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Lex Romana familiae

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LEX ROMANA FAMILIAE

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TABLE OF CONTENTS

CHAPTER I

MATRIMONIUM

Marriage among the Romans could occur at quite an early age, according to modern standards. Bethrothal might be arranged at any age above seven.[1] The custom of early bethrothal and marriage certainly tended to discourage any romantic inclinations. If one did marry for love, generally it was with a widow or divorcee. The possibility of sentimental attachment among the very young was slight, but marriage to the Romans was not for love, but for duty to the state. Often the Romans had to rely on a post-marital propinquity for the development of love which normally precedes marriage. Seneca advises a wise man to

> love his wife with the head, not with the heart, [for] . . . nothing is more hateful than to love one's wife as one loves one's mistress. [2]

Lucre was often another important reason for the Romans to marry. Generally girls without fortune, but nevertheless beautiful, had a hard time securing a husband. Yet the lot of a suitor who made a rich marriage was not always a happy one. The wife had much control over her husband, for he could not alienate any of the dowry or contract

away any without the wife's consent. He was thus a slave to his wife's fortune. "Si illa tibi placet, placenda dos quoque est quam dat tibi. Postremo quod vis non duces, nisi illud quod non vis feres."[3] In reference to this same idea Juvenal said ". . . Optima set quare Censennia teste marito bis quingena dedit: tanti vocat ille pudicam."[4]

Procreation was another important reason for the Romans to marry. In fact, the government offered very lucrative incentives to encourage procreation, because more children meant more Roman citizens and if male children then more soldiers. If a person were married but childless he was forbidden to receive more than one-half his legacy unless the testator stood within the sixth degree.[5] A man escaped penalty if he had one child, a free woman if she had three and a freed woman if she had four. If a wife were childless she could only claim a tenth of that part of the husband's will that he assigned to her. Mothers of three or four children were also entitled to freedom from tutela - guardianship over herself and her property. Persons with children were also exempt from various disagreeable civil duties. Candidates for public office were given preference according to their number of children.[6]

For all of these reasons, marriage was greatly encouraged among the Romans. Augustus also encouraged marriage through additional legislation. It was decreed that if men were not married by the age of 25 and women by 20 they

were to be penalized. The laws favored the married and disfavored the celibate. Celibates were forbidden to receive legacies unless they were related to the testator in at least the sixth degree. There were however a few exceptions. They could receive the legacy if they married within 100 days or if an engagement was made to marry and executed within a two year period. Widows were exempt for two years and divorcees for eighteen months before they were pressured to remarry. Tiberius said that when a man reached sixty and a woman fifty they were to be considered celibates for life if they were unmarried.[7] These penalties for celibacy and childlessness endured for centuries until they were abolished by Constantine and later Christian emperors, for Christian law did not favor remarriage, although it was not prohibited.[8]

Sponsalia

Roman marriages generally were preceded by betrothal or engagement, which was a reciprocal promise between the intending husband or father and the girl's father or guardian. The consent of the woman (girl) was unnecessary, especially if she was under her father's power, and too it was considered improper for a young woman to promise herself. She was always given by the paterfamilias, or in the case of no paterfamilias, she was given by one of her relatives. Betrothal promises took the form of sponsio, and originally the contract was enforceable if either party

reneged on the engagement agreement. Most likely this action ceased long before the end of the Republic, for the Romans felt it was immoral to allow an action for a breach of promise to marry. Betrothal became just an informal agreement to marry. Made in writing and before witnesses, the agreement was easily renounced by either party with the formula condicione tua non utor.[9] The betrothal gifts generally were not of enough significance to warrant proceedings for restoration.

The betrothal agreement, however, did place restrictions on an individual. Sexual intercourse with another man made the engaged girl actionable for adultery, and from the moment of betrothal the relatives of the pair had the status of in-laws.[10] A man was liable for infamia if he were concurrently a party in two different engagements.[11] Through Christianity, the law concerning betrothal was changed and by the fourth century A.D. the fiancee gave the girl a gift, arra sponsalicia, to guarantee betrothal. If he did not marry her he gave up claim to the gift, and if she refused to marry him she had to return fourfold, later double, the monetary value of the gift.[12]

Matrimonii Impedimenta

Betrothal did not guarantee one the right to marry, for there were certain restrictions and requirements pertaining to a Roman marriage. In order to have iustae nuptiae or iustum matrimonium the parties must have conubium,

the right to enter into a true marriage. The right of conubium was possessed by all Roman citizens and certain others to whom the government might grant the privilege.

> Iustum matrimonium est, si inter eos, qui nuptias contrahunt, conubium sit, et tam masculus pubes quam femina potens sit, et utrique consentiant, si sui iuris sint, aut etiam parentis eorum, si in potestate sunt. Conubium est uxoris iure ducendae facultas. Conubium habent cives Romani cum civibus Romanis; cum Latinis autem et peregrinnis ita, si concessum sit. Cum servis nullum est conbium.[13]

Also certain bars existed which further prevented certain marriages: (i) There was a minimum age requirement for marriage based generally on puberty. For girls the age was twelve. There is some dispute concerning boys. The Sabinians felt that the boy should have reached puberty and that a physical examination was necessary, while the Proculians demanded only that the boy be fourteen. This latter school of thought has been the prevelant one.[14] (ii) Both parties must be of sound mind. (iii) According to Augustus' statute, senators and their sons could not have iustae nuptiae with a freedwoman or any other undignified woman, nor could a woman of senatorial rank marry a man of lower rank. (iv) Roman officials in a province were forbidden to marry women of that same province. (v) Not until Septimus Severus could soldiers of ordinary rank marry during their time of service; even if a child were conceived before one's entry into the service and

born while one was in the service, the child was not considered to be a product of iusta nuptia.[15] (vi) According to the Digest 23.2, guardians were not allowed to marry their wards.[16]

There were also certain degrees of relationship which made marriage impossible: (vii) Originally any blood relationship nearer than and including first cousins was forbidden, but by the end of the third century B.C. marriage between first cousins was allowed.

> Inter eas enim personas quae parentum liberorumve locum inter se optinent nuptiae contrahi non possunt, nec inter eas conubium est, veluti inter patrem et filiam, vel inter matrem et filium, vel inter avum et neptem . . .[17]

(viii) Also forbidden to marry were uncle and niece, and great uncle and great niece. However, the Emperor Claudius stated that marriage with a brother's daughter was lawful, since he wished to marry Agrippina, his niece. Three and a half centuries later the old rule was restored.

> Fratris filiam uxorem ducere licet, idque primum in usum venit cum divus Claudius Agrippinam fratris sui filiam uxorem duxisset, sororis vero filiam ducere non licet et haec ita principibus constitutionibus significantur.[18]

(ix) Augustus' Lex Papia forbade those of senatorial order from marrying actresses, but the Emperor Justin allowed this type of marriage, thus permitting his nephew Justinian to marry Theodora. In 542 A.D. Justinian abolished for all senators these restrictions relating to the marriage

agreements.[19] Justinian, however, because of religious scruples, forbade marriage between the baptized and his or her sponsor.

If both parties were Roman citizens and not restricted from marrying for any reason, then the marriage was iustae nuptiae and the children of that marriage were iusti liberi and cives optimo iure (possessing all civil rights). If one party was a Roman citizen and the other was a member of a community having ius conubii but not full civitas the marriage was still iustae nuptiae, but the children of that marriage took the civil standing of the father. If either party were without ius conubii the marriage was legal but nuptiae iniustae and the children, though legitimate, received the rank of the lower degree.[20]

Matrimonii Modi

In Roman times there were two types of marriage: (i) cum manu and (ii) sine manu. The earlier and original form of marriage, cum manu, was that in which the woman passed into the manus of her husband. She left her agnatic family and became a member of his family as if she were adopted. Whatever property she took with her became part of the property of her husband or his paterfamilias. Her husband had control over her and she stood in loco filiae to him.[21] Marriage sine manu appears to date back as far as the XII Tables, but cum manu was the common form of

marriage. By the end of the Republic sine manu, however, was the common form and cum manu the exception. In a sine manu marriage the woman did not come under the power of her husband nor did she even become a member of his agnatic family; she remained under the postestas of her father if alive and if not she was sui iuris and a tutor was appointed as though she were single. According to civil law, she was not related to her children; they were under the potestas of her husband. A marriage of this type required no ceremony. All that was necessary was the consent of the parties and, if they were in potestate, of the patres, together with a de facto beginning of a conjugal agreement. The intent of the parties had to be evident.[22]

Cum Manu Matrimonia

There were three different methods for establishing a marriage cum manu. These methods were established first by the XII Tables.

Confarreatio

Confarreatio was a religious ceremony requiring the presence of a leading priest. This type of marriage was limited to the aristocratic patrician class, though not necessarily legally. According to Gaius, the name comes from the use of spelt bread (pannis farreus) in the sacrifice made to Jupiter Farreus.

> Farreo in manum convenient per quoddam genus sacrificii quod Iovi Farreo fit; in quo farreus panis adhibetur unde etiam confarreatio dicitur.[23]

The Pontifex Maximus and Flamen Dialis had to be present at the ceremony along with ten witnesses. This form of marriage was requisite for the four highest state priesthoods - Rex Sacrorum, Flamen Dialis, Flamen Martialis, and Flamen Quirinalis. Not only did the holders of these offices have to be married by confarreatio, but their parents also had to have been married by this same procedure.[24]

> . . . nam flamines maiores, id est Diales, Martiales, Quirinales, item reges sacrorum, nisi ex farreatis nati non leguntur; ac ne ipsi quidem sine confarreatione sacerdotium habere possunt.[25]

Coemptio

Coemptio was a fictitious sale of the wife to the husband, and in early times may have actually been a sale. The purchase was a certain application of mancipatio, a mode of transferring certain types of valuable property.

> Coemptione vero in manum convenient per mancipationem, id est per quandam imaginariam venditionem. Nam, adhibitis non minus quam V testibus civibus Romanis puberibus, item libripende, emit is mulierem civis in manum convenit.[26]

There are two views of the original nature of coemptio. (i) It never was a real purchase, but came into existence after mancipation had become a "fictitious

sale." It was introduced by the plebians so they could acquire rights over their wives in the manner that the confarreatio granted these rights to patricians. Before this, plebian marriages had not been recognized according to civil law. Therefore, the plebians wanted recognition, and also desired to counter the patrician claim that persons born of unrecognized unions were not fit for state offices. Therefore,"in support of this view it is urged that coemptio is too purely secular an institution to belong to the earliest stratum of Roman law."[27]

(ii) It was "the Roman form of the widely spread institution of marriage by purchase, and [that] originally some real consideration was given to her father or guardian in exchange for the bride, or . . ., for the power (manus) over her.[28]

The latter view seems to be the most acceptable, for marriage by purchase was so common among other nations that it seems the same was probable in Rome. Also in reference to the first theory it does not seem likely that in a legally conservative nation there would be a deliberate introduction of a new form of marriage for merely political purposes, rather than religious purposes.[29] In the coemptio ceremony at least five persons had to be present as witnesses and a sixth as libripens or balance holder. The precise words and forms used for the ceremony are unknown, but most likely they were similar to those

used in the mancipatio ceremony.[30]

Usus

Usus was the acquisition of a wife by possession. Usus was related to coemptio in the same manner as usucapio to mancipatio. A Roman citizen who bought some property and got possession but not ownership because he failed to follow certain forms outlined by jus civile might become owner through the process of usucapio, i.e. through a lapse of time. If the object were in his continuous possession for one year he might then become owner.[31]

