

AUGUSTUS AND LAW-MAKING

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ABSTRACT

The aim of this thesis is to establish the significance of the Augustan period in the history of law-making and of various important areas of Roman Law. Clearly, the demise of the Roman Republic and the emergence of a princeps could not fail to be reflected in a system which had evolved, along with the Republic itself, over five centuries, and which was, therefore, closely linked with Republican institutions and processes. The varied Republican channels of law-making continued to be employed under Augustus, but never before had one man enjoyed sufficient power and auctoritas to enable him to oversee a large law-making programme as Augustus did.

In chapter 1, I survey briefly the many enactments which are attributed in the evidence to the Augustan period after about 19 B.C., particularly those which can confidently be categorised as statutes, senatusconsulta or edicts, in order to see what happened to the Republican sources of law under Augustus and to look at the sorts of issues which were regulated by law during the Augustan period. The remaining chapters are devoted to the most important and best documented Augustan statutes, the lex Iulia de maritandis ordinibus and the lex Papia Poppaea (chapters 2 and 3), the lex Iulia de adulteriis coercendis (chapter 4) and the lex Aelia Sentia and the lex Fufia Caninia (chapter 5). The purpose of these chapters is to examine the individual statutes in detail and to see what policies and aims may be detected in them in order to assess their importance in the history of these areas of Roman Law and as reflections of the aims and achievements of Augustus in general. The most important observations made in all five chapters are summarised in the final conclusion.

CONTENTS

<u>Chapter</u>		<u>Page</u>
1	Law-Making in the Augustan Period	1
2	The <u>Lex Iulia et Papia I</u>	44
3	The <u>Lex Iulia et Papia II</u>	97
4	The <u>Lex Iulia de Adulteriis Coercendis</u>	167
5	The <u>Lex Aelia Sentia</u> and the <u>Lex Fufia Caninia</u>	225
	Conclusion	283
	Bibliography	286
	Abbreviations	290

CHAPTER 1

LAW-MAKING IN THE AUGUSTAN PERIOD

No one would deny that the Augustan period was a crucial one in the history of Rome, marking as it did the transition from the Republic to the Empire. This transition had major implications for law-making, for the advent of an Emperor raised many questions regarding the continuing relevance of the various Republican law-making channels and regarding the competence of the Emperor to influence the formulation of the law. In this chapter I hope to survey briefly the many enactments attributed to the Augustan period, to examine Augustus's attitude to and relationship with those bodies and individuals involved in law-making during the Republic and to assess the responsibility of Augustus for the emergence of the later situation whereby the pronouncements of the Emperor in various different capacities came to be acknowledged by the classical jurists as possessing the force of law.

There is no room here to discuss the far-reaching question of sources of law under the Republic about which much has been written (1). Any such discussion would have to take into account concepts such as natura, consuetudo, mos, aequitas etc.. The aim of this chapter is primarily to see what happened under Augustus to the Republican sources of "declared" law, although the question of the role of the jurists is too important to leave aside.

The most important Republican sources of "declared" law were statutes (leges and plebiscita) proposed by magistrates to the popular assemblies. Most of those enacted in the Republic regulated public law issues, but there were a few relating to private law, notably the famous lex Aquilia of 287 B.C. Also important were senatusconsulta. The evidence for Republican senatusconsulta shows that the Senate did not confine its resolutions to its particular spheres of competence, finance and foreign policy. The Senate was clearly expected to act at times of crisis, for the convening of a popular assembly was a slow and a cumbersome procedure. Nevertheless, there is little or no evidence of the Senate passing decrees relating to private law issues (2).

A question which has caused some controversy among scholars is whether or not senatusconsulta enjoyed strictly law-making status during the Republic (3). By the time of Gaius they were regarded as law-making (4) although Gaius adds that the Senate's right to make law had been questioned. Watson believes that the Senate did not act as if it had law-making powers in the Republic on the ground that its resolutions were addressed to magistrates rather than to all citizens and that senatusconsulta were only enforceable by being incorporated into edicta or leges. Crifò, on the other hand, takes the view that if in practice magistrates applied the principles laid down by senatusconsulta, then the latter were law-making. Since the Romans had no theory of "sources of law" under the Republic, Crifò must surely be right to argue that what happened in practice is the important issue. Watson's arguments are, in any case, rather shaky: it cannot be demonstrated that every single senatusconsultum for which there is evidence was incorporated into a lex or edictum, and even if it could, this does not necessarily point to a lack of efficacy on the part of senatusconsulta. Those who believe that senatusconsulta gained law-making status under the Empire cannot designate a certain point at which this occurred, and there is little doubt that senatusconsulta enjoyed as much efficacy in practice during the Republic as they did under the Empire.

Magisterial edicts, and especially the praetorian edict, were another important source of law in the Republic, although, as Stein argues (5), they were not regarded by Cicero as "written" law because they were only valid during the magistrate's term of office, and a magistrate might not write down all the principles on which he would base his actions. Nevertheless, much was written down and carried on from year to year (and thus Gaius in the second century A.D. classified edicts as written law (6)) and the praetor's edict came to be a very influential factor in the development of private law by the end of the Republic (7). By this time, a substantial body of rules had grown up through the activity of the praetor alongside the ius civile, rules which were designed, according to Pomponius, 'adiuvandi vel supplendi vel corrigendi iuris civili gratia'(8).

Closely related to the activity of the praetor was that of the jurists who had an important advisory role to play in the formulation of magisterial edicts as well as in the courts. Clearly, in a system where magistrates and judges were men possessing no particular legal expertise, advice from experts was indispensable. Frier (9), however, believes that it was not until the last years of the Republic that juristic science began to assume a rôle of real importance in the development and application of Roman law. Previous to this, he argues, jurists tended to be men of senatorial rank who were politically motivated and gave advice in return for support at elections. Juristic science, however, became less attractive as a political tool in the last century of the Republic for various reasons, not least the overshadowing of jurisprudence by oratory, and men of equestrian status began to replace senators in this sphere (10). Frier believes that the absence of political motivation among the new equestrian jurists of the 1st century B.C. resulted in a greater interest in the law for its own sake on their part. He further claims that three external factors contributed to the increasing importance of the rôle of the jurists, namely the spread of the citizenship (which resulted in a multiplication of the number of cases to be judged), increase in commerce and in personal wealth (which also gave rise to more law-suits) and political instability (which created a desire for a clearer distinction between public and private law). All of this, he believes, contributed to an increase in the weight accorded to the pronouncements of the jurists. Frier's theory is not without flaws : it lacks supportive evidence and surely underrates the contribution made by the "senatorial" jurists who, even if politically motivated, still had an important part to play in the system. Nevertheless, his thesis is attractive and well argued, and there is no reason to doubt that the part played by the jurists in the formulation and application of the law was indeed assuming greater importance by the end of the Republic.

AUGUSTAN ENACTMENTS

Evidence for enactments of the Augustan period exists in both the juristic and non-juristic sources. While the juristic sources almost invariably label the various enactments as statutes, senatusconsulta, etc., the non-juristic sources do not, and since Dio, Suetonius, Tacitus and others sometimes use loose and non-technical terminology, it is at times difficult to determine from their accounts how a particular measure was enacted and what legal form, if any, it possessed (11). Some scholars, notably Biondi, have nevertheless classified some of these doubtful measures as leges, a classification which, in the absence of more specific evidence, does not seem to me to be justified. Given the title of this chapter, my concern is primarily with those measures which can confidently be labelled as statutes, senatusconsulta and edicts. I intend also to limit my survey of Augustan enactments to the period after about 19 B.C., thus omitting the enactments of the earlier period, many of which were introduced in order to offer various titles and privileges to him and which are not relevant to the arguments of this thesis.

STATUTES

Several scholars have produced lists of Augustan statutes, notably Rotondi (12), Gualandi (13) and Biondi and Arangio-Ruiz (14). A useful survey is provided elsewhere by Arangio-Ruiz (15).

Lex Iulia de collegiis

According to Suetonius, both Julius Caesar and Augustus introduced rules concerning collegia (16): he says that they both banned all collegia (which were clearly thought to be politically subversive and had been the objects of a spate of legislation in the

last century of the Republic) except for ancient ones. A few scholars have doubted that there was an Augustan lex de collegiis (17), but the evidence of an inscription (18) seems to confirm that there was. The inscription relates to a collegium symphoniacorum:

quibus senatus c(oire) c(onvocari) c(ogi) permisit e lege Iulia ex auctoritate Aug(usti) ludorum causa.

The most plausible interpretation of the evidence is that a law was passed by Caesar and subsequently revived by Augustus. It is easy to see the political motivation behind such a law on the part of both Caesar and Augustus.

As for the date of the law, Rotondi places it in 21 B.C., while Mitteis (19) favours 7 B.C. on the basis of an inscription of this date (20) which records the granting of authorisation to a collegium fabrorum tignariorum. This, however, by no means proves that the law was passed in this year, and the little evidence that exists for the law does not justify any firm dating (21).

There was a spate of legislation during the years 18-17 B.C. and this has led Arangio-Ruiz to argue that all of the leges Iuliae should be attributed to this two-year period. In order to sustain his argument, however, Arangio-Ruiz has to assume that any law of uncertain date belongs to this period and he is guilty of fitting the evidence around his theory. Nevertheless, the period 18-17 B.C. was clearly characterised by intense activity in statute-making and a number of laws can be confidently assigned to the period, the lex Iulia de maritandis ordinibus, the lex Iulia de adulteriis coercendis, the lex Iulia de ambitu, the leges Iuliae de iudiciis publicis et privatis, the lex sumptuaria, the lex de annona and the leges Iuliae de vi publica et privata.

Lex Iulia de maritandis ordinibus : see relevant chapter

Lex Iulia de adulteriis coercendis : see relevant chapter

Lex Iulia de ambitu (or ambitus)

Like the lex Iulia de collegiis, this law was clearly politically motivated and in the Republican tradition. (There is evidence for four Republican laws de ambitu between 67 and 52 B.C.). Dio places in 18 B.C. a law which debarred from office for five years anyone who had used bribery to gain office, and Suetonius includes a lex de ambitu in his list of Augustan laws (22). As for the juristic evidence, a title of Justinian's Digest 'de lege Iulia ambitus'(23) contains an excerpt from the jurist Modestinus, and the Sententiae of Paul contain a section entitled 'ad legem Iuliam ambitus'(24). The Modestinus passage shows that a pecuniary penalty in addition to that of infamia was fixed by a senatusconsultum for those who contravened the terms of the lex in a municipium. If the purpose of the sc was to extend to the municipia the rules of the lex, and if Dio's passage indeed refers to the lex de ambitu, then more than one penalty must have been introduced. Alternatively, the sc may have been responsible for the introduction of the pecuniary penalty. Yet another penalty is mentioned in the passage from Paul's Sententiae, where the jurist says that if a candidate incites a mob in the course of electioneering he is guilty of vis and is to be deported to an island (25).

