*Adoption and Succession in Roman Law**

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Core Date for Treatment

I shall be examining the use of adoption as a strategy for succession under Roman law, with a main focus on the period from 200 BC-AD 200. This is admittedly a difficult task, since a majority of our legal sources took final form rather later than this, some as late as the age of Justinian (AD 527-565). Nevertheless, the earlier period is more extensively illuminated by literary sources, and in consequence it is here that we can engage in comparison of legal rules with social practice. It is to be hoped that a plausible picture may emerge and that as far as possible anachronism can be avoided. To counter problems of this sort, I shall where possible comment on the evolution of the law of adoption.

Some Introductory Remarks on Succession in Roman Law

Family Life and Patria Potestas[1]

To understand the mechanisms employed for the passing of property from one generation to its successor at Rome, certain aspects of family life have to be understood.

* This article is the first part of a two part series dealing with aspects of the laws of classical civilisations by Hugh Lindsay. Its sequel, on Greek law, will appear in the next issue of the *Newcastle Law Review*. Ed.

1 Useful introductory treatments include J.A. Crook, *Law and Life of Rome*, Thames and Hudson, London (1967) 98-138; B. Nicolas, *An Introduction to Roman Law*, Oxford (1962) 234-270. For some of the specifics on *patria potestas* see J.A. Crook, 'Patria potestas' CQ 17 (1967) 113-122.

Marriages under Roman law by the late Republic fell into two main categories according to the intention of the parties.[2] In the earlier form the woman passed into the *manus* (the hand) of her husband. This meant that she left the agnatic family of birth and joined her new husband's family just as fully as if she had undergone adoption. If she already owned any property at this stage this now fell under the control of her husband (or his *paterfamilias*, if the new husband was a son who had not been emancipated: see further below). If such a woman had been legally independent before the marriage (*sui iuris*), she lost that independence as a result of entering a *manus* marriage. In the second non-*manus* form of marriage, the woman did not pass from her family of origin into her new husband's agnatic family; rather she continued to be under the control of her own *paterfamilias*, or in the event that he was no longer alive, she remained legally independent (*sui iuris*), and consequently under control of her own property. A dowry would become the husband's for the duration of the marriage, but it was subject to certain restrictions. For example, the husband could not alienate Italian land forming part of the dowry.[3] Moreover, a dowry clearly often did not comprise the entirety of the wife's fortune.[4] In the event of death or divorce, dowry would be returned to the wife's family after discounts for children of the marriage. In the case of divorce there might also be penalties for misbehaviour on the part of the woman.

The power of the *paterfamilias* (termed *patria potestas*) meant that those who were subject to him (including not only children but also wives under *manus*) could own no property in their own right. These might include married sons and daughters. Indeed, a *paterfamilias* might in theory force them to marry or divorce. Those still subject to the *potestas* of the *paterfamilias* might even already have acceded to high office. The power of the *paterfamilias* did not end until his death, unless an individual was emancipated. Clearly this implies a highly restricted world for those still subject to the *paterfamilias*, and the idea that individuals might choose emancipation at first sight seems plausible. Emancipation broke the bond of *potestas*, but may have been considered disgraceful. Something appropriate for a 'black sheep'.[5] Although certain freedoms were obtained by emancipation, emancipation effectively reduced an individual's chances of inheritance from the *paterfamilias*. In this atmosphere, it can be seen that the moment of succession must have been highly critical in the Roman world.

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[2] Roman marriage in its social context has recently been subjected to a very full treament by S. Treggiari, *Roman Marriage: Iusti coniuges from the time of Cicero to the time of Ulpian*, Oxford (1991). On legal issues, P.E. Corbett, *The Roman Law of Marriage*, Oxford (1930) is still of value.

[3] A succinct account is provided in Crook, op.cit. 103-104.

[4] Notice the example of Pudentilla, a widow, who married Apuleius. She had a fortune of 4 million sesterces, but Apuleius was to get a dowry of only 300,000 (Apuleius *Apologia* 71; 91-92).

[5] See Crook, op.cit. 110.

Moreover, the power of the *paterfamilias* over the future of his natural offspring was not an end of these power relationships. For the present paper I shall concentrate on the *potestas* artificially generated through adoptions. This placed a person adopted in an identical position to a child who was born under control of the *paterfamilias* (regardless of which form of adoption was concerned: see below). As we shall see certain differences do manifest themselves when we come to look at the succession rights of adopted children.

Intestate Succession

Intestate succession has been considered to have been the oldest form of succession in Rome.[6] It is assumed that intestate succession is related to customary inheritance where the individual was not entitled to nominate his heir, but had to pass down the family inheritance in accordance with custom. In the period under consideration in this paper, it was possible to leave a will, but if there was no will, or for any reason the will was invalidated, then the rules of intestacy applied.

Under these rules for intestacy, a man's *sui heredes* automatically became his heirs. *Sui heredes* were defined as those persons under a man's *potestas* or *manus*, who would become *sui iuris* (i.e. legally independent) on his death. Under the civil law[7] such *sui heredes* became heirs in equal shares without regard to their sex. If there were no *sui heredes*, then agnate relatives would take (those of nearest degree only); finally if this solution failed, the inheritance fell to the *gens*. This automatic line of succession placed all emphasis on protection of agnatic rights.

Praetorian law[8] had already made inroads into this system before the beginning of our period. It is difficult to determine the phases of development in Praetorian law, but importantly it gradually allowed extra categories of person to apply for possession of the estate in cases of intestacy. In the first degree all children (*liberi*) could claim. Some children who would have been *sui heredes* could be excluded as a result either of their own emancipation or their father's emancipation. These were reincorporated under the praetorian jurisdiction. If there were no children

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6 A. Watson, *Roman Private Law Around 200 BC*, Edinburgh University Press (1971) 93-116 describes the situation at the beginning of our period.

7 Civil law or *ius civile* refers to the traditional common law based on statutes and their subsequent modification, as well as their later interpretation by the jurists.

8 The urban praetor was one of the higher magistrates at Rome entitled to issue edicts. From the Praetorian edict derived *ius honorarium* (magisterial law). There were certain limits on the Praetor's ambit. He did not have the power to make law, and in theory the *ius civile* remained unaltered by any Praetorian edict. His jurisdiction was only over the methods employed in the enforcement of the law. For a fuller explanation see B. Nicolas, *An Introduction to Roman Law*, Oxford (1962) 19-27. Detailed treatments can be found in J.M. Kelly, 'The growth pattern of the praetor's edict' *Irish Jurist* 1 (1966) 341-355; A. Watson, 'The development of the praetor's edict' *JRS* 60 (1970) 105-119.

then blood relations down to the sixth degree could claim; finally a widow was allowed a look in. Emancipated children had to engage in *collatio bonorum* if they were to take a share alongside civil law heirs. This meant that they had to give an account of property acquired since emancipation; an emancipated heir had had opportunities to acquire property which were not available to his co-heirs if they were *sui heredes*, and discounting of his share was felt to be appropriate.

Testamentary Succession

In the period under consideration Romans probably did normally make wills.[9] If there was a will it had to deal with the entire estate. It was not possible to combine testation with an intestacy, because an heir (*heres*) was a universal successor, and took over all the legal responsibilities of the deceased. Also included was responsibility for the family cult. The most important role of a Roman will was to name an heir or heirs, since if this was not done the will would be void, and the intestacy provisions would come into effect. In the event of multiple heirs, the heirs did not inherit individual items but took on the role of 'joint universal successors' to the entire estate in the fractions named in the testament. Any number of individuals could be so named, and precautions could be taken against the possibility of a named heir predeceasing the testator by naming substitutes. It has been noticed that Romans of standing employed wills as a method of reinforcing their prestige;[10] perhaps the most notable instance here is the will of the emperor Augustus, who included the entire populace of Rome in his bequests.[11] Entailment of an estate was not possible - each generation had the freedom to dispose of the property it had received from its predecessor. Certain classes of marginal persons were not authorised to make wills.[12] A testator could disinherit his own children, but was required to do so expressly. Those who were not expressly disinherited either because the intention was to pass them over, or because they were born or adopted after the drafting of the will, could cause upsets - they would have an entitlement to shares in the estate. A general phrase such as 'and let all others be disinherited' was generally sufficient to exclude such persons. However, the feeling at Rome was that a man should only be able to exclude children on serious grounds,

[9] This topic has generated a certain amount of debate. See D. Daube, 'The preponderance of intestacy at Rome' *Tulane Law Review* 39 (1964-65) 253-262; J.A. Crook, 'Intestacy in Roman society' *PCPhS* 19 (1973) 38-44.

