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## FUTILITY OF RESORT TO ROMAN LAW FOR INTERPRETATION OF STATUTES ON ADOPTION

J. GILBERT HARDGROVE\*

IN a case recently presented to the Supreme Court of Wisconsin, it was held that a child adopted under the statutes of Wisconsin would not take by descent from a brother of the adoptive parent.<sup>1</sup> An argument was made to the effect that adoption, being unknown to the common law, must be presumed to have been taken from the Roman Law, that under the Roman Law, adoption carried with it the right of collateral inheritance and that the same result should follow when we provide for adoption. The court, in its opinion, very properly, it is thought, did not discuss this argument, treating the case as turning upon a correct interpretation of the statute involved. However, as the argument is frequently met with and sometimes followed after what seems very superficial study, the writer believes that a discussion of the subject will be found of more than passing interest. In this article the writer simply restates from the brief filed by his firm the results of the study given to the subject, largely by his associates, in the case above referred to.

No common law state which enacts a statute providing for adoption stands in such relation to the Roman law that the statute can be said to have been adopted from that law, and least of all from the ancient Roman law. Modern statutes dealing with adoption are framed to take care of a social practice, the origin of which in this country was wholly independent of the practice known to the Roman state. There is no historical relation either in the laws or in the practice itself. To an understanding of this question an examination of the history of the Roman law and of Roman society becomes necessary. If there be eliminated in any given case under the ancient Roman law, those elements which are peculiar to the ancient Roman social structure, and for which no analogy can be found in modern society, there remains no right of inheritance from or succession to collateral kindred of the adoptive parent. Under the law as settled by Justinian, the same thing

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The references to and translations from Latin, French and German material are largely the work of Mr. Elwyn Evans, also of the Milwaukee Bar.

<sup>1</sup> *In re Bradley's Estate*, 201 N.W. 973 (Wis.).

was true with an exception which when analyzed is found to rest on blood relationship.

The historical development of the Roman law covers a period of approximately one thousand years, from the Twelve Tables (about 450 B.C.) to the Justinian Code (529 to 534 A.D.). Roman law during this period went through a course of gradual development not greatly unlike that of the common law of England.

Roman society during the same period went through a slow but very important process of change. Beginning in the patriarchal stage, it was gradually transformed until, by the time of Justinian, it had reached a stage not unlike that of modern western societies. Adoption was known to both stages of the law and to both stages of social development and the law of adoption changed with the changes in the social and governmental fabric.

To understand the institution of adoption in the ancient Roman state and to understand succession under the Roman law, it is necessary to understand the institution of the family, the position of the father of the family (*pater familias*), his extraordinary power over his family (*patria potestas*) and what is known as agnatic relationship.

The family, in early Roman history, was a little kingdom of which the eldest male ascendant (*pater familias*) was the king. His power extended to life and death and was as unqualified over his children and their households as over his slaves. From the standpoint of property rights, the family might be compared to a modern corporation of which the *pater familias* was the public officer; he was vested with all of the property of the family and subject to all of its obligations. The physical death of the *pater familias* made little difference to the aggregate of the family property; it passed on as a unit, rights and obligations alike, to his heir or group of heirs, who were deemed, for the purposes of law and religion, as carrying on the existence of the family.

Among the members of the family were to be found, quite naturally, the descendants of the *pater familias*. These were related to him by ties of blood, or what the Romans called *cognition*. To be contrasted with this, is the artificial legal relationship existing by virtue of the family tie which the Romans called *agnation*. Not all of the *cognatic* or blood descendants, however, were members of the family. Sons or other male descendants who had been emancipated and daughters or other female descendants who had been given in marriage were completely cut off from the *agnatic* family. On the other hand, there could be many persons who were not blood relatives of the *pater familias* who were, nevertheless, members of his family and, consequently, bound together by the ties of *agnation*. Thus the wife of the *pater familias* and the wives of all of his male descendants who were still

under his power were within the *agnatic* group. A stranger, not subject to any other paternal power (*sui juris*), might join the family and fall under the power of the *pater familias*. This was known as *adrogation*. Or, again, one who was under another *patria potestas* could be brought into the family by adoption. The family, in short, was composed of all those who were subject to the absolute power of the *pater familias*, quite irrespective of blood relationship. It was at once something greater than and something less than the modern family. *Agnation* was the artificial legal relationship which existed between the members of the same family or between all of those who would have been members of the same family were the common *pater familias* still living.

