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ADOPTION AND THE LAW OF DESCENT AND DISTRIBUTION: A COMPARATIVE STUDY AND A PROPOSAL FOR MODEL LEGISLATION

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The author examines civil-law and common-law rules of descent and distribution in adoptive filiation and concludes that these rules fail to reflect the recognized function of adoption and the prevailing theory of inheritance. He questions the validity of the underlying policy of legislation that formulates an inheritance arrangement in adoptive filiation different from that accepted in natural filiation. Observing that inheritance in adoptive filiation finds its justification, along with the other effects of adoption, in the function of adoption itself, he offers a model law on the effects of adoption that completely equates adoptive filiation with natural legitimate filiation.

I

INTRODUCTION

After World War II there was a dramatic increase in adoption the world over. The problem of finding decent homes and responsible tutelage for the countless orphans left by the war brought to the foreground the necessity of devising a suitable legal institution. For most countries in Europe the answer was sought in the hitherto little-used institution of adoption.[1] In the United States, adoption was widely practiced even before the war. The mounting number of adoptions which were noted during the war years did not abate with the coming of peace: in 1951, 80,000 adoption petitions were filed in the United States—sixty per cent more than in 1944;[2] in 1955, the number of petitions filed increased to 93,000;[3] in the period 1951 to 1960, almost a million children were adopted.[4]

The popularity of adoption poses numerous problems. Notably, it confronts us with the necessity of making a frank reexamination of our old attitudes towards the adoptive relationship. Adoption is an artificial filiation, a sort of legal make-believe; it does not have the natural and extralegal foundation of consanguinity filiation. For this reason, questions ha-

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1 See U.N. Dep't of Economic & Social Affairs, Comparative Analysis of Adoption Laws (1956).

2 Children's Bureau, U.S. Dep't of Health, Educ. & Welfare, "Statistical Series No. 14," at 1 (1953).

3 Children's Bureau, U.S. Dep't of Health, Educ. & Welfare, "Statistical Series No. 39," at 1 (1957).

4 Children's Bureau, U.S. Dep't of Health, Educ. & Welfare, "Statistical Series No. 66," at 2 (1962).

bitually ignored in natural filiation gain unique perspective and relevance in adoptive filiation. For instance, no dispute can arise as to who are "children," or "parents" in natural filiation, whereas much dispute has arisen over these terms in adoptive filiation. These disputes suggest that conventional assumptions, doctrines, and even terminologies lose their familiar meaning if examined against the background of adoption; more important, they show that we find it psychologically difficult to reconcile ourselves to the operative existence of legal consequences created by a mere make-believe. The introduction of a foreign element invariably provokes prompt reactions from the natural family of the adoptive parent; the adopted child's natural relations have occasional difficulties forgetting the bond created by blood. The motives of these relations are likely to be personal: attempting to protect what they assume to be their own interests.

The main burden of this study is to ascertain and evaluate the legislative and judicial arrangements of descent and distribution currently existing in the civil-law and common-law jurisdictions.[5] To conclude the work,

[5] The following statutes in common-law jurisdictions were consulted in this study: Ala. Code tit. 27, §§ 5, 9 (Supp. 1963); Alaska Stat. § 20.10.120 (1962); Ariz. Rev. Stat. Ann. § 8-108 (Supp. 1964); Ark. Stat. Ann. § 56-109 (1947); Cal. Prob. Code § 259; Colo. Rev. Stat. Ann. §§ 152-2-4, 153-2-1 (1963); Conn. Gen. Stat. Ann. § 45-65 (1960); Del. Code Ann. tit. 13, § 920 (1953); D.C. Code Ann. § 16-222 (1961); Fla. Stat. Ann. § 731.30 (1964); Ga. Code Ann. § 74-414 (1964); Hawaii Rev. Laws § 331-16 (1955); Idaho Code Ann. § 16-1508 (Supp. 1963); Idaho Code Ann. § 16-1507 (1943); Ill. Ann. Stat. ch. 3, § 14 (Smith-Hurd 1961); Ind. Ann. Stat. § 6-208 (Supp. 1964); Iowa Code Ann. § 600.6 (1950); Iowa Code Ann. § 633.222 (1964); Kan. Gen. Ann. §§ 59-507, -2103 (1949); Ky. Rev. Stat. § 199.520 (1962); Me. Rev. Stat. Ann. tit. 19, § 535 (1964); Md. Ann. Code art. 93, § 147 (1957); Mass. Gen. Laws. Ann. ch. 210, § 7 (1955); Micb. Comp. Laws §§ 702.86, .94, 710.9 (1948); Minn. Stat. Ann. § 259.29 (1959); Miss. Code Ann. § 1269-06 (Supp. 1964); Mo. Rev. Stat. § 453.090 (1959); Mont. Rev. Codes Ann. § 61-212 (Supp. 1965); Neb. Rev. Stat. §§ 43-110 to -111 (1960); Nev. Rev. Stat. § 127-160 (1957); N.H. Rev. Stat. Ann. §§ 416:6, 461:7 (1955); N.J. Rev. Stat. §§ 2A:22-3, 9:3-30 (Supp. 1963); N.M. Stat. Ann. §§ 22-2-10, -19 (1953); N.Y. Dom. Rel. Law § 117; N.C. Gen. Stat. § 29-17 (Supp. 1963); N.D. Cent. Code §§ 14-11-13 to -14 (1960); Ohio Rev. Code Ann. § 3107.13 (Page .. 1960); Okla. Stat. tit. 10, § 60.16 (1961); Ore. Rev. Stat. §§ 111.210, .212 (1963); Pa. Stat. Ann. tit. 20, § 1.8 (1950); R.I. Gen. Laws Ann. § 15-7-16 (Supp. 1964); R.I. Gen. Laws Ann. § 15-7-17 (1956); S.C. Code Ann. § 19-52.1 (1962); S.D. Code § 14.0407 (Supp. 1960); Tenn. Code Ann. § 36-126 (Supp. 1964); Tex. Prob. Code § 40 (1956); Utah Code Ann. §§ 78-30-9 to -10 (1953); Vt. Stat. Ann. tit. 15, § 448 (Supp. 1963); Va. Code Ann. § 63-357 (1950); Va. Code Ann. § 63-358 (Supp. 1964); Wash. Rev. Code § 26.32.140 (1961); W. Va. Code Ann. § 4759 (1961); Wis. Stat. §§ 48.92, 322.04 (1961); Wyo. Stat. Ann. § 1-727 (1957); Ont. Rev. Stat. c. 53, § 76 (1960) (Can.); English Adoption Act, 7 & 8 Eliz. 2, c. 5, §§ 16-17 (1958). The following materials in civil-law jurisdictions were also consulted: Ley No. 13.252 del 23 Septiembre de 1948 (Argen.) [hereinafter cited as Ley No. 13.252]; Brazil Civil Code (Wheless transl. 1920) [hereinafter cited as Braz. Civ. Code]; Code Civil (Fr. Dalloz ed. 1958) [hereinafter cited as Code Civil]; Bürgerliches Gesetzbuch (Ger. 9th ed. Soergel-Siebert 1963) [hereinafter cited as B.G.B.]; Codice Civile (Italy 3d ed. Torrente & Pescatore 1961) [hereinafter cited as Codice Civile]; La. Civil Code (1870) (as amended); Mexico Civil Code (Schoenrich transl. 1950) [hereinafter cited as Mex. Civ. Code]; Phil. Civil Code (1950) [hereinafter cited as Phil. Civ. Code]; Que. Rev. Stat. c. 324, § 18 (1941) (Can.).

The research for this paper was concluded on March 20, 1965. At that time a number of reforms concerning adoption legislation were in progress in many jurisdictions. One consulting the above materials must be warned of probable changes since March 20, 1965.

a model statute which it is hoped will satisfactorily solve the problem will be offered.

II

Some General Considerations

A study of this nature appears disjointed and incoherent unless some facts and principles of the civil-law and common-law systems are kept in mind. First, there is the way adoption entered into the civil and common law and the purpose it was intended to serve. Adoption is an ancient institution in the civil law, tracing its origin to Roman law. The form of adoption in vogue in the civil-law today is an improved and systematized version of Roman adoption, practiced even before the Twelve Tables.[6] Roman adoption, like most institutions of ancient societies,[7] served largely a religious function.[8] When adoption found its way into Europe, the religious function had vanished but it had not yet outgrown the egoistic assumption implicit in its original function. Christian Europe needed a new orientation for adoption. However, this was not found in the concept of adoption as a philanthropic institution for the benefit of the adopted child. Rather, adoption was conceived as a means of constituting the adopted child an heir to perpetuate the adoptive parent's property and name; the emphasis did not move from the adoptive parent to the adopted child. Not until the two recent wars did the idea of heirship move to a

[6] Early Roman adoption was either "arrogation" or adoption in the strict sense. Arrogation, the more ancient of the two, originally required a law in every case; the person adopted was a "sui juris." He lost his original status, his person and properties were transferred to the authority of the "pater adrogans," and as a consequence his rights and obligations were extinguished. Adoption in the strict sense, the early predecessor of modern civil-law adoption, was the adoption of a person not sui juris. It did not alter the rights and obligations within the natural family of the parties since the adopted child was incapable of having rights and obligations; it effected only a transfer of parental authority over the adopted child. For details, see Sohm, Institutionen des römischen Rechts 528-31 (17th ed. Mitteis & Wengler 1949); Weiss, Institutionen römischen Privatrechts 470-73 (2d ed. 1949).

[7] The law of Manu declares: "He to whom nature has denied a son can adopt one, so that the funeral ceremonies may not cease." 2 Kocourek & Wigmore, Evolution of Law 344 (1915).

[8] The Roman belief in the "sacra privata," relates Cicero, was deep-seated and continued to exist even after cremation became an accepted practice. Cicero, Tusculan I, ¶ 16 (Loeb ed. 1927). Family worship and sacrifices were sacred obligations because the "kinfolks who are dead [are] . . . considered gods." Cicero, De legibus II, ¶ 9 (Loeb ed. 1928). The continuity of the "sacra privata" was dependent upon the presence of a legitimate male descendant, and to die without such descendant was an alarming curse which the Romans feared. For instance, an inscription in a Roman tombstone reads: "May he who removes or damages this stone be the last male scion of his race (ultimus suorum)." 1 Westrup, Introduction to Early Roman Law 63 (1944). They easily recognized that marriage was no guarantee for the birth of a legitimate male issue. Id. at 91-93. To meet the problem of extinction of the family cult, adoption was devised to permit the "pater familias" to infuse a stranger's blood into his race. Id. at 105. In essence, early Roman adoption was a gift from one family to another and a means of imitating nature. As Cicero suggests, adoption meant asking religion and the law for that which nature had not bestowed. Cicero, De domo sua XIII, ¶ 34 (Loeb ed. 1935).

great degree to the background;[9] at the present time the transformation is not complete.[10]

Early common law, on the other hand, did not recognize adoption;[11] as a result, early colonial America had no adoption statute. But when adoption was finally accepted, it was for a motive materially different from that in the civil-law jurisdictions. Adoption legislation in the common-law areas was a part of the movement for social reform that appeared in England even before the seventeenth century. The welfare of the waif, who was at first subject to the devices of apprenticeship and indenture, was the focus of the law that ultimately developed into the modern common-law adoption.[12] The common-law areas have always conceived adoption as an altruistic institution for promoting the child's welfare.

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[9] In France, the personal ambition of Napoleon played an important role in the introduction of adoption. Long before the French Revolution, the adoption in fashion during the Roman days in France had long disappeared. Custom of the localities dominated the regulation of adoption. Although the drafters of the Code Napoleon did not retain adoption in its "projet," it was introduced through the influence of Napoleon. Napoleon had been interested in adoption and divorce for political reasons. Planiol relates:

> [I]t was due to Bonaparte that two institutions, adoption and divorce by mutual consent, were introduced into the Code. He did so for political reasons. Having no children by his marriage with Josephine Beauharnais, and already dreaming about founding a dynasty, he placed in reserve in our laws this double means of obtaining an heir, either by another marriage or by adoption . . . . He prevented the publication of the minutes to adoption that it will never be known what ideas he had in that subject.

1 Planiol, Traite elementaire de droit civil 60 (La. State L. Inst. transl. 1959).

[10] In Bolivia gratitude adoption, such as the adoption of a child who saved the life of the adoptive parent, is still recognized. In fact, in many civil-law jurisdictions, especially in Latin America, the adopted child is looked upon as inferior, sometimes as worse than an illegitimate child.

[11] Kolb v. Ruhl's Adm'r, 303 Ky. 604, 198 S.W.2d 326 (1946); In re Eddin's Estate, 66 S.D. 109, 279 N.W. 244 (1938); 17 Halsbury, Laws of England 11 (1911). Bracton relates that only in the story of Thomas of Saleby did the common law go far enough towards permitting something like adoption. 2 Pollock & Maitland, History of English Law 391, 396 (2d ed. 1911). Saleby's resourceful wife claimed a villager's daughter as her child to prevent Saleby's brother taking land upon Saleby's dying childless. The common law held the child to be legitimate. The common law, however, was not here flirting with the reception of adoption when it reached this conclusion. It simply refused to inquire into a child's paternity because of the common law's strong presumption of legitimate filiation. Id. at 396.