Leges Iuliae iudiciorum publicorum et privatorum (26)

There seem to have been two separate laws, the lex Iulia iudiciorum publicorum and the lex Iulia iudiciorum privatorum, although they are referred to in various different ways in the sources (27). Some scholars have regarded them as one law, while others have argued for the existence of three laws, the third relating to municipal jurisdiction, on the basis of Gaius, Insts. 4.30 (28). Mommsen believed that these laws and the leges Iuliae de vi were one (29). The evidence for the laws is poor, but they were clearly far-reaching and highly significant: they are generally regarded as having been crucial in the history of both civil and

criminal jurisdiction. The laws overlapped to some extent and were designed to introduce greater uniformity and better organisation to the civil and criminal courts. They dealt with such issues as the qualifications of judges, composition of juries, witnesses and length of trials.

It is difficult to date the laws with certainty, but Dio, in his account of the events of 17 B.C., refers to measures which are very likely to have belonged to them (30), while one of the provisions attributed to them by the juristic sources suggests that they were passed after the lex ambitus (31).

The provisions mentioned by Dio are that orators must not charge for acting as advocates and that people should not enter the houses of others while serving on juries. Suetonius also describes a number of provisions which are generally attributed to these laws (32). He says that when people have been waiting a long time for trial and the charges are not pressed, Augustus ruled that the case should be abandoned. Augustus also lengthened the period for the hearing of cases (actus rerum) by thirty days to ensure that certain misdeeds ('maleficium negotiumve') should not be unpunished nor such cases delayed. To the existing three divisions of jurors (that is, senators, equites and tribuni aerarii) he added another group, the ducenarii, to deal with minor pecuniary claims. He changed the minimum age of jurors from 35 to 30, and, because of reluctance to serve on juries, he gave to each group one year's vacation in four and had no judging of cases in November and December. A passage from Macrobius (33) shows that cases were also not judged during the Saturnalia. A text of Gellius (34) indicates that the lex Iulia contained provisions regarding adjournments and resumptions of trials, while from Asconius (35) we learn that the law limited the number of patroni who might act for a defendant.

Such is the information provided by the literary sources. As for the juristic sources, Gaius (36) mentions the abolition of the ancient system of legis actiones in favour of the formulary system except in two cases, that of damni infecti and in trials by the

centumviral court. The formulary system had been provided as a possible alternative to the rigid legis actio system by the lex Aebutia of the late second century B.C., and with its flexibility had clearly more or less supplanted the ancient system. Augustus's reform in this area was therefore not as crucial as it at first appears and his aim seems to have been to rid the system of unnecessary archaisms rather than to introduce any fundamental reform. A more important development (and while there is no clear evidence which associates this with the leges iudicariae they may well have been responsible for it) was the emergence of the cognitio extraordinaria exercised within the new criminal courts established by Augustus, that of the Senate presided over by the consuls and that of the Emperor with his consilium (37). By the cognitio extraordinaria a magistrate might conduct an entire trial himself, thus doing away with the traditional division of a trial into two parts. This system was more efficient and more in keeping with the political circumstances of the Augustan period.

A passage of Ulpian preserved in the Fragmenta Vaticana (38) confirms the close relationship between the two leges iudicariae by attributing certain rulings to chapter 26 of the lex iudiciorum publicorum and to chapter 27 of the lex iudiciorum privatorum. The provision being discussed in the text is exemption from iudicandi munus through the possession of three children and the jurist is questioning whether children lost in war and nepotes may be counted. Other provisions relating to iudicia privata ruled that a person might not act as an arbiter when on the list of judges (39), that an under 20 should not be compelled to act as a judge (40), that the iudicium might be agreed upon between the parties (41) and that if a iudicium legitimum was not judged within 18 months it should be dropped (42).

Changes were likewise made in the iudicia publica. Here Augustus seems to have aimed to provide more uniformity among the various very diverse quaestiones by laying down rules for all criminal trials. A text of Paul (43) shows that rules were laid down concerning the drawing up of libelli, while another excerpt from

Justinian's Digest stipulates that a person may not make two accusations concurrently unless he is the injured party in both (44). According to Macer (45), a case may be re-tried if the accuser in a former trial in which the defendant was absolved was guilty of praevaricatio. Papinian attributes to the lex publicorum a provision regarding the capital accusation of a slave (46) and Paul says (47) that by the terms of this law people must not be compelled to give evidence against adfines and cognati. A passage from Modestinus' second book de poenis (48) attributes to the law a provision which forbade the defendant and prosecutor to enter the house of the judge on pain of transgressing the lex Iulia ambitus.

Further light is cast on the leges iudiciorum by epigraphical evidence. A passage from Augustus' edictum de aquaeductu Venafrano (49) shows that they contained provisions concerning the rejection of recuperatores, while the Augustan edicts to Cyrene contained measures (such as stipulations concerning the age and qualifications of judges) regulating the judiciary system there, measures perhaps based on the reforms effected at Rome by the leges iudiciorum.

There is evidence for other Augustan measures which are regarded by some scholars as separate enactments but by others as part of the judiciary laws. A passage of Gaius (50) mentions a lex Iulia in connection with cessio bonorum by a debtor, which according to evidence elsewhere (51), was no longer to involve loss of liberty nor infamia. There are two differing views on this, one that there was an Augustan lex Iulia de cessione bonorum which revived a Caesarian law, the other that the lex Iulia mentioned here by Gaius is the lex iudiciorum privatorum (52). It is difficult to see how a provision of this nature would have fitted in with what we know of the provisions of the judiciary laws, and in spite of the paucity of evidence, it is likely that there was indeed such a lex.

Some scholars also argue for the existence of a lex Iulia de suffragiis iudicum on the basis of a passage of Dio (53). Here, after describing the conspiracy of Caepio and Murena in 22 B.C., he says that some of the jury voted to acquit them and that Augustus therefore

ruled (ἐνομοθέτησε) that the vote should not be taken in secret in trials at which the defendant was absent and that all of the jurors must vote to convict him. That such a ruling was made by Augustus is quite impossible : Dio cannot be believed here. According to Mommsen (54) what should be understood here is that because Augustus insisted on a show of hands in such trials, everyone in practice did vote for condemnation : this is a plausible suggestion. Dio's use of ἐνομοθέτησε does not necessarily imply that a formal law was passed and there is no other evidence for a law of this kind. Given the nature of the ruling (that the vote should not be taken in secret) it is likely that, even if it was enacted in 22 B.C., it was later incorporated into the judiciary laws.

Leges Iuliae de vi publica et privata

As in the case of the judiciary laws, some of the evidence implies that there were two laws while some implies that there was only one, and scholars are therefore divided (55). If there were two, they were very closely related and scholars have found it impossible, especially given the later development of the concept of vis, to make clear distinctions between public and private vis. As has already been mentioned, Mommsen identified the legislation concerning vis with the judiciary laws. While vis clearly did feature in the judiciary laws, this merely illustrates the close connections between many of the laws of Augustus (56).

This legislation was clearly very extensive, for in one passage Ulpian mentions the provisions of the 88th chapter (57). There is no mention of it in the literary evidence, but there are titles in Justinian's Digest 'ad legem Iuliam de vi publica'(58) and 'ad legem Iuliam de vi privata'(59) and sections of Paul's Sententiae and of the Collatio are devoted to it.

Some provisions can easily be categorised as relating to public vis, such as that which forbade possessors of imperium to kill, beat

or torture a Roman citizen adversus provocationem (61). Thus the Republican right of provocatio was reinforced. Another provision stipulated that a defendant must not be prevented from reaching Rome within the requisite period in order to make his appeal (62). There are various other offences mentioned in the excerpts collected in Justinian's Digest 48.6 ('ad legem Iuliam de vi publica'). The law forbade the collection of arms and weapons except for hunting, travelling or sailing (63) and penalised those who had slaves or free men armed with the intention of stirring up sedition (64). There were provisions designed to prevent disruption of the course of justice : thus, for example, it was forbidden to have a weapon with malicious intent in a place where justice was dispensed (65). Another excerpt from this chapter of the Digest (66) shows that stuprum (presumably rape) was forbidden by this law as well as by the adultery law. A passage from Paul's Sententiae (67) adds to this the rule already mentioned under the lex de ambitu, that a person who stirs up a mob in the course of electioneering should be relegated to an island as guilty of vis publica. Elsewhere, however, the penalty for vis publica is designated as aquae et ignis interdictio (68).

An important provision is specifically assigned in Paul's Sententiae to the lex Iulia de vi privata. The law penalised those who used force to drive a person from his property or to shut him in (69). Nicolet (70) argues that this sort of measure was designed to end "private justice", and adds that vis of this nature was ancient rural custom for evicting a debtor or a person whose ownership of property was disputed. The same text of Paul's Sententiae shows that the law also penalised those who did not allow a person to be buried or who threw out a body and those who caused sedition or arson.

Given the similarity between these rules and those of the lex de vi publica, it is not surprising that scholars have had difficulty in distinguishing between public and private vis. Again, there are juristic excerpts ascribed to both laws by the compilers of Justinian's Digest concerning a prohibition against stealing by force (71) and concerning a provision which forbade flogging and beating (72). Another Digest excerpt assigned to the lex de vi publica (73)

describes a provision which prohibited the use of force to place a person under an obligation : this is similar to the provision assigned by Paul (74) to the lex de vi privata which penalised a creditor who forcefully gained a pledge from a debtor. Reminiscent of the rulings of the lex de vi publica is a provision assigned by Paul to the lex de vi privata (75) which incriminated a person who tried to prevent someone by force from being brought to justice.

A passage from Julian (76) ascribes to the lex Plautia et Iulia a ruling that ownership may not be acquired by usucapio of anything possessed by force, and this is confirmed by Gaius (77). The reference here must be to the lex Iulia de vi which presumably either confirmed this ruling of the Republican lex Plautia or enlarged upon it.

Biondi (78) separates from the other evidence three texts which, he believes, assign provisions wrongly (on the ground of their content) to the lex Iulia de vi. One text (79) assigns to the lex a provision which allowed those who enjoyed exercitio to delegate it, and another (80) describes a provision which allowed a new accuser to start afresh a prosecution if the original accuser was unable to continue. The third text (81) is more significant because it purports to provide a verbatim quotation from the 87th and 88th chapters of the law concerning those who were not allowed to give evidence under this law. This category included those under puberty, those convicted in a iudicium publicum, gladiators and such like and close relatives if they were not willing. There seems to me to be no good reason to doubt Ulpian's claim to be quoting from the lex Iulia de vi, especially since the text is confirmed by an excerpt from Callistratus preserved in Justinian's Digest (82).