[10] See E. Champlin, *Final Judgments: Duty and Emotion in Roman Wills 200 BC-AD 250*, University of California Press (1992) 5-28.

[11] Suet. *Aug.* 101, discussed by E. Champlin, 'The testament of Augustus' *RhM* 132 (1989) 154-165.

[12] These included criminals and lunatics and others listed by Crook, *Law and Life of Rome*, Thames and Hudson, London (1967) 120-121.

and there developed the important action of the *querela inofficiosi testamenti* - the complaint against an unduteous will. A successful plaintiff in an action of this sort obtained his intestate portion, provided that he was not already entitled to one quarter of that amount.[13] It was also possible to leave legacies (often numerous), a complicated area in Roman law, but outside the scope of this treatment.

Adoption and its Relationship to Succession

It is clear that in societies ancient and modern adoption has served a number of different functions, but a common thread has been that an adoption enables the adoptee to assume many aspects of the social personality of the adopter on his death. The commonest reason for adoption appears to have been the lack of any immediate offspring.[14] However, in theory adoption enables a testator during his lifetime to select an individual from outside the family group to be his heir and in this way to introduce new blood into the system. It has been pointed out that the impact of adoption is to create new *sui heredes*, new agnates and new cognates. As far as succession is concerned this means that an adoption can in theory result in a completely new complex of individuals entitled to *bonorum possessio*.[15] Nevertheless in Rome it seems to have been commonest for those chosen for adoption to have been close relatives, such as a brother's or sister's child.[16] At any rate, when the legal authorities are consulted there is little sign of adoption of complete strangers. A major difference from the modern world is in the age at which adoption would occur. Often those adopted were adults. A clear advantage in this is that the adopter has the opportunity to engage with the individual before making a final choice.

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[13] See D. 5.2.8.8; Plin. *Ep.* 5.1.9, and further below.

[14] Demographic factors are usually cited to explain the importance of adoption in Roman society. Low fertility is attributed to this world. See K. Hopkins, *Death and Renewal*, Cambridge University Press (1983) 69-106. For an analysis of the demographic structure of Roman society see T.G. Parkin, *Demography and Roman Society*, Johns Hopkins (1992) 91-133.

[15] See C. Russo Ruggeri, *La Datio in Adoptionem*, Milan (1990) 222ff. outlining some instances in the Digest where major changes to the order of inheritance are encompassed.

[16] This has been well illustrated in an important paper by M. Corbier, 'Divorce and adoption as Roman familial strategies' in *Marriage, Divorce and Children in Ancient Rome* (ed. B.M. Rawson), Oxford (1991) 47-78. See also her paper 'Constructing kinship in Rome: marriage and divorce, filiation and adoption' in *The Family in Italy from Antiquity to the Present* (ed. D. Kertzer & R. Saller), Yale (1991) 127-146. The legal rules on Roman adoptions have recently been concisely surveyed by A. Borkowski, *Textbook on Roman Law*, London, Blackstone Press (1994) 124-127.

Categories of Adoptee in the Roman System

There are three major types of adoption in the Roman system: adrogation, adoption and testamentary adoption. This paper will try to outline the impact of each of these forms of adoption on the world of inheritance. Succession is a major theme in the Digest, and a large number of contingencies are canvassed in that work. Theoretical possibilities are acknowledged to be a major feature of the treatment of all areas of the law by the Roman legal writers, and it is only to be expected that each contingency should merit attention in the Digest and elsewhere.

Adrogation (*adrogatio*)[17]

This process reduced a man who was a *paterfamilias* or independent person (*sui iuris*) to the status of a *filiusfamilias* or dependent person. It is important to understand the role of the *Comitia Curiata* in this procedure; although representing the people and legally omnipotent, it was unconstitutional to deprive a person either of the franchise or domestic independence without his consent. Cicero explains how this was managed in his vituperation against procedures employed at the time of the adrogation of his political enemy Clodius:

> "As it is an immemorial rule of law that no citizen of Rome shall be deprived of independence or the franchise against his will, as you have had occasion of learning by your own experience, for I suppose that, illegal as your adoption was in all points, you at least were asked whether you consented to become subject to the adrogator's power of life and death as if you were his son; if you had opposed or been silent, and the 30 *curiae* had nevertheless passed the law, tell me would their enactment have had any binding force?" [De Domo 29]

The form in which the law authorising an adrogation was proposed to the legislative asembly is given in the following extract from Aulus Gellius:[18]

> "Adrogation is subjection of an independent person with his own consent to the power of a superior, and is not transacted in the dark or without investigation. The *Comitia Curiata*, at which the College of Pontiffs is present, are convened and examine whether the age of the adrogator does not rather qualify him for natural procreation of children, and whether the estate of the *adrogatus*

[17] Useful accounts of adrogation can be found in E. Poste, *Elements of Roman Law by Gaius*, Oxford (1890) 85-86; A. Watson, *The Law of Persons in the Later Roman Republic*, Oxford (1971) 82-90.

[18] On the background of this author from the age of the Antonines see L. Holford Strevens, *Aulus Gellius*, London, Duckworth (1988).

is not the object of fraudulent cupidity, and an oath, said to be framed by Q. Mucius, the high pontiff, has to be taken by the adrogator... Adrogation, the name given to this transit into a strange family, is derived from the interrogation of the legislative body, which is in the following form:

'May it please you to will and covenant that L. Valerius shall be completely by law and statute the son of L. Titius, as if he were born of L. Titius and his wife, and that L. Titius shall have the power of life and death over L. Valerius as a father has over his son. Do you will and covenant as I have said, *Quirites?*'" [Aulus Gellius *Noctes Atticae* 5.19]

As can be seen, care was taken over issues such as age of the adrogator and the consent of the person undergoing *adrogatio.* A bachelor was not excluded from employing *adrogatio,* but there was a concern to ensure that financial and other interests of the person adrogated were being taken into account. Since a person adrogated was a *sui iuris,* his adrogation would result in the extinction of his family of origin, and this was not taken lightly. The emphasis in the formula as recounted by Aulus Gellius is on total replication of the role and status of a natural child.

Adoption (*adoptio*)

This was the form of adoption used where the person to be adopted was *alieni iuris* (i.e still subject ot the jurisdiction of the *paterfamilias* in his family of origin). Under Classical law *adoptio* was an adaptation of the rule of the 12 tables that if a father sold his son 3 times he lost *patria potestas* over him. Each sale was called a mancipation (*mancipatio*). After each *mancipatio* the son would be manumitted, and after the third *mancipatio* the son could be remancipated to his father, from whom the adopter would claim him as his son before the praetor, or else the son would not be remancipated to the father, and the adopter would claim him from the person with whom he was under the third *mancipatio.* An adopted son became a member of the tribe (*tribus*) of his adoptive father. It is not clear under Republican law whether the adopted son entered the *gens* of his adoptive father. It is however highly likely, since one of the commonest indicators of adoption is change of *nomen,* usually considered to the main indicator of *gens* in Roman nomenclature.