Before the time of Justinian, adoption created an *agnatic* but did not create a *cognatic* relationship.

Justinian's *Digest* 1, 7, 23:

"... *adoptio enim non ius sanguinis, sed ius agnationis adfert*. . . ."

(Translation) "... adoption does not create a tie of blood, but the tie of agnation. . . ."

It is important to appreciate the full force of this distinction, for without doing so it is impossible to get a correct understanding of adoption under the Roman law. *Agnation*, as we have seen, was a highly artificial and purely *legal* relationship. It was an institution of the earliest statute law, or what the Romans called the *civil law* (*jus civile*). By the term *civil law*, the Romans meant something quite different from what we mean today. It was the law of the city of Rome (literally, citizen's or civis' law) before that city had expanded into a world empire. It was a purely local law which reflected the institutions peculiar to the Roman people as contrasted with the *jus gentium* or the law of peoples, which reflected the institutions common to all mankind (see Justinian's *Institutes* 1, 2). It rested upon the XII Tables and the earliest statutes, while the law of peoples, or *jus gentium*, was introduced into the body of Roman jurisprudence by the praetor's equitable reforms and to a certain extent, also, by the decrees of the emperors.

It was this civil law relationship which was established by adoption and not blood relationship. Blood relationship was recognized only by the law of nature (*jus naturale*) and the law of peoples (*jus gentium*).

Girard, an eminent authority on Roman law, in his *Manuel Elementaire de Droit Romain*, 6th Ed. Paris 1918, at page 128, says:

"With regard to the family of the adopter, he (the adopted person) becomes the gentile of all the gentiles of the adopter, the agnate of all his agnates and, since agnation implies cognation, in becoming their agnate, he becomes their cognate. However, this point, whether with

regard to the adopter or with regard to his relatives, only exists from the point of view of the civil law (*jus civile*); consequently, the adopted person, who becomes the agnate and the cognate of all the agnates of the adopter, does not become the cognate of his cognates and if the civil bond is broken by an emancipation, for example, he ceases at the same time to be the agnate and the cognate of the relatives of the adopter and of the adopter himself."

Inasmuch as adoption created the tie of agnation, the adopted child became an *agnate* to all of the adopting parent's *agnates*. This is no more than we should expect from the *civil law* character of the institution of adoption.

Girard says: ". . . as agnation implies cognation, in becoming their agnate, he becomes their cognate."

But this was a mere legal fiction to enable the adopted child, in case of an intestacy, to take in the same class as the cognates in case he should for any reason fail to come in with the preferred class of agnates.

This will be apparent when we consider the rules of intestate succession under the Roman law. Under the law of the XII Tables, the *sui heredes*, or those liberated from the paternal power by the death of the *pater familias*, were given the estate. If none of these took the estate, it was given to the *nearest* agnate. If he did not take, then it went to the *gentiles*. The gentiles must not be confused with blood relatives. They were merely members of the same *gens*, or *clan*.

The provisions of the XII Tables here referred to read as follows:

XII tab. V. 4, 5: *Si intestato moritur, cui suus heres nec escit, adgnatus proximus familiam habeto. Si adgnatus nec escit, gentiles familiam habento.*"

(Translation) "If a man dies intestate, without a *suius heres*, the nearest agnate shall have his estate. If he has no agnate, the gentiles shall have his estate."

Buckland says:

"No text survives, and probably none existed, laying down in express terms the right of succession of the *suius heres*. It is taken for granted in the first of these texts. The word *heres* indeed means, as it seems, owner: the *suius heres* is not exactly inheriting, but assuming control of what was in a sense his already. More significant is the fact that the agnates and the gentiles are not said to become *heredes*. The words are not *heredes sunt*, but *familiam habento*."

(Literal translation of *heredes sunt*, is let them be heirs; of *familiam habento*, let them have the family.)<sup>2</sup>

<sup>2</sup> *Elementary Principles of Roman Private Law*—Buckland, p. 185.

