Book VIII.
Title XLVII.

Concerning adoptions.
(De adoptionibus.)

Bas. 33.1.41, et seq; Dig. 1.7; Inst. 1.11.

Headnote.

Two different adoptions are mentioned in the Roman law.[1] The ordinary adoption was, where a father or other male ascendant gave a child in his paternal power in adoption to another. The second form of adoption was, to distinguish it from the first form, called adrogation - here generally mentioned as adoption by adrogation - where a person not under paternal power - sui juris - was adopted by someone else. Adrogation under the ancient law could be effected only by consent of the people, or an assembly thereof, and under the alter law only by consent of the emperor in whom all the former powers of the people were vested. Minors whose father or other ascendant, having paternal power over them, was dead, came within the designation of person sui juris, and could only be adrogated, adopted, by consent of the emperor. The term "adrogation" was applied because both parties were asked whether they consented to the adoption; while in case of the other form of adoption, the consent of the person adopted was not asked; it was sufficient if he did not object. D. 7.2 pr and 5.[2] Paternal power was acquired over the adopted person by the person who adopted him, except that, under law 10 of this title, an outside adoptive father, of a person already under paternal power, acquired no such right.

8.47.1. Emperor Gordian to Marcia.

Person in another's power cannot, according to the civil law, be given in adoption before any magistrate except one who has plenary jurisdiction in suits.
Promulgated June 1 (239).

Note.

That a magistrate before whom ad adoption could be made must be one with plenary jurisdiction, that is to say, who had full rights in all actions brought under the law (apud quem plena legis actio est), is well attested. Inst. 1.11.8; D. 1.7.4.5 and 7. The simple method by which the adoption could be effected in Justinian's time is stated in law 11 of this title. It must be borne in mind that the adoption here mentioned is where a child in the power of a father or other ascendant was given in adoption to another.

8.47.2. Emperors Diocletian and Maximian to Timotheus.

You will have as your son the boy below the age of puberty, whom you want to adopt by adrogation as your own offspring, if the persons united to him by ties of blood affirm before the president of the province that such adoption will be to his benefit, so

[1] Blume's typewritten original reas: "Two forms of adoption…" He penciled in the version given in the text and penciled a question mark into the margin
[2] It appears as if this citation should be D. 1.7.2 pr and 5.

that in that event the boy will be entitled to a fourth part under your last will, as well as in the event that he should be emancipated by you. And a bond, as to his property, must be given to a public slave with suitable sureties, so that you may not, under the pretence of making an adoption, appropriate his property, which must be carefully preserved for him.
1. And adoption by adrogation, made under imperial permission, registered with the praetor or president, is as valid as if it had been made before the people under the ancient law.
Promulgated March 11 (286).

Note.

An adoption by adrogation must be made by the consent of the emperor, and, as here stated, took effect when the rescript containing such consent was registered with the praetor or president. That such registration was required in all cases is shown by C. 1.23.3.

Inst. 1.11.3 closely follows this law, except that it provides that the bond must be given to a public agent (publicae personae), instead of a public slave (public servo), since the person who attended to these matters was the so-called tabularius, a municipal employee who became custodian of its archives, and who in the latter part of the empire ceased to be a slave. Buckland, Roman Law of Slavery 323; C. 10.71.3; Smithers, Hist. French Not. System; 60 Pa. L.R. 19.

8.47.3. The same to Marcianus.

Since you (merely) state that the person whom you want to adopt by adrogation is your freedman, but you fail to mention in your petition any just reason (for the adoption), that is to say, that you have no children, you know that what you wish to do is contrary to law.
Promulgated June 16 (286).

Note.

Adoption by adrogation was allowed only as a last resort to save a family. Hence if a person had a legitimate child, he could not adrogate anyone, and he must further by sixty years of age, or it must otherwise appear that for some cause he was not likely to have children of his own. D. 1.7.15.2 and 15. 3; D. 1.7.17. 3.

No such restraint existed in case of adoption as opposed to adrogation. But an adoption was considered as following nature; hence no one could adopt anyone unless the person adopted, if as a son, was at least eighteen years younger, and unless the person adopted as a grandson - which might be done - was at least thirty-six years younger. Inst. 1.11.4; Hunter 206, 211. Both forms of adoption agreed on this point, that persons incapable of procreation by natural impotence were permitted to adopt, but castrated persons could not. Inst. 1.11.9. Adoption could not be repeated. One that had adopted a person, and then had given him in adoption, or had emancipated him could not readopt him. D. 1.7.37.1. So a guardian or curator could not adrogate anyone that had been his ward, otherwise a door to malversation would have been left open. D. 1.7.17 pr.

8.47.4. The same Proculianus.

An adoption is not to be made by a written document, though written by a notary, but by solemn judicial proceeding before the president.[3]
Promulgated September 1 (290).

