* likewise prevent the adoption by a person domiciled in New South Wales of a child not resident within the State. But see s.172A.

[24] Though Dr. O'Connell in his article in (1955) 33 *Canadian Bar Rev.* 635 suggests that it is only the domicile of the adopter which counts and this could equally well be reconciled with the decision in *Re Wilson*.

But it is submitted that such a solution would ignore any claims which the law of the child's domicile justly might have in the matter, especially in view of the fact that several countries have expressly prohibited the adoption of their nationals (adhering to the concept of nationality rather than domicile) abroad without the consent of some tribunal or official in their country. His Lordship did say, however, in the course of his judgment in *Re Wilson* that an English court could not be expected to scrutinise foreign adoption laws to see whether they corresponded with the standards required by the Adoption Act, but it is doubtful whether this remark referred to the problem of jurisdiction.

[25] See Cheshire, *Private International Law* (4 ed. 1952) 402.

[26] Dicey, *Choice of Law* (6 ed. 1949) 511.

[27] Cheshire, *Private International Law* (4 ed. 1952) 402.

[28] It is assumed that the *lex domicilii* at the time of the adoption is meant.

[29] *The Conflict of Laws* 649.

Restatement of the Law[30] is that foreign adoptions should be given the same effect as they have in the State of adoption. This view is based on the celebrated case of *Ross* v. *Ross*,[31] where a child adopted in another State where the parties were domiciled at that time, was held to have the same rights of inheritance as legitimate offspring, as it had acquired these rights under the law of the State where it was adopted. In *Slattery* v. *Hartford Connecticut Trust Co.*[32] the Connecticut court recognised a right of a child adopted in Michigan, which Michigan law allowed, but local legislation had taken away. And in the case of *New York Life Insurance & Trust Co.* v. *Kiele*,[33] a child adopted in Saxony was held not to be the "lawful issue" of the testator's daughter, as Saxon law did not give the child the status of a descendant.[34] But even in the United States this view is not generally accepted. In the New Jersey decision of *Frey* v. *Nielson*[35] an inheritance statute of the State of New Jersey admitting adopted children to equal status with lawful issue was held to be restricted to children adopted in New Jersey. In Canada, *Ross* v. *Ross* was followed in *Re McGillivray, Purcell* v. *Hendricks* where the word "heirs" in a will was interpreted to include a child adopted under Massachusetts law, where it had the status of lawful issue of the adopter. But the next year in *Burnfiel* v.*Burnfiel*[37] a child adopted in Iowa was refused Letters of Administration of the estate of the adopter, on a qualification to *Ross* v. *Ross* to the effect that only countries having adoption laws themselves could recognise foreign adoptions, but that in such case they should give such adoption the full effect they had under the law of the state of adoption. This view was based on Dicey's opinion, since then discarded by the Editors of the present edition, that English law does not recognise a status unknown to it.[38] However, *Burnfiel* v. *Burnfiel* was followed in *Re Donald*.[39]

More recently two Australian decisions have given strong support to *Ross* v. *Ross*. In *In re Pearson*[40] it was said that the question whether or not a child adopted in Tasmania was issue of the adopter for the purposes of a Victorian will was to be decided by the law of Tasmania, but the court on the facts found that the child did not have such status under Tasmanian law. In *Re McKenzie*[41] the result was more definite, as Sugerman, J. held that a child adopted in New Zealand was entitled to commence proceedings under the Testator's Family Maintenance Act, 1916.

The Supreme Court of New Zealand also held in *Re Brophy*,[42] a case concerning the interpretation of a will, that the status of a child adopted according to the law of New York had to be recognised by the New Zealand court.[43]

---

[30] *Sub. nom. Conflict of Laws*, para. 143.
[31] (1880) 129 Mass Rep. 243.
[32] (1932) 115 Conn. Rep. 163.
[33] (1899) 161 N.Y. 11.
[34] It may be noted here that the Dutch High Court in a 1952 decision before adoption was introduced in Holland recognised a child adopted in Germany where it had the status of a legitimate child of the adopter, as a legitimate child for succession duty purposes (*Ned. Jurisprudentie* No. 40, 113).
[35] (1926) 99 N.J. Eq. 135. See also *Anderson* v. *French* (1915) 77 N.H. 509, a New Hampshire decision to the same effect as *Bairstow's Case infra.*
[36] (1925) 3 D.L.R. 854.
[37] (1926) 2 D.L.R. 129.
[38] Dicey, *Choice of Law* (6 ed. 1949) 467-68, and Cheshire, *Private International Law* (4 ed. 1952) 147-49, and see n.34 *supra.*
[39] (1929) 2 D.L.R. 244.
[40] (1946) V.L.R. 356.
[41] (1951) 51 S.R. (N.S.W.) 293.
[42] (1949) N.Z.L.R. 1006.
[43] In fact it was decided that the child did not have the status of a legitimate child under New York Law. In a similar problem in England the court evaded the issue and held on the facts as a matter of interpretation of the will, that the adopted child only could have been intended by the testator. *Re Fletcher* (1949) Ch. 473.