There are two theories relating to the institution of usus: (i) Usus originally was not a separate form of marriage, but arose from the principle that any defect in the other forms of marriage would be cured by the de facto relationship of man and wife for one year. Confarreatio and coemptio were both complicated ceremonies, and any slip concerning the correct procedure would make the marriage invalid, but if the parties lived together for one year the defect would become void and manus would then occur. Often it was difficult to distinguish between a defective ceremony and no ceremony at all. Therefore, it became accepted that if two people lived together with the intention of being married they would, without participating in any ceremony, be married cum manu at the end of one year.[32] There was, however, a devise which would cancel

the manus relationship but not the marriage. This privilege of defeating manus was granted by the XII Tables. It was at first probably a device of patricians to protect their interests, for occasionally patrician women married plebians. If the wife remained apart from her husband for three consecutive nights during the year she failed to enter the manus. By this contrivance a woman could prevent becoming plebian herself, and if she had any property she could keep it out of the husband's control. Therefore, at her death her property went to her patrician agnates.[33] This informal type of marriage was known as matrimonium jure gentium and was possible even for aliens. However, the wife was known only as uxor and not materfamilias, and the children followed the mother; they did not pass under the potestas of the father.[34]

(ii) Another view relating to usus was that it was originally a separate method of contracting marriage - a type of marriage on approval. It was

> comparable to the 'handfast' marriages found at one time in the north of England and in Scotland, which became permanent if the woman bore a child or became pregnant within a year and a day, but might be dissolved if she did not. [35]

Usus might also be connected to marriage by capture - the idea being that if the union lasted for one year the father lost his right of power over his daughter. The difficulty in this theory for the modern mind is being able

to distinguish between marriage and concubinage. This was not a problem for the Romans who regarded marriage as a de facto relationship distinguishable from concubinage by attendant events such as betrothal and the festivities which customarily attended the marriage. The intention of the parties to marry had to be manifest.[36]

Confarreatio continued to be the prevailing type of marriage until the time of Cicero. At the time of Gaius marriage was generally secured by coemptio, and at the time of Justinian only the freer type existed. Confarreatio only survived for specific purposes however (religious priesthood). Actually by the time of Gaius manus was virtually obsolete. By a gradual development which was probably complete by the time of Cicero, the informal marriage had come to be the formal marriage and thus recognized as justum matrimonium; although the wife did not come under the husband's power, the children of the marriage did.[37]

Effectus Civilis Matrimonii

Once a civil marriage had been established several effects were produced: (i) The children were liberi iusti and in potestas of the paterfamilias and were agnates of his agnates. (ii) Apart from manus, the wife did not enter her husband's familia and therefore was not concerned with his religion. (iii) The wife did not necessarily take the husband's name though during the Empire she often did.

(iv) The wife shared the husband's honorific titles. (v) Their properties remained distinct. (vi) Gifts between them were void. Apart from issue, the effects of marriage legally were the result of the Roman conception of liberum matrimonium. Whether the parties were married or not was important if there were issue and for that reason there were certain rules for a valid marriage. Relief against error of status was given only if there were issue. If there were no issue no relief was necessary; the parties could end their relation at any time.[38]

Dos

In addition to the civil effects of a marriage, another important concern was that of dos. Dos or dowry was the "transfer (or promise to transfer) of things having a money value from the bride's side - her family or friends - to the husband."[39] The husband became full owner of the property, and the dos was intended to help defray some of the expenses which were a part of marriage. Dowry was not trival. There was no set rule that it had to be the intestate portion, i.e. what she could expect from her father's estate in any event; but that this was at least the socially expected magnitude is suggested by the rules of collatio datis, whereby a woman claiming a share of paternal inheritance might have to bring her dowry into account.[40]

In a marriage cum manu the property of a woman sui iuris passed to her husband. If the daughter were under

the power of her father it was customary for the father to provide a dowry for the husband. This dowry could also be supplied by other interested persons, other than the father. If the marriage were sine manu the woman could own property and even have property given to her, but it was still customary for the dowry to be given to the husband. Generally there was much negotiation about dowry arrangements prior to marriage - pacta dotolia. The arrangement could be of almost any type.

There were three kinds of dos: (i) dos profecticia - provided by the father or other paternal ancestor whose legal duty it was to provide the dowry for the woman, (ii) dos adventicia - dowry coming from any other source, (iii) dos recepticia - a type of dos adventicia but given on the agreement that it be returned to the donor on the wife's death. The dos might be constituted in three ways: (i) aut datur - handed over at the time the agreement was made, (ii) aut dicitur - ancient verbal contract in which the bride, paternal ascendant, or debtor might agree informally to give it. This type became obsolete. (iii) aut promittitur - this was the ordinary course followed in which the dos was not actually handed over at the time of the agreement. The person agreeing to give the dos bound himself to do so by a solemn stipulation. From the time of Theodosius and Valentinian, a mere promise to give the dowry became actionable as a pactum legitimum.[41] At the termination of a marriage various things could happen to

the dos. If the dos were recepticia, i.e. if the donor prior to marriage made the husband agree to restore the dos, then the donor or heir could compel restoration. If no such stipulation had been made the husband according to a strict view of civil law was entitled to keep the entire dos for himself. The wife, though, had a moral claim for the return, and often or usually it was recognized.

About 200 B.C. a new action, actio rei uxoriae appeared. This differed from an actio ex stipulatu because it allowed for the recovery of dos at the end of marriage even though no agreement had been made for its return. The actio rei uxoriae was a bonae fidei situation as opposed to the stricti juris interpretation of actio ex stipulatu. Therefore, the judge was not bound unconditionally to order the return of the dos, but had the discretion to enforce such equities as he thought best. The judge might make allowances to the husband for expenses pertaining to property, or if the termination of marriage were due to the wife's adultery or other fault, the judge could make a reduction from the amount to be returned, the amount depending on the seriousness of the offense. On the other hand, if the termination was due to the fault of the husband, the wife might then recover more than the original sum of the dos. Unlike actio ex stipulatu, actio rei uxoriae did not pass to the heir. If the wife predeceased the husband, the husband was allowed to keep all the dos except dos profecticia. Justinian changed

this law so that the dowry had to be returned in every case except for misconduct of the wife. The husband could claim rebate only concerning outlay upon dotal property necessary for its preservation. The husband was also forced to make compensation for any movable property which he had alienated or for damages to the dotal property due to his negligence; and as a further protection Justinian gave the wife tacita hypotheca (implied mortgage) over her husband's estate.[42]

Gifts originally were not allowed between husband and wife, but under Christian emperors a donatio ante nuptias (later propter nuptias) was allowed. This was a gift to the bride from the groom or his family, often matching in value the dos. This was set aside for the wife's future use if she should survive her husband. Though set aside, the husband meanwhile could use and enjoy it. If the wife died before him or if divorce occurred without fault on his part it was extinguished. If the wife survived the husband and there was issue she then had life use of the donatio for herself and her children. But if there were no issue then it passed to his heirs, unless specific arrangements had been made to the contrary. If marriage were terminated by divorce because of the husband's fault, he was penalized by losing the donatio and it passed to the wife.[43]

Other property which the wife owned that was not part of the dos or donatio was known as parapherna. The husband had no right over the wife's bona paraphernalia except what she granted him.

Potestas Problema

A paterfamilias could not order his married children to divorce, but they could not marry without his consent. Whether he could order them to marry a particular person is a complex question. The Digest 23.2.21 states that he could not do so concerning his sons, and the same is implied in Gellius (Noctes Atticae II, 7, 20) concerning the son's moral duty. ". . . he ought to obey; but if his father orders him to take a shameful or criminal wife . . . he should not obey, for if turpitude enters into the question these things are no longer indifferent." The father, however, could make the situation more difficult concerning the daughters. The Digest 23.1.11-12 says, "that a daughter's consent is necessary for bethrothal, but adds that anything short of positive resistance is taken for consent, and consent can only be refused if the proposed bridegroom is morally unfit." The control of the paterfamilias did not apply in the sphere of public affairs, but privately one was in the control of the paterfamilias; if one were in potestate he owned nothing. Whatever was acquired accrued to the paterfamilias. One could make no gifts and if one borrowed, the debt was owed to the paterfamilias. Loans of money to sons in potestate produced many problems. Therefore, during the reign of Vespasian a decree made it impossible for a lender to sue the paterfamilias for payment on such loans. As a result it was very unlikely that loans were made to those in potestate. How then was a filius familias with a wife and

a separate home able to run his own household if he owned nothing? There are two possible answers neither supported by much evidence: (i) emancipatio took a son out of potestate but generally this was used only for misbehavior, (ii) there existed the institution of peculium - "a son in potestate like a slave could have a fund which, though ultimately belonging to the head of the family, was in practice his to manage, and on the basis of which he could contract."[44] This situation was most probable for sons living independently, but in potestate; but the situation certainly had its limitations, for the peculium actually belonged to the paterfamilias and could be terminated by the paterfamilias at any time and was part of the estate of the paterfamilias when he died. Augustus' legislation invented an extra peculium, the peculium castrense (military fund) - what a son acquired by or for the purpose of military service was his own. He could will it however he pleased, but if he did not it reverted to the paterfamilias as part of the peculium. The son could alienate the peculium castrense at any time, and the father was unable to touch it.[45] Augustus may have introduced this program to encourage volunteer enlistment in his army.

In the time of the early Republic the foundation of Roman social life was monogamous and marriage was dominated by the husband, but it would be wrong to assume that sexual relationships were confined to marriage; free sexual intercourse co-existed with marriage.

According to Bachofen, The Right of the Mother, there are three stages of marriage: (i) primitive stage - indiscriminate sexual intercourse, (ii) intermediate stage - marriage dominated by the wife and (iii) highest stage - marriage dominated by the husband.

> . . . This is the highest type of law and it was most purely developed by Rome. Nowhere else did the ideal of potestas (power) over wife and child reach such complete maturity; and so nowhere else was the corresponding ideal of a unified political imperium (supreme power) so consciously and consistently pursued." "The Romans banished from their laws the physical and materialistic view of human relationships, more completely than any other nations; for Rome was from the first founded on the political aspect of the imperium; in conscious adherence to this aspect Rome pursued her destiny. [46]

A sort of matriarchy may have prevailed for many centuries before there was the real development of the Roman family based on patria potestas. Remnants of this matriarchy remained in the "free sexual intercourse which co-existed with the monogamous marriage recognized by the state."[47]

Much of this paper has been devoted to the institution of marriage, its development, its forms and the laws concerning it. However something must be said concerning the actual ceremony itself and the many customs and festivities surrounding it.

Nuptiales Ritus

A Roman wedding was only allowed to occur on certain days. Forbidden days were the entire month of May because of the Argean and Lemuria offerings and the first half of June because of the religious days connected with Vesta. Also forbidden were the first half of March as well as the Kalends, Nones, and Ides of each month and each day following them. Also avoided were the dies parentales (February 13-21) and the days when the entrance to the lower world was open, August 24, October 5, and November 8. Numerous Roman festivals were also avoided on religious grounds and also great holidays because people usually had other engagements. Women marrying for the second time often chose these holidays in order to make their wedding less noticeable.[48]

The actual marriage rites began the day before the wedding. The young bride laid aside the dress she had worn as a girl and dedicated it to the gods along with her childhood playthings. Then she put on her bridal attire, the tunica recta or regilla. This was a white tunic, woven in one piece and falling to the floor. Fastened about the marriage tunic was a band tied in a manner called the knot of Hercules, probably because Hercules was the guardian of marriage and the patron of good fortune. Only the husband was allowed to untie the knot of Hercules.[49] Over the tunica, the bride wore a cloak or palla of saffron color and around her neck she wore a metal collar. Covering her head the bride wore a large veil called the flammeum. This

veil draped over her head but did not cover her face. The veil was flame colored - a yellow - reddish hue, the color sacred to the god of marriage, Hymen. Matching the veil in color were the shoes she wore. Special emphasis was paid to the arrangement of her hair. It was the custom for the groom to part the bride's hair into six plaits. This was done with the bent point of an iron spearhead. A spearhead which had recently killed a gladiator was considered especially effective, since the parting of the hair may have been done to dispel the evil spirits which reside particularly in the hair.[50] The six locks were fastened with wooden fillets (vittae) at the top of her head in the shape of a cone (meta) called a tutulus. This was a primitive coiffure which except for some priestesses was used only for brides on their wedding day. Under her veil the bride wore a crown of flowers which she had gathered herself. The groom also wore a wreath of flowers on his head.[51] Others at the ceremony also wore wreaths of flowers. The bride's house, if the ceremony occurred there, was decorated with flowers, tree boughs, bands of wool, and tapestries.