Although the offences of vis publica and vis privata were sufficiently similar to make it difficult for scholars to disentangle them from each other, the penalty for vis privata was less severe than that for vis publica. Those convicted had one third of their property confiscated and they were debarred from being senators, decurions or judges. It is difficult to separate the Augustan

rulings de vi from later rulings, but there is no doubt that the leges Iuliae were significant statutes in the history of the law of vis. The various means of redress against violence which existed under the Republic such as the praetor's interdicts unde vi and de vi armata were clearly not very effective (83). Brunt believes that Augustus's lex was aimed "not at common criminals, but at offenders who had the money and power to organise armed bands and terrorize their neighbours, precisely as Cicero says Clodius terrorised Etruria"(84). Such a political motivation on the part of Augustus is very plausible. He seems generally to have wished to consolidate Republican rulings on the issue of vis and to provide more effective redress by making it a crime punishable under the terms of a comprehensive statute.

Lex Iulia sumptuaria

A lex sumptuaria is attested by Suetonius (85) and by Aulus Gellius (86). According to Gellius, limits were placed on the duration of and expense involved in banquets and weddings. Dio also mentions, under the events of 22 B.C., that Augustus placed limits on public banquets. He does not, however, portray this as a law, but rather as an example of Augustus taking on the role of ensor, and it may well have been incorporated into a formal law at a later date. Elsewhere (87) Dio says, in connection with Augustus' measures on marriage and adultery that he admonished women about their dress, and some scholars have attributed this to the lex sumptuaria (88). The passage does not, however, justify assigning such a measure to any particular law. The fact that Suetonius seems to group this law with the law de adulteriis et de pudicitia has led to the theory that the lex sumptuaria was part of the adultery law (89): however the evidence for the adultery law provides no support for this.

Lex Iulia de annona

The existence of a lex Iulia de annona is well attested in the juristic sources (90), although Mommsen attributed it to Caesar (91). According to a passage of Ulpian (92), the law penalised anyone responsible for the formation of a societas which increased the price of corn and anyone who hindered its transportation. Various dates have been suggested, notably 7 B.C.(93). Whatever the exact date, a law which checked speculation by limiting freedom of contracts and which perhaps reinforced the Emperor's responsibility for overseeing the corn supply would have been in the Augustan mould.

Lex Quinctia de aquaeductibus

The evidence for this law is found in Frontinus, De aquis urbis Romae, 129, where a full text of the law is preserved. The law belongs to 9 B.C. and owes its name to its proposer, the consul T.Quinctius Crispinus. It penalised anyone who caused damage to or obstructed the water supply of Rome and empowered curators and praetors to deal with offenders.

Lex Fufia Caninia : see relevant chapter

Lex Aelia Sentia : see relevant chapter

Lex (Iulia) de vicesima hereditatum

It is clear that Augustus instituted a 5% inheritance tax in order to finance the aerarium militare (94). Dio ascribes the measure to A.D.6 and says that Augustus exempted close relatives and very poor people, claiming that he had taken over the idea from Caesar's writings. The tax was ratified in 13 B.C.^{AD}. Whether or not this measure is to be identified with the lex de vicesima hereditatum mentioned in the juristic sources has been the subject of scholarly debate (95). A passage of Gaius (96), for example, mentions a provision of the lex de vicesima hereditatum, that the securities required by this law should be exempt from the stipulation of the lex

Cornelia which limited the amount of money for which one person might be surety in relation to the same creditor and debtor. A section of Paul's Sententiae entitled de vicesima (97) also mentions a lex (par. 3) and outlines various rules concerning how and when the will is to be opened. The jurist, Macer, seems to have written two books of commentary 'ad legem de vicesima hereditatum' (98). The fact that Dio uses the word κατεστήσατο in the passage mentioned provides no proof that Augustus did not actually enact a law on this issue, given that Dio often uses loose, non-technical language, and while the jurists do not ascribe the law to Augustus, there is no evidence to associate it with anyone else. The institution of the vicesima hereditatum was not at all popular, as Dio's account suggests, since Italy had been more or less free from taxation in the late Republic. Nicolet (99) believes that since inheritances left to close relatives were exempt from the tax (as, evidently, were smaller inheritances) the effect of the law was to discourage the common practice of leaving money to friends and freedmen in favour of handing money down within families and thus "discouraging the breaking up and too rapid decay of private estates".

Lex Papia Poppaea : see relevant chapter

It is worth while mentioning a few laws which are sometimes ascribed to Augustus, although of doubtful authorship :

Lex Iulia maiestatis

Many scholars believe that Augustus enacted a lex Iulia maiestatis (100) designed to penalise any act which threatened the security of the state (101). Others believe that there was no Augustan lex Iulia maiestatis and that all of the juristic evidence for such a law refers to a Caesarian lex (102). The existence of a Caesarian lex Iulia maiestatis is clearly attested by Cicero (103). There is, however, no firm evidence for an Augustan lex and the arguments of those who believe that there was one are by no means conclusive. One of the main arguments, for example, is based on a

text of Marcian (104) in which the jurist, describing a provision of the law, uses the phrase 'iniussu principis', a phrase which, it is argued, cannot be Caesarian. Nor, however, can the phrase be Augustan : it is obvious that Marcian is not quoting the law verbatim in this text, but is representing the law as it was applied in his day. Another argument is based on the fact that, although the Caesarian law replaced the death penalty with that of aquae et ignis interdictio, Augustus was still able to put Caepio and Murena to death on charges of maiestas in 23 B.C., the assumption being that the Augustan law introduced the death penalty (105). But this argument is not conclusive either : as Allison and Cloud point out, there is plenty of evidence to show that Augustus, like subsequent Emperors, appropriated for himself a privileged position in relation to the law. In any case, the date most favoured for an Augustan lex Iulia maiestatis is 8 B.C., long after the conspiracy.

Lex Iulia de tutela

There are some references in the sources to a lex Iulia and a lex Titia (or a lex Iulia et Titia) which extended to the provinces the provision by the lex Atilia of a tutor to a person who did not have one (106). However, there is no evidence which associates this with the Augustan period, and it is more likely to have been Caesarian (107).

Lex Iulia peculatus, lex Iulia de residuis

These two laws were closely related, as the title of Justinian's Digest, 48.13, shows : 'ad legem Iuliam peculatus et de sacrilegiis et de residuis'. Some scholars believe that they were not, in fact, separate laws (108). This legislation was concerned with the embezzlement of public funds. Once again, however, there is no evidence to justify the assumption that it was Augustan.

Some scholars (109) believe in the existence of a lex de senatu (habendo) on the basis of passages from Dio which describe rulings made by Augustus regarding the Senate and a few references elsewhere

to a lex de senatu (110). The Dio passages describe how Augustus enacted (ἐνομοθέτησεν) that the magistrates in office should nominate certain equites to fill up the tribunate (111) and how he made a distinction between a senatusconsultum and a senatorial auctoritas (112). There is, however, no juristic evidence for a lex de senatu and the authors mentioned may be using the term 'lex' loosely. Dio's account certainly gives no indication that a formal law was passed to incorporate these various measures, and there is little justification for believing in the existence of an Augustan lex de senatu. Rotondi also lists a lex Iulia de magistratibus on the basis of a passage of Dio (113) where he says that Augustus allowed all to stand for office who possessed property worth 400,000 HS : but this supposed law also lacks firm evidence.

Rotondi (114) places in A.D. 4 a lex Iulia theatralis on the basis of two passages of Suetonius (115) which show that Augustus designated certain seats at the theatre to certain categories of spectator. Suetonius does not call the disposition a law, but a lex Iulia theatralis is mentioned by Pliny (116) and by Quintilian (117). There is, however, no juristic evidence for a lex Iulia theatralis and this measure cannot with certainty be designated a law.

These examples illustrate the difficulty often encountered in determining from the literary evidence the exact status of Augustan enactments. The juristic evidence, while more precise, often poses problems regarding dating (as well as the usual problems of corruption and interpolation). Dio, for example, uses a variety of terms whether describing provisions which we know from elsewhere to have belonged to statutes or not. He employs the terms ἐκέλευσε (118), διενομοθέτησεν (119), διενομοθέτησε (120), προσέταξε (121), ἀπέπειν (122), ἀπηγορεύσε (123) and κτεστῆσθε (124). Nevertheless, there is a sufficient number of well-attested Augustan statutes to warrant the conclusion that Augustus, far from abolishing the law-making function of the popular assemblies, made extensive use of it in order to enact measures encroaching on a large number of areas, some formerly free from intervention by statute. Statutes thus seem to have become more important than the praetorian edict in the

development of private law, a reversal of the Republican situation. Dio implies that Augustus showed deference to the popular assemblies by bringing many of his proposed laws to them in advance for discussion and possible alterations (125), although there can be little doubt that in general the approval by a popular assembly of legislation was merely a formality.

What exactly was the basis of Augustus's right to propose statutes? There is no need to enter into a discussion concerning the "constitutional position" of Augustus in order to answer this question. Dio says that he accepted an offer from the Senate of permission to enact any laws he wished, to be known as leges Augustae (νόμοι Αὐγούστου) (126). Since there is, however, no evidence of a single such lex Augusta, this was clearly not the basis on which he enacted laws. As he claims in Res Gestae (127), the basis of his right to propose laws at this time was his possession of tribunicia potestas, hence the large number of plebiscita known as leges Iuliae from the earlier part of the period. Later on, statutes tended to be proposed by the consuls rather than by Augustus, as their names show, but comparison of the content of these with that of the earlier statutes (for example, comparison of the content of the lex Iulia de maritandis ordinibus with that of the lex Papia Poppaea) suggests strongly that he was the author of both. Clearly, his auctoritas was such that the compliance of the consuls in proposing laws initiated by him was assured.

The thesis proposed by Arangio-Ruiz that all of the Augustan leges Iuliae belong to the period 18 - 17 B.C. has already been mentioned, together with its shortcomings. What does emerge clearly from the evidence is the observation just made, that the leges Iuliae which were plebiscita, proposed by Augustus, belong to the earlier part of the Augustan period, while the leges which were proposed by the consuls belong to the latter part of the period. There are various theories which might be proposed in order to explain this apparent change of policy: that Augustus, for example, did not wish to appear to be monopolising the right to propose statutes, that insecurity in the earlier period led him to emphasise his possession

of tribunicia potestas, or that it was not until the later period that he felt sufficiently confident of the acquiescence of the consuls to entrust legislation to them. Such theories are purely speculative, and it may be that the answer lies in the simple fact reported by Dio (admittedly in the context of elections) that Augustus gave up attending popular assemblies when he was older (128).