Testamentary Adoption (*adoptio testamentaria*)

This last category is not treated by the legal writers (although it is mentioned quite a few times in literary works of late Republican or early Imperial date), and many authorities have doubted whether this amounts to much more than a requirement under a will to take the testator's name

in order to enter on an inheritance (the so-called *condicio nominis ferendi*). Fuller discussion is reserved for the latter part of this paper, where it is relevant as a testamentary strategy for securing the succession.

The Impact of Adoption

The main result of an adoption or adrogation was to place the subject under the *patria potestas* of the adopting *paterfamilias*. He might be adopted either as a son or a grandson, and legal authorities deal with both propositions. Both of these types of adoption lead to significant changes in the agnatic relationships. With adrogation two agnatic families were blended into one, while *adoptio* results in a change of status for the adoptee, but he still has a natural father (*pater naturalis*). Those arrogated and adopted take on the mantle of those who are agnates by birth. In each case although the historical development of the two types of adoption appears to be different, the process results in reduction of legal status, *capitis deminutio minima*. In testamentary cases the question is whether any structural changes are encompassed by taking on the deceased's name. If these are 'genuine' adoptions, since the adopter is not alive, there will be no *capitis deminutio*. A person who is *sui iuris* will remain *sui iuris*, and one who is *alieni iuris*, will in fact gain the status of a *sui iuris*.

The Legal Authorities On Adoption And Succession

My aim in this section will be outline the legal effects of an adoption on succession in the family under different situations. The *Institutes* of Gaius and the Digest provide the main evidence; some allowance needs to be made for the possibility of development of the legal rules during the timeframe treated in this paper, but in general the apparently static picture provided may be considered accurate.[19]

Adrogation and Sole Succession: Scope of Property Acquisition

As we have seen, the adrogated person at time of adoption must be a person *sui iuris*. This has consequences for succession rights since as a result of the adrogation the person *sui iuris* and all his property falls to the adrogator. The effective result is that sole succession is thus entrenched in the person adrogating. It is a form of succession while both parties are still alive (*inter*

[19] I have borrowed significant parts of my structure here from M. Kurylowicz, *Die Adoptio im klassichen romischen Recht*, Warsaw (1981) 106-156.

vivos). This can be seen from two passages in Gaius *Institutes*:[20]

> "And so let us see now by what means property may be acquired by us in its entirety.If we become heirs to someone, or we buy their goods, or we adopt someone, or we take a woman into *manus* as a wife, their property comes over to us."[21]

A further passage is specific both over inclusions and exclusions:

> "For when a *paterfamilias* gives himself up in adoption or a woman undergoes *manus*, all their goods corporeal and incorporeal and all things owed to them fall to the adoptive father or the *coemptionator*, with the exception of those which perish through *capitis deminutio*, such as usufruct, agreements over services, and those elements which are contracted under oath and under legal authority."[22]

The Digest is also helpful in identifying what is and is not covered:

> "Skilled craftsmen's labour and other labour, which amounts as it were to an exchange for cash, transfers to the heir, but official services do not."[23]

It can be appreciated that the while the person who is adrogated appears to lose substantive rights, in practice the expectation was quite the reverse. The person adrogated undergoes what is expected to be a relatively short term loss of status to enter a new inheritance net.

Legal rights were significantly diminished in the meantime. It was not possible for a person who had been adrogated to engage in legal contest with his adrogator since he was not legally independent. This is clarified in the Digest:

> "If a person who has been adrogated by me was at law with me or I with him, Marcellus in the third book of his Digest writes that the proceedings are terminated; for it is not even possible to start proceedings between us."[24]

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[20] All translations from Gaius *Institutes* and the Digest of Justinian are my own. The Latin text is provided in the footnotes.

[21] Gaius *Inst.* 2.97-98:...videamus itaque nunc, quibus modis per universitatem res nobis adquirantur. si cui heredes facti sumus, sive cuius bonorum possessionem petierimus, sive cuius bona emerimus sive quem adoptaverimus sive quam in manum ut uxorem receperimus, eius res ad nos transeunt.

[22] Gaius *Inst.* 3.83: etenim cum pater familias se in adoptionem dedit mulierve in manum convenit, omnes eius res incorporales et corporales, quaeque ei debitae sunt, patri adoptivo coemptionarive adquiruntur, exceptis his, quae per capitis deminutionem pereunt, quales sunt ususfructus, operarum obligatio libertorum quae per iusiurandum contracta est, et lites contestatae legitimo iudicio.

[23] D. 38.1.6 (Ulp. 1.26 Ad Sab.): fabriles operae ceteraeque, quae quasi in pecuniae praestatione consistunt, ad heredem transeunt, officiales non transeunt.

[24] D. 5.1.11 (Ulp. 1.12 ad ed.): si a me fuerit adrogatus qui mecum erat litem contestatus vel cum quo ego solvi iudicium Marcellus libro tertio digestorum scribit: quoniam nec ab initio inter nos potuit consistere.

On the more positive side this meant that the adrogator was responsible for securing his adrogated son's rights, as can be seen in the following passage from the Digest:

> "Likewise if I have adrogated a person who had begun an action for an undutiful will against a man who had given me a legacy, and I have carried through the case in the name of my son and not won, it is not right for me to lose my legacy, because I do not deserve to have taken from me by the imperial treasury what was left to me. For I have acted not in my own name, but through the right of a type of succession."[25]

This shows that the adrogator was expected to follow through with such cases, and was protected under Roman law from consequent losses.

The Obligations of the Adrogated

The extent of this protection was not absolute. A grey area was what happened to debts and other obligations incurred by the person adrogated at a date earlier than the adrogation. Some such debts did not transfer:

> "In contrast what the person who gives himself in adoption and she who enters into *manus* owes does not transfer to the *coemptionator* or the adoptive father, unless the debt was hereditary. In this case then because the adoptive father or the *coemptionator* himself becomes heir, he is held by a direct legal bond. Indeed he who gives himself in adoption and she who enters into *manus* stop being heirs. Concerning what those persons owe in their own name, although neither the adoptive father nor the *coemptionator* is bound, neither indeed does the person himself who is given in adoption nor she who enters into *manus* remain each individually bound, doubtless because each is freed by *capitis deminutio*. Nevertheless there is provided a valid action against both parties which ignores the *capitis deminutio*. And if there is no defence against this action, the praetor allows the creditors to sell outright goods which will belong to them in the future, if they are not subject to a third party."[26]

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[25] D. 5.2.22.3 (Tryph. 1.17 disput.): item si adrogavi eum, qui instituerat litem de inofficioso testamento eius qui mihi legatum dedit, litemque peregero nomine filii nec optinuero: perdere me legatum non oportet, quia non sum indignus, ut auferatur mihi a fisco id quod derelictum est: cum non proprio nomine, sed iure cuiusdam successionis egi.

[26] Gaius *Inst.* 3.84: ex diverso quod is debuit, qui se in adoptionem dedit quaeve in manum convenit. non transit ad coemptionatorem aut ad patrem adoptivum, nisi si hereditarium aes alienum fuerit: tunc enim, quia ipse pater adoptivus aut coemptionator heres fit, directo tenetur iure; is vero, qui se adoptandum dedit quaeve in manum convenit, desinit esse heres. de eo vero, quod proprio nomine eae personae debuerint, licet neque pater adoptivus teneatur neque coemptionator, et ne ipse quidem, qui se in adoptionem dedit quaeve in manum convenit, maneat obligatus obligatave, quia scilicet per capitis deminutionem liberetur, tamen in eum eamve utilis actio datur rescissa capitis deminutione; et si adversus hanc actionem non defendantur, quae bona eorum futura fuissent, si se alieno iuri non subiecissent, universa vendere creditoribus praetor permittit.