Cicero says (De Div. i. 16, 28) that the marriage began by the taking of the auspices early in the morning of the ceremony day. Quondam maioris rei nisi auspicato ne privatim quidem gerebatur, quod etiam nunc nuptiarum auspices declarant, qui, re omissa, nomen tantum tenent.

Meanwhile the guests were assembling and were

informed of the auspices. The marriage contract was then completed in the presence of ten witnesses. Then the bride and groom solemnly declared that they agreed on the marriage. They were next led to each other and their hands were brought together by a pronuba (usually a married woman representing Juno). The couple then moved to the altar to offer the chief sacrifice, (ancient times - fruit or far, and in later times - pig or bullock). They sat on two seats tied together with sheepskin. The auspex nuptiarum or the attendant priest of this confarreatio ceremony recited words of prayer for the couple to repeat while walking around the altar. Then good wishes were extended to the couple and the banquet began. The wedding feast was generally at the home of the bride's father, rarely at the groom's home. The feast ended with the distribution of the wedding cake, mustaceum. These feasts became so extravagant that during the reign of Augustus it was suggested that a limit of 1,000 sesterces be set, but this never became law.[52] At night the last stage of the ceremony began - the deductio, procession, escorting the bride to her husband's house. Ancient custom dictated that the bride be torn by her husband from her mother. Festus (288) said, "They pretend that the girl is torn away from the protection of her mother, or if her mother is not present, from the protection of her next-of-kin, when she is dragged to her husband."[53] This custom may point to the primitive marriage by capture and may also be a reference to the rape of the Sabine women. The bride was then escorted in a procession to the husband's house.

Three young people whose fathers were still living simulated a rape and carried the bride to the husband's house. The bridal couple in a carriage was preceded by flute players and a boy with a torch, which had been lit at the hearth of the bride's father. Surrounding and following them were the guests and the public. Phallic songs were sung and there may have been a phallic dance. Such a procession is referred to in Catullus' famous marriage song, #61, an invocation to Hymen. Everyone in the procession was shouting "Talasio" and had no idea of what it meant. The procession to the groom's house occurred even when the groom was absent and therefore played his part by letter or messenger.[54] The bride carried three coins with her. During the procession she dropped one as an offering to the Lares Compitales, gave one to the groom as a symbol of the dowry and gave the last to the Lares of her husband's house.[55] When the procession reached the husband's house the boy carrying the torch threw it away, and a mad scramble for it ensued, for its possession promised a long life. If either the husband or wife had been trapped into marrying and wished to ensure the other's quick death, the bride, if she caught it, should extinguish it and place it under the marriage bed; and the groom, if he caught it, left it on a tomb and allowed it to burn itself out.[56] The wife then annointed the doorposts with oil and bound them with woolen threads. Then she was lifted over the threshold and received fire and water and together the bride and groom lit the new hearth. She was afterwards

sprinkled with water and therefore admitted to share the domestic and religious life of her husband. In the hall of the groom's house was found a small bed for the groom's genius and the bride's juno.

Consummation also followed certain customs. The pronuba had prepared the marriage bed and instructed the bride. The bride prayed to Juno Virginensis and to Circia (goddess to whom the loosening of the girdle was consecrated). The husband loosened his wife's girdle, but only women who had been married once could undress the bride on her wedding night.[57] The bride then sat down (probably naked) on the phallus of the god of fertility, Mutunus Tutunus.[58] In most ancient times the first intercourse was probably in the presence of witnesses. Also friends of the husband may have had intercourse with the bride. Bachofen says,

> Natural and physical laws are alien and even opposed to the marriage tie. Accordingly the woman who is entering marriage must atone to mother nature for violating her and go through a period of free prostitution, in which she purchases the chastity of marriage by preliminary unchastity.[59]

The sexual intercourse was superintended by a series of deities whose names represent various stages of the act. In later times husband's friends threw nuts into the bridal chamber.[60] The day after the wedding, a second wedding feast occurred, the repotia. Friends and relatives attended this and here the bride made her first offering as matrona.

One should not suppose, however, that the entire complicated ceremony was always observed even in first marriages, especially since, as has been stated earlier, no ceremony was required for marriage.

Roman marriage was an institution much influenced by tradition and symbolism as evident in the actual ceremony. Tradition and custom would probably have allowed parents to arrange a child's marriage. It was customary that marriages were arranged for the good of the state, but it seems incredible that the child did not rebel against this action. Roman youth were obviously taught that the state came first.

The consent of the paterfamilias was a complex issue. Legally it may not have been requisite, but customarily it had to be given especially for a young man if he were in potestate. He was dependent on his paterfamilias for a livelihood. He could never be financially independent, for anything which he might accrue had to revert to the father. In this situation the power of the purse was mighty!

The institution of marriage changed greatly from the time of the XII Tables to the time of Justinian. Originally the husband had marital power over the wife; she fell under his potestas or under that of his paterfamilias; and all of her property, if she had any, came with her. Gradually during the late Republic and early Empire the idea appeared that the wife ought not to have

to change her status - that she should remain as she was prior to marriage, and that she should be as free and independent as her husband. This free type of marriage was very much in vogue at the time of Gaius and Justinian. The husband no longer had tyrannical control over his wife. They each retained their own identity - even to the extent of keeping their properties separate. They were two distinct individuals! The wife no longer legally became a member of her husband's family.

CHAPTER II

DIVORTIUM

The marriage agreement under Roman law was considered a contract and was "consistently logical in recognizing that marriage like any other contract might be broken or dissolved."[6] Roman law held that a contract not to divorce was invalid, because it infringed on the right of married couples to divorce if they ever so desired.[62] Divorce law changed greatly as Rome grew from a small city to an empire.

It has been asserted that for the first 500 years of Rome's existence there was no divorce until approximately 230 B. C. when Spurius Carvilius divorced his barren wife. That divorce did not take place until this late date is unlikely, for the XII Tables of 451 B. C. recognized freedom of divorce under the formula Res tuas tibi habeto and the wife's surrender of the household keys.[63] Therefore, Carvilius' divorce may have occurred in the seventh or sixth century B. C.[6]

At the time of the kings a husband could divorce his wife for adultery, tampering with the keys, or poisoning a child.[65] Under the ancient marriage laws, a wife in manu (no independent status) could not divorce her husband, but if he divorced her she could obtain release from the marital control of manus.[66]

Divortii Actiones

There were two distinct types of divorce actions: (i) repudium - divorce by the will of either husband or wife and (ii) divortium - divorce by mutual consent. Originally repudium was granted only to the husband, but later was extended to the wife, and divortium was not possible for a manus marriage.[67] The Christian clergy unsuccessfully tried to do away with divortium, but it continued until Justinian. A marriage of manus, performed by a ceremony of confarreatio, was dissolved by a diffareatio ceremony (religious ceremonies corresponding to marriage ceremonies). Divorce was not possible for the Flamines Diales, married by confarreatio. There is only one instance of a divorce of a Flamen Dialis, and that was granted by special permission of Domitian.[68]

Gaius indicates that after Tiberius changed the confarreatio procedure, a wife could divorce or be divorced through the repudium procedure. In other marriages of coemptio or usus marriage was dissolved by a remancipatio ceremony - for the most part the same procedure used for the emancipation of a daughter.

> In manu autem esse mulieres desinunt isdem modis quibus filiae familias potestate patris liberantur. Sicut igitur filiae familias una mancipatione de potestate patris exeunt, ita eae quae in manu sunt una mancipatione desinunt in manu esse, et si ex ea mancipatione manumissae fuerint, sui iuris efficiuntur.[69]

> Inter eam uero quae cum extraneo et eam quae cum uiro suo coemptionem fecerit, hoc interest, quod illa quidem cogere coemptionatorem potest ut se remancipet cui ipsa uelit, haec autem uirum suum nihilo magis potest cogere / quam et filia patrem. Sed filia quidem nullo modo patrem potest cogere, etiamsi adoptiua sit; haec autem [uirum] repudio misso proinde compellere potest atque si ei numquam nupta fuisset.[70]

Where marriage was sinu manu divorce was free to either party. Just as marriage began by a de facto beginning as husband and wife so it also ended if this life were broken by a desire to divorce by either party. But mere separation did not constitute a divorce; the intention of divorce had to be made manifest to the spouse. The husband could send the wife away using the traditional formula* or the wife could leave declaring her wishes for the marriage to end. No particular form was used, but generally there was a written or oral message, and repudium or nuntium mittere became common expressions of divorce.[71]

In the Republic and in earlier classical law the paterfamilias had the power to end by divorce a marriage of his child, without his child's consent. Reference is made in The New Testament to possibly this type of divorce where Paul writes that Pius forbade separation of a bene concordans matrimonum by the father. However, this may mean that though the divorce were valid, the father could not compel actual separation.[72] Marcus Aurelius abolished this paternal priviledge of divorcing a daughter without her permission; but, nevertheless, in the Justinian Code there is one instance

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*cf. p. 28

remaining when divorce was not granted unless with parental permission - when the mother or father paid the dowry and would suffer harm at its forfeiture.[73]

There were no divorce courts during the Republic, and though a wife might repudiate her spouse she could take no legal action against him, even if he were guilty of adultery. If a wife were unfaithful her husband simply divorced her and retained part of the dowry; or if the marriage were manu then a family tribunal, including her relatives, was summoned and she might be sentenced to death.[74]

By the end of the Republic divorce was common place, especially in Rome. It was alleged that women reckoned the years by husbands and not by consuls. Juvenal speaks of ladies "having eight husbands in five years."[75] Most likely this was an exaggeration, but, nevertheless, based on some truth. A husband might even divorce his wife in her absence. Cicero ended his marriage to Terentia by letter.[76]

Divortii Leges

Augustus

Augustus through legislation tried to change the trend of frequent divorces. His statute Lex Julia de Adulteriis of 18 B. C. restricted the form of divorce. Under this legislation a written bill of divorcement (libellus repudii) ought to be delivered to the other party but was not compelled. The divorce had to take place before seven adult male citizens, and their seals were required if the

intent of divorce were in writing. Later, this became the only acceptable form of divorce.[77]

Under the statute of Lex Julia adultery was made a public crime. Permanent courts were set up to hear cases against married women and their paramours. A married man was liable as a paramour if he seduced another's wife and if she were prosecuted by her husband. He was also liable for prosecution if he practiced stuprum - an offense if his mistress were not a registered prostitute. Women of respectable origins were not permitted by the Senate to register as prostitutes.[78] Augustus' purposes in reforming divorce law were

> . . . to devise some satisfactory form of proof that divorce had in effect taken place; to make adultery and other gross immorality (stuprum) crimes actionable before a special court, and to prevent connivance in a wife's adultery or a husband's part by encouraging the public informer who, at Rome, doubled the part of public prosecutor.[79]

Augustus' new laws established new duties for husbands. If he discovered his wife in an adulterous act he must divorce her, or if he were dependent on his father, his father on his behalf prosecuted the divorce. Failure to do this could have resulted in the husband being prosecuted for condoning adulterous behavior, and if he were condemned he would be punished as an adulterer. He was allowed sixty days after the divorce to bring action against the guilty wife and lover. If the husband wished to forgive his wife

or if he felt that divorce were adequate punishment, the common informer was present to prevent this. The informer, who often profited by Augustus' laws, had four months in which to prosecute. The time limitation did not commence until sixty days from the granting of the divorce had passed. If the informer waited six months after divorce or five years after the alleged offense he could no longer prosecute.[80]

Augustus' legislation saw an end to the husband's right to kill the wife if discovered in adultery, though if the lover were found in his house the husband could kill the lover if he were an inferior person, such as a slave or family freedman. However, the wife could be killed by her father if he caught her in the act and if he killed or tried to kill the adulterer at the same time.[81] Augustus' laws also ended family tribunals except when the Senate felt that the offense should be investigated privately in lieu of public court. Augustus' legislation seems to have had one immense weakness. It did not provide any means for a wife to directly prosecute her husband for adultery. If a husband were questioned for adultery it was not through the insistance of his wife but rather his lover's husband.