SENATUSCONSULTA

A fair number of senatusconsulta are attested for the Augustan period (129), some relevant to particular situations, others designed to have a longer lasting application. Belonging to the former category are many which voted honours to Augustus and to his relatives and friends (130) which there is no need to enumerate. In the latter category are those enacted in order to supplement statutes and to clarify their application: here too there is little point in enumerating all of those associated with Augustan statutes since most of these were probably post-Augustan (131). As in the case of statutes, my concern is with sca belonging to the period after 19 B.C. which are well attested.

The best known of the Augustan sca with a specific application is the sc de ludis saecularibus of 17 B.C. known from an inscription (132) which permitted those debarred by the lex Iulia de maritandis ordinibus from watching games to do so on the occasion of the ludi saeculares. Another inscription (133) mentions an sc which gave to Augustus the right to conduct repairs on a bridge (134). Two inscriptions (135) attest sca authorising the building of arches (136) and a third (137) is thought to refer to an sc concerning the boundaries of the Tiber (138).

Frontinus (139) describes a series of six sca passed in 11 B.C. relating to aqueducts. These sca gave to the Emperor a formal right

to ensure the water supply of Rome (a task previously undertaken by Agrippa) and outlined, in case of disputes, the competence and jurisdiction of the curatores which would formerly have been determined by the praetor. It is likely that these sca were passed in order to deal with the immediate necessity and that the lex Quinctia was passed to provide fuller legislation on the subject.

The Augustan edicts to Cyrene have already been mentioned in connection with the leges iudiciariae. To the fifth edict was appended an sc Calvisianum de pecuniis repetundis of 4 B.C. which provided a quicker procedure for extortion charges before the Roman Senate : the penalty in case of a successful prosecution was merely the restoration of the amount extorted. Apart from introducing this important procedural reform, the sc does not seem to have made any innovation in the law of extortion (140). Another well-known Augustan sc was the sc Silanianum of A.D. 10 which made provision for the torture and trial of slaves whose master had been killed, presumably by one of them (141). All of the slaves in proximity to the master when he was murdered were to be tortured, and if one of the slaves denounced the killer, he was to be free without an act of manumission : this, as Arangio-Ruiz shows (142), was an important innovation, introducing as it did the concept of manumission without an act of the master. Buckland (143) argues that the aim of the sc was to ensure that the murder be avenged (previously the task of the relatives) and hence the will was not to be opened before a quaestio had been held. This meant that no slave could receive testamentary manumission and hence be spared torture before the murderer had been found. Relating to this sc was an sc Aemilianum of A.D. 11 (144), which stipulated a period of time for the cognitio resulting from the sc Silanianum.

Suetonius mentions an Augustan sc which forbade equites to take part in plays or gladiatorial shows (145) and another (called a decretum patrum) which assigned certain seats at the theatre to senators (146). A passage of Dio (147) describes how Augustus made a proposal to the Senate (γνώμην ἐς τὴν βουλὴν ἐσήνεγκε) that money should be set aside for the payment of soldiers. This led to

the setting up of the aerarium militare. Elsewhere (148) Dio describes a senatorial decree (δογμα ἐγερευτο) passed in Augustus's absence which aimed to enlarge the diminished senatorial body by laying down that the vigintiviri be chosen from the equites. Dio's use of different terms to describe what seem to have been sca is indicative of the difficulty involved in determining which Augustan enactments were strictly sca. This difficulty is further illustrated by some passages of the Res Gestae in which Augustus describes measures proposed by the Senate or by the people and the Senate (149) without clarifying the status of such proposals. This, together with the problems involved in dating the various sca attached to Augustan laws which are mentioned in the juristic sources, makes any attempt at a list of Augustan sca rather unsatisfactory.

There is no room here to discuss fully the relationship between Augustus and the Senate. As Nicolet shows (150) Augustus made official (although not compulsory) the hereditary tendency in the senatorial order, and made the division between this and the equestrian order more clear cut. The Senate still had a large part to play in the Augustan system, and not merely in order that Republican sentiment be satisfied. The senatorial order was important and useful both socially and politically to Augustus, and in his membership of the Senate there was mutual benefit. One of the continuing functions of the Senate lay in law-making, and since Augustus tended to enhance rather than to diminish the prestige and self-consciousness of senators, the Senate's decrees would not have lost any of their efficacy. A variety of issues was regulated by sca, most of those for which there is evidence relating to honours voted to Augustus and others, celebrations of victories, public works and the amendment and application of statutes : these are the sorts of issues also regulated by sca under the Republic. The sc which stands out is the sc Silanianum which dealt with an issue of private law, an issue which under the Republic would have been dealt with, if not by the familia, then by the praetor. It is thus difficult to see why it was regulated by sc and this suggests an extension of the law-making competence of the Senate into areas not formerly regulated by it. The Senate's influence over criminal law was also extended by its

institution as a court in which interpretatio had to be exercised (151).

While the Senate under Augustus was accorded deference and a continuing role in law-making, the real influence exercised by individual senators over the content of sca was greatly undermined by the power and auctoritas of its most prominent member. Augustus was entitled to sit between the consuls at meetings of the Senate and to speak first at any meeting, but he seems to have exercised control over senatorial proceedings mainly through his consilium. Dio (152) says that Augustus took the consuls, one of each of the other kinds of officials and fifteen men chosen by lot from the Senate as advisers for periods of six months ; he adds that this came to be the way that legislation proposed by the Emperors was communicated to the remaining senators. Elsewhere (153) Dio says that late in life when Augustus was unable to attend meetings of the Senate he asked for 20 annual counsellors, and that any measure decided upon by him with Tiberius, his counsellors, the consuls of the year, the consuls designate, his grandchildren and others called upon, was regarded as valid, as if it had been agreed upon by the whole Senate. Dio adds that he had, in any case, enjoyed these rights in practice. It was not until much later that the issuing of sca to follow orationes by the Emperor in the Senate sometimes became superfluous, but the nature of many of the sca for which there is evidence shows that the Senate and its law-making activities provided another useful channel through which Augustus might exercise his will.

EDICTS

As proconsul of a large province, Augustus was entitled to issue edicts relating to the affairs of these territories. He did not, however, limit his edicts to apply to the inhabitants of his own provinces, but issued some which were directed to the inhabitants of "senatorial" provinces (154) and others concerning private law issues which were clearly designed to apply to all Roman citizens.

Several Augustan edicts have been found on inscriptions, the most famous being the Cyrenian edicts, the first four dating from 7/6 B.C., the fifth from 4 B.C. (155). The nature of these illustrates the fact that edicts were used as channels to inform provincials of the state of the law on certain issues and to enforce the existing law more often than to introduce new rules (156). That the sc Calvisianum was appended to the fifth edict has already been mentioned. The edicts also informed the inhabitants of Cyrene of various rules regarding the administration of justice in the province, some of which were probably introduced at Rome by the judiciary laws. Some of the provisions of the edicts are addressed to the provincial governor, others to the provincials themselves. There were rules concerning the governor's consilium with whose aid he judged cases, and concerning juries of capital cases which were to be taken from lists published by the governor at the beginning of the year and to be made up equally of Greeks and Romans unless the defendant wished otherwise. This last provision was aimed at an abuse whereby rich provincials were sometimes brought before governors on trumped-up charges, tried before an all-Roman jury and condemned (the accuser presumably hoping for a share of the confiscated property). Such rules were clearly designed to protect provincials from abuses, while another edict which regulated the privileges of Roman citizens in the provinces forbade those who had obtained the citizenship to claim exemption from liturgies. A letter of Pliny to Trajan (157) shows that analogous edicts were issued relating to Asia and to Bithynia, and a text from Justinian's Digest (158) attests an edict relating to the affairs of Egypt. Other edicts were issued concerning the affairs of the Jews, such as that attested by Josephus (159) which granted permission to the Jews to follow their own customs : Augustus claims here the approval of the Roman people.

There is also evidence for edicts concerning the affairs of the army, an issue closely related to the provinces (160) and concerning public works (161). Suetonius and Dio describe as edicts some proclamations made to all Roman citizens which look more like

propaganda than legislative acts. Thus Suetonius (162) claims that Augustus proclaimed in an edict his desire to be the author of the best possible constitution, and Dio (163) that Augustus set forth in an edict the aspect of the stars and the time of his own birth. Much more important are a few Augustan edicts which regulated issues of private law. Ulpian (164) claims that by the terms of edicts of Augustus and, subsequently, of Claudius, women were forbidden to intercede for their husbands. A fragment (165) prescribes a penalty for a person who 'contra edictum Augusti rem litigiosam a non possidente comparavit'. Another Digest text (166) mentions an edict of Augustus which forbade a father to disinherit a son serving as a soldier. Two further texts describe Augustan edicts which were designed to apply other measures: D.29.5.3.18 shows that the sc Silanianum was enforced by edict, and D.48.18.8pr. mentions an Augustan edict proposed to the consuls concerning quaestiones, probably an application of the judiciary laws.

Arangio-Ruiz (167) believes that Augustus only issued edicts relating to the provinces, and that none of these enactments mentioned which concerned issues of private law for general application were genuinely edicts. He claims, for example, that D.16.1.2pr. is corrupt and that, since any prohibition against intercessio would have had to be incorporated into the praetor's edict, the 'eorum' of the text should be replaced by 'praetorum', making for better style and sense. He also argues that, since the prohibition attested in frag. iure de fisci 8 carried with it the penalty of payment to the fiscus, it was probably incorporated into instructions to the officials in charge of the Imperial finances.