It can be seen that there is a serious danger of loss for creditors in these circumstances. Some further details emerge in another passage in Gaius *Institutes*:

> "Moreover sometimes we pretend that our adversary has not undergone *capitis deminutio*. For if a person contractually obligated to us were to undergo *capitis deminutio*, as in the case of a woman through *coemptio* or a male through adrogation, each ceases to have a debt to us under the civil law, nor can it directly be claimed that the party ought to give it to us. But so that it may not be possible for them to corrupt our law, there has been introduced against these parties a valid action which ignores the *capitis deminutio*, that is one in which it is pretended that the *capitis deminutio* has not occurred."[27]

The area is also covered in the Digest:

> "Those who have undergone *capitis deminutio*, remain under a natural obligation in respect of matters which have preceded the *capitis deminutio*."[28]

This is all very well, but it seems to be correct to suspect that creditors would have great difficulty in recovering debts in these circumstances unless they could induce the adrogator to take responsibility for them. Some authorities seem to have taken the view that the adrogator was so obligated:

> "Although Sabinus and Cassius think that there should be no action on the *peculium* available against the adrogator in respect of prior dealings, some authorities rightly believe that an action on the *peculium* is available against the adrogator."[29]

The short summary of the position is that the person adrogating has total financial control. He can tell his adrogated son exactly what he can and cannot take in the way of inheritances. This is not unexpected when it is remembered that all such inheritances become the adrogator's personal property, as emerges clearly from the following passage from the *Institutes* of Gaius:

> "...and on this account if a *filiusfamilias* has been instituted heir he cannot enter into the inheritance except on our command: and if he enters into it on our

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[27] Gaius *Inst.* 4.38: praeterea aliquando fingimus adversarium nostrum capitis deminutum non esse. nam si ex contractu nobis obligatus obligatave sit et capite deminutus deminutave fuerit, veluti mulier per coemptionem, masculus per adrogationem, desinit iure civili debere nobis, nec directo intendi potest sibi dare eum eamve oportere; sed ne in potestate eius sit ius nostrum corrumpere, introducta est contra eum eamve actio utilis rescissa capitis deminutione, id est in qua fingitur capite deminutus deminutave non esse.

[28] D. 4.5.2.2 (Ulp. 1.12 ad ed.): hi qui capite minuuntur ex his causis quae capitis deminutionem praecesserunt, manent obligati naturaliter...

[29] D. 15.1.42 (Ulp. .1.12 ad ed.): in adrogatorem de peculio actionem dandam quidam recte putant, quamvis Sabinus et Cassius ex ante gesto de peculio actionem non esse dandam existimant.

instructions, the inheritance is acquired for us just as if we ourselves had been instituted heirs; and doubtless in tune with this a legacy falls to us through their agency."[30]

Consequences of Adoption for Intestate Succession

As noted above, under intestate succession, it was entrenched that all children of the family should be incorporated in the group of *sui heredes*. The Digest discusses the various permutations which could arise from this situation.

Intestate succession in the family of the adrogator/adopter: the civil law (*ius civile*) position

The main point made in the Digest in relation to intestate succession under the *ius civile* is that a *filiusfamilias* or *filiafamilias* was entitled to the role of *suus heres* whether a natural child or adoptive.[31] In the passage concerned the term adoptive covers both those arrogated and those adopted. It is clearly contemplated that both sons and daughters can be adopted, even though literary sources place so little emphasis on female adoption, and very little is known of its actuality.[32] Women cannot themselves adopt within our time-frame, although later some special arrangements were made for those who had lost their children under tragic circumstances.[33]

The inclusion of both natural and adoptive children in the group of *sui heredes* is a consequence of more general theory which places the standing of an adoptive child on all fours with that of the natural child for the duration of the adoption. However, after emancipation it is a different matter, as is illustrated by a passage in the *Institutes* of Gaius:

"Adoptive sons, as long as they remain under adoption are in the position of natural sons: but when emancipated by their adoptive father they are counted amongst children neither under the civil law (*ius civile*) nor under the praetor's edict."[34]

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[30] Gaius *Inst.* 2.87: ...et ideo si heres institutus sit (scil. filius familias) nisi nostro iussu hereditatem adire non potest: et si iubentibus nobis adierit, hereditas nobis adquiritur proinde atque si nos ipsi heredes instituti essemus; et convenienter scilicet legatum per eos nobis adquiritur.

[31] See D. 38.16.1.2 (Ulpian 1.12 Ad Sab.): suos heredes accipere debemus filios filias sive naturales sive adoptivos.

[32] It is believed that women could not be adrogated because of the requirement of sanction in the *comitia calata*. Women did not participate in the *comitia*.

[33] Diocletian took this intitiative which was repeated by Justinian. In every case imperial permisssion was required. See Justinian Institutes 1.10; Codex Iustinianus 8.47 (48) 5.

[34] Gaius *Inst.* 2.136: adoptivi filii quamdiu manent in adoptione naturalium loco sunt: emancipati vero a patre adoptivo neque iure civili neque quod ad edictum praetoris pertinet inter liberos numerantur.

For those adopted as grandsons (*in locum nepotis*), the fictional family is operative in questions of succession. That is, the grandson does not automatically become a *suus heres* of his adoptive grandfather on his death; he is still under the power of the son in the intervening generation, provided that the adoption has occurred in the first place with that son's consent. This is discussed in the Digest:

> "If a man who has a son in his *potestas* should with the consent of that son adopt anyone into the position of grandson through that son, this will not make the party adopted *suus heres* to his adoptive grandfather, seeing that if the grandfather dies he falls into the *potestas* of the person who is, so to speak his father."[35]

If a man who has a son should adopt someone into the position of grandson as though he were the son of that son but the son himself has not concurred in the adoption, then on the death of the adoptive grandfather such grandson will not be under the *potestas* of the son.[36]

Intestate Succession of the Adrogated/Adopted in the Former Family: the civil law (*ius civile*) position

Once a person had been adopted into another family and had consequently undergone *capitis deminutio*, their right to inheritance in the family of origin was gone, because they were no longer classed as agnates:

> "Likewise agnates who have undergone *capitis deminutio* are not, as a result of that law, admitted to an inheritance, because the title of agnate is destroyed by *capitis deminutio*."[37]

A person in this category would then be classified as an *extraneus heres*, an heir of the third degree.

On the other hand, if a person is adopted and then subsequently emancipated, he is no longer under the aegis of the adoptive parent in any sense from the point of view of succession. He reverts to the standing of emancipated son of his *natural* parents:

> "For this reason, in what affects their natural ascendant, they are considered

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[35] D. 1.7.10 Paulus (On Sabinus 2): si quis nepotem quasi ex filio natum quem in potestate habet consentiente filio adoptaverit, non adgnascitur avo suus heres, quippe cum post mortem avi quasi in patris sui reccidit potestatem.

[36] D. 1.7.11 Paulus (On Sabinus 4): si is qui filium haberet in nepotis locum adoptasset perinde atque si ex eo filio natus esset, et is filius auctor factus non esset; mortuo avo non esse nepotem in potestate filii.

[37] See Gaius *Inst.* 3.21: item agnati capite deminuti non admittuntur ex ea lege ad hereditatem, quia nomen agntionis capitis deminutione perimitur.

amongst the number of outsiders (*extranei*) as long as they are in the adoptive family; if they have been emancipated by their adoptive father, then they begin to be in that situation which they would have been in if they had been emancipated by their natural father."[38]

Intestate Succession in the Family of the Adrogator/Adopter: the Position Under Praetorian Law

The range of those eligible for intestate succession under the praetorian law is clearly identified in the Digest:

"But we should accept as children those whom we have held to be admissible to *bonorum possessio* contrary to the terms of a will, that is adoptive children as well as natural children. But we admit adoptive children only insofar as they have been in power, but if they have become *sui iuris, bonorum possessio* is not open to them, because the rights of adoption have been lost by emancipation."[39]

Children who have suffered a change of civil status are also called to *bonorum possessio* of their parents' property by the praetor's edict, unless they have been adopted; for these last also lose the title of children after emancipation. But if natural children have been emancipated and subsequently adopted and have then been emancipated a second time, they keep the natural right of children.[40]

The significant factor here is the natural relationship to the adopter. A mother still remains in the wilderness, because of her lack of any claim to an agnatic relationship:

"But adoptive children are admitted after emancipation provided that they have been of the number of natural children; for instance a natural grandson who has been adopted by his grandfather, for although he has been emancipated, once he has received *bonorum possessio,* he will bar his mother."[41]

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[38] See Gaius *Inst.* 2.137: qua ratione accidit, ut ex diverso, quod ad naturalem parentem pertinet, quamdiu quidem sint in adoptiva familia, extraneorum numero habeantur; si vero emancipati fuerint ab adoptivo patre, tunc incipiant in ea causa esses, qua futuri essent, si ab ipso narturali patre emancipati fuissent.