Constantine

During Constantine's reign the laws concerning adultery became even more strict than those of Augustus. Much of the legislation can be attributed to the influence of the

Christian religion and its strict moral codes. It was not until Constantine that adultery was made actionable in the case of the husband as well as the wife. For centuries Stoicism had deplored the double standard privileges for husbands, and the Jewish and Christain religion had imposed by its religious code a higher standard of morality than the law required.[82] Plutarch said, "a husband who bars his wife from the pleasures in which he himself indulges is like a man who surrenders to the enemy and tells his wife to go on fighting.[83]

During Constantine's reign if a wife were found guilty of adultery, she and her lover were banished to different islands; the wife lost one-half of her dowry, one-third of her property, and it was a criminal offense for anyone to remarry her. Her lover was also deprived of one-half of his property. After Constatine both guilty parties were condemned to death.[84] Constantine enacted that if divorce occurred outside of acceptable grounds, a wife might be penalized concerning her dos and she might even be deported, and a husband lost his right to ever remarry. If he did remarry, the divorced wife might seize the second wife's dos. Ninety years later this extreme penalty was restricted to cases where where there were no grounds for divorce, and if the grounds were insufficient the wife might not remarry and the husband not for two years.[85]

Justinian

These laws did not appear under Justinian but there were similar provisions. He set up other legitimate grounds for divorce and if divorce were not due to a recognized ground, the wife was to be confined to a nunnery for the remainder of her life, and she had to forfeit her property to various uses, including the nunnery. The husband was subject only to pecuniary penalties.[86] If remarriage occurred by either party after divorce, there was legislation aimed at preserving for the children of the first marriage the dos and donatio connected with that marriage. In the Republic, penalties were much less severe and a causeless divorce might have involved only a nota censoria and a loss of dos.[87]

Under Justinian a man could be fined in the wife's favor. If he brought divorce without sufficient reasons, he could be fined one-third of all the property she acquired at her marriage. Sufficient grounds are found in the Justinian Code. These grounds, from a constitution of Theodosius and Valens, included "strong suspicion on either side of the other party having engaged in adulterous, criminal, or treasonable practices, or keeping the company of flagitious characters, or using or threatening personal violence, especially of a kind outrageous to the freeborn citizen."[88]

Dos

The dowry was a deciding factor in many divorces.

Dowry (dos) is a gift to the husband from the bride to help defray the husband's expenses pertaining to married life. For a manus marriage, a woman's property passed to her husband, and if she were under the control of her father, the father would provide the dowry. If the marriage were sine manu she could own property, but nevertheless a dowry was usually given to her husband. If the dowry were given by the bride or someone for her, it was called dos adventicia. Originally, neither in a manu marriage nor sine manu did the husband appear to have any legal duty to return the dowry if the marriage were terminated by divorce.[89]

At the time of the XII Tables neither a wife nor her father had any right to claim any portion of the dowry, if the wife were guilty of any one of the three acceptable grounds of divorce.[90] If she were expelled from the home for any other reasons, the husband was required to give his wife one-half of his property. This was the situation in the case of Spurius Carvilius. According to Aulus Gellius, Servius Sulpicius in this book on Dowries said

> Servius quoque Sulpicius in libro, quem composuit De Dotibus, tum primum cautiones rei uxoriae necessarias esse visas scripsit, cum Spurius Carvilius, cui Ruga cognomentum fuit, vir nobilis, divortium cum uxore fecit, quia liberi ex ea corporis vitio non gignerentur . . .[91]

Technically Spurius Carvilius should have given one-half of his property to his divorced wife, for she had committed

none of the offenses that were legal grounds for divorce. The probability is that the penalty was not exacted as was the custom. No legal action could be taken against him to require him to return the dowry. This particular case was very significant to the Romans. After this it was wise for the bride's father or guardian to make personal financial arrangements in case the marriage failed.

Many divorces were restrained because of financial considerations. Marcus Aurelius at the suggestion that he divorce Faustina replied, "What - and return the dowry?" meaning the empire, for he had succeeded his father-in-law, the former emperor.[92]

When Cicero divorced Terentia he had a very difficult time coming up with the necessary money to return the full amount of the dowry. It is most probable that when he died, four years after his divorce, the dowry still remained unpaid.[93]

An interesting case involving dowry rights is that of C. Titinius of Minturnae who applied to Judge C. Marius to receive the dowry of his divorced wife on the grounds of immoral character. The judge knew that Titinius had known of her character prior to marriage and married her with future divorce and dowry in mind. Therefore, the judge imposed a small fine on her and forced Titinius to pay a sum equal to the amount of her dowry. She later repaid Marius by hiding him in her home when he was fleeing from Sulla.[94]

Often a divorced wife or her father or tutor in her behalf had to go to court to recover the dowry. In the early Republic, a judge had complete discretion over the matter, but by the end of the Republic there were fixed rules. If a wife or her father sought divorce a husband could get one-sixth for each child up to three children. If the wife were guilty of adultery, he might retain an extra one-sixth. If she were guilty of a less serious offense he might retain an extra one-eighth.[95]

If a husband did not return the dowry a woman of marriageable age would have a difficult time remarrying. Therefore, many changes occurred in the laws concerning dowry rights as the divorce rate increased.

In many cases the giver of the dowry could stipulate prior to marriage that the dowry be returned in the event of divorce (actio ex stipulatu). If the dowry was not returned a special action (actio rei uxoriae), which appeared approximately in 200 B. C., was allowed to the wife for the return of the dowry or part of it when the marriage was dissolved by divorce. "The action was almost certainly in bonum et aequum concepta."[96] The actio rei uxoriae was an action of bonae fidei. The judge was not legally bound to return the dos but had discretion to decide as he thought best. He could make allowances for the husband, for the expenses on property and for marriage termination due to the adultery of the wife. Generally a reduction in dowry return would occur. If the husband's misconduct was the reason for divorce,

the wife might be awarded a sum larger than the original dos.[97]

Justinian greatly changed the laws regarding dowry. He said that a husband had to restore the dowry in every case except misconduct of the wife. The husband could only claim rebate for outlay expenses concerning preservation of dotal property but was forced to make amends for any movable property which he had alienated or for damage to the dos through his negligence. Justinian also added tacita hypotheca (implied mortgage) over the husband's whole estate.[98]

Donatio

Similar to dos was donatio propter nuptias, a gift given by the husband. Originally it was given only before marriage since Roman law did not allow gifts between husband and wife, but Justin I allowed that the gift might be increased after marriage. Justinian added that donatio might then be constituted after marriage, and the former name ante nuptias was therefore changed to propter nuptias. Eventually the husband's relatives were obligated to provide a donatio, just as the bride's relatives provided the dos for the husband. The donatio had to equal in monetary value the dos. The control or management of the donatio and the dos was given to the husband, but under Justinian the husband could not alienate the immovable part of donatio even with the consent of his wife, and the wife had tacita hypotheca to secure the donatio. At the dissolution of the marriage by divorce because of the husband's misconduct, the wife had

a life estate in the property, sharing the dominum with issue.[99]

Alimony was unknown in the present sense to Roman law. Alimony, however, is of Roman origin, but only as a claim of support by a ward against an unfaithful guardian. A praetor would fix the amount necessary for support (alimenta). Alimony between husband and wife did not exist.[100]

In Roman times divorce was not a disgrace, in spite of the restrictions. The dowry system made it possible for a woman to live without the support of her husband.

The Romans according to modern standards certainly allowed some unfair practices to exist. Women seemed to have been placed on a pedestal which demanded the utmost moral behavior. They could be killed for committing adultery whereas the man received a reprimand of some sort, such as banishment, the return of the dowry, etc., but certainly not anything comparable to the loss of one's life. Even though Roman women did not play an active role in politics, it does seem that they could have found a way to change the law to make the punishment fair for both men and women.

Augustus' legislation concerning adultery was far from fair. He did not allow anyone the right to a mistake. There was no margin for error. Whatever the attendent circumstances, if a husband caught his wife in an adulterous situation he had to initiate divorce. He had no choice; for if he chose not to do this, he could then be prosecuted as

an adulterer himself. This law certainly seems to be a weakness in Augustus' legislation, for it allowed no room for personal choice or for a mistake. It did not matter whether or not the husband wished to initiate divorce proceedings. The choice wasn't his. It is amazing that the Roman people accepted this notion and lived by it.

CHAPTER III

TUTELA ET CURA

"The power of a guardian is the form of family power which takes the place of paternal power when there is no one to exercise the latter." [101] There were two kinds of guardianship: (i) *tutela* and (ii) *cura*. Both were charged with care of the person as well as the person's property. The distinction between the two was in the manner in which the ward's property was handled.[102]

Tutela

In reference to *tutela*, John Crook says "it originated as a right of agnate relatives to keep a hold over property which, if the infant did not grow up and have heirs, was due to come to them - to see that the infant was not cozened into squandering it; and similarly with the woman *sui juris*, to prevent her from disposing of family property."[103]

The essence of *tutela* lay in *auctoritas interpositio*, i.e. "the assistance which the tutor is required to give in order to enable juristic acts to be concluded."[104] *Tutela* supplies a method by which a person who is incapable of performing juristic acts is cured of this disability.

Auctoritas interpositio may be accompanied by gestio, i.e., the right to make decisions on behalf of the ward which are necessary for the general management of the property.[105]

Generally, there were two types of tutela: (i) tutela impuberum and (ii) tutela perpetua mulierum.

> Permissum est itaque parentibus hiberos quos in potestate sua habent testamento tutores dare: masculini quidem sexus impuberibus . . . que cum nuptae sint. Veteres enim voluerunt feminas, etiamsi perfectae aetatis sint, propter animi levitatem in tutela esse.[106]

Every child who was sui iuris and under the age of puberty, i.e. fourteen, had to have a tutor. Tutela originally was considered as an artificial extension of potestas until the child was capable of potestas for himself. Tutela was less in the interest of the child than of the guardian since the tutor received the property if the ward died impubes.[107]

Tutela ended for males when puberty was attained, but often it was supplemented by devices such as restitutio in integrum and curatio (similar but less protection).

> Itaque si quis filio filiaeque testamento tutorem dederit, et ambo ad pubertatem pervenerint, filius quidem desinit habere tutorem, filia vero nihilo minus in tutela permanent. . .[108]

Modi Designandi Tutores

Gaius and Justinian classify tutors according to the method of appointment: (i) testamentarii, (ii) legitimi, (iii) fiduciarii, (iv) a magistratu daviti.

Tutela Testamentaria. The XII Tables authorized the paterfamilias to appoint tutors by will to sui heredes impuberes. Jurists later extended this right to postumi, those not sui heredes when the will was made but who were born afterwards. This included children born after the will was made or after the testator's death, or even grandchildren who became sui heredes by the death of the father after the grandfather's will was made.[109]

> Cum tamen in conpluribus aliis causis postumi pro iam natis habeantur, et in hac causa placuit non minus postumis quam iam natis testamento tutores dari posse, si modo in ea causa sint ut, si vivis nobis nascuntur in potestate nostra fiant. Hos etiam heredes instituere possumus, cum extraneos postumos heredes instituere permissum non sit.[110]

Ordinarily appointment of a tutor by will was sufficient, but in certain cases confirmation by a magistrate was necessary, e.g. if the ward receiving the tutor had been emancipated.