This theory of Arangio-Ruiz is an attractive one, especially because it is so difficult to discern the basis of any right enjoyed by Augustus to issue edicts relating to private law for general application. As has already been mentioned, he possessed the right, as proconsul, to issue edicts relating to the affairs of his own province, and it is not surprising that he extended this to provinces which did not belong to him, probably on the ground of possessing maius imperium. But he did not claim to possess the imperium of a

praetor and was therefore not entitled to issue edicts relating to private law for general application as part of the praetorian edict. (This may well explain why the praetorian edict became less important in the development of private law under Augustus than it had been in the Republic). His issuing of edicts is unlikely to be linked to imperium consulare, for if he did possess this, he did not use it as a basis for influencing the law in other ways permissible to a consul, such as proposing statutes to the comitia. However, while the theory proposed by Arangio-Ruiz would get over this problem, there are other edicts mentioned in the sources which he does not account for, and his rejection of all of the juristic references to edicts regulating private law issues is not convincing. This is not to deny that many Augustan edicts were indeed issued for the provinces, often to apply rules already incorporated into other enactments, but there were others for more general application which are portrayed as innovatory. Those which related to private law issues seem to have been based on a right simply appropriated by Augustus to issue such enactments as a quick and direct means of supplementing statutes and sca. The edict mentioned in D.48.18.8pr. is addressed not to a provincial governor nor to provincials, but to the consuls. He was indeed a possessor of imperium, but the extent of his competence in the realm of edicts must also have depended on his auctoritas. It is significant that there is a notable lack of evidence for any innovatory edicts issued by any other magistrates. *

OTHER AUGUSTAN ENACTMENTS

While my concern is mainly with those enactments which may confidently be described as statutes, sca and edicts, it is worthwhile briefly mentioning various enactments of uncertain status which are attested in the juristic sources and listed by Gualandi (168). A few measures are preceded by the words 'Augustus constituit', notably the surprising innovation whereby a filiusfamilias miles was permitted to make a will with his peculium castrense (169) while another lays down that a slave may be freed

before the prefect of Egypt 'ex constitutione divi Augusti'. No doubt the jurists (or the compilers) had in mind here the system which developed later whereby the pronouncements of the Emperor either in reply to requests for rulings or in his capacity as a judge, known collectively as constitutiones, came to overshadow all other law-making channels and were acknowledged by the jurists as being law-making. Two well known passages of Justinian's Institutes describe how Augustus repeatedly urged the consuls to use their authority to ensure that trusts be legally enforced (170) and how he gathered together the jurists and asked them to ratify the legal validity of codicils (171). Honoré (172) sees Augustus here taking on the reforming role of a Republican praetor. What in fact seems to emerge most forcibly from these passages is the variety of traditional channels used by Augustus in order to enforce his will and the enormous auctoritas enjoyed by him which enabled him to gain the cooperation of consuls and jurists.

In a passage concerning certain invalid marriages we find a ruling preceded by the words 'Augustus interpretatus est'. This suggests the beginnings of the system of decreta : the auctoritas of the Emperor made his decisions more influential than those of any other judge, and they came to be acknowledged by the classical jurists as being legally binding. Gualandi also lists a ruling concerning the discipline of soldiers preceded by the words 'in disciplina Augusti ita cavetur' (173), and another regarding the bodies of those condemned to death with the words 'divus Augustus libro decimo de vita sua scribit' (174). A grant of the ius Italicum to the colony of Berytensis is described by Ulpian as 'Augusti beneficiis' (175).

THE RÔLE OF THE JURISTS

The text cited above (176) which portrays Augustus persuading the jurists to ratify the legal validity of codicils confirms that the jurists had a part to play in the formulation of law under

Augustus. The exact role of the jurists under Augustus is a much debated issue. Clearly there was still a need for advice to be submitted by those who were experts to magistrates and to judges (including the Emperor) who, as under the Republic, were men with no particular legal expertise. The controversy centres on a statement made by the second century jurist, Pomponius, preserved in Justinian's Digest (177) in which he attributes to Augustus a measure which gave to certain favoured jurists the right to give opinions 'by his authority'. This seems to be confirmed by Gaius (178) who says that the answers of the jurists are the decisions and opinions of those who have been authorised to lay down the law. Scholars are divided over the exact status which this gave to the opinions of jurists in the Augustan period who enjoyed or who did not enjoy this privilege. Gaius, writing in the second century, adds that an opinion held by all of the 'privileged' jurists by this time actually had the force of law. Kunkel (179) believes that the responsa of the 'favoured' jurists were legally binding only when written and delivered under seal, while de Visscher (180) argues that legal force was given to the rulings of jurists on certain important issues but not to all of the responsa of any particular jurist. Guarino (181) believes that the ius respondendi merely made the responsa of the favoured jurists more persuasive and that they were not made legally binding until the time of Tiberius (182). However, it seems arbitrary to try to pinpoint a date at which the 'authorised' responsa gained the force of law in the absence of firm evidence. Frier (183), pursuing his argument that jurisprudence grew in importance as an influence on the law towards the end of the Republic regards the introduction of the ius respondendi as the climax of this growth.

I do not believe that Augustus gave law-making status to the responsa of the favoured jurists, but the 'authorisation' of the emperor must, nevertheless, have greatly increased their authority and influence, gradually leading to the situation described by Gaius, while the opinions of other jurists must have become, if not valueless, then of very limited worth. The important point about the attitude of Augustus to the jurists is that, while he recognised

their value, he wished to make those who were able to influence the law to some extent dependent on him and on his patronage. More importantly, perhaps, he wished that the most eminent jurists should be identified with him, in other words, that juristic activity should be associated with his rule. The trend of the late Republic towards equestrian jurists was reversed under Augustus and jurists of senatorial rank were patronised. This, no doubt, enhanced the prestige of juristic science (as well as fitting in with Augustus's general policy towards the Senate) and probably contributed to the growing 'authority' of the jurists.

The best known jurists in the Augustan period were Trebatius, Capito and Labeo (who was supposed to have been an outspoken opponent of the régime). According to Pomponius (184), it was from Labeo and Capito that the two schools of jurists, the Proculians and Sabinians, derived, even though they were named after later jurists : this, however, has been questioned. If it is true, it suggests that Augustus gave to them a free hand in exercising interpretatio.

CONCLUSION

In the light of this survey, how was the transition from Republic to Empire reflected in law-making under Augustus, and to what extent did Augustus preserve the old system or lay the foundations for a new system? It has been shown that all of the Republican channels of "declared" law were preserved. Thus the popular assemblies continued to pass leges and plebiscita proposed by magistrates, several of these regulating issues of private law previously untouched by statutes, sca were enacted on an even wider range of issues, magistrates still issued edicts and jurists continued to submit responsa. However, given the power and auctoritas enjoyed by Augustus, these channels could not possibly remain exactly as they had been in the Republic. Thus the right to propose plebiscita to the concilium plebis was monopolised by Augustus to an extent that would not have been possible for any tribune of the plebs in the Republic, sca were now promulgated from a changed Senate dominated by one figure to a degree unprecedented in

Republican times, there is little evidence of any magistrate other than Augustus innovating by means of edicts so that the praetorian edict ceased to play the part it had played during the Republic in the development of private law, and the influence of jurists on the law, while apparently enhanced, was dependent on their being 'authorised' by Augustus. It is unlikely that Augustus preserved the various traditional channels only in order to satisfy Republican sentiment. It was useful for him to preserve a system which possessed many checks and balances and which provided a variety of different channels through which he might exert his influence over the formulation of law.

Augustus influenced the formulation of law not only by means of the various powers which he enjoyed (proconsulship, tribunicia potestas etc.) but also by means of his auctoritas. Clearly this auctoritas played an important part in the willingness of the Senate and people to vote to him the various powers, but it also enabled him to influence the jurists (185) and to persuade the consuls both to use their authority at his bidding (186) and to propose laws for which he was undoubtedly responsible (such as the lex Papia Poppaea). This auctoritas must also have given to the decisions of Augustus in his capacity as a judge a higher status than that of the decisions of anyone else and thus the foundations were laid for the system of Imperial decisions, known as decreta, which were acknowledged by the classical jurists as being law-making (187). The foundation was also laid for the system of Imperial rescripts, already mentioned, whereby the Emperor's replies to requests from rulings from magistrates and from individuals were also regarded by the classical jurists as having the force of law.

The pronouncements of the Emperor, whether as a judge or in reply to petitions (which, by the second century, seem to have poured in to him from all over the Empire and which often required a simple statement of the law as it stood), gradually came to overshadow all of the more traditional channels of law-making. Thus the passing of statutes through the popular assemblies died out by the end of the first century A.D., Imperial orationes in the Senate

often made sca superfluous, the lack of innovation by praetors resulted in the consolidation of the edict in the reign of Hadrian, and jurists came to be employed to a great extent within the Imperial rescript system instead of giving independent advice to magistrates. Of course, none of these developments occurred in the reign of Augustus, but they were nevertheless the logical outcome of the undermining effect on the traditional law-making channels of a figure possessing the power and auctoritas of Augustus.

NOTES

(1) See e.g. A. Watson, Law-making in the later Roman Republic, Oxford, 1974, P. Stein, "The sources of law in Cicero", Estratto di atti del III colloquium Tullianum, Rome, 1976, pp. 19 ff..

(2) See Crifò, "Attività normativa del senato in età repubblicana", BIDR, 71 (1968), pp. 31 ff. who cites one sc relating to private law which he believes to be Republican.

(3) See Watson op. cit. pp. 21 ff. with literature cited there.

(4) Gai. Insts. 1.4, D.1.3.9, Ulp. 16 ad edictum.

(5) Stein, op. cit. p. 27.

(6) Gai. Insts. 1.2, 6.

(7) Watson, op. cit. pp. 35 ff..

(8) D.1.1.7.1, Papinian 2 definitionum.

(9) Frier, The Rise of the Roman Jurists, Princeton, 1985, esp. pp. 267 ff..

(10) Frier adduces various reasons for the attraction of jurisprudence to equites, notably their "general desire for an increase in legal security", p. 257.

(11) On the distinction between legal enactments and 'administrative acts' see Biondi, Scritti Giuridici II, Milan, 1965, pp. 84 ff..

(12) Rotondi, Leges Publicae Populi Romani, Milan, 1912; repr. Hildesheim, 1962.

(13) Gualandì, Legislazione Imperiale e giurisprudenza, Milan 1963.

(14) Biondi & Arangio-Ruiz, Acta Divi Augusti, Rome, 1946, pp.231ff., reproduced in Biondi, op.cit., who also provides a list of such compilations, p.191.

(15) Arangio-Ruiz, "La legislazione" in Studi in occasione del bimillenario Augusteo, Rome, 1938, ch.3, pp.100ff..

(16) DI 42.3, DA 32.

(17) See the literature cited by Arangio-Ruiz op.cit.p.135.

(18) CIL 6.4416.

(19) Mitteis, Römisches Privatrecht bis auf die Zeit Diokletians I, Leipzig, 1908, p.395, n.22.

(20) CIL 6.10299.

(21) see esp. F.M.de Robertis, Il Diritto Associativo Romano, Bari, 1938.

(22) Dio 54.16.1, Suetonius DA 34.

(23) D.48.14.

(24) Sent. 5.30a.