The reason why the common law refused to accept adoption is not yet wholly clear. One commentator has suggested that "the nature of the English feudal system and the English reverence for the heirs of the blood of the ancestor" were the reasons. Kuhlmann, "Intestate Succession by and from the Adopted Child," 28 Wash. U.L.Q. 221, 233 (1943). Another view relies only on "the sentiment or . . . the peculiarities of the feudal tenures." Brosnan, "The Law of Adoption," 22 Colum. L. Rev. 332 (1922). Jenks offers an interesting psychological explanation: "In later time inertia, coupled with the generally satisfactory working of the familiar social phenomenon whereby elderly childless people 'adopted' children, educated them, fed and clothed them, and quite probably, provided for them by their wills presumably account for a failure legally to recognize adoption in England prior to 1926." Jenks, Book of English Law 294-95 (2d ed. 1929).

[12] Uhlenhopp, "Adoption in Iowa," 40 Iowa L. Rev. 228 (1955). The first adoption statute in England was passed in 1926. Adoption of Children Act, 1926, 16 & 17 Geo. 5, c. 29. The American states had adoption statutes before mother England, mainly tracing their origin to the civil-law models. See, e.g., Ala. Code, ch. 385 (1852) (now Ala. Code tit. 27, §§ 1-9 (1958)); Tex. Gen. State Law 1859, ch. 33 (now Tex. Rev. Civ. Stat. art. 46a (Supp. 1964)). For this reason, one has made the exaggerated statement that "Roman law is the unquestioned source of our adoption statutes today." Brosnan, supra note 11, at 332.

The current theory of inheritance in the civil and common law must also be adequately understood.[13] The rationalism in the present law of inheritance emerged only after the disappearance of the feudal arrangements; its motto is the individualism of the eighteenth century. Almost universally the civil and common-law worlds today recognize the power of the individual to determine the destination of at least part of his property, even after death. The power of free disposition is no longer the limited exception that it was in older laws; it has developed into the rule.[14]

Some states had adoption laws without precedent going back to the civil law, and perhaps the Massachusetts adoption law has the strongest claim of being the first. Mass. Acts & Resolves 1851, ch. 324 (now Mass. Ann. Laws ch. 210, §§ 1-11a (Supp. 1964)). See Knox, Family and the Law 93 (1937). McFarlane, "The Mississippi Law on Adoption," 10 Miss. L.J. 239 (1938), claims the honor for Mississippi.

[13] For an extensive discussion of the historical development in comparative perspective, see 5 Staudinger, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen 35-55 (11th ed. 1954).

The common law has followed, until recently, the Germanic system of inheritance which separates land from chattels. In England until primogeniture was abolished in 1925, Administration of Estates Act, 1925, 15 Geo. 5, c. 23, the rule was that the land should descend according to the primogenitary system, whereas the decedent ought to dispose of his chattels by will. The rule of primogeniture was the scheme of distribution upon the death of the decedent; any attempt by the decedent to direct the destination of his land was regarded with suspicion. See Plucknett, A Concise History of the Common Law 725 (5th ed. 1956). On the other hand, precisely the opposite policy was followed in the descent of chattels. The decedent was expected, indeed obliged, to make a testamentary disposition of his chattels. At one time to die without a will disposing of one's chattels was looked upon as horrible sin, and some regarded it even as a crime. To early common law, "the man who dies intestate dies unconfessed, and the man who dies unconfessed . . . ; God's mercy is infinite; but . . . the intestate [cannot be buried] in consecrated soil." 2 Pollock & Maitland, History of English Law 356 (2d ed. 1911).

The implication of the old rule in our present law is still far-reaching, and it is not without reason that Maitland writes harshly of our system of inheritance:

> It is in the province of inheritance that our medieval law made its worst mistakes. They were natural mistakes. There was much to be said for the simple plan of giving all the land to the eldest son. There was much to be said for allowing the courts of the church to assume a jurisdiction, even an exclusive jurisdiction, in testamentary causes. We can hardly blame our ancestors for this dread of intestacy without attacking their religious beliefs. But the consequences have been evil. We rue them at the present day, and shall rue them so long as there is talk of real and personal property.

2 Pollock & Maitland, supra at 363.

The Roman succession was unitary and universal; no distinction between land and chattel was attempted, and the heir succeeded to the totality of the decedent's properties and obligation. The reason for this rule was the hereditary family worship of Roman society; property was an adjunct to the family cult. Intestate succession to properties was the recognized rule in Roman law; the making of a will was the exception and a much later elaboration. If a testament was allowed, a strict apportionment of the expense of the family worship among the heirs had to be settled. As Cicero affirms, the family worship was an indestructible part of inheritance, to be transmitted from generation to generation. Cicero, De legibus II, ¶ 19 (Loeb ed. 1928).

[14] This complete reversal of assumption in succession explains many common doctrines in our law. The civilian law and common law look with disfavor on the substitution of a legal scheme of distribution for the decedent's preferences formally declared in a will. Cf. Buckland & McNair, Roman Law and Common Law at xv (2d ed. 1952). They hesitate to declare a decedent to be dying intestate rather than testate; they will cautiously avoid total or partial revocation of a will if the effect is to result in intestate distribution. Where doubt exists, they are inclined to resolve it in favor of the validity of a disposition, and only when clear inconsistency is established will the courts nullify the provisions of a will. The doctrine of dependent relative revocation is a case in point. See McIntyre v. McIntyre, 120 Ga. 67, 47 S.E. 501 (1904); Cutler v. Cutler, 130 N.C. 1, 40 S.E. 689 (1902); In re Bernard's Settlement, [1916] 1 Ch. 552; Onions v. Tyrer, 1 P. Wms. 344, 24 Eng. Rep. 418 (Ch. 1716).

The law of descent and distribution attempts to effectuate a disposition for a person who died without having disposed of his estate; the estate devolves according to his "tacit will" and those who receive it are his tacit heirs.[15]

Sound and desirable reforms have been accomplished in many fields to reflect these novel theories of adoption and inheritance. But reform in the law of descent and distribution reflecting the new function of adoption has not fared as well. The temperament of the civilian legislator has been extremely constrained because of the still distorted popular conception of adoption. In most civil-law areas, inheritance in the adoptive relationship is regulated in accordance with Roman-law rules, especially those introduced by Justinian.[16] The major rules in the civil-law areas were made

[15] The principle that modern law considers the implied intention of the decedent primary in the formulation of intestate arrangement does not, however, explain the whole structure of succession. There are numerous rules that cannot be accommodated by this principle, and in a number of instances the state limits the freedom of disposition to realize some necessary policy. For instance, the law compels the decedent to allocate a part of his estate to the members of his family. Some jurisdictions direct that the decedent cannot injure a certain fraction of his estate by lucrative disposition, and others sometimes overdo it by declaring onerous dispositions void or voidable. The exclusion of this "forced portion" in fact vaguely creates a vested right in the beneficiaries that becomes absolute upon death. The right of free expression of liberality is thus subordinated to the fulfullment of a family duty. If the testator attempts to "pretermit" a forced heir, the whole will becomes void. He is only permitted to "disinherit" the forced heir upon good cause, such as unworthiness or the commission of an offense against him.

[16] Justinian introduced a reform in intestate succession of the adoptive family because he felt that adoption could create injustice for the adopted child in certain instances. This would occur if the adopted child was emancipated by the adoptive father, for the adopted child would then be excluded from the adoptive parent's succession. Since by adoption he already lost his right to succeed the natural father, he succeeded from nobody. This would be the case, Justinian thought, if the adopted child was a stranger or if the adoption was made by a person other than an ascendant. If the adoptive parent was a maternal grandfather, or in case the father was emancipated, a paternal or maternal great grandfather, the child still succeeded as a member of the agnatic or cognatic family. To remedy this situation, Justinian ordered that adoption by a person other than an ascendant does not remove the child from his original family. See Bergmann, Beiträge zum römischen Adoptionsrecht 7-40 (1912).

Justinian's law provides:

> But now, by our constitution, when a filius-familia is given in adoption by his natural father to a stranger, the power of the natural father is not dissolved; no right passes to the adoptive father, nor is the adopted son in his power, although we allow such son the right of succession to his adoptive father dying intestate. But if a natural father should give his son in adoption, not to a stranger, but to the son's maternal grandfather; or supposing the natural father has been emancipated, if he gives the son in adoption to the son's paternal grandfather; or the son's paternal great grandfather; or if the natural father gives the son to the son's maternal grandfather, or great grandfather, then in this case, as the rights of nature and adoption concur in the same person, the power of the adoptive father, knit by natural ties and strengthened by the legal form of adoption, is preserved undiminished, so that the adopted son is both in the family, and in the power, of his adoptive father.

Justinian, Institutes I, tit. XI, ¶ 2 (8th ed. Sandar 1888). Commentators called the adoptions developed by this innovation as "adoptio plena" and "adoptio minus plena." See Kaser, Das römische Privatrecht 237-39 (3d ed. 1964), for a short summary of these kinds of adoption. The changes made by Justinian have been criticized in his days and at later times. See 1 Colquhoun, Summary of Roman Law 557-58 (1849). For a sophisticated discussion, see Bergmann, supra at 41-98. It might be mentioned also that these terms are still used in many civil-law countries, especially in Latin America.

before World War II and practically no changes have been made in newer codes. The common-law legislator has been more active in this field than his civilian counterpart and remarkable improvements have been achieved.

However, the common-law areas have also shown substantial opposition to progressive reforms,[17] especially the courts. Since adoption is a legislative creature, the common-law technique of interpreting statutes enables the courts to impose their traditional conservatism even upon progressive legislation. The courts construe adoption legislation within the framework of the common law, which did not even recognize adoption much less inheritance through adoptive filiation.[18] As a corollary, the courts are antagonistic to the introduction of an outsider into the scheme of inheritance of the natural family, adhering to the idea of consanguinity as a theory of descent and distribution.[19]

III

Inheritance Between the Child and the Adoptive Parent

Legislative regulation of the successional rights of the adopted child and the adoptive parents appears to be quite detailed. In some common-law states the law declares that this right should be set out in the decree of adoption; others formally regulate the relationship by statute. The agreement among the states on common premises and policies is more pronounced in this area than any other, perhaps because theoretically the benefits granted to the parties in the estate of each other are not too difficult to justify. Because of the unequivocal motives of the parties to an adoption, it is easy to appreciate that some adequate form of filiation should exist between the adopted child and adoptive parent. Once such

[17] The opposition against the inheritance provision of the Uniform Adoption Act should be sufficient proof. See Merrill & Merrill, "Towards Uniformity in Adoption Law," 40 Iowa L. Rev. 299 (1955).

[18] Hockaday v. Lynn, 200 Mo. 456, 98 S.W. 585 (1906). Pound, "Common Law and Legislation," 21 Harv. L. Rev. 383 (1908), criticizes this peculiar juristic technique. For a defense, see Allen, Law in the Making 387-91 (4th ed. 1946).

[19] The firm language of the court in Dodson v. Ward, 31 N.M. 54, 60, 240 Pac. 991, 993 (1925), goes far enough to illustrate these points:

> Throughout the statute of the several states consanguinity is fundamental in legislative fixing of descent and distribution of property. True, the subject is one of legislative will; but legislation repudiating or eliminating blood relationship from the descent of property would be so abhorrent to every incident of our home and family life as to meet with general disapproval. The courts should depart from this elemental guideship only when forced to do so by an inexorable statutory demand. Our statute is inexorable in its demand that the estate of one dying shall go to his kindred; those of his blood, flesh of his flesh, bone of the bone. To such kindred, the father, the mother, the grandfather, the grandmother, the children, the grandchildren, the collaterals of blood relation, and only to those who are kin, those of the same blood, does the chapter anywhere extend; . . . . The statute on adoption must be read into the statute of distribution and descent, but it is to be read only to effectuate the precise terms of the statute on adoption . . . .

filiation is accepted, it is not difficult to fashion a successional arrangement between them.

In common-law areas, the successional scheme is often one-sided: the child almost universally being recognized as an intestate heir, whereas the parent is not permitted to inherit from the child.[20] It is felt that the philanthropic principle of adoption dictates this so as to prevent the adoptive parent from enriching himself.

The courts have taken the initiative in formulating rules of descent and distribution in the common-law area where the statutes have provided only cryptic or general regulation. Typically the statute simply provides that the adoptive parents of the child shall be invested with every legal right in respect to the obedience and maintenance of the child as if born to them in lawful wedlock.[21] The judicial interpretation of such a statute is not uniform. The successional right of the adopted child is almost axiomatic with the courts, but they support the right on differing grounds.[22] The majority's rationale is exemplified by the construction of the California statute.[23] The California courts assume that the inheritance right of the child is inherent in the establishment of the relationship; inheritance is understood as an incident of paternity and filiation so that no express statutory grant is necessary.[24] The courts consider the general stipulation of the law that the adopted child and adoptive parent shall bear toward each other the legal relation of parent and child with all the rights and duties of this relation as adequate basis for the recogni-

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20 In 44 of the 52 common-law jurisdictions, statutory provisions expressly allow the adopted child the right to take in the intestate estate of his adoptive parent, whereas the remaining 8 common-law jurisdictions have statutes which do not explicitly allow or deny the adopted child a right to succeed from the adoptive parent. On the other hand, the succession by the adoptive parent from the adopted child is related to the right of succession of the natural parents and kindred of the adopted child. Only 29 of the jurisdictions afford the adoptive parent an absolute right of succession to the estate of the adopted child.