In *Re Wilson*,[44] however, Vaisey, J. rejected this approach and held that the question whether the child could succeed was determined by the law governing the succession and not the adoption, quoting Dicey to that effect. The law governing the succession being English law, his Lordship considered s.13 of the Adoption Act, 1950, which gives adopted children equality with children born in lawful wedlock in wills and intestacies. His Lordship remarked that the Act made express provision for the inclusion of orders made by Northern Ireland courts, but was silent on foreign orders and deduced therefrom that the common law position applied to children adopted abroad, i.e. they were not "lawful issue" and enjoyed no rights as such except perhaps for certain purposes such as orders for custody in divorce suits. His Lordship rejected the analogy with legitimation cases such as *In re Goodman's Trusts*,[45] on the ground that adoption was purely artificial while the intention of legitimation was to put the child of the parents in the position of one born in lawful wedlock.[46]

In *In re Goodman's Trusts* it was stated by James, L.J.:[47] ". . . the status of a person, his legitimacy or illegitimacy is to be determined everywhere by the law of the country of his origin, the law under which he was born." The same principle was asserted by Kay, J. in *In re Andros*,[48] and again by Stirling, J. in *In re Grey's Trusts*.[49] In *Re Ferguson's Will*,[50] Byrne, J. decided that the next of kin of a domiciled German meant next of kin according to English and not German law, but distinguished the above-mentioned cases on the ground that there a question of status and not of interpretation was involved. It would seem that the general principle laid down by the foregoing cases is that the status of a child as lawful issue for succession purposes is to be determined according to the law of the country where that status was created, provided, of course, that that country had jurisdiction in the matter, and it is hard to see why a distinction should be drawn between legitimation and adoption, except for reasons of public policy. The reason that in the first case there are bonds of blood and in the latter the bonds are purely artificial cannot be a legal distinction, for the law in both cases gives the child the same status which it would otherwise not have had in either case. The similarity is greater than the dissimilarity.

It appears that Vaisey, J. was swayed by considerations of public policy, for his Lordship digressed at some length on the wide differences which exist among the various systems of law with regard to adoption, and viewed with apparent alarm the proposition that he should recognise and give full effect to all adoptions, preferring, it would seem, to recognise none.[51]

It must be conceded that there is a considerable difficulty in the fact that in many countries, especially where adoption has been introduced by legislation, an adopted child may be the lawful child of the adopter for some but not for all purposes.[52] And it would then become the onerous duty of an English judge to determine at what stage the adopted child attains the status of a lawful child of the adopter. Does a child which still has a right to inherit from its natural parents on intestacy, as is the case under the laws of many countries, enjoy such a status or not? And should such a child be equal in position to a child adopted under the English legislation or to a child born in lawful wedlock? As adoption itself is entirely foreign to the common law and a legislative innovation of quite recent years, it is small wonder that

[44] (1945) 1 Ch. 733.
[45] (1881) 17 Ch. D. 266.
[46] (1954) 1 Ch. 733, 742.
[47] (1881) 17 Ch. D. 266, 296.
[48] (1883) 24 Ch. D. 637, 642.
[49] (1892) 3 Ch. 88.
[50] (1902) 1 Ch. 483.
[51] See Wolff, *Private International Law* (2 ed. 1950) 400-402, where the learned author comes to the conclusion that English courts probably will not recognise any foreign adoptions.
[52] See on this point the short summary given *id.* at 399.

the courts are perplexed by the difficulties raised and tend to refuse to recognise any foreign adoption decree.