(25) It has been suggested that the title of this section is an error, and that Paul is, in fact, describing a provision of the lex Iulia de vi : this is unlikely, however, given that there is another section of the Sententiae, 5.26, devoted to the lex Iulia de vi. The penalty prescribed, however, is relevant to the crime of vis. Biondi, op.cit. p.226, argues that the penalty of deportatio was introduced at a later date. See also, on the lex de ambitu, Mommsen, Römisches Strafrecht, Leipzig, 1899, repr. Darmstadt, 1955, pp.867ff..

(26) see especially Girard, ZRG 34 (1913), pp.295ff..

(27) e.g. leges iudicariae, lex iudiciaria etc..

(28) see Biondi, op.cit.p.227 n.1, for a list of the different appellations with references and p.227 for a list of those who believe in 3 laws.

(29) Strafrecht cit.p.654, but see Girard, op.cit., for a refutation.

(30) 54.18.2 cf.D.48.14.1.4, Modestinus 2 de poenis.

(31) D.48.14.1.4.

(32) DA 32.

(33) 1.10.4.

(34) Noctes Atticae 14.2.1.

(35) In Scauro.

(36) Insts.4.30-31

(37) See A.H.M.Jones, The Criminal Courts of the Roman Republic and Principate, Oxford, 1972, pp.91ff., who cites evidence for the emergence of these courts. The courts of the great prefects were probably established later.

(38) 197 - 8.

(39) D.4.8.9.2.

(40) D.4.8.4.1.

(41) D.5.1.2.1

(42) Gai.Insts.4.104

(43) D.48.2.3pr., Paul 3 de adulteriis.

(44) D.48.2.12.2, Ven.Sat.2 de iudiciis publicis.

(45) D.47.15.3.1, 1 publicorum iudiciorum.

(46) D.48.3.2pr., 1 de adulteriis.

(47) D.38.10.10pr., liber singularis de gradibus.

(48) D.48.14.14.

(49) CIL 10.4842.

(50) Insts. 3.87.

(51) C.Th.4.20, CJ 2.11(12).11.

(52) See Biondi, op.cit., for lists of scholars who take these differing views.

(53) 54.3.6.

(54) Strafrecht cit.p.334 n.3, p.445 n.1.

(55) See Biondi, op.cit.p.177 n.1, p.214.

(56) The legislation de vi also bore some relation to the ambitus law, for it penalised actions which were thought to threaten the security of the state.

(57) Collatio 9.2.2.

(58) D.48.6.

(59) D.48.7.

(60) 9.2.

(61) D.48.6.7; Ulpian 8 de officio proconsulis ; Paul, Sent.
5.26.1,2.

(62) D.48.6.8, Maecianus 5 publicorum.

(63) D.48.6.1, Marcianus 14 institutionum.

(64) D.48.6.3pr., Marcianus 14 institutionum.

(65) D.48.6.10pr., Ulpian 68 ad edictum.

(66) D.48.6.3.4.

(67) 5.30a.

(68) D.48.6.10.2.

(69) 5.16.3.

(70) "Augustus, government and the propertied classes" in Caesar Augustus eds.Millar & Segal, Oxford, 1984, ch.4, p.114.

(71) D.48.6.3.3,5, 48.7.1.1, Marcianus 14 institutionum.

(72) D.48.6.10.1, 48.7.2., Scaevola 4 regularum.

(73) D.48.6.3.1, 5pr., Marcianus 14 institutionum.

(74) Sent.5.26.4.

(75) D.48.7.4pr., Paul 55 ad edictum.

(76) D.41.3.33.2, 44 digestorum.

(77) Insts.2.45.

(78) op. cit. p.223.

(79) D.1.21.1pr., Papinian 1 quaestionum.

(80) D.48.2.3.4, Paul 3 de adulteriis.

(81) Collatio 9.2.1-3.

(82) D.22.5.3.5, 4 de cognitionibus. Similar exemptions were made in other laws, such as the judiciary laws.

(83) For details of Republican statutes and interdicts relating to vis see especially A.Lintott, Violence in Republican Rome, Oxford, 1968, Brunt, Italian Manpower 225 B.C. - A.D.14, Oxford, 1971,pp.551ff..

(84) op.cit. p.557.

(85) DA 34.

(86) Noc. Att. 2.24.14.

(87) 54.16.

(88) See Biondi op. cit.p.281.

(89) See Fitzler-Seeck in Pauly-Wissowa X, 354.

(90) D.48.12, 48.1.1, Macer 1 de publicis iudiciis, Just.Insts. 4.18.11.

(91) Strafrecht cit. p.852.

- (93) Volkmann, Zur Rechtsprechung in Prinzipat des Augustus, Monaco, 1935, p.189 n.1.
- (94) e.g. Suetonius, DA 49, Dio 55.25.5.
- (95) See Biondi op.cit.p.302.
- (96) Insts.3.125.
- (97) 4.6.
- (98) See D.35.2.68
- (99) op. cit. p.110.
- (100) D.48.4, Paul, Sent. 5.29.
- (101) e.g. Mommsen Strafrecht cit.p.541 n.3, Rotondi op.cit.p.453, Biondi, op.cit.p.181.
- (102) e.g. Arangio-Ruiz op.cit.pp.136-7, Allison & Cloud, Latomus 21 (1962) pp.711ff..
- (103) Philippics 1.9.23.
- (104) D.48.4.3, 14 institutionum.
- (105) See R.S. Rogers, "Treason in the early Empire", JRS 49 (1959) pp.91ff..
- (106) Gai. Insts.1.185 = Just. Insts. 1.20pr..
- (107) See Biondi op.cit.p.282.
- (108) See Biondi op.cit.p.181 n.6.

(109) e.g. Rotondi op.cit.p.452, Biondi op.cit.p.238.

(110) Gellius Noc.Att.4.10.1, Pliny Ep.5.13.5, Seneca de
brev.vit.20.

(111) 54.30.2.

(112) 55.3.

(113) 54.17.3.

(114) op.cit.p.462.

(115) DA 40,44.

(116) Hist.Nat.32.2.(8).32.

(117) Inst.Orat.3.6.18-19..

(118) 54.17.2, 54.18.2, 54.35, 55.5.4, 55.31.4.

(119) e.g. 54.17.

(120) 55.3.2.

(121) 54.16.

(122) 54.18.2.

(123) 56.27.2.

(124) 55.25.5.

(125) 53.21.3.

(126) 54.10.6.

(127) 6.2.

(128) 55.34.2.

(129) For a list of Augustan sca see O'Brien Moore, Pauly-Wissowa Suppl.VI pp.808ff., Volterra "Senatusconsulta", Nuovo Digesto Italiano 12.1.25ff..

(130) E.g. Suet.DA.57, Dio 53.32.5-6, 54.25.3.

(131) e.g.D.23.2.43.10-11,Ulpian 1 ad legem Iuliam et Papiam, 24.1.3.1, Ulpian 32 ad Sabinum.

(132) CIL.6.4.2.32323-4.

(133) CIL.6.1.878.

(134) Caesar divi f(ilius) Augustus pont(ifex) max(imus) ex sc reficit. See Biondi op.cit.p.325 n.4.

(135) CIL.6.1.1384,1385.

(136) Biondi op.cit.p.333 n.4, p.337 n.2.

(137) CIL.6.1236a.

(138) See Biondi op.cit.p.349.

(139) De Aquis urbis Romae 99-101, 103-108, 124-127.

(140) Some scholars, however, believe that it did, see Arangio-Ruiz op.cit.pp.143-4, and on extortion legislation in general, A.Lintott "The leges de repetundis and associate measures under the Republic", ZSS 1981 pp.206-7.

(141) D.29.5; some scholars believe that it was post-Augustan, see Biondi op.cit.p.338.

(142) op.cit.p.126.

(143) The Roman law of Slavery, Cambridge, 1970 p.96.

(144) D.29.5.13, Ven.Sat.2 de publicis iudiciis, see Biondi op.cit.p.342.

(145) DA 43.

(146) DA 44.

(147) 55.24.9.

(148) 54.26.5-7.

(149) e.g.5.1, 6.1, 8.1.

(150) op.cit.pp.93ff..

(151) See Bauman, "Leges iudiciorum publicorum", ANRW ed.Temporini, Berlin, 1980 vol.13 pp.149ff..

(152) 53.21.

(153) 56.28.2.

(154) e.g. Cyrenian edicts.

(155) see especially F.de Visscher, Les Édicts d'Auguste découverts à Cyrène, Louvain-Paris, 1940.

(156) Orestano "Gli editti imperiali" in BIDR 1936-37 pp.219ff. has, however, argued that Imperial edicts were law-making.

(157) Ep.10.79(83).

- (158) D.40.2.21, Modestinus 1 pandectarum.
- (159) Jewish Antiquities 16.762-5.
- (160) BGU 628 attests an edict de privilegiis vetanorum.
- (161) e.g. CIL.10.4842, edictum de aquaeductu Venafrano.
- (162) DA 28.
- (163) 56.25.5.
- (164) D.16.1.2pr., 29 ad edictum.
- (165) frag.de iure fisci 8.
- (166) D.28.2.26, Paul 3 sententiarum.
- (167) op.cit.p.145.
- (168) op.cit.
- (169) Ulp.Reg.20.10, confirmed in Just.Insts. 2.12pr. which says 'ex auctoritate divi Augusti'.
- (170) 2.23.1 : it is interesting that Augustus did not use his own alleged imperium consulare here.
- (171) 2.25pr..
- (172) Emperors and Lawyers, Oxford, 1981 p.3.
- (173) D.49.16.12.1, Macer 1 de re militare.
- (174) D.48.24.1, Ulpian 9 de officio proconsulis.
- (175) D.50.15.1.1, Ulpian 1 de censibus.

(176) Just. Insts. 2.25pr..

(177) D.1.2.2.49, sing.enchiridii.

(178) Insts.1.7.

(179) ZSS 66 (1948),pp.423ff. Herkunft und soziale Stellung der römischen Juristen, Graz-Wein-Koln, 1967.

(180) "Le ius publice respondendi" RHD 15 (1936) pp.615ff..

(181) "Il ius publice respondendi", RIDA I (1949) pp.401ff.

(182) Other scholars believe that this happened later still.

(183) op.cit.

(184) D.1.2.2.47.

(185) Just.Insts.2.25pr. discussed above.

(186) Just.Insts.2.23.1, discussed above.