[39] See D. 38. 6.1.6 (1.44 ad ed.): liberos autem accipere debemus quos ad contra tabulas bonorum possessionem admittendos diximus, tam naturales quam adoptivos. sed adoptivos hactenus admittimus, si fuerint in potestate: ceterum si sui iuris fuerint, ad bonorum possessionem non invitantur, quia adoptionis iura dissoluta sunt emancipatione.

[40] D. 38.6.4 (Paul. 1.2 Ad Sab.): liberi et capite minuti per edictum praetoris ad bonorum possessionem vocantur parentium, nisi si adoptivi fuerint: hi enim et liberorum nomen amittunt post emancipationem, sed si naturales emancipati et adoptati iterum emancipati sint, habent ius naturale liberorum.

[41] D. 38.17.2.6 (Ulp. 1.13 Ad Sab.): ...adoptivi autem liberi post emancipationem ita admittuntur, si ex liberis naturalibus fuerint, ut puta nepos naturalis ab avo adoptatus: nam licet sit emancipatus, bonorum possessione accepta matrem obstabit.

Intestate Succession in the Family of Origin: the Position Under Praetorian Law

Under the civil law emancipation and *deminutio capitis* automatically closed the door to succession.[42] The praetorian edict did however modify the situation in important ways. Children who were in an adoptive family were admitted to inheritance from their natural parents in the same degree as female agnates who are not *consanguinei.*[43] That is as heirs of the third degree. As long as they were in the adoptive family they were considered as *extranei* .[44]

Intestate Succession of the Adopted/Adrogated Contrary to the Will

Intestate Succession of the Adopted and Adrogated Against the Will of the Adopter/Arrogator

How easily can an adopted child succeed to his adoptive parent if the will which has cut him out is invalidated? Provided that the adoptive child has not been emancipated (i.e. is still under the *potestas* of the *paterfamilias*), the adoptive child has a right equal to that of a natural child to succeed to *bonorum possessio contra tabulas* in the event that an intestacy is declared. Notice the problems which could arise for an adoptive child once he had been emancipated by his adoptive parent:

> "And the praetor admits children who have become *sui iuris* to *bonorum possessio.*Therefore whether they have been emancipated or have passed out of parental power in some other way, they are admitted to *bonorum possessio.* But the emancipated child of an adoptive father cannot be admitted to *bonorum possessio* of his property. For to be capable of admission one must rank as a child."[45]

The reasoning was that the bonds of the adoption were entirely severed by emancipation.[46] More complex multi-generational situations are also discussed:

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[42] This is outlined clearly by Gaius *Institutes* 3.18-24.

[43] Gaius *Institutes* 3.31: liberi quoque, qui in adoptiva familia sunt, ad naturalium parentum hereditatem hoc eodem gradu vocantur.

[44] Gaius *Institutes* 2.137.

[45] D. 37.4.1.6 (Ulp. 1.39 ad ed.): et sui iuris factos liberos inducit in bonorum possessionem praetor/sive igitur emancipati sunt sive alias exierunt de patris potestate, admittuntur ad bonorum possessionem: sed adoptivi patris non potest: ut enim admitti potest, ex liberis esse eum oportet.

[46] See D. 38. 6.1.6 (1.44 ad ed.), above n. 39.

"If a man with two grandsons has emancipated one of them and adopted him in place of a son, we must see whether he alone may be admitted in the quality of a son; and this indeed is the result if he has been adopted as the father of the grandson who had been kept in power, but the better view is that he alone can come into *bonorum possessio*.

2. But if the grandson in question has been emancipated, it is true to say that he cannot be admitted in the quality of son; for the quasi-son does not rank as a child, since the rights acquired by adoption are cancelled by emancipation.

3. If I have a son and a grandson of whom that son is the father and I have adopted the grandson as my son both will be admitted; but clearly if the grandson has been emancipated, he will not be admitted because his father takes precedence."[47]

"A man, who had a son and had a grandson of whom that son was the father, emancipated the son and adopted him as grandson, and then emancipated him. The question is whether he impedes the grandson's claim. I prefer the view that the grandson in question is not excluded, whether his father had remained as an adoptive grandson or whether he was emancipated. For I submit that even if his father had been emancipated, the grandson too is admitted together with his father in accordance with the edict."[48]

Intestate Succession of the Adopted/Adrogated Contrary to the Will in the Family of Origin

This section canvasses what rights an adopted person has in his natural family in case of an intestacy. A person who has been adopted loses his right of succession in his family of origin for the duration of that adoption. In the event that he is emancipated he regains an entitlement to *bonorum possessio* provided that the emancipation predates the decease of his parents. Clearly this was aimed at preventing an adopted person from undergoing emancipation precisely with the intention of making himself eligible for inheritance from his natural family. This is articulated as follows in the Digest:

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[47] D. 37.4.3.1-3 (Ulp. 1.39 ad ed.): si duos habens nepotes alterum emancipatum loco filii adoptaverit, videndum, an solus ille quasi filius admittatur: quod ita scilicet procedit, si quasi patrem eius nepotis, quem retinuerat, sic adoptaverit: melius est autem dicere posse eum solum ad bonorum possessionem pervenire. sed si sit hic nepos emancipatus, verum est dicere non admitti eum quasi filium: hic enim quasi filius non est ex liberis, cum iura adoptionis emancipatione finita sunt. si filium habens et ex eo nepotem in locum filii nepotem adoptavero, ambo admittantur: plane si fuerit emancipatus nepos, non admittetur, quia pater eum praecedit.

[48] D. 37.4.1.7 (Ulp. 1.39 ad ed.): qui habebat filium, habebat et nepotem ex eo, filium emancipavit et adoptavit in locum nepotis, deinde emancipavit: quaeritur an nepoti obstet. et mihi magis videtur hunc nepotem non excludi, sive pater eius in adoptione mansisset quasi nepos sive emancipatus est: puto enim et emancipato patre nepotem quoque cum patre suo ex edicto admitti.

"Adoption impedes rights only so long as a man may be a member of another family. However, once emancipated he obtains *bonorum possessio* in respect of his natural parents' property, but he must have been emancipated in their lifetime, not after their death. For the more correct view is that a man emancipated after their death is not admitted."[49]

"If a man has emancipated his son while keeping in his power the grandson of whom that son is the father and then has given the grandson in adoption to the son, that grandson is admitted to *bonorum possessio* contrary to the terms of the will in respect of his grandfather's property if his father has predeceased him, because he is part of the family of one who could himself have been admitted to *bonorum possessio* contrary to the terms of the will."[50]

"And there is the same principle of law where the emancipated son's son has remained in his grandfather's power and has subsequently been given in adoption to his father; that is he will be able to seek *bonorum possessio* contrary to his grandfather's will because he has not been in another family as a result of adoption."[51]

"The praetor did not intend sons given in adoption to be excluded provided that they have been instituted heirs and Labeo says that his observance of this practice was most just; for they are not entirely strangers to the family. Therefore if they have been appointed heirs, they will receive *bonorum possessio* contrary to the terms of a will, but they themselves will not initiate the edictal procedure on their own unless another of the children that normally do so has been passed over. But if an adopted son has not himself been appointed heir, but another who can obtain the inheritance for him has been, he is not in a position to be admitted to *bonorum possessio* contrary to the terms of the will."