> Sed ei emancipato filio tutor a patre testamento datus fuerit, confirmandas est ex sententia praesidis omnimodo, id est, sine inquisitione.[111]

Under Justinian there were no precise rules of form. A testator could appoint any one who was persona certa and testamenti factio (i.e. capable of making a testament), and it had to be manifest to which child or children he was appointed. The appointment might be conditional or from or to a certain time.[112] A testator could even appoint a slave simultaneously giving him freedom. In Justinian's time mere appointment denoted freedom unless the testator appointed a slave "cum liber erit." Otherwise, the appointment was invalid if the testator did not free the slave or indicate that he was to be freed at a later date. The appointment of another person's slave was invalid if the condition "cum liber erit" were not attached. The heir was then bound, if possible, to purchase him and free him.[113]

Tutela Legitima. This type of tutelage was probably older than the XII Tables. It represented a primitive notion of tutela, i.e. the right of potential successors to look after the estate. An impubes to whom no tutor had been appointed by will would have a legitimus or statutory tutor. There were three types of tutela legitima: (i) legitima agnatorum, (ii) legitima parentum tutela, and (iii) legitima patronorum tutela.

Legitima Agnatorum Tutela. According to the XII Tables a person sui iuris and under the age of puberty and having no testamentary tutor had as his tutor his nearest agnate or agnates (if there were several of the same degree).

> Quibus autem testamento tutor datus non sit, his ex lege duodecim tabularum adgnati sunt tutores, qui vocantur legitimi.[114]

They became tutors because they would become heirs to the property on death intestate and without issue. "Ubi successionis est emolumentum ibi et tutelae onus esse debet."[115] In early law if there were no agnates the tutelage passed like property to the nearest gentile. This, however, disappeared by the beginning of the Empire.[116] After the 118th novel of Justinian, tutela was given to the nearest cognate capable of being guardian instead of the nearest agnate.[117]

Legitima Parentum Tutela. The paterfamilias who emancipated a person in potestas and under puberty not only acquired the right of succession but also became the tutor.

> . . . nam si quis filium aut filiam, nepotem aut neptem ex filio et deinceps impuberes emancipaverit legitimus eorum tutor erit.[118]

Legitima Patronorum Tutela. If a master manumitted a slave under puberty, then the master and his children after his death became the slave's tutor and patron.[119]

> . . . libertorum et libertarum tutela ad patronos liberosque eorum pertinet. . . . Eo enim ipso quod hereditates libertorum libertarumque, si intestati dicessissent, jusserat lex ad patronos liberosve eorum pertinere, crediderunt veteros voluisse legem etiam tutelas ad eos petinere: . . .[120]

Tutela Fiduciaria. This type of tutela arose when the emancipation of a child under puberty was made by the extraneous manumissor who then became the child's tutor fiduciarius. This was obsolete in Justinian's time when the tutela fiduciaria only arose if the paterfamilias emancipated a person in his potestas who was under puberty, and then himself died. Then the unemancipated male children of the deceased father became fiduciary tutors of the emancipated person.

> . . . nam si parens filium vel filiam, nepotem vel neptem vel deinceps impuberes manumiserit, legitimam naciscitur eorum tutelam: quo defuncto, si liberi virilis sexus ei extant, fiduciarii tutores filiorum sudrum, vel fratris vel sororis et ceterorum efficiuntur. . . .[121]

For example, A has two sons, B and C. A emancipates B at age eleven and then becomes his tutor. A dies and C becomes fiduciary tutor until B attains the age of fourteen.[122]

Tutela A Magistratu Dativa.

> Si cui nullus omnino tutor sit, ei datur in urbe Roma ex lege Atilia a praetore urbano et maiore parte tribunorum plebis, qui Atilianus tutor vocatur; in provinciis vero a praesidibus provinciarum lege Iulia et Titia.[123]

If there were no tutor one was appointed by the magistrate, but this was not a normal magisteral function. It existed only because it was expressly created by certain

legislation. Some time before 186 B.C. the Lex Atilia was passed which stated that if an incapable person sui iuris was without a tutor at Rome the praetor urbanus should appoint one with the cooperation of the majority of the plebian tribunes. In the provinces this appointment was made by the praesides under the Lex Julia et Titia (31 B.C.). This appointment usually occurred if there were no tutor, or if those which existed were disqualified, excused or removed. In later law it was customary to appoint a curator if a testamentary tutor were temporarily excused. A tutor was appointed only if actual auctoritas to some formal act was needed.[124]

Vicissitudines Tutelae

The idea of tutela as a public duty was at this point beginning to supersede the early idea of tutela as an advantage to the guardian. Therefore the actio tutelae was introduced which made the tutor accountable for any loss the ward had suffered due to the fault of the tutor, whether intentional or negligent, in administering the estate.[125] This action was a great advance over earlier law in which the tutor was liable only if he actually embezzled property of the ward.

The actio tutelae was applicable only in case of guardianship over impubes. No action ever developed in the case of adult women, for the position of the tutor was different. If a woman were not in manu she had to have a

tutor, but guardianship over women was only a burdensome technicality, remaining from an earlier period. The woman administered her own estate and only needed the tutor's permission for certain types of transactions. Tutors, other than those holding tutela legitima, as parents or patrons, could be forced if necessary to give approval to transactions which the woman desired. A method was also developed whereby a woman could obtain a different tutor if she wished. To do this, a coemptio fiduciae causa was used; the woman made a co-emptio with any man she wished and then fell under his control, manus. He then mancipated her to whomever she desired as a tutor; and he who held her in mancipio manumitted her, thereby becoming her tutor. This was performed in the same manner as a man who manumitted a female slave and then became her tutor. It was also possible for the husband while in the process of appointing by will a tutor for his wife in manu to let her choose the individual she desired and even to change as often as she desired.[126] The unreality of tutelae of adult women in classical law is evident by the number of devices for changing one's tutor.

Nominatio Tutoris

Any friend or relative could initiate the appointment of a tutor when needed and where applicable. If no one initiated an appointment, creditors and others might give notice for them to apply; and if the tutorless defaulted, they could apply to the magistrate.

Anyone who was appointed tutor had a public duty to serve unless he met certain disqualifications or acceptable excuses. Modestinus applies the rules to all tutors, but classical law stated that the excuses applied only to legitimi or fiduciary tutors.

Excusationes. Excuses had to be pleaded before the officer in charge of tutorial appointments and within limits of time dependent on distance from the location of court. The grounds of excuse were numerous. General grounds were age, permanent ill health, ignorance, poverty, exile, the occupying of a high office, having a certain number of natural born children and holding three substantially independent guardianships. Special grounds might be litigation or hostility between the involved parties or remoteness of residence. Sometimes, the grounds for excuse were temporary.

One who had promised the father that he could serve as tutor could not later excuse himself. A libertus appointed by a magistrate to his patron's child could not plead an excuse, but if he were appointed by the patron's will to be a collibertus he could then plead an excuse to prevent confirmation of the appointment by the magistrate. Any person appointed by the father as tutor, whether subject to confirmation or not, claiming an excuse lost any benefit under the father's will, apart from testator's indication to the contrary.

Impedimenta. There were several restrictions placed on tutorial appointments. (i) Generally, a woman could not be a tutor. However, in A. D. 390 this was changed. If there were no legitimus or testamentory tutor, a mother if she desired could be appointed tutor provided she took an oath not to remarry. If she did remarry, the tutela ended and her husband might be sued on liabilities already accrued. (ii) To be under the age of twenty-five was an excuse in classical law but not at the time of Justinian. Being an impubes was always a disqualification except for legitimi tutelae, and Justinian made it an excuse for all cases. (iii) Deaf or dumb persons could not be tutores, except legitimi in classical law, and Justinian excluded them altogether. Lunacy was only a temporary excuse instead of a disqualification, for lunacy was considered curable. During classical law there was no bar at all for legitima tutela. (iv) Some persons due to their station or function could not be tutors. Milites and certain officials could not be tutores even if they were willing, and there were certain cases in which a person of one class could not be appointed to one of another class. (v) Misconduct was not an absolute disqualification but would come under consideration during a magistrate's inquiry prior to appointment.[127]

Officia Tutoris

The duties of the tutor were numerous. In some cases he had to give security, rem salvam pupillo fore.

Security was not required of a testamentary tutor or of one confirmed or appointed by superior magistrates after an inquiry. If the tutor was a patron or patron's filius and if the estate were small and the tutor a man of substance and probity, the security might be remitted. If security were required, the acts of the tutor did not bind the pupil until the security had been provided.[128]

Administratio. The first step in the actual administration of tutela was the inventory of the estate. Failure to do so resulted in heavy liabilities. Under Justinian the tutor could be released from this inventory by the testator from whom the property came.

The tutor was required to provide out of the estate an appropriate sum for the maintenance of the child. The magistrate sometimes would determine the appropriate amount.[129]

The real business of the tutor was with the patrimonium and there were three functions: (i) the management, improvement, and preservation of the ward's estate, (ii) the education and general care of the ward, (iii) the acting on behalf of the ward or co-operating with him in order to import legal validity to his acts.[130]

The tutor had to care for the ward's property and be watchful for its increase as if it were his own. If a guardian failed to make the obvious gains, he was liable within two months of assuming duties to make good the loss; and if he were not financially able to do so, he was liable

for judicial punishment under the old law. But Justinian allowed them to gradually replace the loss unless the ward's provisions for necessary subsistence had been impaired.[131]

In A. D. 195 Severus forbade tutores to sell lands except by direction of will or of magisterial authorization in case of emergency. Even though alienation was forbidden, the tutor was still entitled to sell unproductive or perishable moveables, urban property, and urban slaves. He was bound to sell it if the interest of the ward's property required it. This system was not completely satisfactory. Therefore, Constantine forbade the tutor to sell urban or surburban property, or valuable moveables except in circumstances which justified the sale of rustica praedia.

The tutor had to make every effort to recover debts due to the ward. He must invest the ward's money within a certain time, and if he delayed he was liable for the lost interest.[132]

Auctoritas interpositio was the co-operation of the tutor with the ward. An act was done by the ward with the auctoritas of the tutor. The authority involved the presence of the tutor, for the tutor had to orally declare his approval. A child was not legally able to act until he had reached a certain level of development; he must have intellectus. The tutor then simply provided judgement and wisdom. Until the fifth century infantia meant the incapacity to speak, but in A. D. 407 the limit of infantia

was fixed at seven years. After a child reached the age of seven he had mental intelligence but not judgment. Therefore, the tutor added auctoritas to the ward's actions, thus making them legal and binding for both the ward and the person with whom he dealt. The authority of the tutor was not necessary in two instances: (i) the release of the ward from obligations and (ii) the acquisition by the ward of rights of inheritance or succession.

A tutor could not authorize any acts in which he had an interest. If he were the sole tutor, no such transaction was possible unless a tutor praetorius was appointed for the purpose of authorizing it. However, if there were other tutors one of these could authorize the transaction. Not all transactions needed auctoritas; the ward could perform transactions which would benefit him but not bind him even if the transaction bound the other party. But if the transaction bound the ward then the auctoritas of the tutor was necessary.[133]

Causae Tutelae Terminandae

There were many ways by which a tutela ended. Tutela ended if there occurred the death, capitis deminutio or puberty of the ward, or if the date or event till which the tutor had been appointed occurred. The completion of the purpose for a temporary tutor also ended the tutela. The death, capitis deminutio[134] (maxima or media) of the tutor,

i. e. the loss of caput, or a supervening ground of exemption ended the tutela. Capitis deminutio minima of a tutor was applicable only for tutores legitimi. The tutela would end and pass to the person with the next civil law right of succession.

A tutor was liable for misconduct. If a crimen suspecti tutoris occurred then there may be a petition for the tutor's removal based on the XII Talbes. He would be tried before the chief magistrate of the district. Any one might bring the petition except the impubes himself.