(187) The basis of Augustus' right to judge cases is, in fact, a debatable issue. As proconsul of a large province, he possessed the right (which he mostly delegated to legates) to try cases arising there. This meant that Roman citizens dissatisfied with the judgments passed by his representatives could appeal to him just as they might appeal to an assembly of the Roman people during the Republic. The privilege of appeal seems also to have extended to citizens in "Senatorial" provinces, perhaps on account of Augustus's maius imperium. It is more difficult to explain the basis of his right to judge cases in Rome and Italy. Some scholars explain this in terms of his possession of consular imperium, others in terms of tribunicia potestas. But neither the rights associated with a consul nor a tribune explain his

rights associated with a consul nor a tribune explain his competence to judge criminal cases which should have come before inappellable quaestiones. For instance, we hear of Augustus presiding over cases of forgery and of treason (Suet.DA 33.2, Tac. Annales 1.72.4). It is equally difficult to explain his competence to investigate civil suits. The only feasible conclusion is that he merely appropriated for himself and for his consilium the right to judge such cases, just as he gave to the Senate the right to judge certain cases.

CHAPTER 2

THE 'LEX IULIA ET PAPIA'(1)

The lex Iulia et Papia is a collective term employed in the juristic sources for two distinct Augustan marriage laws of similar content, the lex Iulia de maritandis ordinibus and the lex Papia Poppaea.

The full title of the lex Iulia de maritandis ordinibus is attested by the jurists Ulpian and Paul (1). Suetonius also mentions a law 'de maritandis ordinibus' (2). Dio's account of events suggests that a law of this nature was passed around 18 B.C. (3); this date is supported by the evidence for the sc de ludis saecularibus which confirms that the law was in force by 23rd May, 17 B.C., when the sc was passed (4). A dispensation was granted on the occasion of the ludi saeculares to the unmarried who would, by the terms of the lex Iulia, have been debarred from the privilege of watching public games (5). There is no evidence to suggest an alternative date, and scholars have generally accepted that of 18 B.C.. The lex Papia Poppaea was a much later law. It was certainly passed in A.D. 9, when the consuls to whom it owes its name were M. Papius Mutilus and Q. Poppaeus Secundus. The date is confirmed by Dio (6). The full title is mentioned by Ulpian and by Tacitus and Dio (7). It is frequently found in its abbreviated form, lex Papia (8).

None of the non-juristic sources is very specific about the chronology of events surrounding the passing of the two laws. Suetonius includes the lex de maritandis ordinibus in a list of laws passed by Augustus without specifying a date. He mentions various emendations made later by Augustus, but does not actually acknowledge a second law. Gellius also only mentions the lex Iulia (9). Tacitus mentions the Papia Poppaea twice, adding that Augustus had it passed in his old age, and that it followed the 'Iuliae rogationes' (10). Dio summarises some of the provisions of the lex Iulia under the events of 18 B.C., without actually naming it, but he does name the

lex Papia after mentioning various modifications which were made to the first law in response to a demonstration by the knights against its severity (11). Scholars generally associate these measures with the lex Papia Poppaea.

There is evidence in Justinian's Digest of books of commentary ad legem Iuliam et Papiam by the jurists Ulpian (20 books), Gaius (16 books), Paul (10 books) (12), Iunius Mauricianus (6 books) and Marcellus (5 books). Hence the term 'lex Iulia et Papia' is a popular one among modern scholars, and the two laws are often treated as one. No doubt there was some tralatician material carried over from the lex Iulia to the lex Papia Poppaea, and there are areas in which the provisions of the individual laws cannot, from the evidence, be separated from one another. Nevertheless, the term 'lex Iulia et Papia' (or a similar one) rarely appears in the juristic sources (13) apart from its regular application to the juristic commentaries, while there is a considerable number of references to the lex Iulia and to the lex Papia Poppaea individually (14), sometimes in the context of the jurist making a comparison between the provisions of the two laws. It is clear from the jurists' comments that the second law was designed to revise and to complement, not to completely supersede, the first law. There are of course, enormous difficulties involved in trying, from the juristic evidence, to separate the provisions of the two laws. For example, we do not know enough about the transmission of the texts of laws, and there are the problems of suspected interpolation and corruption of the juristic texts. However, precision must have been a primary consideration to jurists involved in the process of transmission of the texts of laws. Since they discuss some provisions in their commentaries without mentioning either law in particular, and in a few cases assign provisions to a collective lex Iulia et Papia (presumably when the provisions of the two laws in a certain area cannot be separated) this suggests that they had good reason for sometimes associating a provision with one or other of the laws. If they had mentioned the individual laws completely at random, one would expect frequent contradictions among them, and this is not the case.

A few scholars have attempted to disentangle the provisions of the two laws, and to reconstruct them individually, notably Gothofredus, Heineccius and Joers (15). Gothofredus attempted to reconstruct the exact wording of the law in its final form in A.D. 9 : he divided it into two sections, The 'lex de maritandis ordinibus' (28 chapters) and the 'lex caducaria' (9 chapters). Heineccius suggested that there were forty-four chapters in the 'lex de maritandis ordinibus' and fifteen in the 'lex caducaria'. Generally, scholars have been content with the distinction that the lex Iulia was concerned with marriage and the lex Papia Poppaea with the procreation of children. Such a distinction is, however, inadequate in relation to such complex statutes, and there is generally a lack of historical comment accompanying the proposed reconstructions and divisions. An examination of the relationship between the two laws appears in Chapter 3.

A study of the excerpts from the jurists' commentaries ad legem Iuliam et Papiam provides assistance in any attempt to reconstruct the provisions of the two laws. There are of course, certain problems here: as already mentioned, many excerpts are suspected of interpolation or corruption; the jurists clearly discuss later developments as well as the original provisions of the laws; it is difficult to assign some of the excerpts to any particular issue; there are some books of commentary from which we have no excerpts; and there is certainly not complete uniformity among the jurists in their order of commentary. Nevertheless, there is enough consistency to make certain conclusions possible. An obvious example is that most of the excerpts relating to permitted and forbidden marriages appear in the early books of the jurists' commentaries, suggesting that provisions on this topic appeared at the beginning of the law (16).

It is therefore useful to classify the individual Digest excerpts which are taken from the jurists' commentaries ad legem Iuliam et Papiam under the author and book of commentary to which they are attributed. Thus an attempt may be made to determine the

various topics discussed by the jurists and to gain some idea of the order in which they were discussed. (Only a very brief summary of the content of the excerpts is necessary for this purpose. Many of the excerpts listed are suspected of interpolation, but for present purposes it is unnecessary to detail these) (17).

GAIUS 'ad legem Iuliam et Papiam'

Liber 1

- 23.1.17: Just causes for extensions of betrothals.
48.19.29: Condemnation 'ultimo supplicio'.

Liber 2

- 23.2.30: Inefficacy of simulated marriages.

Liber 3

- 28.6.5: Rôle of substitutes in cases of incapacity of heirs.

Liber 4

- 22.5.5: Definition of 'gener' and 'socer', who are not compelled to act as witnesses (18).

Liber 5

- 33.1.8: Legacies of usufruct.
34.5.23: Decision that in case of a woman dying in shipwreck with son below puberty, he is deemed to have died first (19).

Liber 6

- 50.15.7: Categorisation of Troas, Berytus and Dyrrachium as 'iuris Italici'.

Liber 7

no excerpt.

Liber 8

- 23.2.46: Debate among jurists as to rights of a patron married to freedwoman if he shares possession of her.

37.1.4: Bonorum possessio.

50.16.148: Explanation of term 'habet liberos'.

Liber 9

50.16.150: Giving of pledge for another's debts.

Liber 10

38.16.13: Effect of capitis diminutio on a woman's possession of sui heredes.

50.16.149: Definition of 'habere liberos'.

50.16.152: Definition of 'homo'.

Liber 11

29.3.11: Relation of 'codicilli' to 'testamentum' and of 'secundae tabulae' to 'principales tabulae'.

49.14.14: Safety of liberties and legacies when inheritance is appropriated by the fiscus (20).

Liber 12

31.55: Repudiation of legacy; institution of heir who is partly or wholly incapax.

40.1.18: Rights of venditor and promissor to manumit.

Liber 13

35.1.69: Conditional legacies.

38.16.14: Aditio not required for sui heredes.

40.7.31: Conditional legacy made to a slave.

28.5.74: Substitution to an heir instituted conditionally.

Liber 14

29.3.53: Institution of heir conditionally.

31.56: Legacy made to Emperor (ruling by Antonius Pius).

31.58: Acceptance of legacy.

Liber 15

- 34.9.10: Use of tacita fideicommissa to evade provisions of laws concerning inheritance.

ULPIAN 'ad legem Iuliam et Papiam'

Liber 1

- 1.5.25: Validity of senatorial ruling to give free status to a freedman, since 'res iudicata pro veritate accipitur'. Cf. 50.17.207: 'Res iudicata pro veritate accipitur'.
- 1.9.5: Inclusion of adopted sons in category of 'son of a senator'.
- 1.9.7: Definition of 'son of a senator': effect of emancipation, removal of father from senatorial rank etc.
- 23.3.43: Definition of prostitute and of 'lena'. Ruling of Senate against marriages between senators and women condemned in a public court.
- 35.2.62: Application of lex Falcidia (21).
- 40.10.6: Elevation to free status by ius anulorum (rescript of Hadrian).
- 50.16.128: Definition of 'spado' (22).

Liber 2

- 25.7.1: Right of patron over freedwoman who is his concubine; those who may lawfully be held as concubines; condemnation of concubine for adultery; woman who passes from concubinage of patron to that of his son or grandson; minimum age of concubines.
- 29.2.79: Acquisition of inheritance by a paterfamilias through another party.
- 50.16.130: Clarification of 'lege obvenire hereditates'.

Liber 3

- 23.1.16: Oration of Antoninus and Commodus concerning senatorial marriages (23).
- 23.2.27: Licence of man who has lost his senatorial rank to have a freedwoman as wife.
- 23.2.29: Manumission of a slave woman by a patron with a view to marriage.
- 23.2.45: Definition of 'patronus' who enjoys rights over freedwoman; absence of right over fiancée; explanation of 'invito patrono'; position of a freedwoman whose patron is captured in war.
- 24.2.11: Prohibition against initiation of divorce by freedwoman married to her patron as long as he wishes to have her as his wife; her lack of an 'actio de dote' and of conubium with any other man.
- 40.10.4: Obtaining of 'ius anulorum aureorum' by women.
- 50.16.131: Definitions of 'fraus', 'multa' and 'poena'.

Liber 4

- 1.6.10: Passing of judgment on possession or otherwise of a son.
- 1.7.46: Status of a son acquired during servitude of father and restored to his potestas by an act of the Emperor.
- 36.2.23: Conditional legacy.
- 49.15.9: Status of a son born in captivity if restored, according to a rescript of Antoninus Pius.
- 50.16.133: Reckoning of 'intra diem mortis'.
- 50.16.135: Benefit of deformed offspring to parents.
- 50.17.209: Definition of servitude.