"12. To be admitted to *bonorum possessio* they must rank as children. However, if I have given an adoptive son in adoption and have appointed him heir and others intitiate the edictal procedure, he will not be given *bonorum possessio* contrary to the terms of the will."[52]

This last passage in particular is very clear in its discussion of praetorian motives.

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[49] See D. 37.4.6.4 (Paul. 1.41 ad ed.): ...adoptio tamdiu nocet, quamdiu quis in familia aliena sit. ceterum emancipatus ad bonorum possessionem parentium naturalium venit, sed emancipatus vivis eis, non etiam post mortem eorum: hoc enim verius est post mortem eorum emancipatum non admitti.

[50] D. 37.4.3.7 (Ulp. 1.39 ad ed.): si quis filio suo emancipato nepotem, quem ex eo retinuerat, dederit in adoptionem, nepos iste ad contra tabulas bonorum possessionem avi sui admittitur patre eius ante defuncto, quia in eius est familia, qui et ipse admitti potuit ad bonorum possessionem contra tabulas.

[51] D. 37.4.21.1 (1.6 Pand.): idemque iuris est, si emancipato filio nepos ex eo in potestate avi remanserit et postea patri suo in adoptionem datus fuerit: id est contra tabulas avi bonorum possessionem petere poterit, quia per adoptionem in aliena familia non fuerit.

[52] D. 37.4.8.11-12 (1.40 ad ed.): in adoptionem datos filios non summoveri praetor voluit, modo heredes instituti sint, et hoc iustissime eum fecisse Labeo ait: nec enim in totum extranei sunt. ergo si fuerunt heredes scripti, accipient contra tabulas bonorum possessionem, sed ipsi soli non committent edictum, nisi fuerit alius praeteritus ex liberis qui solent committere edictum, sed si ipse scriptus non sit, sed alius, qui si adquirere hereditatem potest, non est in ea causa, ut eum ad bonorum possessionem contra tabulas admittamus. ut autem admittantur ad bonorum possessionem, ex liberis esse eos oportet. ceterum si adoptivum filium dedi in adoptionem et heredem scripsi, commisso per alio edicto bonorum possessio contra tabulas ei non dabitur.

Adoption and Testamentary Succession

Where the Testator is Adopted

Here I deal with the impact of the testator's change in status on the arrangements in his will. One very critical point is that a will fails if the testator suffers in the meantime from *capitis deminutio*, as always happens in the case of adoptions.[53] Gaius has some general observations on factors causing the voiding of wills which are pertinent to this area:

> "But those wills which either from the beginning were not created legally or after being created legally afterwards were either invalidated or broken are not completely useless. For if wills have been signed by seven signatories, the heir nominated on the will can seek *bonorum possessio* on condition that the testator was at time of death both a Roman citizen and under his own power. For if a will were to become invalid because for example the testator has lost his citizenship or liberty, or because he has given himself in adoption and at the time of death was under the power of an adoptive father, the heir nominated on the will cannot seek *bonorum possessio* according to the will."[54]

The particular case of adoption is treated more fully in the Digest:

> "Having made a will, Titius gave himself up in adoption and then after becoming *sui iuris* died. If the heir nominated in his will seeks possession, he will be rejected under the exception for fraud, because by giving himself into *adrogatio* the testator transfers along with his person his fortune into another family and household. Clearly if having become *sui iuris* he has declared through codicils or other written evidence that he wants to die under the same will, his intention which had lapsed will be considered to have been restored by his fresh statement no less than if he had made a new will and had destroyed the old will, so as to leave the earlier will as his last. Nor should anyone think that a will is being set up on a bare statement of intention; for the legality of the will is not the central concern, but the pleading of a defence. And although in these proceedings it is set up against the plaintiff, nevertheless it draws its value from the character of he who sets it up."[55]

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[53] Gaius *Inst.* 2.145: alio quoque modo testamenta iure facta infirmantur, velut cum is qui fecerit testamentum, capite deminutus sit; quod quibus modis accidat, primo commentario relatum est: 'wills rightly instituted are in another way too invalidated, as when the person who has made the will undergoes *capitis deminutio*. How this happens is related in the first commentary.'

[54] Gaius *Inst.* 2.147: non tamen per omnia inutilia sunt ea testamenta, quae vel ab initio non iure facta sunt vel iure facta postea inrita facta aut rupta sunt. nam si septem testium signis signata sint testamenta, potest scriptus heres secundum tabulas bonorum possessionem petere, si modo defunctus testator et civis Romanus et suae potestatis mortis tempore fuerit. nam si ideo inritum factum sit testamentum, quod puta civilitatem vel etiam libertatem testator amisit, aut quia in adoptionem se dedit et mortis tempore in adoptivi patris potestate fuit, non potest scriptus heres secundum tabulas bonorum possessionem petere.

[55] D. 37.11.11.2 (Papin. 1.13 quaest.): testamento facto Titius adrogandum se praebuit ac postea sui iuris effectus vita decessit. scriptus heres si possessionem petat, exceptione

Where the testator adopts

Questions of timing were obviously critical in view of the last passage quoted. What will happen if the testator adopts after writing his will? The *Institutes* of Gaius and the Digest both provide insights:

> "If after completion of a will someone adopts either *per populum* a man who is *sui iuris* - or through the praetor - a man in the power of an ascendant, his will is in every respect broken as if by the agnation of a *sui heredis*."[56]
>
> "Nor is it of advantage to the woman or the man who has been adopted if she or he have been instituted by the will, since at the time of making of the will they were not amongst the number of the *sui heredes*. Moreover, a son who is set free by a first or second mancipation breaks a previously created will because he returns under *patria potestas*. Nor does it help whether he has been instituted or disinherited in the will."[57]

Some of the niceties which could arise are raised in the Digest:

> "If a person who has been instituted heir is adopted by *adrogatio* by the testator, it can be held that he has been satisfactorily dealt with because even before he is adopted the institution had effect, as being that of an *extraneus*."[58]
>
> "If Titius having been instituted as heir is adopted as a grandson, should the son who was regarded as father afterward die, the will is not broken by the succession of the grandson in the person of one who is found to be heir."[59]

This is in reality dealing with the question of the line of title in the event that an intervening generation dies. Aquilius Gallus had ruled on this area, as had the Lex Junia Vellaea of 26-28.[60]

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doli mali summovebitur, quia dando se in adrogandum testator cum capite fortunas quoque suas in familiam et domum alienam transferat. plane si sui iuris effectus codicillis aut aliis litteris eodem testamento se mori velle declaraverit, voluntas, quae defecerat, iudicio recenti redisse intellegetur, non secus ac si quis aliud testamentum fecisset ac supremas tabulas incidisset, ut priores supremas relinqueret. nec putaverit quisquam nuda voluntate constitui testamentum: non enim de iure testamenti maxime quaeritur, sed viribus exceptionis, quae in hoc iudicio quamquam actori opponantur, ex persona tamen eius qui opponit aestimatur.

56 Gaius *Inst.* 2.138: si quis post factum testamentum adoptaverit sibi filium aut per populum eum, qui sui iuris est, aut per praetorem eum, qui in potestate parentis fuerit, omni modo testamentum eius rumpitur quasi adgnatione sui heredis.

57 Gaius *Inst.* 2.140-141: nec prodest, sive haec sive ille qui adoptatus est, in eo testamento sit institutus institutave: nam de exheredatione eius pervacuum videtur quaerere, cum testamenti faciundi tempore suorum heredum numero non fuerint. filius quoque, qui ex prima secundave mancipatione manumittitur, quia revertitur in potestatem patriam, rumpit ante factum testamentum; nec prodest, si in eo testamento heres institutus vel exheredatus fuerit.