Some common-law jurisdictions grant the adoptive parent the right to succeed from the adopted child, but such right is dependent upon some limitation such as the source of the property composing the mass of the estate of the adopted child, the direction contained in the decree of adoption, and the age of the adopted child at the time of adoption. See, e.g., Ark. Stat. Ann. § 56-109(6) (1947); Ga. Code Ann. § 74-414 (1964); Ill. Ann. Stat. ch. 3, § 14 (Smith-Hurd 1961); Ind. Ann. Stat. § 6-208 (Supp. 1964); Me. Rev. Stat. Ann. tit. 19, § 535 (1965); Mass. Gen. Laws Ann. ch. 210, § 7 (1955); Mich. Comp. Laws §§ 702.94, 710.9 (1948); Miss. Code Ann. § 1269-06 (Supp. 1964); Tenn. Code Ann. § 36-126 (Supp. 1964).

21 Ala. Code tit. 27, § 5 (Supp. 1963). See also the statutes of Arizona, California, Colorado, Delaware, Nebraska, New Jersey, New Mexico, North Dakota, South Carolina, South Dakota, Utah, and Wyoming, note 5 supra.

22 See Estate of Calhoun, 44 Cal. 2d 378, 282 P.2d 880 (1955); Matter of Estate of Darling, 173 Cal. 221, 159 Pac. 606 (1916); Estate of Kruse, 120 Cal. App. 2d 254, 260 P.2d 969 (Dist. Ct. App. 1953); Bedal v. Johnson, 37 Idaho 359, 218 Pac. 641 (1923); Hester v. Young, 154 Neb. 227, 47 N.W.2d 515 (1951); Dodson v. Ward, 31 N.M. 54, 240 Pac. 991 (1925); Sorenson v. Churchill, 51 S.D. 113, 212 N.W. 488 (1927); Calhoun v. Bryant, 28 S.D. 266, 133 N.W. 266 (1911).

23 Cal. Prob. Code § 259.

24 See California cases cited note 22 supra.

tion of the child's right to inherit from the adoptive parent. As a further statutory basis, the courts refer to the provision that as a consequence of adoption the parent-by-blood is relieved of all parental duties and responsibilities for the adopted child, and in the eyes of the law is no longer the child's parent.[25] South Dakota, however, follows a different theory. In *Sorenson v. Churchill*,[26] the court denied that the right of inheritance can be implied from filiation, regarding inheritance as purely statutory. In both adoptive and natural relationships, it is within the power of the legislature to deny any succession between the parent and the child. Emphasizing the contractual element in adoption proceedings, the court held that the consent given by the parties was decisive on the question of inheritance in adoptive filiation.

As a rule the courts will construe the inheritance right of the adopted child as coextensive with the right of the natural legitimate child towards his natural legitimate parent. The adopted child takes as if he were born in lawful wedlock to his adoptive parents. How far this right may be extended raises problems in the construction of lapse statutes. The issue, for instance, in *Hoellinger v. Molzhon*[27] was whether the adopted child of a legatee could be considered a "lineal descendant" of the adoptive parent to take the legacy under the lapse statute. The court had no difficulty considering the child a "lineal descendant" because it liberally construed adoption as the strict equivalent of natural legitimate filiation. In the same vein, the existing limitation of heirship in natural relationship applies to the adopted child. The adopted child may be disinherited and thus lose his inheritance. The disinheritance must be made with proper formalities and for cause, subject to the same rules that are applied to the disinheritance of a natural heir. The court will disregard the disinheritance, and will allow the child to take that part of the estate to which he is entitled if the adoptive parent fails to observe the same legal requirements for the disinheritance of natural heirs.[28]

These rules would seem to have immediate relevance were inheritance premised on the filiation established by adoption. But if the inheritance is based, as in *Sorenson v. Churchill*, on the consent given in adoption, it is doubtful whether these rules will be found controlling by the court. The contract theory of *Sorenson* implies that the inheritance right of the child could be lesser or greater than the natural legitimate child of the adoptive parent, as may be agreed upon at the time of adoption. Although it seems normal to give the adopted child a lesser right than that of a nat-

[25] Matter of Estate of Darling, supra note 22.
[26] Supra note 22. See also Calhoun v. Bryant, supra note 22.
[27] 77 N.D. 108, 41 N.W.2d 217 (1950).
[28] Bedal v. Johnson, 37 Idaho 359, 218 Pac. 641 (1923).

ural legitimate child, it seems extraordinary to give that child rights greater than those of a natural heir. This result cannot be supported by the argument that the law allows a similar result in marriage. Although an analogy exists between adoption and marriage in that both have a contractual element and each relationship is created at the initiative of the parties, yet some legal rights exist which a party may freely contract away in marriage but not in adoption. Public policy cannot sanction, for instance, an agreement whereby the adoptive parent waives his right to disinherit an adopted child, whereas a marriage settlement can practically accomplish this result. Inheritance supported on the theory of consent loses the distinctive element of expectancy and acquires the character of a right founded on contract. The consent theory opens possibilities which can never be available to the natural legitimate heirs of the adoptive parent. *Hester v. Young*[29] raised an issue actually involving these considerations. The question put to the court was whether the adopted child could recover property lawfully disposed of by the adoptive parents on the ground that it was understood at the time of adoption that the child would take this property. The court upheld the right of the parents to dispose of their property freely during their lifetime without interference from prospective heirs. The court refused to go as far as the adopted child had urged, ruling that the rights of the adopted child are subject to the same limitations as exist in natural filiation. The adopted child's right of inheritance could not extend to property already lawfully disposed of by the adoptive parent.

The courts are in less agreement where the adoptive parent claims succession from the adopted child. The majority is extremely conscious of the philanthropic objective of adoption which to them justifies the intestate claims of the adopted child to the estate of the adoptive parent. When the adopted child's estate is in question, the courts have difficulty overcoming the philanthropic rationale so as to recognize the right of heirship in the adoptive parent. They are sensitive to the fact that it is the child who has been adopted, and that to allow the adoptive parent to succeed presents the appearance of material benefit to the parent, who has always been considered a voluntary benefactor. The willingness to derive the successional arrangement from the adoption, as it is done in the rights of the child, gives way in the face of this consideration. Even the principle of reciprocity sometimes loses its immediate relevance; the courts feel bound to insist that adoption statutes should not modify the usual rules of succession in the natural family.[30] They are hesitant to

[29] 154 Neb. 227, 47 N.W.2d 515 (1951).
[30] Gamble v. Cloud, 263 Ala. 336, 82 So. 2d 526 (1955); Franklin v. White, 263 Ala. 223, 82 So. 2d 247 (1955).

include the right of inheritance in the rights and duties transferred from the natural parent to the adoptive parent in the adoption process. For the courts to allow the adoptive parent to participate in the intestate estate of the child, the statute must clearly and explicitly recognize the heirship right.[31]

The California courts have reached a different result by applying the principle of reciprocity. In *Estate of Jobson*[32] the court said that this fundamental principle of descent and distribution could not be disregarded where the adopted child's estate is contested. Whatever rule is applied with respect to the right of succession must apply to both parties to the adoption. The court concluded that the adoptive parents were entitled to inherit as parents because in California the adopted child inherits from the adoptive parents. The same result has been reached by South Dakota on the basis of the consent theory. The consent given by the natural parents to the adoption divests them of successional rights, which are then transferred to the adoptive parents along with other family rights and duties.[33]

Bastards given in adoption present another problem in the view of the courts. Under common law, the bastard is "filius nullius"; he cannot be succeeded by his putative parents even in the absence of adoption. Since no conflict of rights between the natural and adoptive parents exists in the case of bastards, the courts are inclined to accept the adoptive parents as heirs of the adopted bastard.[34]

The civil-law areas are decidedly more conservative; adoption is ordinarily considered as a limited civil filiation between the adopted child and adoptive parent. The adopted child has the status of a child of the adoptive parent, taking as any legitimate child. Where a forced portion is provided by law the child sometimes takes an equivalent forced share, although some jurisdictions allow the child a share not exceeding that part of the estate of which the adoptive parent may freely dispose by will.[35] The inheritance benefits extend only to the adopted child, and exceptionally to his descendants; the adoptive parent cannot inherit from the adopted child or his descendants.[36]

The French legislation, perhaps the most progressive civilian adoption

[31] Dodson v. Ward, 31 N.M. 54, 240 Pac. 991 (1925).
[32] 164 Cal. 312, 128 Pac. 938 (1912).
[33] Sorenson v. Churchill, 51 S.D. 113, 212 N.W. 488 (1927).
[34] See Ex parte Wallace, 26 N.M. 181, 190 Pac. 1020 (1920).
[35] Que. Rev. Stat. c. 324, § 18 (1914) (Can.). See also Braz. Civ. Code art. 377(2).
[36] See Ley No. 13.252, art. 16; B.G.B. § 1759; Codice Civile art. 304. Brazil confers upon the adoptive parent the limited right to inherit from the adopted child which is subordinate to the claims of the natural parents of the adopted child. Brazil Civ. Code art. 1609. See also Mex. Civ. Code art. 1620; Que. Rev. Stat. c. 324, § 18 (941) (Can.).

law (excepting Louisiana's which follows the common-law pattern), deserves brief examination. The adoption law of France was introduced in the reform of 1939. This reform was provoked by the unpopularity of adoption under articles 320 to 342 of the Code Napoleon. From 1876 to 1880 only 192 adoptions per year were reported, and in 1900 ouly 50 adoptions were contracted.[37] The present law distinguishes between two kinds of adoption according to their effects. Ordinary adoption is the adoption known before the 1939 reform and does not affect the ties of the adopted child with his original family. Extraordinary adoption causes the severance of the relationship of the adopted child with his blood kindred.[38] France has also an institution known as "adoptive legitimation," a remarkable innovation of the 1939 reform.[39] Those who conceived this institution intended to establish a form of adoption which conferred on the adopted child not the status of an adopted child as generally known but the status of a legitimate child.[40]

As mentioned, in ordinary adoption the adopted child maintains his original ties with his blood relatives. But aside from duties and rights in the natural family, he acquires privileges arising from the adoptive relationship.[41] In extraordinary adoption, the child abandons his ties with his blood relations except for the prohibition of the code on incestuous marriage existing before adoption.[42] As far as family relationship is concerned, he is assimilated into the family of the adoptive parent. The members of the natural family are even prohibited from visiting the adopted child.[43] This prohibition was introduced because of the recognition of the disastrous effect upon the success of the adoption of maintaining the original ties of the adopted child. It was realized that these ties are a hindrance to the usefulness of adoption because of the influence retained by the natural relations of the child. Indeed, it was for this reason that the public had given a cold reception to the institution of adoption before this innovation.[44] However, in both kinds of adoption the same successional rights from the adoptive parent exist; the child cannot succeed beyond

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37 For details, see Gehrunger, Die Adoption im deutschen und französischen Recht (1957); Gamillscheg, "Das neue französische Adoptionsrecht," 18 Zeitschrift für ausländisches und internationales Privatrecht 507 (1953).

38 1 Marty & Raynaud, Droit civil 998 (1956).

39 Gehrunger, supra note 37, at 89-95.

40 It is disputed whether this institution is adoption or legitimation. This question has theoretical value, but practical questions of construction are also involved, e.g., whether the general provisions on adoption should be applied to adoptive legitimation. The prevailing opinion is that the institution is a class of adoption. Gehrunger, supra note 37, at 89-90.

41 Code Civil art. 351.

42 Code Civil art. 352.

43 See authorities cited at note 37 supra.

44 1 Marty & Raynaud, supra note 38, at 1000.

them.[45] The adoptive parents, on the other hand, have a personal and limited right of succession to the estate of the adopted child. They or their heirs take only that which the adopted child has received from the adoptive parents by way of donation or succession.[46]

In adoptive legitimation article 370 of the Code stipulates that the child is no longer a member of the original family except for the prohibition on marriage. He acquires the status of a legitimate child in the adoptive family. The Code requires that the child to be adopted (legitimated) by this system should be one whose parents are dead or unknown, or that the child must have been abandoned. According to article 370 the adopted child succeeds to the adoptive parents and the adoptive parents succeed to the adopted child. Thus the effects of adoptive legitimation go beyond the usual parent and child adoptive relationship as most civil-law countries understand it, though not as completely as the innovations introduced in many common-law jurisdictions.

IV

Inheritance Between the Child and Its Natural Kindred

The adoptive parents and the natural kindred of the adopted child, more often than not, are mutually exclusive in most jurisdictions. Although many jurisdictions retain the rule that the adopted child can succeed by intestacy from his original family, the trend of recent legislation on the subject is to deny this right. This progressive development, noticeable in common-law jurisdictions, is only suggested in civil-law jurisdictions.

The principle of reciprocity has a special significance to this aspect of the successional arrangement, particularly where the adopted child is still recognized as an intestate heir of the natural parents. California's use of the doctrine of reciprocity to establish the successional rights of the adoptive parent is rather exceptional; the doctrine has served more as a convenient argument for excluding the adoptive parents, affirming the claim of the natural parents and kindred. This doctrine has been most influential in arresting the progressive development of a rational formula of distribution.