Such a refusal was given in unequivocal terms in the recent decision of Barnard, J. in *Re Wilby*.[53] The facts of this case were that Mr. and Mrs. Wilby, while domiciled in Burma, had adopted the deceased, then also domiciled in Burma, by a mutual agreement in writing between parents and adopters which was registered on the same day. Though there was no court order or judicial confirmation, the adoption was valid under Burmese law. The adoptive mother applied for a grant of letters of administration of the deceased's estate in England and the question arose whether she was entitled to such a grant to the exclusion of the deceased's natural next-of-kin. In this case, unlike *Re Wilson*, the initial validity of the adoption was not in dispute as both parties were domiciled in Burma at the time of adoption and the adoption was valid under Burmese law. The only problem then was the problem of the extent of recognition to be given to the adoption. Barnard, J., though he stated that the adoption would be recognised in England for some purposes, held following *Re Wilson* that the adoptive mother could not be regarded as the lawful mother for the purposes of the English law of succession. His Lordship agreed[54] that adoption was, in the absence of statutory provisions, governed by the law of the domicile of the adopter and child, but said that it did not follow that that law determined whether an adopted child could succeed to property as a child of the adopter. That was a question to be determined by the law governing the succession and English law, as the law governing the succession in this case, only gave children adopted in England, Scotland and Northern Ireland equality with children born in lawful wedlock.[55] It is apparent that in coming to this decision, which shut the gate left ajar by Vaisey, J. in *Re Wilson*, his Lordship was influenced by the consideration of the many difficulties involved in the thesis that the law governing the adoption determines the status of the child for succession purposes. His Lordship said that if this thesis were correct the judge would be faced with the impossible task of granting or refusing an application according to how closely the law of adoption in a foreign country approximated to the English law, and pointed out that[56] "wherever adoption constitutes an artificial relationship, its conditions, its aims and effects differ widely in the various countries and under the various types of civilisation." A similar attitude was taken by the Queensland Supreme Court in *Bairstow* v. *Queensland Industries Pty. Ltd.*[57] where Townley, J. dealing with the claim of a child adopted in England under the Adoption Act, 1926, when all parties were domiciled there, under the local equivalent of the Compensation to Relatives Act, stated that he did not think that the comity of nations required that adoption orders made elsewhere were to receive recognition for all purposes, with the effect of placing the child in the position of a child adopted under local legislation.

The result then of *Re Wilby* and *Bairstow's Case* is to establish the view that no general effect is to be given to foreign adoption decrees, contrary to the *dicta* in the earlier Dominion cases. But, with due respect, it is submitted that such a restrictive attitude has thoroughly undesirable results, granted though it may be that in this case the difficulties may be great. It would seem that equality of treatment requires that if a child according to the law of its adoption has the status of a lawful child of the adopter, such a child be given the same status with all the benefits flowing therefrom under the local law. This will involve the courts in an investigation of foreign laws which, however, would be no more difficult than those engendered by, say,

[53] (1956) 2 W.L.R. 262; (1956) p. 174.
[54] *Id.* at 265.
[55] Adoption Act, 1950, s.13.
[56] (1956) 2 W.L.R. 262, 265.
[57] (1955) Q.S.R. 835.

the foreign court theory. As Cheshire points out,[58] a sovereign can refuse to recognise any law but its own, but such an attitude is impracticable in the modern civilised world. Equally so, the courts should give effect to foreign adoption laws, as it has done with foreign laws in more established fields. It is true that the relative novelty of adoption in the common law countries is the greatest handicap to a broader view.

It must be mentioned that *Bairstow's Case* would possibly have been decided the same way even if the view that status must for all purposes be determined by the law governing the adoption had been applied, as the adoption in question had been effected under the English Adoption Act, 1926 which did not give the adopted child rights of inheritance on the intestacy of the adoptive parents, but to the contrary precluded such rights by express terms.[59] It is doubtful then whether a child adopted under such a statute could be said to have the status of a child born in lawful wedlock, and as Townley, J. in *Bairstow's Case* rightly pointed out, there is no obligation on the Queensland courts to interpret Queensland statutes so as to include children adopted abroad. This point, however, was not raised before the court.

In conclusion, the position contended for is as follows:

1. As regards initial validity, the adoption must be valid according to the *lex domicilii* of both parties, or what is far more probable, both parties must be domiciled in the same place.[60] It is submitted that the true basis for the decision in *Re Wilson*[61] is that the Quebec court did not have jurisdiction.

2. If the adoption then has such initial validity, foreign courts, whether they themselves have adoption laws or not, must treat an adopted child as the lawful child of the adopter, if it enjoys such a status under the law governing the adoption, unless of course the adoption is such that reasons of public policy prevent the court from giving effect to it.