58 D. 28.3.18 (Scaevola 1.5 quaest.): si qui heres institutus est a testatore adrogetur, potest dici satis ei factum, quia et antequam adoptetur, institutio ut in extraneo locum habet.

59 D. 28.2.23.1 (Papin. 1.12 quaest.): si Titius heres institutus loco nepotis adoptetur, defuncto postea filio, qui pater videbitur, nepotis successione non rumpitur testamentum ab eo qui heres invenitur.

60 Brief discussion in J.A.C. Thomas, *Textbook of Roman Law*, North-Holland, Amsterdam, New York, Oxford (1976) 494.

Cases of disinheritance and subsequent reinstatement also attract attention:

> "If a man has disinherited his emancipated son and subsequently adopted him by *adrogatio* Papinian in the 12th book of his Questions says that his natural rights are paramount and for that reason disherison prejudices his position. But in the case of one who is not a member of the family, he approves the opinion of Marcellus, that the disherison has no adverse effects on the rights of a subsequent adoptee by *adrogatio*."[61]

Querela inofficiosi testament against the natural father (pater naturalis)

In relation to adoptions certain questions spring to mind in regard to the possibility of an action for an unduteous will. What rights did an adoptee retain in his family of origin after adoption? How far is the natural bond broken by the adoption?

Different views were taken by different legal authorities over the question of whether a son given in adoption retained recourse to the *querela inofficiosi testamenti* in the event that his natural father were to overlook him in his will. A passage in Valerius Maximus makes it evident that the *querela* was already available as a remedy as early as 60-50 BC.[62] The remedy made provision in cases where a moral duty existed and the testator had failed to make proper provision for that person. It has been suggested that the commonest and perhaps essential prerequisite of this form of action was to show the insanity of the testator.

One complication was the type of instance where a *paterfamilias* gave himself up in adoption, but his emancipated son did not follow him into the adoptive net. Since father and son were now in separate families the son had no right to *bonorum possessio contra tabulas*. But it was reasoned that such situations left the emancipated son without a nominated father, and therefore that was an unfair outcome:[63]

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[61] D. 37.4.8.7-8 (Ulp. 1.40 ad ed.): si quis emancipatum filium exheredaverit eumque postea adrogaverit, Papinianus libro duodecimo quaestionum ait iura naturalia in eo praevalere: idcirco exheredationem nocere. sed in extraneo Marcelli sententiam probat, ut exheredatio ei adrogato postea non noceat.

[62] Val. Max. 7.7.2. See A. Watson , *The Law of Succession*, Oxford (1971) 61-70.

[63] See D. 37.4.17 (Ulp. 1.35 Ad Sab.): si pater se dederit in adoptionem nec sequatur eum filius emancipatus ab eo antea factus. quia in alia familia sit pater, in alia filius, bonorum possessionem contra tabulas non potest filius eius habere: et ita Iulianus scripsit. Marcellus autem sit iniquum sibi videri excludi eos a bonorum possessione, cum pater se dedit in adoptionem: ubi enim filius non datur in adoptionem, at pater se dat, nullum patrem filio adsignat: quae sententia non est sine ratione: 'if a father has given himself in adoption and his son previously emancipated by him does not follow him, because the father is in one family and the son is in another, his son cannot obtain *bonorum possessio* against the will. So states Julian. But Marcellus says it seems unfair to him that an emancipated son be excluded from *bonorum possessio*, when a father has given himself in adoption: for when the son is not given in adoption, but the father gives himself, he assigns no father to his son This is a not unreasonable view.'

"Likewise if an emancipated son, having produced a son and emancipated him has allowed himself to be adopted by *adrogatio* and dies after the death of his adoptive father, there is little room for doubt that the son can be admitted to *possessio* in virtue of a decree contrary to both his father's and grandfather's wills, lest he should otherwise be excluded from the property of everyone."[64]

The Testamentary Adoption

Testamentary adoptions have been considered akin to modern systems in which a person is nominated as heir on condition of taking the testator's name.[65] There are close similarities in the outcome between a testamentary adoption and an *adrogatio.* The aim of an adrogation seems to be above all to allow a *paterfamilias* without a *suus heres* to create one during his lifetime. In the testamentary adoption this was simply attended to in the will. Thus Thomas sees adrogation as a precursor to testation itself. It might be felt that once the possibility of directly nominating an heir in a will came into existence a major reason for *adrogatio* had disappeared. This may be so, but an adrogation might be a convenient way to identify an heir in advance, and thus advertise the connection. It can be expected to have had continuing social and political importance. In contrast a testamentary adoption might be expected in cases where hasty arrangements had been made. A factor slowing down adrogation might be the fact that it could only be effected on two days of the calendar year, 24th March and 24th May.[66]

Girard thought that adoption by testament was bound up with the same considerations as adoption *inter vivos* - in other words as essentially a variant on adrogation, as suggested. In adrogation, however, two major concerns were perpetuation of the name and continuance of the domestic cults. He noted two differences of emphasis with testamentary cases. He maintained that a testamentary heir did not necessarily take the name of the deceased, and was free to repudiate the inheritance.[67]

Of the two the former is the more contentious point. We hardly know of enough examples and sufficient about those examples to be sure about the normality of taking the deceased's name.[68] In the case of Tiberius, it seems as though Suetonius may be rather shocked that Tiberius could

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[64] D. 37.4.14.1: item si filius emancipatus sublato filio et emancipato adrogandum se dederit et mortuo adoptivo patre decesserit, et contra patris et contra avi tabulas ex decreto hunc admitti minime dubitari debere, ne alioquin ab omnium bonis excluditur.

[65] See J.A.C. Thomas, *Textbook of Roman Law*, North-Holland, Amsterdam, New York, Oxford (1976) 437ff.

[66] These were the meeting dates of the *comitia calata.* See Aulus Gellius *Noctes Atticae* 15.27.3; Gaius *Institutes* 2.101.

[67] P.F. Girard, Manuel élémentaire de Droit romain [8th ed., ed. F. Senn], Paris (1929) 850.

[68] Main examples listed in W. Schmitthenner, *Oktavian und das Testament Caesars*, Munich (1973) [2nd ed.] 44-49.

take the inheritance but refuse the name of Gallius by whom he was testamentarily adopted.[69] On the other hand, Girard seems to be correct in his idea that a person named as heir subject to a condition of a testamentary adoption would be free to reject it. It is clear that Tiberius could have repudiated the inheritance outright without attracting adverse comment on his cupidity.

There exist passages in legal writings which create problems for the idea that a testamentary adoption had full legal effect. The most obvious point which has often been made is that it is not covered as a separate category, nor is it clearly identified as a specific problem in those passages which do deal with adoptions. A particularly crucial passage specifies that an adoption involves the presence of the parties and cannot be performed by any other ceremony.[70] Naturally this condition will be very hard for a deceased to fulfil.

Gaius anticipates the situation where a son is adopted after the creation of the will; however, testamentary adoption is not envisaged; rather the possibility that a person who has made a will could while still alive engage in either *adrogatio* or *adoptio* (as discussed above). Any such adoption will break the will since an adoption serves to alter the agnatic line of the testator.[71]

In support of the idea that testamentary adoption had little to do with the other forms of adoption can be cited cases where the obligation to take the testator's name seems to be the *quid pro quo* for the inheritance.[72] Cases which can be fitted into this scheme include the above mentioned inheritance for Tiberius from Gallius, but others, such as that of Octavian, the future emperor Augustus, seem to be far more complicated. The *condicio nominis ferendi* is discussed in the Digest in relation to *fideicommissa*, where Julianus is cited as authority for the proposition that the condition is not legallly enforceable, although it is right to fulfil the praetor's directive.[73]

The strongest evidence that the testamentary form of adoption involved no more than this condition of bearing the testator's name is provided by two cases of women 'adopting' members of the patriciate.[74] Legal writers deny that a woman can adopt, and these instances can surely only be a reference to the *condicio nominis ferendi* which was imposed when an inheritance was taken up.[75] The real problem centres on the extent to which

[69] Suet. *Tib.* 6.3.