Most jurisdictions in common-law areas have statutes expressly prohibiting the child from sharing in the intestate estate of his natural parent.[47] Although ordinarily this rule also applies toward the other

[45] Code Civil art. 356.
[46] Code Civil art. 357.
[47] 23 jurisdictions have this prohibition towards the parents. Only 12 states in the United States still grant this right, whereas 17 do not regulate this aspect of the succession expressly.

natural kindred of the child, some jurisdictions provide a stricter rule toward them than the natural parents.[48] The majority does not consider the natural parents and kindred as heirs of the child when the adopted child dies intestate and the natural kindred survive him.[49] In the few jurisdictions where the natural parent may still inherit, the right is conditional. For instance, in Arkansas and Maine an inheritance right is recognized only as to those properties acquired from the natural parents and kindred; in Illinois, Massachusetts, and New Hampshire the right is limited to properties acquired by the child from the natural parents and kindred by way of gift, will, or inheritance; whereas Michigan provides a narrower rule by confining the source of the properties to inheritance. New York's law gives another typical situation where the right is still retained by natural parents.[50] As a rule, the adopted child's right of inheritance from and through his natural parents terminates upon the issuance of the order of adoption, except in cases where the natural parent remarries and consents to the adoption of the child by the spouse. The succession is confined to the natural children of the adoptive parents and the adopted child and their distributees, leaving the natural parents without right in the child's property.

The judicial formula regarding the inheritance arrangement between the adopted child and his natural kindred is considerably less broad than the legislative formula. In those jurisdictions where the child's heirship right from the natural parents and kindred is not expressly regulated, the prevailing view still is to recognize this right.[51] The courts are unable to see that the existence of this right is inconsistent with the child's complete assimilation to the adoptive family. Again, the primacy of consanguinity in inheritance arrangements plays a prominent role. The judicial development in the state of Washington illustrates this point. The present Washington law expressly excludes the natural parents and kindred of the adopted child from succession.[52] The child is considered to be per-

[48] Towards other blood relatives, 9 American states recognize the child's heirship right, 25 deny the right, whereas 17 give no regulation. Thus, of the 12 American states that allow the natural parents to succeed (Alabama, Arkansas, Colorado, Florida, Indiana, Maine, Michigan, Rhode Island, Texas and Vermont), 3 states will not allow the child to take from the collateral and lineal relatives of his own blood (Florida, Michigan and Rhode Island).

[49] 31 jurisdictions have such statutes. However, 15 jurisdictions have no regulation of this inheritance aspect.

[50] N.Y. Dom. Rel. Law § 117 (effective March 1, 1964).

[51] See Hawkins v. Hawkins, 218 Ark. 423, 236 S.W.2d 733 (1951); Estate of Wilson, 95 Colo. 159, 33 P.2d 969 (1934); Russell v. Jordan, 58 Colo. 445, 147 Pac. 693 (1915); Lefkoff v. Sicro, 189 Ga. 554, 6 S.E.2d 687 (1939); In re Estate of Tilliski, 390 Ill. 273, 61 N.E.2d 24 (1945); Billings v. Head, 184 Ind. 361, 111 N.E. 177 (1916); Bartram v. Holcomb, 109 Kan. 87, 187 Pac. 192 (1921); Sorenson v. Churchill, 51 S.D. 113, 212 N.W. 488 (1927); In re Benner's Estate, 109 Utah 172, 166 P.2d 257 (1946); In re Harrington's Estate, 96 Utah 252, 85 P.2d 630 (1938); Matter of Estate of Roderick, 158 Wash. 377, 291 Pac. 325 (1930).

[52] Wash. Rev. Code § 26.32.140 (1961).

fectly engrafted into the family of his adoptive parent and in the same position as any legitimate child of the adoptive parent.[53] He enjoys all the rights and privileges, as well as duties, of a legitimate child of the adoptive parent.[54] However, the statute fails to divest the adopted child of any right enjoyed in the natural family before adoption. The statute was construed strictly, being in derogation of the common law, and the courts held that the right of succession of the adopted child from his natural family was undisturbed. Its denial, the court concluded, could not be inferred in the absence of any express legislative declaration to this effect.[55]

Most courts, despite protestations to the contrary, are actually assuming that the natural filiation still exists after adoption, and for this reason, the original family and inheritance rights of the child cannot be terminated. South Dakota[56] and Utah[57] hold that natural parents cannot succeed the adopted child because of their consent to the adoption. They point out that on the other hand, the adopted child, the person principally affected by the transaction, has no choice and gives no consent. In fact, no one consents for him; he should not, therefore, lose the right to inherit from his natural parent. Although control over him passes to the adoptive parent, the court insists that he does not cease to be the issue of his natural parents.

The courts generally consider the adopted child as possessing the same rights in the natural family as if no adoption had taken place. In *Wiley v. Lawton*,[58] the children of a divorcee by her first husband were adopted by the second husband. The court, admitting that the natural father was deprived of all rights and control over the children, held that the natural father still had the ultimate liability for their support. Besides, the children retained their right of inheritance from him. Another court allowed the adopted child, as "child" of the natural parent, to prosecute an action for the recovery of damages arising from the wrongful death of his natural father.[59] In testate succession, the adopted child still enjoys the protection of the pretermission provision with respect to his natural parent's will. If the natural father fails either to disinherit the child expressly or mention him in his will, the court will entertain an action by the child to annul the will and consider the natural father as having died intestate.[60]

[53] Matter of Estate of Hebb, 134 Wash. 424, 235 Pac. 974 (1925).
[54] Matter of Estate of Masterson, 108 Wash. 307, 183 Pac. 93 (1919).
[55] Matter of Estate of Roderick, 158 Wash. 377, 291 Pac. 325 (1930).
[56] Sorenson v. Churchill, 51 S.D. 113, 212 N.W. 488 (1927).
[57] See Utah cases cited note 51 supra.
[58] 8 Ill. App. 2d 344, 132 N.E.2d 34 (1956).
[59] Macon, D. & S. R.R. v. Porter, 195 Ga. 40, 22 S.E.2d 818 (1942); Macon, D. & S. R.R. v. Porter, 68 Ga. App. 462, 23 S.E.2d 280 (1942).
[60] See Matter of Estate of Roderick, supra note 55.

The courts' reliance on the filiation theory creates the awkward situation of dual filiation. The concurrence of the adoptive filiation with natural filiation in the person of the adopted child gives the child the right to a dual inheritance, a right which the natural legitimate child does not possess. Dual inheritance challenges the courts to advance a defensible rationale for this preferential treatment received by the adopted child. The rationale must be sufficiently compelling to support the grotesque results reached by following the logic of dual filiation. In Kansas, *Bartram v. Holcomb*[61] went so far as to recognize that a grandchild adopted by his grandfather may take twice from the same decedent, first in his capacity as adopted child, and second, by representation through his natural mother, as natural grandchild. If the estate of the adopted child is under liquidation, Kansas courts have proposed an equally puzzling solution.[62] They do not categorically say who succeeds the child as between the natural and adoptive parents; the estate devolves to the person who answers the description of surviving parent, whether by nature or by adoption. The Arkansas courts have also been willing to stretch the logic of dual filiation to make it applicable to cases of multiple adoption. A testator in Arkansas adopted a child which he later gave for readoption to another.[63] The court thought a basic analogy existed between the first adoption and the original natural filiation and concluded that the adopted child could lawfully succeed from the second as well as the first adoptive parent. The courts, however, have failed to articulate any adequate argument for these results.

The courts that reject dual or multiple inheritance are convinced of its anomaly, but again no sound solution has been fashioned. In fact they seem unable to realize that dual inheritance is related to dual filiation. For example, Colorado[64] and Indiana[65] reject dual inheritance, but allow the adopted child to inherit as adopted child or natural child at his option. This solution avoids dual inheritance but has no theoretical basis: the child still participates in two filiations, although he may not enjoy inheritance benefits from both. Furthermore, the adopted child must exercise his option on the death of one parent. The exercise of his option may then result to his disadvantage since intelligent exercise of the option is possible only after both sets of parents die. A Massachusetts court has

[61] 109 Kan. 87, 198 Pac. 192 (1921).
[62] Baird v. Yates, 108 Kan. 721, 196 Pac. 1077 (1921).
[63] Hawkins v. Hawkins, 218 Ark. 423, 236 S.W.2d 733 (1951). See also Dreyer v. Schrick, 105 Kan. 495, 185 Pac. 30 (1919); Matter of Estate of Egley, 16 Wash. 2d 681, 134 P.2d 943 (1943); cf. Quintrall v. Goldsmith, 134 Colo. 410, 306 P.2d 246 (1957); In re Estate of Leichtenberg, 7 Ill. 2d 545, 131 N.E.2d 487 (1956).
[64] Quintrall v. Goldsmith, supra note 63.
[65] Billings v. Head, 184 Ind. 361, 111 N.E. 177 (1916). See also Head v. Leak, 61 Ind. App. 253, 111 N.E. 953 (1916

developed a rationale that disposes of the narrow issue presented in *Bartram v. Holcomb* but fails to exclude dual inheritance from persons beyond adoptive parents or one that results from multiple adoption.[66] The court reasoned that when the legislature provided that no person should by adoption lose his right to inherit from his natural parents or kindred, this did not mean that "kindred" should include adoptive parents. This provision was intended to save the right of inheritance from other parties; it applies only to the inheritance of property of some third person and not of the adoptive parent. There is no need for a saving provision to prevent injury to the adopted child which is likely to happen in the adoption of a descendant since the adopted child would invariably take more as an adopted child than he could by right of representation through his parents.

This lack of adequate understanding of the problem involved in dual inheritance is also apparent in the courts that have taken the initiative of following the legislative development. In accepting the innovation they do not indicate even an irresolute commitment to the principle that in adoption only one filiation can consistently be recognized. They do not realize that dual inheritance is not the ultimate evil but simply the result of not fully equating adoption with natural filiation. Nevertheless, legislative policy against dual inheritance provides for liberal courts a starting point for progressive, if sadly disorganized, development. Missouri, for example, originally accepted dual inheritance;[67] the repudiation of dual inheritance did not come until the legislature[68] declared that adoption should not be an instrumentality for dual inheritance.[69] This policy has also suggested the necessity of accepting the rule that the adopted child should be removed from his natural family. If the child is omitted in the will of his natural parents or relatives, he cannot, as it was in former laws, be termed a "pretermitted" child.[70] The Pennsylvania courts have also waited for a favorable legislative climate. Before the legislative changes in 1917 and 1947, the courts followed the rule that the child's right from his natural family should subsist.[71] After these changes, the courts refused to recognize that the adopted child could prevent a lapse of

[66] Delano v. Bruerton, 148 Mass. 619, 20 N.E. 308 (1889). For the present law, see Mass. Gen. Laws Ann. ch. 210, § 7 (1955).

[67] Wailes v. Curators of Central College, 363 Mo. 932, 254 S.W.2d 645 (1953); Mississippi Valley Trust Co. v. Walsh, 360 Mo. 610, 229 S.W.2d 675 (1950); St. Louis Union Trust Co. v. Kaltenbach, 353 Mo. 1114, 186 S.W.2d 578 (1945); Clarkson v. Hatton, 143 Mo. 47, 44 S.W. 761 (1898).

[68] Mo. Laws 1917, at 193; cf. Mo. Rev. Stat. § 453.090 (1959).

[69] Mississippi Valley Trust Co. v. Walsh, supra note 67.

[70] Wailes v. Curators of Central College, supra note 67.

[71] Estate of Foley, 1 Wkly. Notes Cas. 301 (Pa. Orphans' Ct. 1875).

a legacy to his natural father when the natural father predeceased the testator.[72]

Pennsylvania courts have, however, occasionally vacillated. The testator in one case made a bequest to the issues of the natural parent of an adopted child.[73] The court found that the adopted child was included in the description "issues" of the natural parent and allowed him to take as instituted heir. The court believed that the case involved testate rather than intestate succession so that the intestate law did not apply; the only question was the ascertainment of the instituted heirs, not the right to take as an heir of the natural parent according to the law of descent. The courts have also approved the claim of an adopted child for a lower tax rate on a bequest received from his natural ascendant. One Pennsylvania court thought the favorable tax treatment granted by law to the "lineal descendants" of the grantor applied to the adopted child.[74]

California courts have a peculiar rule which is discussed at some length elsewhere. Briefly, California prohibits the child from succeeding to the intestate estate of his natural parents.[75] The natural relationship between the child and his blood parents is superseded because the duties of the child cannot be owed to two fathers at the same time.[76] However, the adopted child may lawfully succeed to his other lineal and collateral relatives.