3. Where the status granted to the adopted child is less than that of a child born in lawful wedlock under the law governing the adoption, there is no obligation on a foreign court to give it the benefit which adopted children enjoy under its own laws. In the case of adoptions with unusual aspects, such as the oriental adoptions mentioned by the learned judges in *Re Wilson*[62] and *Re Wilby*,[63] there may be the further consideration that English law, though it does not refuse to recognise the adoption, is unable to give effect to it through lack of machinery under its own laws, which are not designed to deal with matters such as ancestor worship. That would equally apply to any status less than that of a child born in lawful wedlock, or of a child adopted under local legislation if the latter itself differed from the status of a legitimate child.

But it must be pointed out that the *dicta* of the courts in the decisions of the last few years indicate the rule that English courts will not give effect for most purposes to a foreign adoption decree, irrespective of whether the adoption has initial validity or not and whether the foreign laws were similar to English legislation or not.

P. E. NYGH, Case Editor—Fifth Year Student.

---

[58] Cheshire, *Private International Law* (4 ed. 1952) 1.
[59] Adoption Act, 1926, s.5(2).
[60] See R. H. Graveson, *The Conflict of Laws* (3 ed. 1955) 173, where the learned author makes a similar suggestion, and also for a general criticism of *Re Wilson*.
[61] (1954) 1 Ch. 733.
[62] *Id.* at 741.
[63] (1956) 2 W.L.R. 262, 265.

IUS SPATIANDI—A VALID EASEMENT *RE ELLENBOROUGH PARK*[1]

"The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind", observed Lord St. Leonards, L.C. in *Dyce* v. *Lady Hay*,[2] and no clearer example of this principle need be sought than in the detailed and authoritative judgment of the Court of Appeal delivered by Evershed, M.R. in *Re Ellenborough Park*,[3] affirming the decision of Danckwerts, J. in which it was established that a right to the "full enjoyment" of a pleasure ground may constitute in English law a valid easement appurtenant to neighbouring houses.

This right had been granted in 1855-1864 to purchasers of building plots surrounding the Park in conveyances in a common form, in the following terms:

> And also the full enjoyment at all times hereafter in common with the other persons to whom such easements may be granted of the pleasure ground set out and made in front of the said plot of land—in the centre of the square called Ellenborough Park which said pleasure ground is divided by the said Walliscote Road but subject to the payment of a fair and just proportion of the costs charges and expenses of keeping in good order and condition the said pleasure ground.

The vendors covenanted with each of the purchasers, his heirs, executors, administrators and assigns and all others to whom the right of enjoyment of Ellenborough Park might be granted to keep the Park an ornamental pleasure ground.

Upon the death of the successor in title to the original vendors the Park had become vested upon statutory trusts for sale in the plaintiff trustees, who sought by summons a declaration respecting the rights of the successors in title to the original purchasers, as owners of the surrounding properties, to use the Park as a pleasure ground. The question as to entitlement to certain moneys paid to the trustees by the War Office as compensation for wartime use and dilapidations was also decided by Danckwerts, J. in the court below, but was not argued on appeal, the parties having agreed as to application of the moneys subject to the determination of the main issue.

The court held that, on the construction of the deed, the grant of "full enjoyment of the pleasure ground" was intended to create a valid legal easement and contemplated the use of the Park "in its physical state" as an ornamental garden and pleasure ground, such use and enjoyment being "a common and clearly understood conception". The judgment expresses strong doubt that the right to use the Park as a garden in the way in which gardens are commonly used can with accuracy be said to constitute a mere *ius spatiandi*, the existence of which in English law as a valid easement had been denied by Counsel for the plaintiffs, citing Dr. G. R. Y. Radcliffe's quotation from the Roman jurist Paulus "*ut spatiari et ut coenare in alieno possimus, servitus imponi non potest*": (Digest 8.1.8.)[4]—and *dicta* of Farwell, J. in *Attorney-General* v.

---

[1] (1956) Ch. 131.
[2] (1852) 1 Macq. 305.
[3] (1956) Ch. 131.
[4] *Real Property Law* (2 ed. 1938) 148. It should be noted that in the full text the quotation is preceded by the words "*ut pomum decerpere liceat*". The whole translated reads: "A praedial servitude cannot be created so as to give me permission to pick an apple, to wander about or to picnic on another's land." Now it is submitted that this text illustrated the rule that a praedial servitude (like an easement) cannot be in gross; it should be noted also that the Romans included profits (which in English law can be in gross) under the heading "praedial servitude", and thus prevented them from being in gross. The full Roman text, therefore, means that the trivialities mentioned ordinarily give rise to a personal benefit merely (note the singular "apple"): this is not to say that they would have been excluded in Roman law had they been shown (as in the English