The old law of the XII Tables was modified by the prætor's equitable reforms so that all children, whether under *patria potestas* or emancipated therefrom, were called in the first class (*unde liberi*). In the second class (*unde legitimi*) were all those who had a *civil law* claim (*sui heredes*, nearest *agnate*, *gentiles*). In the third class came the cognates (*unde cognati*). It will readily be seen that one person might be in all three of these classes. If, for any reason, he was unable to avail himself of his prior classification, he could come in under a later one. To enable an adopted child to do this was the purpose and the only purpose of this fictitious cognation.<sup>3</sup>

In any case, as Girard says, it was dependent upon the existence of the *agnatic* relationship and did not extend to the *cognates* of the adopter.

If a son, whether natural or adopted, was kept in a family until the death of the *pater familias*, all his earnings (with certain minor exceptions which need not be considered) had, of course, gone to augment the property of the family, the title to which was vested in the *pater familias*. Justice required that such a son, whether natural or adopted, succeed thereto with the other members of the family. Thus we see that neither succession nor adoption could proceed on the same theory under the ancient Roman law as under our law. If an adopted son remained in *potestas* (that is, remained unemancipated) until, let us say, sixty years of age, all his earnings (with exceptions not of controlling importance) would have gone to augment the common fund, with the title vested in the *pater familias* until the latter's death at, let us say, eighty-five, when he simply succeeded to what as a member of the *legal* family was his own.

We can find no analogy under our law because we have in our law neither the *patria potestas*, nor *agnatic* relationship, which is perfectly clear were the controlling features in the Roman law on this subject.<sup>4</sup>

Before any comparison can be made between an adoption under modern law and adoption under the ancient Roman law, we must find a situa-

<sup>3</sup> Buckland's *A Textbook of Roman Law*, pp. 366, 367.

<sup>4</sup> A fuller discussion of the general principles above explained may be found in the following works:

*Roman Private Law*—R. W. Leage, 1900, Macmillan and Co., pp. 66-97. (A good explanation of the Sources of Roman Law is to be found on pp. 2-40. Leage's discussion, though elementary, is clear and easily understood.)

Maines' *Ancient Law*, ch. V, especially pp. 140-157, ch. VI, especially pp. 192-202.

Sohm's *Institutes of Roman Law*, translated from the German by Ledlie, 1907, Clarendon Press, Oxford, pp. 16-19 (Sources of Roman Law); 177-178; 449-452; 479-488; 530-540. 11 *Corpus Juris*, 941-943 (for discussion of the legal sources of Roman law.)

tion in the latter from which both *agnation* and *patria potestas* have been eliminated and in such a situation one who had been adopted lost all right of succession in the adoptive family. If the *pater familias* had adopted a son and that son was still subject to his power at his death, in other words, was still under his *patria potestas*, that adopted son, because of the agnatic relation, succeeded with the other sons who were both *agnatically* and *cognatically* related to him. If, however, a son, natural or adopted, had been emancipated before the death of the *pater familias*, he did not, *under the old civil law*, share in the succession. He was no longer a member of what we might term the family corporation. With respect to a natural son who had been emancipated, the prætor, under his equitable jurisdiction, permitted him to take along with the sons who remained under *patria potestas*. The prætor's reforms, however, did not extend to an adopted son who had been emancipated. To illustrate, let us assume that A had three sons, B and C, being natural sons, and D, an adopted son. Assume that B and D are emancipated but that C continues under *patria potestas*. If A dies, all three surviving him, C takes because he has remained in the agnatic relationship. B also takes because, by the equitable reforms of the prætor, emancipated natural sons were placed on the same footing as natural sons in power. D, however, does not take because by the emancipation the only tie which bound him to his adoptive father, that of agnation, was severed. This is supported by the following quotation from *The Institutes of Justinian*, translated by J. B. Moyle, 5th ed., Book III, Title 1, p. 104:

"As to emancipated children, they have, by the civil law, no right to succeed to an intestate; for, having ceased to be in the power of their parent, they are not family heirs, nor are they called by any other title in the statute of the Twelve Tables. The prætor, however, following natural equity, gives them possession of the goods of the deceased merely as children, exactly as if they had been in his power at the time of his death, and this whether they stand alone or whether there are family heirs as well. Consequently, if a man die leaving two children, one emancipated, and the other in his power at the time of his decease, the latter is sole heir by the civil law, as being the only family heir; but through the former's being admitted to part of the inheritance by the indulgence of the prætor, the family heir becomes heir to part of the inheritance only. Emancipated children, however, who have given themselves in adoption are not thus admitted, under the title of children, to share the property of their natural father, if at the time of his decease they are in their adoptive family; though it is otherwise if they are emancipated during his lifetime by their adoptive father, for then they are admitted as if they had been emancipated by him and had never been in an adoptive family, while, conversely, as *regards their adoptive father, they are henceforth regarded as strangers*. If, however, they are emancipated by the adoptive after the death of the natural father, as

regards the former they are strangers all the same, and yet do not acquire the rank of children as regards succession to the property of the latter; the reason of this rule being the injustice of putting it within the power of an adoptive father to determine to whom the property of the natural father shall belong, whether to his children or to his agnates. *Adoptive are thus not so well off as natural children in respect of rights of succession: for by the indulgence of the prætor the latter retain their rank as children even after emancipation, although they lose it by the civil law; while the former, if emancipated, are not assisted even by the prætor.* And there is nothing wrong in their being thus differently treated, because civil changes can affect rights annexed to a civil title, but not rights annexed to a natural title and natural descendants, though on emancipation they cease to be family heirs, cannot cease to be children or grandchildren; *whereas on the other hand adoptive children are regarded as strangers after emancipation, because they lose the title and name of son or daughter, which they have acquired by a civil change, namely adoption, by another civil change, namely emancipation.*"<sup>5</sup>

When we carefully examine the essential elements of relationship and succession under the ancient Roman law, we realize that wherever *patria potestas* and *agnatic* relationship were eliminated, the adopted child lost the right of succession. Neither *patria potestas* nor *agnatic* relationship are known to our modern social structure or to our modern law and no analogies can be drawn except where both are eliminated. When both are eliminated we find a situation in which under the ancient Roman law the right of succession failed. We have seen that it failed in the case of the emancipated adopted son under circumstances where in the case of an emancipated natural son it would not have failed.

Justinian thoroughly overhauled the old law of intestate succession based upon *patria potestas* and *agnatic* relationship. Certain modifications tending to weaken the force of paternal power and to substitute the cognatic for the agnatic principle, had been brought about under the influence of the prætors and by express imperial legislation. It was, however, left for Justinian entirely to sweep away the old civil law ideas. His final legislation, embodied in his 118th and 127th Novels, has no place for either *patria potestas* or agnation.

With respect to adopted children, Justinian worked out two rules of succession, which commentators have treated as involving two forms of adoption which they came to designate as *adoptio plena* and *adoptio minus plena*. The *adoptio* was *plena* (complete) where the child was adopted by a natural ascendant, generally a maternal grandfather or a great grandfather. In this case, the principle of blood relationship is not violated and Justinian left the old law as it was.

<sup>5</sup> Italics are writers.



Where, however, the child was given in adoption to a stranger in blood, the adoption was *minus plena* (less complete). The adopted child remained under the *potestas* of his natural father. He did not enter the adopting father's family nor fall under his *potestas*, nor did he become related by the ties of agnation either to the adopting father or to his agnates. Inasmuch as he did not become an agnate of the adopting father's agnates, he could not become a cognate of theirs by virtue of the old civil law fiction.<sup>6</sup>

*Adoption minus plena* did nothing more than confer upon the adopted child the right to share in *the adoptive father's estate* in case of an intestacy. He did not even acquire a child's right to upset his father's will in case he was overlooked or in case he was not given a just portion of the estate.

Justinian describes his reforms in his *Institutes*, Book III, Chapter I, Section 14:

" . . . We found cases in which sons by entering an adoptive family forfeited their right of succeeding their natural parents, and then, the tie of adoption being easily broken by emancipation, lost all title to succeed their adoptive parents as well. We have corrected this, in our usual manner, by a constitution which enacts that, when a natural father gives his son in adoption to another person, *the son's rights shall remain the same in every particular as if he had continued in the power of his natural father, and the adoption had never taken place except only that he shall be able to succeed his adoptive father should he die intestate*. If, however, the latter makes a will, the son cannot obtain any part of the inheritance either by the civil or by the praetorian law, that is to say, either by impeaching the will as unduteous or by applying for possession against the will; for, being related by no tie of blood, the adoptive father is not bound either to institute him heir or to disinherit him, even though he has been adopted, in accordance with the SC. Afinianum, from among three brothers; for, even under these circumstances, he is not entitled to a fourth of what he might have taken on intestacy, nor has he any action for its recovery. We have, however, by our constitution excepted persons adopted by natural ascendants, for *between them and their adopters there is the natural tie of blood as well as the civil tie of adoption*, and therefore in this case we have preserved the older law, as also in that of an independent person giving himself in adoption; all of which enactment can be gathered in its special details from the tenor of the aforesaid constitution."<sup>7</sup>