8.47.5. The same and the Caesars to Syra.
It is certain that adoption by adrogation cannot be made by a woman, since she does not even have her own children in her power. But since you want to have a step-son, in place of legitimate offspring, and as a solace for your children which you have lost, we assent to your wishes, as we have noted here, and permit you to have him as your own legitimate child, as though you had given him birth.
Subscribed at Triballium December 4 (291).

Note.

Inst. 1.11.10 says: "Women, too, cannot adopt (adoptare); for not even their children by birth are in her power; but by the emperor's goodness they are allowed to adopt (adoptare), to comfort them for children they have lost." The child thus became the same as though her natural child, but did not give the woman any paternal power. See also C. 7.33.8.

8.47.6. The same to Militon.
Adoption by arrogation of those who are sui juris cannot be made in this imperial city or in the provinces, except pursuant to an imperial rescript.
Subscribed at Byzantium April 2 (293).

8.47.7. The same to Atticus.
When a person is legally given in adoption to a citizen of another place, his relation to his native city is not changed, but another is added, and hence you perceive that the law of his origin requiring him to fill posts of honor and perform duties is not changed by adoption.
Subscribed at Sirmium January 22 (294).

Note.

Bas. 33.1.46 says: "Whoever is given in adoption (to a person) in another province, must perform his municipal duties and honors in both provinces." The duties to a home city is mentioned in C. 10.32 and 39 and subsequent titles.

8.47.8. The same to Ision.
When a father gives his daughter in his power in adoption, the mother being a freedwoman, the patron of the mother (who had manumitted the mother) is not forbidden to adopt such daughter. But adoption by adrogation of a woman not under paternal power (sui juris), cannot be made except pursuant to an imperial rescript.
Subscribed February 9 (294).

8.47.9. The same to Marcianus.
An adoptive father is not forbidden to separate an adopted son, though he is such through an imperial grant, from his family by solemn emancipation.[4]

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[3] [Blume] See laws 1 and 11 of this title.

Given October 28 (294).

8.47.10. Emperor Justinian to Johannes, Praetorian Prefect.

In case of unemancipated children, given by their actual fathers in adoption to others, a doubt arose among the ancient jurists as to whether such a son would, if he had been passed over in the testament by his own father, have an action to set such testament aside as unjust. Papinian denied it. Paulus left the question undecided, and Marcianus distinguished, holding that the son should not, in such case, lose the right to inherit from both - from the actual father because of voluntary disinherison, and from the adoption father because of the poverty in which he might, perchance, find himself. And again another faulty situation had arisen. For if, after the death of the actual father, the adoptive father destroyed the rights of adoption by emancipation, no hope remained to such son, either as against him own father's wish, because he belonged to another family at the time of the latter's death, or as against the adoptive father, because he was separated from the latter's family by emancipation. Settling, therefore, such dispute and correcting such faulty situation, we ordain that the rights to the property of the actual father shall not be destroyed by giving a child in adoption to an outside person, but the rights of the adopted child shall remain as if he had not been transferred to a stranger's family. For as the ties of adoption may be so fragile that a person may find himself to be an adopted child, and, by emancipation, an outsider on one and the same day, who would permit that he should be mockingly defrauded out of his rights against his own father to whom he is bound by divine ties; since he was, by ancient law, given the right to object and was not compelled to pass over into another family against his consent.[5] 1. All rights, therefore, as we have already provided, shall, when a son is, by adoption, transferred to a stranger, remain unaffected, including the right to complain that a testament is unjust and all other rights appertaining to successions, testate or intestate, granted to children, even to the extent that such child may acquire property for the benefit of his actual father and receive from the latter what is naturally due him. 1a. But if the actual father gives his child in adoption to a maternal grandfather of the child, or, in case he is himself emancipated, to the paternal grandfather of the son, or to the paternal or maternal great-grandfather, in such case since the rights of nature and of adoption center in one person, the (former) authority of the adoptive father remains in force by virtue of natural ties and the lawful method of adoption, and the adopted son must, accordingly look to him alone to whom nature and the law of adoption assigned him. In such case the opinion of Papinian shall apply, and the adopted son must center his hopes in him whom adopts him, and he shall not be permitted to disturb the succession of his actual father, but must find his protection in his reverence for his grandfather or great-grandfather, for whose benefit he will acquire whatever property he may acquire for another, and he only shall be understood to be his father who is made so by law, supported by nature. 1b. Nor do we find that the distinction drawn by Marcianus has any application in a case where no ground for suspicion of any fraud can arise, since that is entirely excluded by the natural affection of a grandfather or great-grandfather. 1c. All these provisions shall apply with full force

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[4] [Blume] See law 2 of this title.