It is more difficult to ascertain the position of the courts in handling the rights of the natural parents and kindred in the intestate estate of the adopted child. If the principle of reciprocity were consistently followed,[77] the rules with respect to the claims of the child upon his natural kindred would provide a ready solution. But some courts have overlooked the reciprocity principle, and the arguments they have at times advanced in rejecting the child's claim seem to suggest that the natural kindred is excluded. The consent theory in *Sorenson v. Churchill*[78] justifies the exclusion of the natural parents, since they have given consent to the adoption. Within the ambit of this theory the court can insist that death of the adoptive parents before the opening of the succession of the adopted

[72] Ericsson Estate, 4 Pa. D. & C.2d 110 (Orphans' Ct. 1955).
[73] Taylor's Estate, 57 Pa. D. & C. 311 (Orphans' Ct. 1946). See also Howlett Estate, 366 Pa. 293, 77 A.2d 390 (1951).
[74] Scott Estate, 85 Pa. D. & C. 46 (Orphans' Ct. 1953).
[75] Matter of Estate of Darling, 173 Cal. 221, 159 Pac. 606 (1916). See also Estate of Esposito, 57 Cal. App. 2d 859, 135 P.2d 167 (Dist. Ct. App. 1943); Estate of Hampton, 55 Cal. App. 2d 543, 131 P.2d 565 (Dist. Ct. App. 1942); Matter of Estate of Hunsicker, 65 Cal. App. 114, 223 Pac. 411 (Dist. Ct. App. 1923).
[76] Matter of Estate of Jobson, 164 Cal. 312, 128 Pac. 938 (1912).
[77] Bittner Estate, 2 Pa. D. & C.2d 263 (Orphans' Ct. 1954).
[78] 51 S.D. 113, 212 N.W. 488 (1927).

child does not have the effect of restoring the right of the natural parents to succeed to the adopted child.[79] But this theory cannot be utilized to support the exclusion of the other natural kindred of the child who are regularly not parties to the adoption. Where natural kindred, other than the natural parents, are involved, a court must choose between two alternatives: to recognize the succession of the other kindred or to fashion a new rationalization for excluding them. In either case, the court is in an awkward position. This was exactly the dilemma of the California courts. They were anxious to exclude the natural parents from the adopted child's inheritance, but did not use the consent theory, relying instead on the principle of reciprocity which they thought applied between the child and the adoptive parent. The courts thought that the California statute was not intended to affect the relationship of any person other than that of the parents by blood, the adoptive parent, and the child, and were reluctant to construe adoption as a filiation with effects extending beyond the immediate parties. As a consequence, to its grandparents by blood, the child continues to be a grandchild and the child of his natural parents. The child neither acquires new relations nor loses his blood relations.[80]

Estate of Calhoun[81] shows the difficulty in this distinction. The intestate estate of the adopted child was contested between the natural brothers and sisters of the adopted child and the natural children of the adoptive parent (his brothers and sisters by adoption). The court ruled that the right of succession of the natural relatives of the child excluded all other claimants in the adoptive relationship, in consonance with the rule that the adopted child remains a relative and heir of his natural relatives other than his natural parents, and that these natural relatives were conversely the heirs of the intestate child. It seems strange that adoption can terminate the more immediate and close tie between the adopted child and his natural parents without altering the more distant and detached tie between the child and his other ancestral and collateral relatives.

Most courts that grant the child heirship rights from his kindred also allow these kindred to inherit from the child. The estate of the adopted child in Alabama was contested between the adoptive parents and the natural brothers and sisters of the decedent adopted child.[82] It was clear to the court that the natural parents of the adopted child would have been the heirs had they not predeceased the adopted child. The claim of the adoptive parents was dismissed and the court declared that

79 In re Havsgord's Estate, 34 S.D. 131, 147 N.W. 378 (1914).
80 Estate of Esposito, supra note 75.
81 44 Cal. 2d 378, 282 P.2d 880 (1955).
82 Franklin v. White, 263 Ala. 223, 82 So. 2d 247 (1955).

as between them and the natural brothers and sisters of the adopted child, the blood relatives had a preferential right to succeed to these properties which would have devolved upon the natural parents. In *Carter Oil Co. v. Norman*,[83] the court stood by this principle notwithstanding the provision of the law that the adoptive parent could not inherit any property which the child may have taken by gift from his kindred by blood. The court said that this provision was not intended to give the adoptive parent the general right to inherit as natural parent; rather, it intended only to give to the adoptive parents the right to inherit the property which they had given to the adopted child.[84]

Other courts have special rules governing the inheritance rights of the kindred. Some rules attempt to allocate the intestate estate by placing the adoptive parents in the adopted child's line of intestate succession. The premise is that the order of heirship of the adopted child is that obtaining in the natural family, except that the adoptive parents come in at some point in the order of preference. In Colorado, the adoptive parents are preferred heirs of the child, excluding all other blood kindred.[85] But if the adoptive parents are in default to take, or if they have predeceased the child, then the natural parents and other relatives of the adopted child, in the order provided by law for usual succession, enter the succession.[86] This scheme is also varied by expanding the circle of adoptive relatives who have preferences over the natural parents and kindred. For instance, under the Iowa Code of 1934, it has been held that the right of the natural parents to succeed was subordinate to the successional right of the ancestral and collateral heirs of the adoptive parents, and the adoptive parents themselves.[87] The court relied on the reciprocity principle since the adopted child under certain conditions could inherit from his uncles, aunts and cousins by adoption.

Another common judicial solution paralleling statutory rules in some jurisdictions is to divide the estate of the child according to its source. The aim is to prevent the transfer of the properties from the natural stream to the adoptive stream so as to avoid the situation where the adoptive parents and their kindred indirectly inherit from the natural kindred of the adopted child, or vice versa. The property which the adopted

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[83] 131 F.2d 451 (7th Cir. 1942) (construing an Illinois statute).

[84] An amendment in 1955 did not alter the rule, except to make some verbal changes. See Ill. Laws 1955, at 288.

[85] Coffman v. Howell, 111 Colo. 359, 141 P.2d 1017 (1943); Estate of Warr, 111 Colo. 85, 137 P.2d 408 (1943).

[86] Russell v. Jordan, 58 Colo. 445, 147 Pac. 693 (1915).

[87] In re Smith, 277 N.W. 743 (Iowa 1938). See also In re Estate of Fitzgerald, 223 Iowa 141, 272 N.W. 117 (1937).

child acquired from the natural parents reverts to them, whereas all other property is distributed to the adoptive parents.[88]

The provocative variation of inheritance arrangements in the common-law jurisdictions does not exist in the civil-law countries. The theory of adoption and succession in Roman law as modified by Justinian, the *adoptio minus plena*, has here its strongest influence; almost invariably, the Roman rule that the adopted child could succeed from his original family obtains. The civilian areas thus almost universally recognize the capacity of the child to receive a dual inheritance.

The practice in civil-law areas in the problems of multiple adoption seems more desirable than that employed in many common-law jurisdictions. The civil-law countries generally prohibit the re-adoption of the child while the first adoption continues. The basic idea behind the rule has been extended to cases where natural descendants, legitimate or illegitimate, exist. The situation in which the natural descendants of the adoptive parents compete with the adopted child in the succession of the adoptive parent rarely occurs because the law in the civil-law areas prohibits one from adopting a child if he has natural descendants. As a consequence, the confusion that arises from multiple adoption in the common-law areas has not appeared in the civil law.

Although most countries proceed from the principle of reciprocity to constitute the natural kindred of the adopted child his heirs, some interesting variations on statutory regulation of the right of the natural kindred exist. Generally, inheritance by the child's natural relatives is regulated by a broad provision exemplified by section 1764 of the German Civil Code: "The rights and obligations arising from the filiation of the child with his natural relatives are not affected by the adoption except as otherwise provided by law."[89] Quebec law established a different scheme: the property acquired by gift, will, or inheritance from the child's natural relatives devolves in the same way as if he had not been adopted, whereas those acquired by the child himself, or by gift, will or inheritance from the adoptive family are distributed to the heirs within this family.[90] In both schemes the order of preference and shares is regulated by the general rules of inheritance. Brazil sets up another arrangement but only when no legitimate descendant can inherit. In the ordinary succession

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[88] Humphries v. Davis, 100 Ind. 274 (1884). But see Barnhizel v. Ferrell, 47 Ind. 335 (1874); Dunn v. Means, 48 Ind. App. 383, 95 N.E. 1015 (1911). Humphries v. Davis partially overruled Barnhizel v. Ferrell. Cf. the Iowa rule announced in Baker v. Clowser, 158 Iowa 156, 138 N.W. 837 (1912), calling the Humphries distinction "anomalous."

[89] Author's translation. See also Ley No. 13.242, art. 14; Braz. Civil Code art. 1574; Codice Civile 300; La. Civ. Code Ann. art. 214 (West 195); Mex. Civ. Code art. 1620.

[90] Que. Rev. Stat. c. 324, §§ 18(2)(a)-(b) (1941) (Can.).

all legitimate ascendants in the natural line are next in order to succeed,[91] but the legitimate ascendants qualified to succeed the adopted child are confined first to natural parents of the child. Beyond the natural parents, the other ascendants can no longer take. The adoptive parents, if they survive, are then called to the intestate succession, taking the whole of the estate to the exclusion of other heirs.[92] The other ascendants in the natural blood line of the adopted child only enter the succession in the absence or incapacity of the adoptive parents. Mexico, on the other hand, considers the natural and adoptive parents as heirs with equal rights. In case both of them survive the adopted child, the estate of the child is divided equally between them regardless of the source of the property composing the estate of the child.[93]

The French regulation relies more on the principle of reciprocity. In ordinary adoption where the child remains an heir to his natural kindred, the natural kindred also maintain their heirship right from the child after adoption. In extraordinary adoption, the child appears to have undergone some form of legal disinheritance so that he may no longer take in the intestate estate of his blood relations.[94] Consequently, the natural relatives of the child are cut off. The effect of adoptive legitimation is to constitute the adopted child a truly legitimate child of the adoptive parent. He cannot take as heir of his natural family, and his blood relations are disqualified to succeed him even if they happen to know the child after adoption.[95]

V

Inheritance Between the Child and Relations of the Adoptive Parents

Consistent with the idea of making the child a full member of the adoptive family, current legislation in common-law jurisdictions has tended to liberalize inheritance between the child and his adoptive relatives. However, some strong opposition remains to retard the progress in this area. Because of this opposition the Uniform Adoption Act as now worded leaves the solution of this problem to local policy.[96] The oppo-

91 Braz. Civ. Code art. 1603 (2).
92 Braz. Civ. Code art. 1609.
93 Mex. Civ. Code art. 1620.
94 1 Marty & Raynaud, Droit civil 1007 (1956).
95 Code Civil art. 370. Louisiana's grant of inheritance to the adopted child from his natural kindred, La. Civ. Code Ann. art. 214.4 (West 1952), has been made because of some opinion that to abolish it violates the constitutional prohibition against the abolition of forced heirship. See Bugea, "Adoption in Louisiana—Its Past, Present, Future," 3 Loyola L. Rev. 1 (1945).
96 For a detailed discussion, see Merrill & Merrill, "Towards Uniformity in Adoption Law," 40 Iowa L. Rev. 299, 319 (1955).

sition in civil-law countries is more intense and most of these jurisdictions, except to a limited degree Louisiana and France, remain attached to the antiquated idea that inheritance should remain within the natural family. Even in France, the progressive measures of the 1939 reform were not attained without difficulty; in Louisiana a new approach to the problem is regarded with reservation.

Questions of succession involving the adopted child and relatives of the adoptive parent are numerous, but the discussion here is limited to developments establishing a filiation between the child and the adoptive parents' relatives.

A majority of the common-law jurisdictions grant mutual succession between the adopted child and the relatives of the adoptive parent.[97] Unfortunately, almost as many states provide no detailed regulation of this problem.[98] Only a negligible number of the state statutes explicitly prohibit this inheritance relationship between the adopted child and the adoptive parent's relatives.[99]

The courts in interpreting the general provisions on adoption in questions of inheritance between the adopted child and the adoptive parent's relatives have developed various rules of limited usefulness. To ascertain these rules, it is sufficient to study the rulings on the rights of the adopted child. The rights of the adoptive parents' relatives follow more or less those of the adoptive parents; also, the rule applicable to the child is often extended to relatives of the adoptive parents on reciprocity.

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[97] 27 jurisdictions allow the adopted child to succeed from the lineal relatives of the adoptive parent, 26 from a collateral. In return, 22 jurisdictions allow the lineal relatives to share in the intestate distribution of the adopted child's estate, and about the same number allow the collaterals to share. Some states confine the right to certain lineal descendants. For instance, in Florida, Tennessee and Vermont, the inheritance is limited between the natural and adopted children of the adoptive parent and their descendants; Maine and Massachusetts grant the right of heirship only to lineal descendants of the adoptive parent; New York allows reciprocal inheritance between the adopted and natural children of the adoptive parent and their distributees, whereas Mississippi recognizes only the children of the adoptive parent.

[98] 19 jurisdictions fail to regulate the inheritance between the child and lineal relatives; whereas 23 jurisdictions have no rules respecting collateral relatives of the adoptive parent. The Ontario adoption law provides an illustration of such regulation:

> (1) For all purposes the adopted child, upon the adoption order being made, becomes the child of the adopting parent and the adopting parent becomes the parent of the adopted child as if the adopted child had been born in lawful wedlock to the adopting parent.
>
> (2) For all purposes the adopted child, upon the adoption order being made, ceases to be the child of the person who was his parent before the adoption order was made and that person ceases to be the parent of the adopted child.
>
> (3) The relationship to one another of all persons, whether the adopted child, the adopting parent, the kindred of the adopting parent, the parent before the making of the adoption order and the kindred of that parent or any other person, shall be determined in accordance with subsections 1 and 2.