Again in Book I, Chapter XI of the *Institutes* he says:

" . . . But by the law, as now settled by our constitution, when a

<sup>6</sup> Justinian's *Digest* 1, 7, 23; Buckland's *A Textbook of Roman Law*, pp. 366-367; Girard's *Manuel Elementaire de Droit Romain*, 6th Ed., Paris, 1918, 182, 183.

<sup>7</sup> Italics are writers.

child in power is given in adoption to a stranger by his natural father, the power of the latter is not extinguished: no right passes to the adoptive father, nor is the person adopted in his power, though we have given a right of succession in case of the *adoptive father dying intestate*."

The original constitution to which Justinian refers in the former quotation is found in the *Codex* 8, 48, 10, the material portions of which are as follows:

" . . . . Consequently, we, by way of correcting these uncertainties and defects, have enacted that when a person has been given in adoption to a stranger, the rights of the natural father shall be disturbed as little as possible but he shall remain as though he had not been transferred to another family. . . . When, therefore, a son is transferred by adoption to a stranger in blood, according to what we have now decreed, he retains intact all of the rights to an action for an unjust testamentary disposition (*querella inofficiosi testamenti*) or to all other kinds of successions, whether testate or intestate, which are conferred upon the children, so that he himself is able to profit from his natural father and from him receive that which is due him by nature. . . . *We have authorized such an adoptive parent, that is, a stranger, if he wishes, to leave the adopted son nothing in his will, but whatever he does leave him is purely of his own free will and not the result of a legal obligation.* Since, in all respects, we have placed the son in the position which he would naturally occupy, it is manifest that (the acquisition of) all property which comes to a son in paternal power (*filius familias*), according to our laws, goes, *not to the adoptive father, a stranger in blood*, but to the natural father, and he holds a life interest in such property. He remains in the religious affiliations (*sacra*), or his natural father just as though, in spite of his new relationship, no modification of his original blood relationship had taken place. But, if the child remains in the status of adoption without ever having been emancipated, we have decreed that, in such case, the adoption shall benefit him only to this extent, that he should not be deprived of succession to his adoptive father, who is a stranger in blood to him, upon his dying intestate, but that he should also have the right to acquire property bequeathed to him in his natural father's will. Even according to the old law, the bond of cognation (blood relationship), with the natural father was not dissolved by an adoption. The rights incident to the adoption arise without disturbing certain other rights existing by virtue of the natural law and, *while the child was related to the adoptive family by the bonds of civil law (i.e. Jus Civile), he was related to his natural family by ties of blood.* . . . . Consequently, we enact that, although such a son (by adoption *minus plena*) enjoys all of his natural rights, nevertheless, if the adopting father, being a stranger in blood, dies intestate, he has the right of a family heir (*suus heres*) to his estate and to his alone, so that he does not retain his former agnatic rights with respect to the family of the adopting father, nor does this family retain, with respect to him, any community of ownership in his property, but he stands as a stranger to this family. But if, however,

all of the rights acquired by adoption are dissolved by emancipation, absolutely no vestige of his right to succeed the adopting stranger remains even though the adopting stranger should die intestate, but he continues to look to his natural father only, even as though he had never been given in adoption. . . ."<sup>8</sup>

Modern commentators, whenever they have discussed the point, have uniformly stated that by *adoption minus plena*, the adopted child did not become an agnate of the adopting parent's agnates, nor did he acquire any rights of succeeding them on intestacy.