[70] Dig. 1.7.25 [Ulpian]: neque adoptare adrogare quis absens nec per alium eiusmodi sollemnitatem peragere potest.

[71] Gaius *Inst.* 2.138: si quis post factum testamentum adoptaverit sibi filium ... omni modo testamentum eius rumpitur quasi agnatione sui heredis.

[72] See for example, A. Watson, *The Law of Succession*, Oxford (1971) 21: 'we have no information on the wording of adoptions in wills, and it is by no means certain that such were true adoptions.'

[73] See Dig. 36.1.65.10: si vero nominis ferendi condicio est, quam praetor exigit, recte quidem facturus videtur, si eam expleverit: nihil enim male honesti hominis nomen adsumere...sed tamen si recuset nomen ferre, remittenda est ei condicio, ut Iulianus ait...

[74] Discussed by R. Syme, 'Clues to testamentary adoption' Epigrafia e ordine senatorio, *Tituli* 4 (1982)[1984] 397-410 at 397.

[75] R. Syme, 'Clues to testamentary adoption' Epigrafia e ordine senatorio, *Tituli* 4 (1982)[1984] 397-410 at 397-398.

adoption was bound up with the transfer of *patria potestas*. Since a woman cannot have *patria potestas*, this seems automatically to rule out any capacity for females to adopt in the Roman legal sense of the word.

Syme summarises some of the difficulties thrown up by the concept of testamentary adoption:

1. No citizen by his last will and testament can change the legal status of his heir.
2. He cannot transfer him from plebeian to patrician, or vice versa.
3. He cannot assign him to a different tribe.

These points are highly relevant to the situation of Octavian, who was a plebeian and a member of a different tribe from Julius Caesar (Scaptia rather than Fabia). To achieve the desired transformations, Octavian had to engage in a complicated procedure; what is manifest is that by a last will and testament in itself, it was impossible for Julius Caesar to achieve these alterations to the standing of his heir (if he ever intended to).[76] No other instance is known of the extraordinary privilege which Octavian sought to accompany his testamentary adoption. He wanted to be adrogated by the *curiae*.[77] This is the only known instance of a testamentary adoption involving an *adrogatio*. It is perhaps not over cynical to imagine that Octavian himself forced the point precisely because of some of the weaknesses of the normal testamentary procedures.

Syme's most critical contribution to debate on testamentary adoptions was to underline that real adoption involved a complete transfer into the family of the adoptive father, bringing him into a new agnatic family and consequently supplying him with a new filiation and tribe. Hence filiation would now refer to the adoptive rather than the natural father.[78]

Questions which do arise include the possibility it was only during the empire that the testamentary adoption came to include no more than the *condicio nominis ferendi* and hence were not in reality adoptions at all. Salomies concludes that in practice this means that those so adopted took on the adoptive father's *praenomen* and *nomen* (sometimes also a *cognomen* or further name), but retained their original filiation and tribe, thus remaining members of their original families. Thus Pliny after adoption by his uncle C. Plinius Secundus still referred to his original father Lucius in his filiation. If Salomies' analysis is correct, this would lead to the conclusion that Pliny's is a clear case of testamentary adoption.

Salomies has suggested that in the late Republic there was an earlier stage of development when testamentary adoptions *were* equated with full adoptions. It is however surely inherently implausible that

[76] R. Syme, 'Clues to testamentary adoption' Epigrafia e ordine senatorio, *Tituli* 4 (1982)[1984] 397-410 at 398.

[77] App. BC 3.94.

[78] See O. Salomies, *Adoptive and Polyonomous Nomenclature in the Roman Empire*, Helsinki 1992, 2.

development should occur in this direction.[79]

Mommsen's approach was a precursor of this perspective, and he had been influenced by the case of Octavian which he believed was a full adoption. It was also noticed that Atticus after adoption referred to his adoptive father Q. Caecilius in his filiation. Metellus Scipio is another example who can be added to those who use their adoptive father's filiation (cos. 52 BC). His adoption is again known to be testamentary. These are the supports for the view that in the republic such adoptions had a higher status, but subsequent scholars have found many difficulties, most forcibly W. Schmitthenner in his book on Caesar's will. In the second edition of Schmitthenner's book (1973),[80] there are cited a number of authorities who agree that testamentary adoption never existed, and agree that the testamentary adoption of Octavian was never a valid adoption; others still follow Mommsen.

Lefas late last century had provided an explanation for adoptions by women during the Republic. He thought some kind of *condicio nominis ferendi* already existed in the late Republic alongside valid adoptions by testament.[81] This would be a very neat solution, but unfortunately cannot be confirmed on the basis of legal or literary authorities.

Salomies concludes that the two republican cases of adoption by testament by private persons show that these adoptions were equivalent to real adoptions. He bases his conclusion on questions of nomenclature:

1. Metellus Scipio, cos. 52 BC. He was a son of P. Scipio Nasica, pr. 93 and was adopted by testament by Q. Caecilius Metellus Pius, cos. 80.[82] After adoption he was called Q. Caecilius Q. f. Metellus Pius Scipio.[83]
2. Atticus was originally a T. Pomponius. His adoption by his maternal uncle Q. Caecilius is mentioned by two authorities.[84] both specify that the adoption was testamentary. Cicero in a letter congratulating Atticus heads his letter Q. Caecilius Q.f. Pomponianus Atticus. Whether this was something of a joke or not and whether Atticus himself subsequently took on this nomenclature is not known. What the evidence shows is that after the adoption Atticus' freedmen were Caecilii and his daughter a Caecilia. Atticus himself does seem to have continued to go under the name Pomponius at an informal level, and this is attested in other cases as well. That the father of Pomponius was also a Titus has now been confirmed from inscriptional evidence.

Salomies insists that the reference to the adoptive father and not to the natural father after adoption shows that these are genuine adoptions.

[79] O. Salomies, op.cit. 7-14.
[80] Above n. 69.
[81] A. Lefas, *Nouvelle Revue Historique de Droit Francais et Etranger* 21 (1897) 721ff. at 761ff.
[82] Dio 40.51.3.
[83] Cic. *Ad Fam.* 8.8.5.
[84] Nepos *Att.* 5.2; Val. Max. 7.8.5.

Others have seen the nomenclature issue as something highly informal (Weinrib for example).[85] An additional prop for Salomies' position is the fact that Atticus was eventually buried in maternal uncle's tomb.[86] Nevertheless, the evidence is far from satisfactory, and the legal issues do present formidable obstacles to Salomies' view, and it seems preferable to take narrow view of the scope of testamentary adoptions.

Conclusions

The strategy of adopting an heir did make serious inroads into inheritance patterns at Rome. Not only were new agnates created within the family into which the adoptee was integrated, but the adoptee's family also underwent changes, and his rights to succession in his natural family were severely curtailed. The detailed picture has been explained above. In the event that provision for an adoptive heir had not been made in advance, a testamentary adoption may have been a measure employed to achieve some of the same ends. It seems unlikely that arrangements of this type did amount to full adoptions, and a testator had no guarantee that he would do more than get the nominated individual to take on his name as the *quid pro quo* for the inheritance. It seems that some testators such as Gallius did not even get this; it can be imagined that this was not the only instance in which the person taking the inheritance was not prepared to comply with the *condicio nominis ferendi,* and it may in practice have been unenforceable.[87]

[85] See E.J. Weinrib, 'The family connections of M. Livius Drusus Libo' *HSCPh* 72 (1967) 247-78.

[86] Nepos. *Att.* 22.4, wrongly describing him as *avunculus.*

[87] See n. 73.