[5] [Blume] Whether that was true is considered doubtful. Buckland 124.

unless the grandfather or great-grandfather emancipates the adopted son; for in that event he must necessarily return to his actual father, since an adoption of any person is dissolved by emancipation. 1d. And in order not to leave the subject of adoption by an outside person without regulation, we permit such adoptive father, an outsider, to leave such adopted child without any provision in his testament, and whatever he wants to leave him will proceed from his bounty and not rest on any legal obligation. For since we have left the child in the position in which nature has placed him, it is clear that property also, which an unemancipated son acquires, goes, according to our laws, not to an outside adoptive father, but to his actual father, to the extent of the usufruct thereof. He remains in the family of his actual father, acquiring new ties of affection, in image of the natural ties, without affecting the ties of his former relationship. 1e. If the adoption remains in force and he is not emancipated, he shall have the benefit thereto to the extent only that he will not be excluded from the intestate succession of his outside adoptive father, but he shall have that right as an addition to his fortune, given him as the result of the consent of his actual father (to the adoption). 1f. Not even under the ancient law was the blood-relationship with the actual father dissolved by adoption, but the rights under adoption were an accretion, leaving in tact certain natural rights, and a man who was an agnate relative of his own family. For how could anyone destroy maternal rights, when even under the ancient law one could have an adoptive father, but a mother, (only) the one so recognized by nature. And we, therefore, ordain that, though such adopted son shall retain his natural rights, still, if his outside-adoptive father dies intestate, he shall only have rights of a self-successor (indefeasible heir) in the inheritance of such adoptive father, and he shall have no agnatic rights as to other members of the family of the adoptive father, nor shall that family have anything in common with him, but he shall be considered as a stranger to that family. 2. But if the adoptive rights are extinguished by emancipation, he derives no rights whatever from such adoptive father, although the latter dies intestate, but only the actual father remains for him, as if he had never been given in adoption. 3. What we have said as to other adopted children, shall, moreover, apply also to those who had been adopted by an outsider from among three male children, pursuant to the Afinianian senate decree[6], and no difference shall exist between them and other adopted children. 4. What we have said as to a son, given in adoption by a father, shall apply also to a daughter, grandson, granddaughter and persons of either sex of remoter degree of relationship under paternal power, provided that at the time of the death of the grandfather, their (the descendants') parents do not take precedence over them. For if the parents take precedence over them - in which case no necessity is imposed on the grandfather to leave anything to the grandson or granddaughter - all rights of adoption shall remain in force, for this ordinance is enacted to solve points of doubt when a son, daughter, grandson, granddaughter, and persons of remoter degree of relationship under

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[6] [Blume] This decree is supposed to have been passed in the reign of Marcus Aurelius. It provided that when a man had adopted one of three sons living under the power of their father, he must leave to that adopted son one-fourth of his property. If he did not, the adopted son could recover this one-fourth against the heir appointed by will. Hunter, R.L. 853; Theophilus, Inst. 3.1.14. The rights of such child were, accordingly, similar to the rights of a person, not under paternal power, adopted by adrogation. See law 2 of this title. This was changed by Justinian and the senate decree annulled.

paternal power had two fathers, one the actual, the other adoptive, father. 5. But where a person not under paternal power gives himself in adoption by adrogation, pursuant to imperial permission, his rights against the adoptive father shall remain in force. For when there is no conflict as to fathers (there being in such case only the adoptive father), he shall be treated as an heir of the body of his adoptive father, becomes a member of his family, and all rights given to children adopted by adrogation, by founders of the ancient law, shall remain in force and unimpaired.[7]
Given at Constantinople September 1 (530).

8.47.11. The same to Johannes, Praetorian Prefect.

Correcting or abolishing the ancient circuities in adoptions which were usually made by three mancipations (sales) and two manumissions incase of a son, and by one mancipation in the case of other children, we direct that a parent who wants to give children in his power in adoption shall be permitted to do so without the ancient form of mancipations (sales) and manumissions, by making a statement to that effect, made a matter of record, before a competent judge, in the presence of, and not opposed by, the person adopted.
Given at Constantinople October 28 (530).

Note.

Buckland 112, illustrating the ancient method, following Gaius 1.132-134, closely, says, in substance: "The father A, sold (mancipated) X, the son, to B. B freed (manumitted) him and he reverted to A's power. This was repeated. Then there was the third sale which destroyed the paternal power and left the son in bondage to B. C, the intending adoptor, now brought a collusive action against B, claiming X as his son. There was no defense and judgment went accordingly. B and C might be the same person, but in that case X would be sold back to A after the third sale and the claim made against A - a method often adopted." The emancipation spoken of in the foregoing law was the ancient sale - mancipation, and was not the equivalent of manumission - giving freedom. But when the term emancipation is used in Justinian's law, it generally means the same as manumission - the former term being used in connection with liberating children from paternal power, the latter term for giving liberty to slaves. The term manumission is sometimes used instead of emancipation.

Justinian, in dispensing with the ancient form of adoption, simply required the parties to go before a magistrate with plenary jurisdiction (see law 1 of this title) and have the transaction entered on the records of the court.

[7] [Blume] The substance of this law is stated in succinct form in Inst. 3.1.14, and 1.11.2.