Dr. J. B. Moyle, one of the great English authorities on the Roman law, says in his edition of Justinian's *Institutes*, pp. 356-357 foot note to § 14 that:

" . . . For Justinian's changes in the law of adoption (Cod. 8, 48, 10) see on Bk. i. 11. 2 supr. Their result, so far as relates to intestate succession was as follows:

(1) If the *adoptio* was *minus plena*, the *adoptatus* retained all his rights against the estate of his natural father, and acquired besides a claim as *suus* to that of the adoptive father, if he died intestate, *though none to that of the latter's agnates*. . . ."

Winscheid, one of the principal German authorities, in his book, *Lehrbuch des Pandectenrechts*, (translation, *Textbook of the Law of the Paucts*), Vol. 4, p. 838 says:

"(C) Where adoption does not have the full effect, it does not produce the relationship of paternal power between the adoptive father and the adopted son, but only a natural relationship which, however, does not confer upon the adopted child any rights of necessary heirship with respect to his adoptive father, *and does not establish any relationship for the purpose of inheritance between the adopted son and the relatives of the adoptive father*. (C. VIII 47, (48) 10)."<sup>9</sup>

R. W. Leage, in his *Roman Private Law*, says:

(p. 74) "In every other case (i.e., adoption by strangers or any person but an ascendant) the adoption was *minus plena*; the child, as a fact, passed into the physical control of the person adopting, but as a

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<sup>8</sup> So far as could be learned no English translation of the *Codex* has even been published. One of the writer's associates has in his library a German translation prepared by certain professors of the University of Leipzig under the direction of Carl F. F. Sintenis, published in 1832. The German translation is in complete accord with that given above, the sentence next to the last being rendered as follows:

Und darum verordnen Wir, dass, wenn auch ein Sohn der Art die Rechte der natuerlichen Verwandtschaft unverkuerzt behaelt, er doch, wenn der fremde Adoptivvater testamentlos gestorben ist, auch zu dessen Beerbung, jedoch *nur zu dessen allein*, das Recht eines Notherben erhalten soll, so dass er also nicht auch *die sonstigen agnatischen Rechte* gegen die *Familie* des Adoptivvaters erhaelt, noch diese gegen ihn in einige Gemeinschaft tritt, sondern er zu dieser Familie wie ein Fremder dasteht.

<sup>9</sup> Italics are writers.

matter of law remained a member of its old agnatic family, and the only legal effect of such an adoption was that the child acquired a chance of intestate succession to the person making the adoption."

These reforms instituted under Justinian had for their purpose the giving of recognition to the natural tie of blood and the elimination of the peculiar *agnatic* tie of the old Roman law and reflect changes in the Roman social structure under the growing influence of Christian teaching. These changes were wholly lost sight of in the discussion of the Roman Law in a number of cases in this country.<sup>10</sup> At least one American court caught the distinction.<sup>11</sup>

An argument is also met with at times to the effect that the provisions found in the codes of modern civil law countries, such as France and Germany, expressly excluding an adopted son from any right of inheritance from the adopters' relatives, changed the commonly accepted rules of the Roman law in this respect. This is historically incorrect. Those codes stated the law as it was and as it was understood to be.

The Roman law as accepted in Germany from about the year 1500 onward was the Roman law as codified by Justinian and modified by the Medieval Italian Glossators and Commentators. While this law recognized that adoption could have the full effect (*plena*) or a limited effect (*minus plena*), depending on whether the adopter was a blood relative or not, the only form in practical use was one modeled after *adoptio minus plena*.<sup>12</sup> It was *adoptio minus plena* which was incorporated into the Prussian Civil Code of 1794 and which later formed the basis of the provisions of the German Civil Code of 1900, §§ 1757-58-62-63.

The express language of § 1763 of the German Civil Code is as follows:

"The effects of the adoption of a child do not extend to the relatives of the adopter." (Translation by Loewy in *The German Civil Code*.)

Commenting on the Sources of this section, B. Mugdam, in his book, *Die Gesamten Materialien zum Buergerlichen Gesetzbuch*, (translation, *The Collected Sources of the German Civil Code*), Berlin, 1899, in Vol. 4, on page 519 says:

"Following the Roman and the general law, no relationship between the adopted child and the relatives of the adopter is established by

<sup>10</sup> *Humphries v. Davis*, 100 Ind. 274; 50 Am. Rep. 788.

*Markover v. Kraus*, 132 Ind. 294; 17 L.R.A. 806; 31 N.E., 1047.