Immediately on accusation a tutor was suspended from acting. Removal had no definite grounds and, therefore, was at the discretion of the court. If the evidence showed dolus, the tutor became infamis (but not for incompetence or negligence). The proceeding ended if the tutor died or the tutela otherwise ended. The misconduct had to have occurred during the tutela, but in later law it might have been before the actual administration.[135]

A guardian was also liable for fraud, neglect, or the waste of the ward's property. He could not alienate the ward's property for malfeasance (crimen suspecti). If he wasted or alienated the ward's property, he could be removed. He was also liable to double the value fine or restitution to the ward when he reached the age of majority or upon his own removal.[136]

If there were several tutors, it was possible for all

to administer but it was not convenient. If there were several testamentary tutors the auctoritas of one sufficed except in a matter which would end the tutela. The tutors might administer in command,or they might arrange privately to a distribution of power and control in which case those not acting were liable only in the last resort.

Removal of a tutor was not a remedy but a prevention of future damage. However, there were remedies against tutores who failed in their obligations. (i) Actio de rationibus distrahendis was an action which lay against any tutor at the termination of the tutela. Essentially, it was delicatal, giving double damages and available to but not against the heredes. It dates from XII Tables and probably originally applied to the legitimi tutores. (ii) Actio tutelae dates from the Republic and gave remedy for any breach of duty. This remedy was applicable only at the end of a tutela, and condemnation involved infamia. Originally it was used only for maladministration; therefore, it was not applicalbe if the tutor refused to act at all. However, during the first century of the Empire the law was changed; and a tutor became responsible if he were ordered to act by a magisterial decree, and in the second century inaction was practically equal to maladministration.

The ward's claim took precedence over any other unsecured debts of the tutor, and during later law the ward had tacita hypotheca. This action was available to and

against the heredes. After the accounts were settled, a tutor could deduct what had been properly spent out of his own funds. If a problem arose, the tutor had recourse to actio contraria tutelae whereby he could claim reimbursement.

The ward had other remedies for maladministration. If security had been given, action lay against this or the promise of the tutor and those of his sureties but not till the end of the tutela. An action also lay against inferior magistrates who had not properly or adequately exacted the required security. However, they were liable only as a last resort and only if they had not taken necessary precautions and reasonable security at that time.

If there were several tutors, each was liable in actio de rationibus distrahendis but only for his own malversation. If they all acted in common they were all liable in actio tutelae. If they acted individually, then those not acting were liable last.

An action also lay against a protutor (a person who acted as tutor but not by a valid appointment), and it could be initiated even by third persons who had suffered loss due to the intervention of such a one not qualified to give auctoritas.

Cura

The essence of cura lay in gestio*. The curator

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*cf. p. 43 for definition.

had no auctoritas interpositio; therefore, he could not enable an incapable person in concluding a juristic act. There were three types of cura: (i) cura minoris, (ii) cura furiosi and (iii) cura prodigi.

Cura Minoris

As early as the middle Republic it was obvious that the ending of tutela over males at the age of fourteen left them in a precarious position, for they did not yet have the maturity to be in sole control of their fortunes.[137] The XII Tables did not provide any protection for those who had attained the age of fourteen. Thus in the second century B. C. the lex Plaetoria, or as often written lex Laetoria, was introduced which gave an action to anyone of either sex below the age of twenty-five against persons whom they claimed to have defrauded them. Following this the praetor offered a remedy in which a restitutio in integrum should occur whenever one under twenty-five years of age had been defrauded. In addition, if one defrauded a person under twenty-five he was then liable to criminal prosecution and infamy.[138] As a result of this, transactions with minors were performed very hesitantly unless they had someone with them to sanction their actions. Therefore, it became quite common for minors to apply to the proper authorities for a curator or guardian to authorize their actions until they reached the perfecta aetas of twenty-five years. It was not obligatory for one who attained puberty to have a curator,

but if he had much property it was the tutor's duty to encourage him to apply.

> Item inviti adolescentes curatores non accipiunt, praeterquam in litem; curator enim et ad certam causam dari potest.[139]

A curator was appointed not only when a law suit was involved, but also when a debtor wished to pay a debt owed to the youth or the tutor wished to settle his accounts with the youth. The curator, once he had been appointed held the office until the ward was twenty-five years of age. An exception to this was possible by a special grant of the emporer if the curator felt the ward was capable of managing his own affairs, but it was necessary that the man be at least twenty and the woman eighteen.[140]

Cura Furiosi Et Prodigi

According to the XII Tables the protection of lunatics and spendthrifts vested in the nearest agnate though later a curator could be appointed by the authorities. In both cases a man's relatives could get complete control over his property against his will, and yet according to Crook we do not know what the ancients used as their criteria for determining whether one was a lunatic or a spendthrift.

> Furiosi quoque et prodigi, licet majores viginti quinque annis sint, tamen in curatione sunt adgnatotum ex lege duodecim tabularum; sed solent Romae praefectus urbis vel praetor, et in provinciis praesides ex inquisitione eis curatores dare.[141]

The curator of the furiosus ceased to act during the lucid intervals of the furiosus, for he was considered to have the capacity to act on his own. In early law there seems to be some doubt as to whether the curator needed a reappointment during the non-lucid periods or whether a new curator was appointed. However, in later law the curator did not need a reappointment on the relapse of the furiosus.

There is little information available as to the powers of the curator of the prodigus. The prodigus was often able to execute on his own acts which could not harm the estate. Otherwise, the consent of the curator was always necessary. The appointment seems to have been continuous until the appointment was officially removed. Also placed under curatorship, in addition to those of unsound mind, were those of physical disabilities which would interfere with the managing of their own affairs.

> Sed et mente captis, et surdis,
> et mutis, et qui perpetuo morbo
> laborant, quia rebus suis superesse
> non possunt, curatores dandi sunt.[142]

The function of the curator differed from that of the tutor, but many similarities between the two existed. The rules as to whom the magistrate appointed, the security given, excuses, reasons for removal, restrictions on power, and the reasons for termination were in later law mostly the same. For this reason a separate discussion of these matters will not appear in this paper.

The role of curatorship of minors seems to be

unnecessary. The reason this position existed was because many felt that a boy of fourteen was not yet ready to manage his own estate. Why didn't the Romans extend the age one was under tutelage unless they felt curatorship was a stepping stone from tutelage to manhood and independence.

Another perplexing situation was the situation in which a father emancipates a son in potestas and then becomes his tutor. Why would a father do this? Obviously, if the son needs a tutor he is under fourteen. Why wouldn't the father wait? Possibly he felt death was at hand and wanted his son independent when that time came. By his son being independent, taxes might possibly be lowered. Whatever the reason, it must have been advantageous.

Another problem seems to exist between the father and son. Why would a father appoint a slave as a tutor to his son? The slave would certainly have to be special; for it seems that most slaves due to their station in life would not have the expertise to handle one's estate, unless he had been taught business matters by the paterfamilias. But it does seem odd that a slave would be appointed over a family member unless there was no one in the family who was qualified.

As evident in this paper the institution of tutela and cura was a most complex one. The role of tutor or curator was considered a public duty; and, therefore, it could not be lightly refused. In order for this aspect of law to work the utmost co-operation of Roman citizens was

requisite, but why would one undertake such a responsibility? Certainly the administration and caring of another's estate was an immense task, and in addition the tutor or curator was answerable for maladministration. What a responsibility and burden! The institution however was a necessary one in order that proper care of estates would exist. Even though the guardians - if they were agnates - might benefit, still the responsibility was tremendous. But the guardians were certainly aware of the fact that someone in their family might one day be in a position which required a tutor or curator. This fact would certainly make one more agreeable and acceptable to a guardian's duties.

CHAPTER IV

ADOPTIO ET ADROGATIO

Adoption was an extremely important aspect of Roman law. "A well known feature of the social history of Rome is the infertility of the governing class, its failure to rear enough children to maintain its numbers."[143] There were many reasons for this situation: disease and the ensuing high death rate, the lack of interest of women in childbearing, etc. The remedy for the lack of family was adoption, and the primary purpose of adoption was to keep a family from becoming extinct. The welfare of the children was not a primary concern; in fact, often those adopted were adults.[144] Charles Sherman says that adoption was probably earlier in Roman law than wills, but the purpose of both was the same: "to avoid the extinction of a family by death of its head without heirs. Hence the endeavor of the law to provide fictitious heirs by an artificial relationship."[145] Adoption was quite essential to the pagan Romans; for if there were no heirs, it prevented the family's religious worship,

the sacra,* from extinguishing. Through adoption the religious rites were perpetuated. This desire for family continuity was very powerful at Rome, and for this reason the Romans felt that if the bond existing between a father and a son could be broken by emancipation it could also be created be adoption.[146]

In Republican times there were two entirely different forms of adoption: adoptio and adrogatio.

> Through adoptio a person who is under the paternal power of the head of his family comes under the patria potestas of another (adoptator, pater adoptivus). The change of family (mutatio familiae) is the characteristic feature of the adoptio, while in an adrogatio, i.e., the adoption of a person sui iuris who is himself the head of a family, there is a fusion of two families since the adrogatus enters into another family together with all persons subject to his paternal power. The legal effects are equal in both cases; the adopted persons have the same rights (succession) and duties (sacra) as natural sons.[147]

The modes of these two types of adoption also differed. According to Gaius, "Populi auctoritate adoptamus eos qui sui iuris sunt: quae species adoptionis dicitur adrogatio . . . Imperio magistratus adoptamus eos qui in potestate parentum sunt. . . ."[148] According to Aulus Gellius:

> Quod per praetorem fit, adoptatio dicitur, quod per populum arragotio.

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*Sacra - i.e. the worship of both a deity and ancestors of the family. These rites were performed by heirs - not only natural descendants of last head of family but even by heirs through adoption.

> adoptantur autem, cum a parente in cuius potestate sunt tertia mancipatione in iure ceduntur atque ab eo qui adoptat apud eum legis actio est vindicantur: adrogantur hi qui, cum sui iuris sunt in alienam sese potestatem tradunt eius que rei ipsi auctores fiunt.[149]

Adoptio

Adoptio was a mode of acquiring patria potestas over persons not born into the family. In adoptio, a person under one potestas was given into another's potestas, and the adopted were under the same paternal power as natural children. No specific declaration seems to have been required for the adoption of a son already under potestas, i.e. one termed alieni iuris. The child became property, through mancipatio, of the new owner.[150]

An elaborate form of adoption existed which was derived from the XII Tables stating that if a father sold his son three times (mancipatio) the son was free from his father's power.

> The father, A, sold X, the son, to B, B freed him and he reverted to A's potestas. This was repeated. Then there was a third sale which destroyed the potestas and left the son in bondage to B. C, the intending adopter, now brought a conclusive action against B claiming X as his son.[151]

Since there was no defense, the judge decided in favor of C. B and C could be the same person but then X went back to A after the third sale, and the claim was then made against A.

If a paterfamilias gave his daughter or granddaughter in adoption one sale was sufficient. The sale was performed

by a formal mancipio. The transaction had two parts, a preliminary sale which destroyed the potestas and the act of adoption, i. e. the claim and declaration in court.

Justinian made the adoption of alieni juris simple. Instead of the elaborate ceremony just described, he substituted a simple proceeding of executing a deed in magisterial presence declaring adoption. The parties involved (i.e. the persons given, giving, and receiving) had to be present to give their consent. But it was also sufficient if the person being adopted did not dissent.[153] Adoption affected only the adoptee - if the adoptee already had children they remained in the old family.