Ont. Rev. Stat. c. 53, § 76 (1960) (Can.).

[99] The author has found statutes in only two American jurisdictions. See Me. Rev. Stat. Ann. tit. 19, § 535 (1964); Vt. Stat. Ann. tit. 15, § 448 (Supp. 1965).

The courts' conservative attitude towards adoption is accentuated by the solutions they have fashioned in this area. For the courts to approve any flow of property through inheritance between the adopted child and the relations of the adoptive parent, a more thorough and liberal understanding of adoption must be developed than that used to justify the inheritance between the adopted child and the adoptive parent. The philanthropic objective of adoption may support the inheritance between the adopted child and the adoptive parent, but it seems irrelevant in the current context since the relatives of the adoptive parent have no interest in the adoption proceeding. In fact, this lack of interest appears to be the strongest consideration which psychologically motivates the courts to view the inheritance between the adopted child and these relatives without much sympathy. As a South Dakota court pointedly remarked, the adoptive parent may make a person his heir, but he may not make the adopted child an heir to persons not parties to the adoption.[100] Most courts, however, either find it difficult or lack the frankness to articulate this reasoning accurately; the arguments that the courts have frequently used seem to lack precision and conviction.

The California courts have held in a long line of cases that the adopted child cannot inherit from the relatives of the adoptive parent and that the child is not deprived by the adoption of any right of inheritance that he may have had from his blood ancestors or collateral relations.[101] To the courts, the rules concerning computation of relationship afford convincing indication that the adopted child may not inherit; the rules contemplate a consanguinity relationship, and the adopted child cannot be a relative in this context. They believe that to construe these rules so as to give to the child heirship rights in the property of the relatives of the adoptive parent is to force artificial construction into the law.[102] The Ontario Court of Appeal[103] and the Supreme Court of Canada[104] have advanced a technical argument in a case where the adopted children of the daughter of the testator claimed that they were "children" of the daughter within the terms of the will. The will provided that the life interest of the daughter was to be held in trust after her death for her children until they came of age, when it was to be divided equally among them. Both courts ruled that the adopted children were not "children" within

100 In re Eddins' Estate, 66 S.D. 109, 279 N.W. 244 (1938).

101 Matter of Estate of Darling, 73 Cal. 221, 159 Pac. 606 (1916); Estate of Kruse, 120 Cal. App. 2d 254, 260 P.2d 969 (Dist. Ct. App. 1953); Estate of Grace, 88 Cal. App. 2d 956, 200 P.2d 189 (Dist. Ct. App. 1948); Estate of Jones, 3 Cal. App. 2d 395, 39 P.2d 847 (Dist. Ct. App. 1934).

102 Matter of Estate of Pence, 117 Cal. App. 323, 4 P.2d 202 (Dist. Ct. App. 1931).

103 In re Gage, [1961] Ont. 540, [1961] 28 D.L.R.2d 469 (Ct. App.).

104 In re Gage, [1962] Can. Sup. Ct. 241, [1962] 31 D.L.R.2d 662. But see In re Blackwell, [1959] Ont. 377, [1959] 20 D.L.R.2d 107 (Ct. App.).

the terms of the will. The courts said that to allow them to take would be tantamount to confiscation by the state and distribution by the state of the property confiscated.

Other courts make an emotional appeal to the principle of consanguinity in descent and distribution. *Estate of Warr*[105] in Colorado applied this concept to an interesting set of facts; the deceased died intestate without descendants and the only relatives surviving her were her cousins and the adopted daughter of a predeceased brother. There was no dispute that the adoptive parent of the adopted daughter would have taken the whole estate to the exclusion of the cousins had he not predeceased the decedent. If the adopted daughter could represent her father, she would exclude the cousins. The court, however, concluded that she could not take by representation, holding that the cousins took to the exclusion of the adopted daughter. On the authority of *Russell v. Jordan*,[106] the court reasoned that under the Colorado statute the adoptive relation was personal between the adoptive parent and the child; from this it follows that the rights of third parties, including the right of inheritance from remote kin of adoptive parents, should not be affected. It stressed that the idea that blood relationship always has been fundamental in the law of descent and distribution, and that from time immemorial it has been held by English-speaking people that intestate property should descend to the kindred of the blood. The Colorado courts adhered firmly to this reasoning even after the adoption statute on which *Russell v. Jordan* was based was amended to allow the adoptive family to inherit from the adopted child. The court construed the amendment to mean that the adopted child cannot be considered an issue of the adoptive parent so as to be entitled to inherit from persons other than the adoptive parent, although the relatives of the adoptive parent could lawfully inherit from the adopted child.[107]

The sterile argument that the law provides no express authority for affirming any inheritance rights in the child from the relatives of the adoptive parent is also current. In a New York case,[108] the contestant petitioned for a right to inherit from the sister of her adoptive father. The court rejected her claim despite legislative enactments defining and

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[105] 111 Colo. 85, 137 P.2d 408 (1943).
[106] 58 Colo. 445, 147 Pac. 693 (1915).
[107] Coffman v. Howell, 111 Colo. 359, 141 P.2d 1017 (1943). The rejection of reciprocity in favor of the child in this situation has also been followed in Michigan. Moritz v. Callender, 291 Mich. 190, 289 N.W. 126 (1939).
[108] Matter of Estate of Powell, 112 Misc. 74, 183 N.Y. Supp. 939 (Surr. Ct. Oneida County 1920). See also Matter of Estate of Hall, 234 App. Div. 151, 254 N.Y. Supp. 564 (3d Dep't 1931); Hopkins v. Hopkins, 202 App. Div. 606, 195 N.Y. Supp. 605 (4th Dep't 1922).

enlarging the rights of the adopted child. The court stated it to be well settled that the adoptive parent and the child may inherit from each other, but held that no authority sustained the claim of the contestant that she was an heir of the collateral relatives of the adoptive parent. The adopted child is not the next of kin of the decedent if the deceased is a relative of the adoptive parent.[109] Michigan courts used the same argument in rejecting the claim of an adopted child as representative of his adoptive parent. The general language of the statute convinced the courts that the child cannot be an heir of the adoptive parent's kindred in his own right, much less by representation.[110] Pursuing this argument further in another case,[111] a Michigan court found the adopted child unjustly enriched. The adopted child of a predeceased brother of the decedent had received the properties under claim of heirship. The blood relatives of the decedent who had earlier believed the adopted child to be the decedent's heir-at-law contested the succession when they discovered that the law does not establish the child's right. The court held the child liable for the amount inherited on his other properties because his failure to restore the properties wrongly received from the estate constituted unjust enrichment.

The general language of the adoption laws leaves the courts a real choice whether or not to establish any inheritance relationship. Arguing on the basis of the generality of the statutes only disguises the court's motive. An increasing number of courts are departing from this traditional hostility to the interest of the adopted child in the estate of relatives of the adoptive parent, even in the face of general language in the adoption statutes. Although the courts are unable to articulate a common rationale, it is obvious that the desire to absorb the adopted child completely into the adoptive family is the primary consideration. The Iowa courts derive the inheritance right of the child from the adoptive parent's relatives from the filiation created by adoption; by reciprocity, the courts allow the relatives of the adoptive parent to inherit from the child.[112] In almost the same way, the Nebraska courts assert that the child should be able to succeed from the relatives of the adoptive parent, because one of the most significant rights or privileges of a child of lawful wedlock is the right of mutual succession, and apply this rule within the adoptive family

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[109] Matter of Will of Charles, 200 Misc. 452, 102 N.Y.S.2d 497 (Surr. Ct. N.Y. County 1951). New York has, however, recognized inheritance between the adopted child and the natural children of the adoptive parent. Matter of Estate of Whitcomb, 170 Misc. 579, 10 N.Y.S.2d 824 (Surr. Ct. Kings County 1939); N.Y. Dom. Rel. § 117.

[110] Van Derlyn v. Mack, 137 Mich. 146, 100 N.W. 278 (1904).

[111] Moritz v. Horsman, 305 Mich. 627, 9 N.W.2d 868 (1943).

[112] Cook v. Estate of Todd, 249 Iowa 1274, 90 N.W.2d 23 (1958); In re Estate of Fitzgerald, 223 Iowa 141, 272 N.W. 117 (1937); Estate of Sunderland, 60 Iowa 732, 13 N.W. 655 (1882).

including the adoptive parent's relatives.[113] The general language of the statute also presents no difficulty in Kentucky. The Kentucky courts believe that the provision that the child shall be deemed for purposes of inheritance a child born out of wedlock to the adoptive parents is comprehensive enough to allow the child to inherit not only from but through the adoptive parent as a natural legitimate child.[114]

North Dakota has advanced a very sweeping argument which defines adoption in more precise terms.[115] In upholding the right of the adopted children as "lineal descendants" under a lapse statute, the court argued that the relationship created by adoption is applicable against the world so that inheritance by the adopted child from the adopting parent should be considered established as if the child had been born to the adoptive parents in lawful wedlock. It pointed out that the intention of the legislature as it could be deduced from the statute was to place the adopted child insofar as possible in the same position as the natural child. This, the court concluded, is always the intent of adoptive parents.

The reasoned refusal of a California appellate court to follow the conservative rule expressed in a long line of cases raises hope that the courts can be induced to change their attitude.[116] The court remarked that the legislative and social attitude toward adoption exhibits a purpose to substitute the adoptive family for the natural family in all respects, and, as a consequence, to confine the inheritance within the adoptive family. The court showed an awareness of the development of legislation in recent years, and of the reality that the adopted children come generally from broken homes. It pointed out that changes in the birth records of adopted children make it exceedingly difficult in most cases to establish the relationship of the adopted child to his blood relations.

The position of the civil-law areas can be briefly summarized. Civil-law jurisdictions consider the adoptive relationship a personal and limited filiation between the adopted child and the adoptive parent; for this reason, questions of intestate inheritance between the adopted child and the adoptive parent's natural kindred do not arise. The commonly accepted rule is that no succession can be recognized between these parties. Legally, they are strangers to each other and no binding rights or obliga-

[113] In re Estate of Taylor, 136 Neb. 227, 285 N.W. 538 (1939).

[114] See details in Kolb v. Ruhl's Adm'r., 303 Ky. 604, 198 S.W.2d 326 (1946); Major v. Kammer, 258 S.W.2d 506 (Ky. Ct. App. 1953). But in the 1940 statute and all prior laws, the child was excluded from the succession of the collateral and lineal relatives of the adoptive parents. See Woods v. Crump, 283 Ky. 675, 142 S.W.2d 680 (1940); Sanders v. Adams, 278 Ky. 24, 128 S.W.2d 223 (1939).

[115] Hoellinger v. Molzhon, 77 N.D. 108, 41 N.W.2d 217 (1950).

[116] Estate of Calhoun, 272 P.2d 541 (Cal. Dist. Ct. App. 1954). But see the decision of the Supreme Court of California which reversed the appellate court. Estate of Calhoun, 44 Cal. 2d 378, 282 P.2d 880 (1955).

tions arising from family relationship can exist.[117] Argentina's regulation may be taken as representative. The child succeeds neither from any of the children of the adoptive parent, natural or adopted, nor from the collateral relatives of the adoptive parent. In the event that the adoptive parent predeceases his parents, the adopted child cannot claim the right of succession from the parents or ancestors of the adoptive parent. Since generally in the civil law not even the adoptive parent may succeed the child, it is not strange that very often no relative of the adoptive parent may succeed the child. The German law in fact leaves nothing more to be said when it declares the spouse of the adoptive parent who did not participate in the adoption a stranger to the child in spite of marriage to the adoptive parent.[118]

Only Louisiana and France have made some constructive deviations from this classical position. Louisiana has experienced the stress of legislative reform and inevitably reflects the encouraging developments already noted. In 1958, article 214 of the Louisiana Civil Code was amended to provide that the child and his lawful descendants are intestate heirs of the adoptive parent and his relatives, and these relatives are heirs of the adopted child and his descendants. The French ordinary and extraordinary adoptions give to the adopted child no inheritance right from the adoptive parent's relatives; in turn, these relatives are not heirs by intestacy in the estate of the adopted child.[119] In adoptive legitimation, the relatives may acquire inheritance rights if they subscribe to the adoption of the child thus binding themselves to the consequences of the adoption. The subscription to the adoption, in effect, makes the relatives secondary parties to the adoption. The law also recognizes the right of the child to take in the intestate estate of the adoptive parents' relatives.[120]

VI

A Critique of the Policy of the Current Law of Descent and Distribution in Adoptive Relationships

This study reveals the refusal of most jurisdictions to accommodate in descent and distribution involving adoptive relationships the same underlying considerations applied in natural filiation. As a result, the system of descent and distribution in adoptive relationships follows an order distinct from that observed in the natural family. Some of the

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117 Ley No. 13.252, art. 12; Braz. Civ. Code art. 1618; B.G.B. art. 1753; Codice Civile art. 500; Mex. Civ. Code art. 1612; Phil. Civil Code 342; Que. Rev. Stat. c. 324, § 18(1) (1941) (Can.).

118 B.G.B. art. 1757.

119 Code Civil art. 356.

120 Code Civil art. 670.

various schemes established for the adoptive relationship lack rational justification, and, in the main, the present arrangements fail to reflect the true goal of adoption. The treatment of the problem seems principally dictated by antiquated tradition, distorted conception of the function of adoption, and, to some degree, by the limitations imposed by the juristic techniques of the two legal systems.