*Clark v. Clark*, 76 N. H. 551; 85 Atl. 758.

<sup>11</sup> *Woodward's Appeal*, 81 Conn. 152; 70 Atl. 453, 457.

<sup>12</sup> Sohm's *Institutes of Roman Law* translated by Ledlie, pp. 151, 152; in *History of Germanic Private Law*; Rudolph Huebner, in the *Continental Legal History Series*, published by Little, Brown and Co., 1918, pp. 661, 662.

means of *adoptio minus plena* and adoption by a woman. The contrary provision of the Roman Law with respect to adrogation and *adoptio plena* depends on the peculiar form of the Roman family. Whether and to what extent in this connection the principles of *adrogation* and *adoptio plena* are still applicable as a part of the general law is disputed. In Wurttemberg, it is accepted that by adoption no relationship is established between the adopted son and the relatives of the adopter. This is also the viewpoint of the new laws (citations). The Prussian Civil Code (11, 2, § 710) permits a family relationship to be established between the adopted child and the relatives of the adopter by means of a special family agreement. The first draft of the German Civil Code (§1620, subs. 2) conforms with the modern law. An extension of the relationship established by adoption to the relatives of the adopter would go beyond the purpose of the Institutes, the necessities of the case and the modern viewpoint. In opposition to the admission of such an extension by way of a family agreement, it may be stated that no necessity exists in this direction as in the same situation in case of legitimation by a declaration of legitimacy."

On page 529, in discussing the relationship between the adopted child and his natural relatives, Mugdam points out:

"Concerning the Roman law, which pertains to adrogation and full adoption, removal from the former agnatic relationship and loss of the rights dependent upon that relationship can no longer be called in question because the distinctions of agnatic relationship are foreign to the modern viewpoint."

Von Holtzendorf, *Encyclopaedie Der Rechtswissenschaft*, (translation *Encyclopedia of Law*), Leipzig, 1880, says concerning adoption:

"The Roman principle is valid even today, although by the weakening of paternal power and agnation, it has lost most of its importance. The new legislation, especially the Saxon Civil Code and the Prussian Civil Code, recognizes no difference between adrogation and adoption and restricts the effect of adoption to *adoptio minus plena* so that the adoptive father acquires neither management, life interest (usufruct) nor rights of inheritance in the property of the adopted child, but the adopted child only acquires rights to the property of the adoptive parents and is not removed from his natural family."

In France, adoption does not appear to have been practiced before the time of the Revolution, and consequently, the sections of the Roman Law dealing with this subject were not accepted along with the rest of the Justinian Code.

Brissaud, in the *History of French Private Law*, the Continental Legal History series published by Little, Brown and Company, 1912, says:

(§178, p. 218) "Having at an early period fallen into disuse, which came about owing to the evolution of the family, adoption only appeared

to our old jurisconsults as a Roman institution which had been rejected by the customary law. It was not even in use in countries of written law. . . .

(§179) "Under the Revolution, adoption entered into the law without any necessity of its doing so, by being called up from classical antiquity. The legislative assembly decreed that its committee on legislation should include it in its general scheme of civil laws."

Concerning the preparation of the sections which finally appear in the *Code Napoleon*, G. Baudry-Lancantinerie, *Traité de Droit Civil*, (translation, *Treatise on the Civil Law*), 1905, says:

(Vol. 4, p. 7) "After protracted debates the council ended by adopting the system which the code has sanctioned. It seems that the editors of the code were inspired principally by the Prussian Code (prepared in 1751, but not promulgated until 1794). Berlier, in the explanation of its purposes, which he presented to the legislative body on the 21st of the month, Ventose in the year XI (March 12, 1803), declared that the authors of the provisions did not take into consideration the Roman laws which could not be adapted to our customs but that they had found the true point of departure in the Prussian Code."

With reference to the relationship established between the adopted child and the relatives of the adopter, the code as finally enacted provides:

(§350) "The adopted person does not acquire any right of inheritance in the property of the relatives of the adopter, but he has the same rights as a legitimate child in the succession of the adopter, even if other such children should be born to the adopter after the adoption."