It was possible to adopt one's own child no longer in one's potestas, even though the child had been given to another previously in adoption. But a son so adopted was a new person; he was no longer the father of any children he had left behind. An adoptive child might be emancipated or given in adoption, but he could not be readopted.[154]

Justinian greatly altered the laws on adoption. Since adoption could be lighly undertaken and lightly ended, Justinian provided safeguards for the adoptee lest he discover that he was free and not belonging to any family due to emancipation. Justinian provided that the adoptee retain his rights of succession in the old family which he often lost under the old law. As a member of the new family he would acquire only a right of succession if the adoptive

father died intestate, and no right of complaint if he were bypassed in a will.[155] The adoptive father, unlike the natural father, was not bound to leave the adopted son a share of the estate if he made a will. The adoptee in Justinian's time did not pass into the potestas of the adoptive father. The type of adoption just discussed Justinian referred to as adoptio minus plena.[156] In this type of adoption the adoptee passed into the physical control of the adopting person but legally remained a member of his old agnatic family. The only legal effect was that the child acquired a chance of intestate succession to the adopter.[157] This was a drastic change, for prior to Justinian, adoption placed the adoptee in the exact position he would have had had he been born into his adopted family.

> Sed hodie, ex nostra constitutione, cum filiusfamilias a patre naturali extraneae personae in adoptionem datur, jura potestatis patris naturalis minime dissolvuntur, nec quicquam ad patrem adoptivum transit, nec in potestate eius est, licet ab intestato jura successionis ei a nobis tributo sint.[158]

The old law prevailed under Justinian if the adopted son were given to a natural descendant or ascendant (e.g. the grandfather of the adopted child). Justinian referred to this type of adoption in which the old law of succession prevailed as adoptio plena. An adoptive son could only enter the family of his maternal grandfather per adoptionem. And if the adoptive son were born after the father was emancipated, he would not be in the same family of his paternal

grandfather except by adoption. The adoptive son may even be adopted by his natural father, for if he were born before his father was emancipated then the grandfather may have emancipated his father but not him and then later might give him to his father per adoptionem.[159]

A person could adopt one as a grandson, granddaughter, great-grandson or great-granddaughter or any other descendant even if he had no son.

> Licet autem et in locum nepotis
> vel neptis vel in locum pronepotis
> vel proneptis vel deinceps adoptare,
> quamvis fitium quis non habeat.[160]

According to the system of paterfamilias, it seems that to have a grandson in one's power one must have a son as the sons of daughters do not fall under the same paterfamilias. However, the maternal grandfather could adopt. For marriage it often made a difference whether one was adopted as a grandson or great-grandson, for the natural granddaughter of the adopter would be cousin or neice of the adopted depending on whether one was adopted as son or grandson and could marry him in one case but not the other.

A man could also adopt the son of another as his grandson and could adopt the grandson of another as his son. He could also adopt a grandson to be given as a son to any son provided that son's consent were given, for the adopted would then become an heir of the son's and not of the adopter.[161] On the contrary if a grandfather gives his grandson by a son in adoption, the consent of the son is not necessary.[162]

Conditiones Adoptionis

Certain conditions had to be met in order for adoption to occur. The parties involved must be of the requisite age, i. e. eighteen years and there must be a required number of intervening years, i. e. eighteen years. According to Justinian a younger person could not adopt an older person. The principle adoptio naturam imitatur was the guiding principle for adoption.

> Minorem natu non posse maiorem adoptare placet: adoptio enim naturam imitatur et pro monstro est, ut maior sit filius quam pater. Debet itaque is, qui sibi per adrogationem vel adoptionem filium facit, plena pubertate, id est decem et octo annis praecedere.[163]

The principle adoptio naturam imitatur applied in several other instances also: (i) In Cicero's time, an unmarried man could not adopt,[164] but in later law an adopter did not have to be married. A castratus could not adopt, for nature could never give him children. An impotent person however could adopt, for nature could possibly cure the impotency.

> Illud vero utriusque adoptionis commune est, quod et hi generare non possunt, quales sunt spadones, adoptare possunt.[165]

(ii) Women initially were not able to adopt, because they were incapable of patria potestas. According to an interpolated constitution dated 291 A. D. Diocletian allowed a woman who had lost her own children to adopt as a means of consolation, but she still did not have patria potestas over

them. Justinian allowed this type of adoption provided the Emporer's permission was given. In the constitution the woman apparently was sui juris, but Justinian's law did not have this limitation.[166]

> Feminae quoque adoptare non possunt, quia nec naturales liberos in sua potestate habent. Sed ex indulgentia principis ad solatium liberorum amissorum adoptare possunt.[167]

Adrogatio

In adrogatio a person sui juris and independent became alieni juris by placing himself under the potestas of another citizen. This institution was older than adoptio and was very important, for it destroyed one family and merged it with another. Though this form underwent certain changes during Roman history, its effect and tone were unaltered.

Originally there was a preliminary inquiry by pontiffs as to whether the case or request was admissable and satisfied certain legal requirements. If approved, the case was then sent before the comitia curiata, in this case called the comitia calata, which met on special days for this and other business affecting sacra. The meeting was presided over by the Pontifex Maximus.[168] Originally no woman or Roman subject could introduce an adrogation procedure, for they did not have access to the assembly.[169] The reason for the approval of the assembly and the religious authorities is easy to understand since a family was extinguished and merged with

another. The adoptive family may have consisted of just the adrogatus or if he held a family in potestas they also merged with him. A provision might have had to be made for the continuation of the religious cult for the sake of the ancestors. Therefore, adrogation was of special interest to the pontiffs.[170]

There is no actual proof that adrogatio existed at the time of the XII Tables but it is assumed, for the use of comitia curiatia (which ceased to function in the eary republic) certainly indicates that adrogatio existed prior to the XII Tables.[171]

The parties involved in the adrogation procedure were rogati and they were asked if they consented. Following this was a rogatio of the populus which was probably followed by detestatio sacrorum - the renunciation by the adrogatus of the sacra of his old family.[172] If all went accordingly, an act was passed making the person adrogated a member of his new family and extinguishing the old family. Then the person adrogated passed into the potestas of the person adrogating and lost all his ancient religious rites (sacra). Adrogatio brought the adrogatus completely into the family. He became a filiusfamilias and brought both all those who had been under his potestas and all of his property.

After the comitia curiata lost its power, the citizens were represented by thirty lictors. The judicial inquiry was still held, and the consent of the parties was still

necessary. Diocletian changed the form so that all that was requisite was a rescript of the emporer which continued until Justinian.[173]

Rescriptiones

There were certain restrictions placed on adrogatio: (i) Since adrogatio destroyed a family, it was allowed only to save another family - i. e. to provide heres. Therefore, there was very careful investigation and legislative consent. (ii) If the adrogation was done through the comitia, it had to occur at Rome where the comitia sat. It could be done anywhere by an imperial rescript after Diocletian's change. (iii) A woman could not be adrogated, having no standing before the comitia; but if the adrogation was performed by an imperial rescript it was legal. However, the advantage was small; although she continued her family for her generation she had no heres. (iv) In early law an impubes could not be adrogated, for it placed an easily misused power in the hands of the tutores, for they would then have the means to avoid accounting for the administration of the ward's estate. Antoninus Pius allowed it in certain cases after a careful inquiry concerning the possible advantages to the child. The auctoritas of the tutor was required and the adrogator gave security that if the adrogatus died while still an impubes his property would be restored to those who would have had it had he not been adrogated. If the adrogatus was emancipated while still an impubes, the adrogator

had to restore the property immediately. If the adrogator disinherited the adrogatus, the adrogatus could claim his own property at the adrogator's death. If the adrogator had emancipated the adrogatus without revealing the reason to the court and later died, the adrogatus could claim one-fourth of the adrogatus' estate (quarta antonina). This was what an only child could claim of a father's estate unless he had been justly disinherited. The liabilities were probably covered by the security given earlier. When the adrogatus reached puberty the securities and liabilities ended. However, the adrogatus could have the adrogatio set aside by a forced emancipatio - if he could show sufficient reason.[174] (v) Adrogation was used only as a last resort to save a family, and a person could only adrogate once. (vi) A person in order to adrogate must be at least sixty years of age and unlikely to have children. (vii) One under twenty-five could not be adrogated by a former tutor or curator. All of these restrictions could be overridden if the reasons were justified. It lay in the discretion of the controlling authorities. An adrogatio which broke these rules was valid if actually carried out.[175]

Modi Adrogationis

Some dispute exists as to when adrogation was first made per rescriptum principis. Ulpian says that by his time adrogation was made per populum (i. e. curies represented by

lictors) and not by imperial rescript. Ulpian further says adrogation could only occur at Rome, but when the use of imperial rescript was introduced the place did not matter.[176] It is known that in the time of Justinian the Roman forms of adoptio were abolished and replaced by declarations registered in the archives of court in the muncipality.[177]

Adoption by the rescript of the emperor insisted that a person having his own children not only gives himself in adrogation but also submits to the adrogator's control his own children. The children are then considered to be the grandchildren of the adrogator. For this reason Augustus did not adopt Tiberius until Tiberius adopted Germanicus, and thus upon Tiberius adoption Germanicus became Augustus' grandson.[178] Adrogation also could be performed through a will. It was in this way that Julius Caesar adopted Augustus. Probably this method had to be approved by an act of the comitia curiata.[179]

Before Justinian all the property of the person adrogated became the property of the adrogator, but Justinian changed it so the adrogator acquired only a life use of the property of the adrogatus. Originally the debts of the adrogatus were wiped out upon adrogation, but in Justinian's time the adrogator had to pay the debts lest the creditors could claim the assets of the adrogatus. This was a protection for interested third parties. In some cases where the adrogator did not meet an action arising out of debts incurred

before adrogation, the praetor authorized a bonorum venditio (sale of adrogator's property in bulk) up to the amount of the adrogatus' original contribution plus any subsequent additions made through him.[180]

Similitudines Inter Adoptionem Et Adrogationem

The similarities between adoption and adrogation are many, to mention a few: (i) Both the adoptee and adrogatus changed families although the prior status of each differed. The former was alieni juris while the later was sui juris. (ii) Both the adrogator and adopter had to be eighteen years of age. (iii) It was impossible for one to adopt or adrogate if castrated. (iv) In early law women could neither adopt nor adrogate since a woman was the end of the family. Later, however, a woman was allowed to adopt as a solace for lost children.

The institution of adoption and adrogation is a very complex one. Adoptions to a large extent were arranged for political or practical reasons. In most cases adoption probably lacked the emotional tie with which we are so accustomed. Because of its importance to the Roman people, they devised many ways to ensure benefits for all concerned; but as a result of these complex machinations, problems were inevitable. For example, for what reason would one adopt a person as a grandchild or great-grandchild rather than a child of the first degree of ascendancy, especially when there were no heirs

of the first degree? The obvious answer would seem to be for inheritance reasons - i. e. the one adopted or adrogated may inherit more by avoiding certain taxes as a result of not being of the first degree.

Another perplexing problem was that in later Roman times women were allowed to adopt in a special circumstance - i. e. as a solace for lost children. But why was this allowed? The children did not enter the woman's potestas; the family ended with the woman. This seems to be of a disadvantage to the children unless they remained legally a part of their old family; or possibly they fell under the potestas of the adoptive paternal grandfather, although this is not indicated.

One was allowed to adopt or adrogate and then in turn give the adoptive person or adrogatus to his own son in adoption. The reason this was allowed seems to be confusing. Possibly it was allowed because the son was in potestas of his own father; and, therefore, could not initiate an adoptive procedure on his own behalf.

There are many suppositions one could suggest as to the why's of Roman adoptive procedures. There are many unanswered questions and many blanks and fragments as a result of little primary information. Gaius and Justinian are of immeasurable importance, but much of their writing has been interpolated and revised so that it would be relevant for their day. It is regrettable that there occurs a

lack of primary information in such an area that affects us greatly - for much of our own legal system is influenced by Roman law.

FOOTNOTES

[1]H. A. Treble and K. M. King, Everyday Life In Rome In The Time of Caesar and Cicero (Oxford: The Clarendon Press, 1930), p. 73.

[2]Cited in William Stearnes Davis, The Influence of Wealth In Imperial Rome (New York: The MacMillan Company, 1910), p. 288.

[3]Plautus, Trinummus, 1158-59.

[4]Juvenal, Satirae, VI, 136.