In spite of its increasing popularity, the difficulties in the current systems of inheritance continue to arrest the full public acceptance of adoption and to frustrate the huge potentialities of adoption to accommodate numerous problems in domestic relations. Reform is needed to establish an equitable order of distribution of intestate estates within the adoptive family consistent with the widely recognized functions of adoption and succession. In the United States the Uniform Adoption Act was promulgated in 1953 but the inheritance provision of the act has been adopted only in Montana and Oklahoma and partially in Wisconsin. Conflicting state policies prevented the incorporation in the act of a uniform provision on the inheritance effects of adoption. The arguments against a uniform rule, premised on the reorientation of adoption towards a complete assimilation of the adopted child in the adoptive family, uniquely summarize the thinking of legislatures and of the courts. A brief evaluation of these arguments should be useful to conclude this work.

Although the adopted child is universally allowed to succeed the adoptive parent, the adoptive parent is not considered an heir of the intestate child: the natural parents are generally preferred. This arrangement is justified on the ground that adoption should be for the exclusive benefit of the child and not a means for the enrichment of the adoptive parent. As a corollary, the fear is expressed that allowing the adoptive parent an inheritance right in the child's estate would invite unscrupulous persons to adopt children.

Even were this fear valid, it is at once clear that the remedy is not the denial of successional right but the formulation of adoption procedure which contains safeguards to exclude such persons. Adoption through court proceedings which require background investigation of persons seeking to adopt should do much to remove this problem. But it is extremely doubtful that this fear is justified. Children given for adoption are not invitingly rich. In fact, the main reason natural parents put their children up for adoption is poverty. Most of these children are orphans; many do not know their parents because they were born out of wedlock and abandoned by the mother; some are remnants of broken homes. In the United States more than half of the children adopted in 1951 were

born out of wedlock;[121] their unmarried mothers are young[122] and find it difficult to face the stigma of unmarried parenthood.

Of those born in wedlock, the children mostly come from homes broken by divorce, desertion, or separation.[123] Those from unbroken homes are given for adoption because the parents feel they cannot support the child; or both parents are ill and unable to take care of the child; or because the parents had married shortly before or after birth of the child and could not face the social disapproval of their situation.[124] Recent data reveal no change in the status of the children given for adoption.[125]

The traditional hostility toward the heirship right of the adoptive parent overlooks factors that must be considered in this question. First, only the death of a party provokes succession. This establishes the favorable probability that the adopted child will end up succeeding the adoptive parent. It can be said that in those rare instances where the child has properties before adoption, the adoptive parent will "benefit" from

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[121] Children's Bureau, U.S. Dep't of Health, Educ. & Welfare, "Statistical Series No. 14," at 17 (1953).

[122] Two out of five unmarried mothers are reported to be teenagers. Ibid.

[123] Children's Bureau, U.S. Dep't of Health, Educ. & Welfare, "Statistical Series No. 14," at 8-10 (1953).

[124] Id. at 9.

[125] The percentage distribution of the status of children adopted by unrelated petitioners in 1955 is a follows:

Total		100
Born out of wedlock		69
Born in wedlock		31
One or both parents dead	5	
Parents living and together	8	
Parents divorced or separated	13	
Status of parents unknown	5	

Children's Bureau, U.S. Dep't of Health, Educ. & Welfare, "Statistical Series No. 39," at 7 (1957).

The percentage distribution in 1960 shows a slight increase in children born out of wedlock:

Total		100
Born out of wedlock		77
To unmarried women	60	
To married women	10	
Not reported	7	
Born in wedlock		23
One or both parents dead	2	
Parents living and together	6	
Both parents living, broken marriage	7	
Others & not reported	8	

Children's Bureau, U.S. Dep't of Health, Educ. & Welfare, "Statistical Series No. 66," at 29 (1962).

the adopted child only in the still rarer instance where he survives the child. Second, the opposition operates on an assumption inconsistent with the other effects of adoption that most countries readily concede to the adoptive parent. For instance, all jurisdictions grant the adoptive parent the right of custody of the person and management of the properties of the child during minority. A person unworthy to succeed should be more than unworthy to assume these rights which concern directly the child's welfare during the most crucial time of his life.

It is also idle to insist that granting such rights would undermine the purpose of adoption as an institution primarily for the benefit of the child. To deny the adoptive parent an incidental benefit when the adopted child has ceased to enjoy whatever benefit he may have derived from the relationship is to pursue an exaggerated consistency. To determine who, between an adoptive parent and the blood parent, is worthy of inheriting the child's estate is the real issue. The answer cannot be found in axioms that exclusively emphasize the primacy of consanguinity connections. The natural relationship is not so sacred that it cannot be overcome in achieving successful adoption and in accordance with the underlying theory of modern intestate succession. The great efforts of the adoptive parent to bring up an unrelated child he considers his own by sincere and enlightened conviction, the altruistic motivation and natural desire to be parent that pervade the adoptive relationship, and the tangible and intangible assistance the adoptive parent bestows upon the child in the accumulation of his properties more than balance whatever worthiness to succeed the natural parent can claim on the mere basis of kinship. On the other hand, it is difficult to ignore the fact that the natural parent has voluntarily freed himself from the exacting and delicate responsibility of parenthood, often even unwilling to draw the slightest attention to his parental connection with the child. Furthermore, it is more defensible to assume that the adopted child's intention upon his death is to dispose his properties to the adoptive parent whom he has always thought as parent throughout his life. It would frustrate the realization of his tacit will to supplant the adoptive parent with the natural parent at the time when the material benefits accumulated during adoptive life are under liquidation. To allow the natural parents to succeed is to override the decedent's legitimate preference.

Legislatures are inclined to take a hard look at the wisdom of totally removing the adopted child from his kindred's succession. The historical reasons for the rule allowing the child to succeed from his natural kindred are easy enough to overcome. The civil law acquired the rule from Justinian's innovation, whereas the common law maintains it because of the

abundant hesitation to abolish blood filiation as a basic assumption of inheritance right. The broad conception of emancipation together with the limited nature of legal personality of the child in Roman law justified Justinian's law. But in the present civilian codes, emancipation no longer causes disinheritance, and minors—indeed an unborn child in most jurisdictions—have the capacity to succeed and own properties. The position of the common law confuses consanguinity as a rough measure of the decedent's preference with the decedent's preference itself. Besides, it thoroughly misinterprets the true motive of adoption.

Studies suggest that the present rule fails to operate often enough to justify its place as a general rule of descent and distribution. The natural relatives of the child are often difficult to find not only because they are eager to conceal their connections, but also because valid methods of placement make the reliable ascertainment of the natural relations of the child extremely difficult. Also, these children are placed and shortly thereafter adopted at a very early age, a majority at an age of less than a month.[126] This age makes it difficult to trace their relations at death. In the few cases where family connections can be reasonably established, poverty among the relatives has practically excluded any possible inheritance.

The need for a psychological environment that assures successful adoption dictates the complete removal of the child from his natural family. Maintaining the child's connection with his natural family casts serious obstacles in the path of achieving mutual affection and responsibility within the adoptive family. It leaves the child uncertain as to whom he should treat as "parents." Besides, prospective adoptive parents obviously desire, and are entitled to, a protected privacy and free use of

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[126] The percentage distribution of the ages at the time of placement of the children adopted in 1955 and 1960 is as follows:

1955:	
Total	100
Under 1 month	50
1 month, under 6 months	13
6 months, under 1 year	6
1 year, under 6 years	22
6 years and over	9

Children's Bureau, U.S. Dep't of Health, Educ. & Welfare, "Statistical Series No. 39," at 7 (1957).

1960:	
Total	100
Under 1 month	39
1 month, under 3 months	20
3 months, under 6 months	12
6 months, under 1 year	8
1 year, under 6 years	15
6 years, under 12 years	5
12 years and over	1

Children's Bureau, U.S. Dep't of Health, Educ. & Welfare, "Statistical Series No. 66," at 29 (1962).

discretion approximating that of a natural filial relationship. The fact that children are adopted at an early age hopefully assures full assimilation into the adoptive family before the child reaches the age of discretion. It is extremely doubtful that the child will find it to his advantage, even at an advanced age, to be continuously exposed to the unfortunate events that led to his adoption. On this point, a lesson can be learned from the long experience in France. The unpopularity of adoption under the Code Napoleon was due to the embarrassment that the natural relationship caused.[127] As mentioned elsewhere, this provided the initiative for establishing the concepts of extraordinary adoption and adoptive legitimation. Reports indicate that despite the irrevocable nature of adoptive legitimation, adoptive parents in France prefer this to ordinary or extraordinary adoption.[128]

Some argue that prohibiting the child from succeeding natural kindred prevents these kindred from benefiting the child. It is enough to reply that this need can be satisfied by making the child testate heir in the will of the relatives.

The inheritance arrangement between the adopted child and the relatives of the adoptive parents evidences the antiquated attitude of most jurisdictions, especially of the civil-law areas. The civil-law jurisdictions almost universally oppose the establishment of any legal channels of interchange of proprietary and family rights between the adopted child and the relations of the adoptive parent. The conception of adoption as a limited artificial filiation between the adoptive parent and the child effectively isolates the child from his adoptive parent's relation. Even the exception made in France in adoptive legitimation has a thoroughly restricted usefulness because of the requirement that a subscription to the adoption by the parent's relatives is necessary. The existing systems in the common-law areas are so diverse that no valid generalization can be drawn. Some jurisdictions permit mutual inheritance to all relatives of the adoptive parent and the child, but many confine the inheritance to lineal relatives, and a substantial number to legal descendants. A few states consider the source of the property in the estate determinative, and others apply the unusual rule that the relatives of the adoptive parent may be heirs of the child, but the child is not an heir to them. The existence of an inheritance arrangement clearly shows the belief of most common-law areas that some form of inheritance arrangement could be consistently recognized between the parties. The differences present a complex pattern not so much on the desirability, as on the degree of in-

[127] 1 Marty & Raynaud, Droit civil 1000, 1007 (1956).
[128] See Gehrunger, Die Adoption in deutschen und französischen Recht 89-95 (1957).

novation acceptable to the states. Since the introduction of novel schemes of inheritance involves widespread alteration of current systems and a careful formulation of a new order of heirship and equitable distribution of shares within the natural family of the adoptive parents, the legislative development in this field must understandably be guarded. However, the numerous variations of inheritance arrangement contained in current laws are definitely an intelligent and discerning experimentation by legislatures in the common-law areas focused on the ultimate acceptance of the idea of complete assimilation of the adopted child into the new circle of relatives in the adoptive family.

Few arguments advanced against the establishment of inheritance rights between the adopted child and the relatives of the adoptive parent deserve examination. Most earnestly pressed is the point that the adoptive parents have a right to adopt a person as their heir but not as an heir of their relatives. It should be noted that inheritance is not the aim of adoption. People adopt, as people marry, not with the intention of constituting a person to be an heir of themselves or of their relatives. The injustice is more apparent than real; it is true that the adoptive parent adopted a person who may inherit from his relatives, but he also adopted a person from whom the relatives may inherit. Since inheritance opens with the death of a party, the relatives have as much chance to inherit from the adopted child as the child from them. It is also true that some relatives usually oppose an adoption. But even in this case, exclusion of mutual right of inheritance cannot be justified. Any opposition is not based on the desire of relatives to exclude the child as their heir; rather, they hope to exclude the child from the estate of the adoptive parent. Their opposition is, therefore, contrary to the intentions of the adoptive parent, and overreaches the limits of the right of these relatives in the estate of the adoptive parent as a mere expectancy. If the relatives have reason to oppose the child's taking in their estate, they are not without effective remedy; the right of testation affords ample protection.

Many believe that mutual inheritance may be used as a threat to relatives of a person to change the descent of his property. This argument generalizes occasional abuse of the institution. It further questions the utility of adoption itself. The usefulness of adoption should sufficiently answer it, but it may be added that the same objection could be raised against the right to make a will. Yet no one would suggest the abolition of the right of free testation merely because the making of a will can be used occasionally as a threat to relatives to change the descent of properties. Any such threat violates no right of the relatives, since nobody, not even forced heirs of a person, has a vested right in the adoptive

parent's property during his lifetime. During the adoptive parent's lifetime, he may, like the testator, lawfully consume or dispose of his property. Adoption may likewise be considered a kind of allowable disposition.

It is also objected that persons making a will or trust instrument seldom have in mind the adoption of children at the time the will or trust instrument is made. The same is true of the subsequent birth of a natural legitimate child, yet no opposition has been raised against the right of the natural child to succeed. When a will is made before marriage or before the birth of a child, generally no provision is made for unborn children. Most jurisdictions will declare the will void; in fact, some jurisdictions already apply the rule to adoption,[129] and in these jurisdictions no difficulty has so far presented itself.