While this section was under consideration by the Council of State, M. Tronchet made the following pertinent remark which is quoted in J. C. Iocré's *Esprit du Code Napoleon Tiré de la Discussion ou Conférence Historique*, (translation, *The Spirit of the Code Napoleon as reflected in the discussion or historical conferences*):

(p. 460) "In the Council of State, one person observed, 'It is impossible to admit that an individual by his own will may change the order of succession of an entire family and give to all his relatives an heir which the law has not designated. To modify the absurdity of such a provision, one can conceive that the other relatives may be given the option of exclusion or a reciprocity with regard to the rights of inheritance. Vain precaution! Too often the collaterals either neglect to exercise the option which the law gives them or surprised by death, have no time to exercise it. On general principle, the effects of adoption should not extend beyond the adopting father and the adopted child.'"

The whole subject of adoption as it appears in the *Code Napoleon* is admirably discussed by Toullier in his *Le Droit Civil Français*, (translation, *The French Civil Law*), 5th ed., Paris, 1830.

He says:

(Vol. 2, pp. 254, 255, 256) "Adoption as it exists today has almost nothing in common with the ancient adoption of the Romans except the name. The basis upon which it rests, the characteristic effects, the forms, all are different. Our legislators have even declared that the adoption of the Romans cannot be adapted to our customs, and that it should remain banished from our institutions.

"The principal and characteristic effect of adoption among the Romans was to cause the adopted child to pass into the family of the adopting person and to confer upon the latter all the rights of paternal power over the person and over the property of the adopted child who, if he was already the master of his own rights, *sui juris*, experienced in this way a change in his status, *capitis diminutio minima*, or who, if he was a son in a family, passed out of the power and the family of his natural father to fall under the power and to enter into the family of his adoptive father.

"On the contrary, according to the Civil Code, the adopted son remains in his natural family; he preserves all his rights as a member of that family (§348); he remains consequently under the control of his natural father and mother without passing either under the power or into the family of the adopting parent to whose relatives he is never able to succeed.

"A complete change in the effects of adoption was brought about under Justinian. This prince permitted these effects to continue only in the case where the adopting parent was one of the ascendants of the adopted child, for example, his maternal grandfather; in all other cases Justinian desired that the adopted child should not pass either into the family or under the power of the adoptive father, to whom only he acquired the right to succeed on intestacy, without this right being reciprocal. It is this adoption of Justinian that the doctors have called imperfect.

"This imperfect adoption served as the prototype or model for the adoption which was incorporated into the Prussian Code finally accepted in 1791, revised and promulgated in 1794, and it is upon that adoption that our legislators have based a large part of the provisions of the code. It is from that source that they have taken the idea of an adoption which does not break the family ties between the adopted child and his natural relatives, which does not cause the adopted child to enter into the family of the adopting parent and which is only a personal contract *whose effects, confined to the parties alone, do not extend to any other members of the family of the adoptive parent.*"

Provisions similar to those in the French and German Civil Codes are found in most of the modern civil law countries.<sup>13</sup>

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<sup>13</sup> *Swiss Civil Code of December 10, 1907*, translated by Robert P. Schick; Boston Book Co., Boston, U. S. A., 1915, Sec. 268; *Civil Code of Spain*, with Philippine Notes, translated by F. C. Fischer, 1918; The Lawyers Co-op. Publishing Co., New York, Art. 177.

Thus we see that the Roman law in its final form, the form in which it was handed down to modern Europe, did not regard adoption as forming the basis for inheritance or succession from the kindred of the adoptive parent.

When we examine, from the historical and philosophical standpoint, the change worked in the law under Justinian, we will find that it was but one phase in the struggle toward the ultimate recognition of the call of the blood as the correct principle governing intestate succession. The old law, based upon agnatic relationship and *patria potestas*, was entirely wiped out. In the one case where the adopted child was already related to the adoptive parent, by ties of blood, for example, where the adopting parent was his maternal grandfather, Justinian permitted the old law to continue in effect. But even this was entirely in accord with the principle of blood relationship, for the right of succession was, as Justinian himself said, given by reason of blood relationship rather than adoption.

The older Roman law, tied up as it was with the archaic conception of the family, was entirely disregarded by the continental European countries as being inapplicable to their social conditions, and the modern codes of those countries merely re-enact those parts of the later Roman law which had already been accepted as part of their general law.