[5]Each generation constitutes a degree. For example father and son are in the first degree, grandfather and grandson are in the second degree. cf. Charles Sherman, p. 51 - cf. note 8 for bibliographical information.

[6]Davis, The Influence of Wealth, p. 303.

[7]Ibid., pp. 302-03.

[8]Charles Phineas Sherman, Roman Law In The Modern World (3 vols.; New York: Baker, Voorhis & Co., 1937), II, 71.

[9]J. P. V. D. Balsdon, Roman Women Their History and Habits (London: The Bodley Head, 1962) p. 177.

[10]Alan Watson, The Law of the Ancient Romans (Dallas: Southern Methodist University Press, 1970), p. 31.

[11]Harold Whetstone Johnston, The Private Life of the Romans (New York: Scott, Foresman and Company, 1903), p. 63.

[12]Watson, Ancient Romans, pp. 31-32.

[13]Ulp. 5, 2. cited by James Robinson, Selections from the Public and Private Law of the Romans (New York: American Book Company, 1905), p. 111.

[14]Watson, Ancient Romans, p. 35.

[15]John Crook, Law and Life of Rome (Ithaca, New York: Cornell University Press, 1967), pp. 99-101.

[16]Sherman, Roman Law, p. 49.

[17]Gai., Inst., I, 59.

[18]Gai., Inst., I, 62.

[19]Watson, Ancient Romans, p. 34.

[20]Johnston, Private Life, pp. 61-62.

[21]R. W. Leage, Roman Private Law Founded on The Institutes of Gaius and Justinian (New York: The MacMillan Company, 1906), p. 91.

[22]Herbert F. Jolowicz, Historical Introduction To The Study of Roman Law (2nd ed.; Cambridge: The University Press, 1952, reprt. 1967), p. 243.

[23]Gai., Inst., I, 112.

[24]Balsdon, Roman Women, p. 180.

[25]Gai., Inst., I, 112.

[26]Gai., Inst., I, 113.

[27]Jolowicz, Historical Introduction of Roman Law, p. 114.

[28]Ibid.

[29]Ibid. p. 115.

[30]James Hadley, Introduction to Roman Law, (New York: D. Appleton & Company, 1881), pp. 138-39.

[31]R. W. Leage, Roman Private Law, p. 87.

[32]Jolowicz, Historical Introduction of Roman Law, p. 115.

[33]Jolowicz, Historical Introduction of Roman Law, p. 116.

[34]Leage, Roman Private Law, p. 89.

[35]Jolowicz, Historical Introduction of Roman Law, p. 116.

[36]Ibid.

[37]Leage, Roman Private Law, p. 90.

[38]William W. Buckland, A Text - Book of Roman Law from Augustus to Justinian (3rd ed. revised by Peter Stein; Cambridge: The University Press, 1963, reprt. 1966), p. 106.

[39]Crook, Law and Life of Rome, p. 104.

[40]Ibid., pp. 104-05.

[41]Leage, Roman Private Law, pp. 92-93.

[42]Ibid., p. 95.

[43]Ibid., p. 96.

[44]Crook, Law and Life of Rome, p. 110.

[45]Ibid.

[46]Cited in Otto Kiefer, Sexual Life in Ancient Rome (London: Abbey Library, 1934, reprt. 1971), p. 9.

[47]Ibid. p. 10

[48]Johnston, Private Life, p. 65.

[49]Ibid. p. 66.

[50]Balsdon, Roman Women, p. 183.

[51]Johnston, Private Life, p. 66.

[52]Ibid., p. 70.

[53]Kiefer, Sexual Life, p. 19.

[54]Balsdon, Roman Women, p. 184.

[55]Johnston, Private Life, p. 71.

[56]Balsdon, Roman Women, p. 185.

[57]Ibid.

[58]Kiefer, Sexual Life, p. 20.

[59]Ibid., p. 21.

[60]Ibid.

[61]Sherman, Roman Law, p. 74.

[62]Ibid., p. 75.

[63]Balsdon, Roman Women, p. 216.

[64]Ibid.

[65]Watson, Ancient Romans, p. 35.

[66]Sherman, Roman Law, p. 75.

[67]Ibid. p. 74.

[68]Balsdon, Roman Women, p. 216.

[69]Gai., Inst., I, 137 (Krüger's conjectural restoration underlined).

[70]Gai., Inst., I, 137a (Krüger's conjectural restoration underlined).

[71]Jolowicz, Historical Introduction of Roman Law, p. 245.

[72]Buckland, Text Book of Roman Law, p. 117.

[73]Sherman, Roman Law, p. 77.

[74]Balsdon, Roman Women, p. 217.

[75]Cited by Davis, The Influence of Wealth, p. 292.

[76]Sherman, Roman Law, p. 76.

[77]Balsdon, Roman Women, p. 217.

[78]Ibid., p. 218.

[79]Ibid., p. 217.

[80]Ibid., pp. 218-19.

[81]Ibid., P. 219.

[82]Ibid., p. 218.

[83]Plutarch, Moralia, 145a, quoted in Ibid., p. 218.

[84]Balsdon, Roman Women, p. 219.

[85]Buckland, Text Book of Roman Law, p. 117.

[86]Ibid., p. 118.

[87]Ibid., p. 117.

[88]Sheldon Amos, The History and Principles of the Civil Law of Rome: An Aid to the Study of Scientific and Comparative Juris Prudence (London: Kegan Paul, Trench & Co., 1883), p. 286.

[89]Jolowicz, Historical Introduction of Roman Law, p. 246.

[90]Supra, p. 1.

[91]Aulus Gellius, Noctes Atticae, 4. 3. 1. 2.

[92]Balsdon, Roman Women, p. 219.

[93]Ibid.

[94]Ibid., p. 220.

[95]Ibid.

[96]Jolowicz, Historical Introduction of Roman Law, p. 247.

[97]Leage, Roman Private Law, p. 94.

[98]Ibid., p. 95.

[99]Ibid., p. 96.

[100]Sherman, Roman Law, p. 79.

[101]Rudolph Sohm, The Institutes: A Text Book of the History and System of Roman Private Law, trans. by J. C. Leddie (3rd ed.; Oxford: Clarendon Press, 1907), p. 488.

[102]Ibid.

[103]Crook, Law and Life of Rome, pp. 113-14.

[104]Sohm, The Institutes, p. 488.

[105]Ibid.

[106]Gai., Inst., I, 144.

[107]Buckland, Text Book of Roman Law, p. 142.

[108]Gai., Inst., I, 145.

[109]Buckland, Text Book of Roman Law, p. 143.

[110]Gai., Inst., I, 147.

[111]Just. Inst., XIII, V, cited by Thomas Collett Sandars, The Institutes of Justinian (Chicago: Callaghan & Company, 1876), p. 119.

[112]Buckland, Text Book of Roman Law, p. 144.

[113]Leage, Roman Private Law, p. 99.

[114]Just. Inst., XV, cited by Sandars, The Institutes, p. 122.

[115]Leage, Roman Private Law, p. 100.

[116]Buckland, Text Book of Roman Law, p. 145.

[117]Leage, Roman Private Law, p. 100.

[118]Just. Inst., XVII, cited by Sandars, The Institutes, p. 128.

[119]Sandars, Institutes, p. 127.

[120]Just. Inst. XVII, cited by Ibid., p. 127-28.

[121]Just. Inst. XIX, cited by Ibid., p. 129.

[122]Leage, Roman Private Law, pp. 100-01.

[123]Gai., Inst., I, 185.

[124]Buckland, Text Book of Roman Law, pp. 147-48.

[125]Herbert F. Jolowicz and Barry Nicholas, Historical Introduction to the Study of Roman Law (3rd ed., Cambridge: The University Press, 1972), p. 249.

[126]Ibid., p. 250.

[127]Buckland, Text Book of Roman Law, pp. 150-52.

[128]Ibid., p. 153.

[129]Ibid.

[130]Amos, Civil Law of Rome, p. 299.

[131]Ibid.

[132]Buckland, Text Book of Roman Law, p. 154.

[133]Ibid., p. 158.

[134]Capitis deminutio according to Adolf Berger in Encyclopedic Dictionary of Roman Law is "the loss of caput (the civil status of a person which implies the legal ability to conclude legally valid transactions and to be the subject of rights recognized by the law) through the loss of one of

the three elements thereof, freedom, Roman citizenship or membership in the Roman family." p. 380. Capitis deminutio maxima meant the loss of freedom and the loss of liberty also resulted in the loss of citizenship and family ties. Capitis deminutio media was the loss of citizenship and the loss of family ties, but not the loss of liberty. Capitis deminutio minima was simply the loss of family. The family tie may be broken by one's entry into another family, marriage of woman in manum or one becoming the head of a new family (emancipatio).

[135]Buckland, Text Book of Roman Law, p. 160.

[136]Sherman, Roman Law, pp. 120-03.

[137]Crook, Law and Life of Rome, pp. 116-17.

[138]Sandars, The Institutes, p. 138.

[139]Just. Inst., XXIII, cited by Ibid., p. 139.

[140]Sandars, The Institutes, p. 139.

[141]Just. Inst., XXIII, III, cited by Ibid., p. 140.

[142]Just. Inst., XIII, IV, cited by Ibid., p. 140-41.

[143]Crook, Law & Life of Rome, p. 111.

[144]Ibid.

[145]Sherman, Roman Law, p. 84.

[146]Jolowicz and Nicholas, Historical Introduction of Roman Law, p. 119.

[147]Adolf Berger, Encyclopedic Dictionary of Roman Law (Philadelphia: American Philosophical Society, 1953), p. 350.

[148]Gai., Inst., I, 99.

[149]Gellius, Noctes Atticae, V, XIX, II-IV.

[150]A. H. J. Greenidge, The Legal Procedure of Cicero's Time (New York: Augustus M. Kelley, 1971), p. 368.

[151]Buckland, Text Book of Roman Law, p. 121.

[152]Ibid., p. 122.

[153]Sandars, The Institutes, p. 104.

[154]Buckland, Text Book of Roman Law, pp. 122-23.

[155]Ibid.

[156]Sandars, The Institutes, p. 105.

[157]Leage, Roman Private Law, p. 74.

[158]Just. Inst., I, XI, cited by Sandars, p. 105.

[159]Sandars, The Institutes, pp. 105-06.

[160]Just., Inst., II, IV, cited by Robinson, p. 134.

[161]Buckland, Text Book of Roman Law, p. 123.

[162]Sandars, The Institutes, p. 108.

[163]Just. Inst., II, IV, cited by Robinson, p. 134.

[164]Sherman, Roman Law, p. 85.

[165]Gai., Inst., I, 103.

[166]Buckland, Text Book of Roman Law, p. 123.

[167]Just. Inst., XI, cited by Sandars, p. 109.

[168]Buckland, Text Book of Roman Law, p. 124.

[169]Sherman, Roman Law, p. 86.

[170]Jolowicz and Nicholas, Historical Introduction of Roman Law, p. 120.

[171]Ibid.

[172]Buckland, Text Book of Roman Law, p. 124.

[173]Leage, Roman Private Law, p. 75.

[174]Buckland, Text Book of Roman Law, pp. 124-26.

[175]Ibid., p. 127.

[176]Sandars, The Institutes, p. 107.

[177]Jolowicz and Nicholas, Historical Introduction of Roman Law, p. 509.

[178]Sandars, The Institutes, p. 110.

[179]Sherman, Roman Law, p. 87.

[180]J. Declareuil, Rome the Law Giver (New York: Alfred A. Knopf, 1926), p. 118.

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VITA

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Since graduating from Westhampton College, Mrs. Barr has pursued her graduate degree in Latin at the University of Richmond as a part-time graduate student. She is now on leave from Virginia Commonwealth University. Mrs. Barr will return to her duties at Virginia Commonwealth University in the fall of 1976.

On June 8, 1968 Mrs. Barr married Mr. John S. Barr. They have two children, Mary Brantley Barr, born March 4, 1974 and Sarah Lewis Barr, born May 1, 1975.