What has been discussed applies to adoption by unrelated petitioners. The problems presented by adoption by related petitioners should be considered on an entirely different basis. Available data indicate that in the United States related petitioners are involved in about half of all adoptions. With thirty-one states making complete reports in 1955, about one per cent of the adoptive parents were natural parents, thirty-six per cent were stepparents, and eleven per cent were other relatives. Thus forty-eight per cent of all adoptions were made by related petitioners. In 1960, the pattern of distribution was unchanged, with forty-six per cent of adoptions contracted by related persons.[130] These facts speak for the need of formulating rules for this type of adoption. A different rule is necessary because the need of the child for responsible tutelage and care is seldom present in this adoption. This is especially true with the adoption by stepparents, who make up the majority of petitioners. Unless the other blood parent is dead or unknown, or has consented to the adoption, the adoption by a stepparent may create new difficulties besides those of stepparenthood. The wisdom of allowing adoption must be fully considered, and if allowed by the states, adequate safeguards must be made to avoid confusion in the definition of the child's family status, allegiance, and responsibility to all parents. These new insights will then determine the necessity and structure of the scheme of intestate distribution in this type of adoption. Particular effort must be made to avoid the anomalous situation of doubel or multiple filiation and its corollary—multiple inheritance.

However, if the adoption by a related petitioner parallels the motive

[129] See, e.g., La. Civ. Code Ann. art. 1705 (West 1952).

[130] See Children's Bureau, U.S. Dep't of Health, Educ. & Welfare, "Statistical Series No. 39," at 12-13 (1957), for 1955 data, and Children's Bureau, U.S. Dep't of Health, Educ. & Welfare, "Statistical Series No. 66," at 24 (1962) for 1960 data.

of a conventional adoption, there seems to be no valid reason why the adoption should be differently regulated.

Although a few jurisdictions regulate the relationship of the descendants of the adopted child with the adoptive parent and his relatives, all jurisdictions studied disregard the spouse of the adopted child; the spouse is generally thought of as a stranger. Actually, the spouse of the adopted child is as much a member of the family of the adopted child as the child's descendants, and no valid reason can be found to treat the spouse and the descendants differently. The positions of the spouse and the descendants in the family of the adopted child differ, but the reasons that can be articulated for assimilating the descendants within the bond of the adoption apply as well, or perhaps more so, to the spouse of the adopted child.

VII

Model Law on the Effects of Adoption

Inheritance is only one of the aspects of a natural legitimate filiation. Inheritance in adoptive relationship finds its justification, along with the other effects of adoption, in the purpose of adoption itself. For this reason, its regulation is inseparable from the regulation of the general effects of adoption such as the right to use the family name, the mutual obligation of support, and the right to the custody of the person of the adopted child. These incidents of an adoptive filiation can be described by the general terms "family rights and duties" because their existence presupposes a family relationship. If adoption is faithfully to approximate a natural legitimate filiation in all its aspects, the only exhaustive and workable regulation of the effects of adoption is with reference to all the incidents of a natural legitimate filiation, not by a tedious enumeration of particular family rights and duties governing the relationship.

The model must be taken only to suggest the basic ideas considered essential in regulating the effects of adoption. Some reworking in style when the model is adopted in the civil law or common law is perhaps necessary: legislative style must sufficiently take into account the customary legal reasoning of the two systems. The common-law legislation must use more detailed language to protect the ideas expressed in the model from the literal-restrictive approach of the courts towards adoption; the civil law may safely use general terms as its courts incline toward broader interpretation. Further, some adjustment in content may appear necessary, especially in jurisdictions where the spouse has a different position from that assumed in the model, so as to harmonize the inheritance scheme of the heirs to the arrangement in the natural legitimate filiation.

AN ACT ESTABLISHING THE EFFECTS OF ADOPTION OF PERSONS

§ 1. *Effect of Adoption to Third Person.*

For all legal purposes, the adopted child, his spouse and descendants shall acquire, as against all persons, the status and family rights and duties of a natural legitimate child, or spouse and descendants of such natural legitimate child, of the adoptive parent.

The terms "family rights and duties" as used in this and the following sections shall be interpreted in their broadest sense with the intent of constituting an adoptive relationship to have all the incidents of a natural legitimate relationship.

In appropriate cases, sections 1 to 7 shall apply to any act, contract or transaction by a person or between persons not related to the adopted child or adoptive parent before or after adoption.

§ 2. *Effect of Adoption to Adoptive Parent.*

The adopted child, his spouse and descendants shall acquire toward the adoptive parent the status and all family rights and duties of a natural legitimate child, or spouse and descendants of such natural legitimate child, of the adoptive parent. They shall be entitled to inherit from the adoptive parent with such right, preference and share as the general statutes of descent and distribution provide for a natural legitimate child, or spouse and descendants of such natural legitimate child, of the adoptive parent.

The adoptive parent shall have towards the adopted child, his spouse and descendants the status and all family rights and duties of a natural legitimate parent of the adopted child. He shall be entitled to inherit from the adopted child, his spouse and descendants with such right, preference and share as the general statutes of descent and distribution provide for a natural legitimate parent of the adopted child.

§ 3. *Effect of Adoption to Relatives of Adoptive Parent.*

The adopted child, his spouse and descendants shall acquire toward all relatives of the adoptive parent, of whatever status, line or degree, the status, and all family rights and duties, and the right of inheritance, of a natural legitimate child, or spouse and descendants of such natural legitimate child, of the adoptive parent. All relatives of the adoptive parent, of whatever status, line or degree, shall acquire towards the adopted child, his spouse and descendants the status, and all family rights and duties, and the right of inheritance, of relatives of a natural legitimate child, or spouse and descendants of such natural legitimate child, of the adoptive parent. The status, line and degree of relationship, and the right, preference and share in the inheritance which the adopted child, his spouse and descendants shall have toward the relatives of the adoptive parent, or which these relatives shall have toward the adopted child, his spouse and descendants, shall be that status, line and degree of relationship, and right, preference and share in the inheritance which the general laws of this state establish between such relatives and the natural legitimate child, or spouse and descendants of such natural legitimate child, of the adoptive parent.

§ 4. *Effect of Adoption to Relatives of Adopted Child.*

All legal and natural relationship of the adopted child toward any person, other than his spouse and descendants and those deriving their relationship to him through his spouse and descendants, as well as the relationship of his spouse and descendants toward such person derived exclusively

through the adopted child shall, after adoption, be considered dissolved, and no family rights and duties, and right of inheritance by and from such person shall exist.

§ 5. *Effect of Adoption by Stepparent.*

The adoption of a child by a person married to one of the natural legitimate parents of the adopted child shall establish the same status, family rights and duties and right of inheritance as provided in sections 2, 3 and 4, provided the other natural legitimate parent is dead or unknown, or has consented to the adoption and agreed to the consequences of adoption as provided by this law. In this case, section 4 shall apply only to the other natural legitimate parent and his relatives.

§ 6. *Effect of Adoption by Other Related Persons.*

An adoption by any other relative of the adopted child shall be governed by sections 1 to 4 of this law.

§ 7. *Effect of Adoption to Interpretation of Laws, Regulations, Contracts and Wills.*

Any express or implied reference in any law, regulation, contract, agreement, gift, will or any instrument to the child, or the spouse and descendants of such child, of the adoptive parent shall be construed to include the adopted child, his spouse and descendants.

Any express or implied reference in any law, regulation, contract, agreement, gift, will or any instrument to the child, or spouse and descendants of such child, of the natural or former adoptive parent of the adopted child shall be construed not to include the adopted child, his spouse and descendants.

Any express or implied reference in any law, regulation, contract, agreement, gift, will or any instrument to the relatives, of whatever status, line and degree, of the adopted child, or of his spouse and descendants shall be construed to include only those persons considered in sections 2 to 4 as relatives of the adopted child, or of his spouse and descendants.

The preceding paragraphs shall not apply if contrary intention clearly appears from the law, regulation, contract, agreement, will or instrument, *provided however*, that the reference to _____ [state the class of relatives] in section _____ [lapse statute] and section _____ [pretermission provision] of the Wills Act shall be construed in accordance with the provisions of the preceding paragraphs.

§ 8. *Repealing Provision.*

The following provisions of _____ [state law or laws] are hereby repealed: _____ [state section or sections].

The provisions of the model are self-explanatory and need little comment. Section 1 defines the effect of adoption on third persons. Since adoption is not an isolated relationship between the adopted child and his family, on one hand, and the adoptive parent and his family, on the other, this provision is necessary. This provision gives rights and recognizes obligations to third persons toward the adopted child and his family. It will find application, for instance, in the theory of imputed liability in tort or warranty in contract. It should also enable the adopted child

or his family to sue for damages caused to the adoptive parent by third persons.

The assimilation of the family of the adopted child into the adoptive parent's family may provoke objections. However, it must be conceded that any other arrangement confuses the purpose of adoption and reduces its usefulness. Where the adopted child has a spouse and descendants at the time of adoption, it is not the child alone who is adopted into the adoptive family, but the whole family of the adopted child. I have great sympathy for the position that questions the wisdom of allowing adoption of a child of age, with spouse and descendants. In this case, the adoption does not have the essential motive of adoption in general, and it might well be desirable to prohibit adoptions of this kind. It reminds us vividly of the anomaly which Cicero condemned when the Roman patricians and plebians abused adoption to penetrate each other's ranks to acquire or confer patronal privileges. However, as long as the states recognize adoption of this nature, this provision must be applied. Where the adoption is conventional, the subsequent marriage of the adopted child should be treated as the marriage of a natural legitimate child. To isolate the adopted child's spouse and descendants from the family of the adoptive parent will cast a shadow of a stranger's status upon them.

Section 2 is simple, and prevailing thinking now recognizes the necessity of this provision. If the adoptive parent is married at the time of adoption, no adoption should be permitted unless both spouses adopt the child jointly. In this case, section 3 does not apply to the spouse of the adoptive parent. However, if the adoptive parent marries after adoption, section 3 should be applied.

Section 3 puts the adopted child and his family within the circle of the adoptive parent's relations. Thus the adopted child and his family acquire a new set of relatives. Toward the brothers and sisters of the adoptive parent, the child is a nephew, whereas to ascendants, he is a descendant. He and his family must discharge the duties and acquire the rights which pertain to their new status and relationship. If the adoptive parent is an illegitimate child, the adopted child acquires no more rights and obligations towards the natural relations of the adoptive parent than he would as a natural legitimate child of an illegitimate child has toward the relation of the adoptive parent.

Section 4 dissolves all relationship, legal or natural, of the adopted child and his family before adoption. If his former parent was himself an adopted child, the adopted child loses the rights and duties derived in the adoption of his former parent; if the adopted child has been

previously adopted, the first adoption is dissolved. However, the relationship of the spouse and descendants which are not derived through the adopted child remains. For instance, the adopted child's wife remains the natural legitimate daughter of her parents, and her children are still descendants of her parents. If the wife was an adopted child, she and her children continue to have the status and rights derived from her adoption.

Section 5 refers to adoption by a stepparent. It is not desirable to allow adoption by step-parents unless the purpose is to find a total substitute for the other parent who must then be wholly excluded if the adoption is perfected. In this case, it is necessary to maintain the relationship of the adopted child to his natural parent (to whom the stepparent is married) and the parent's relatives.

Section 6 regulates the adoption of children by other relatives in the same manner as adoption by unrelated petitioners. There is no valid reason for a different rule in this case, since those relatives who will adopt the child will be more distant than parent so that the existing relationship is not an exact equivalent of the adoption. However, in order to abolish the anomaly of double filiation, it is necessary that the natural relationship should be dissolved. For instance, if a brother adopts a nephew, the adoptive parent becomes a natural legitimate parent and loses the status of uncle. Since the adoption creates a more immediate and primary relationship than the original relationship of uncle and nephew, the adoption does not prejudice the property rights of the adopted child, his spouse and descendants.

The adoption by natural parents must be re-examined. These parents are adopting their illegitimate children, and thus the distinction of adoption and legitimation is confused. Adoption creates a natural legitimate filiation and logically should be confined to persons who are not by nature parents of the adopted child. Legitimation must be reserved to those illegitimate children whose parents want to legalize their existing natural filiation. Adoption, not legitimation, should be resorted to by persons who are not parents of illegitimate children.

Section 7 contains important rules of construction. It is similar to, but broader than, the English law.[131] In some laws, *e.g.*, the workmen's com-

[131] The English adoption law provides:
(2) In any disposition of real or personal property made, whether by instrument inter vivos or by will (including codicil) after the date of an adoption order—
(a) Any reference (whether express or implied) to the child or children of the adopter shall, unless the contrary appears, be construed as, or as including, a reference to the adopted person;
(b) Any reference (whether express or implied) to the child or children of the adopted person's natural parents or either of them shall, unless the contrary intention appears, be construed as not being, or as not including, a reference to the adopted

pensation acts, the adoptive relationship must be fully recognized. This must also be considered in instruments made between third persons alone, for instance in a contract with obligations for the benefit of another. The section discards the rule established in Illinois that the natural father still has the ultimate liability for the support of the adopted child, and in Pennsylvania that the adopted child is a lineal descendant of his natural ancestors for tax purposes. The intent is to remove consistently all traces of the artificial nature of adoption and to maintain it for all purposes as a natural legitimate filiation.

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person; and

(c) Any reference (whether express or implied) to a person related to the adopted person in any degree shall, unless the contrary intention appears, be construed as a reference to the person who would be related to him in that degree if he were the child of the adopter born in lawful wedlock and were not the child of any other person.

Adoption Act, 1958, 7 & 8 Eliz. 2, c. 5, § 16(2).