Liber 5

- 37.14.14: Establishing of right to patronal succession.
- 38.10.6: Explanation of terms 'gener', 'nurus', 'socer' and 'socrus' (24).
- 50.16.136: Explanation of 'gener'.

Liber 6

- 4.6.36: Explanation of absence for the sake of the Republic (25).
- 4.6.38: Expansion on absence for the sake of the Republic,

description of legitimate reasons for delayed return.

23.2.31: Licence of senator to have a freedwoman as iusta uxor by the indulgence of the Emperor (26).

Liber 7

24.3.64: Obligation of a husband to restore to his wife any gain made from manumission of a dotal slave.

50.16.139: Definition of terms 'Romae' and 'perfecisse' in relation to buildings.

Liber 8

31.51: Legacy of maximum which may by law be taken or given; inefficacy of adoption to acquire what has been left 'ad tempus liberorum'.

35.1.61: Legacy made by husband to his wife with condition 'ad tempus liberorum'.

39.6.36: Conditional legacies.

48.8.15: Distinction between 'occidere' and 'causam mortis praebere'(28).

49.17.3: Expansion on 'castrense peculium' (29).

50.16.141: Explanation of term 'filium habere'.

Liber 9

26.5.4: Prohibition against appointment by praetor of himself as tutor.

50.16.143: Definition of 'apud se habere'.

Liber 10

37.14.11: (lib. II? v. Index Interp. III, 51) Exclusion from entry to inheritance by terms of law of Twelve Tables,

37.14.16: Attempt by freedman to evade law by making himself 'minor centario'(30).

50.16.145: Explanation of term 'virilis' (31).

Liber 11

37.14.17: Description of Imperial rescript concerning rights of patrons and descendants to possession of property of



freedmen accused of capital offences.

38.1.36: 'Libertatis causa societas' formed between patron and ex-slave.

38.2.37: Right of patron to bonorum possessio contra tabulas of freedman.

Liber 12 no excerpt.

Liber 13

1.3.31: Freedom of Emperor from laws, status of Augusta.

8.1.7: Example of servitude (32).

29.2.81: Entry of substitute into inheritance.

29.3.10: Opening of will.

29.3.12: Opening of will.

38.8.4: Circumstances in which a legacy is 'pro non scripto'.

35.1.59: Destiny of conditional legacies where legatee has died, left the state or gone into servitude.

32.2.64: Legacies and lex Falcidia.

Liber 14

34.9.9: Hostility between testator and legatee.

33.2.22: Legacy of proceeds from testator's patrimony.

Liber 15

39.6.37: Comparison between mortis causa donationes and legacies.

Liber 16

31.60: Institution of a conditional trust, senatorial ruling concerning case of death of intended beneficiary of trust.

Liber 17 no excerpt.

Liber 18

22.6.6: Activities of informers.

29.2.83: Attempts to evade law by tacita fideicommissa.

31.61: Trusts in cases of incapacity of heir.

- 35.2.66: Legacies and mortis causa donationes left conditionally.
49.14.16: Disposition of Trajan concerning self-delation.

Liber 19

- 4.4.2: Remission by law of one year for each child possessed in age prescribed for holding magistracies.

Liber 20

- 1.6.14: Rules concerning proconsular fascēs (34).
27.1.18: Explanation of term 'bello amissi' through whom is granted exemption from tutorship (35).

Paul 'ad legem Iuliam et Papiam'

Liber 1

- 23.2.44: Description of marriages forbidden to those of the senatorial order.
50.16.129: Definition of 'liberi'.

Liber 2

- 1.9.6: Definition of 'son of a senator'.
22.5.4: Release from obligation to give evidence against those in certain relationships by the lex Iulia iudiciorum publicorum.
23.2.47: Circumstances in which a senator's daughter may marry a freedman with impunity.
24.3.63: Manumission of a dotal slave.
35.2.63: Estimation of value of things in an inheritance (36).
38.1.35: Release of freedwoman over 50 from obligation of performing operae for her patron.
38.1.37: Release of freedman from obligation to perform services for his patron by possession of two or more children.
50.16.134: Definition of 'anniculus'.
50.16.137: Definition of 'ter enixa'(37).

Liber 3

- 1.7.45: Transferral of obligations of adopted son to adopting father.
- 4.6.35: Definition of absence for the sake of the Republic.
- 4.6.37: Example of absence which is not for the sake of the Republic(38).
- 49.15.8: Recovery of a wife 'iure postliminii' by husband.
- 50.16.132: Definition of 'anniculus' and of 'filium peperisse'(39).
- 50.17.208: Definition of 'desinere habere'.

liber 4

- 32.87: Inclusion of trusts and mortis causa donationes in term legacy.
- 50.16.138: Inclusion of bonorum possessio in term hereditas (40).

Liber 5

- 1.3.28: Relationship between earlier and subsequent laws.
- 28.5.72: Conditional institution of heir.
- 29.2.68: Entry of jointly owned slave into inheritance.
- 29.2.80: Institution of a sole heir to more than one property.
- 29.7.20: Relationship of codicilli to will.
- 31.49: Legacies in kind.
- 32.88: Legacies in kind.
- 34.4.6: Definition of 'translatio' of legacy.
- 41.5.4: 'Pro herede usucapere'.
- 42.5.29: Decision concerning ownership of public statues.

Liber 6

- 12.4.12: Mortis causa donationes.
- 30.29: Circumstances in which a legacy is inutile.
- 32.89: Institution of joint legatees.
- 34.3.29: Inclusion of an incapax in a will.
- 35.2.65: Conditional legacies.
- 36.2.24: Conditional legacies.
- 39.6.35: Senatorial ruling that the provisions of the law relating to legacies should also apply to mortis causa donationes.
- 50.16.140: Definition of 'cepisse'.
- 50.16.142: Institution of joint heirs (41).

Liber 7

- 32.90: Acceptance of a legacy.
33.2.21: Conditional legacies.
35.1.60: Conditional legacies.
35.3.7: Ruling of Antoninus Pius concerning 'annua legata'.
49.14.13: Imperial rulings concerning self-delation.

Liber 8

- 37.14.15: Loss of patronal rights in relation to freedman through
contravention of the terms of the lex Aelia Sentia.

Liber 9

- 40.10.5: Acquisition of free status.

Liber 10

- 25.7.2: Position of freedwoman concubine of patron who becomes
insane.
38.5.13: Rights of an adopted child to property of dead father.
50.16.144: Definition of 'pellex'.

Liber 11 no excerpt.

Liber 12 25.7.2? (42).

TERENTIUS CLEMENS 'ad legem Iuliam et Papiam'.

Liber 1 no excerpt.

Liber 2

- 22.6.5: Harming knowledge or ignorance of another (43).
50.16.146: Definition of 'socer' and 'socrus' (44).

Liber 3

- 22.3.16: Declaration of children by mother and grandfather (45).
23.2.21: Freedom of filiusfamilias from compulsion to marry.
23.3.61: Various rules concerning duties of a curator responsible

for a woman's dowry.

31.52: Enquiry into condition of designated heir or legatee.

50.16.147: Explanation of 'Romae nati'.

Liber 4

28.5.73: Institution to an insolvent inheritance of a sole heir who is partially incapax.

28.6.6: Substitution by an impubes in case of partial incapacity.

31.53: Legacy made as compensation for dowry and rules relating to the actio de dote.

35.1.62: Conditional legacies; conditions relating to remarriage or to offspring of legatee.

35.2.67: Implication of terms of lex Falcidia in determining capacity.

Liber 5

24.1.25: Admission of wife to usucapio of gift made by husband.

35.1.64: Overruling by law of conditions in legacy limiting or forbidding remarriage of legatee.

40.9.31: Injunction of temporary widowhood on freedwoman by patron.

50.16.151: Definition of 'hereditas delata'.

Liber 6 no excerpt.

Liber 7 no excerpt.

Liber 8

23.2.48: Rights of sons of patrons to freedwomen, loss of patronal rights in case of marriage to a freedwoman, who is ignominiosa; assignation of patronal rights.

38.1.14: Absence of obligation on freedwoman to perform operae when she is no longer married.

40.9.32: Placing of obligation on freedwoman that she should not marry; provision of lex Aelia Sentia that patron may not force his freedman to give money in lieu of operae.

Liber 9

- 37.14.10: Exclusion of patron from bonorum possessio contra tabulas of the will of a freedman whom he has accused of a capital crime.
- 38.2.38: Rights of grandsons of patron to property of freedman if son has been disinherited.
- 40.9.24: Manumission of several slaves by master who is in debt.

Liber 10

- 38.2.39: Right of patron's daughter who is 'in adoptiva familia' to property of her father's freedmen.

Liber 11

- 50.16.153: Status of child left in womb of deceased mother.

Liber 12

- 34.3.21: Legacies involving debts and conditions.
- 38.2.40: Rights of disinherited son to freedman.
- 38.4.10: Conditional 'adsignatio' of freedman.

Liber 13

- 31.54: Conditional legacy.

Liber 14

no excerpt.

Liber 15

- 31.59: Conditional legacies involving slaves.
- 33.5.16: Legacy involving 'optio'.

Liber 16

- 29.2.82: Manumission or sale of the slave of an incapax instituted heir.

Liber 17

- 28.2.22: Conditional institution of a postumus.
- 33.5.17: Legacies of slaves involving 'optio'.

Liber 18

- 7.7.5: Legacy of services of a slave.
40.6.1: Taking away of liberty by the law.

Liber 19 no excerpt.

Liber 20 no excerpt.

MARCELLUS 'ad legem Iuliam et Papiam'

Liber 1

- 23.2.32: Debarring of freedman from a senatorial marriage even if adrogated into a senatorial family.
23.2.49: Permitted and forbidden marriages.
25.3.8: Responsibility for children.
39.6.38: Clarification of mortis causa donatio.

Liber 2 no excerpt.

Liber 3

- 23.2.33: Circumstances in which the return of the same woman to the same man is 'idem matrimonium'.
23.2.50: Licence of a freedwoman manumitted because of a trust to marry against the will of her patron.

Libri 4-6 no excerpt.

IUNIUS MAURICIANUS 'ad legem Iuliam et Papiam'

Liber 1 no excerpt.

Liber 2

- 31.57: Rulings of Hadrian and of Antoninus Pius concerning legacy made to Augusta.
33.2.23: Ruling of Antoninus Pius concerning recovery of a legacy

of usufruct by testator.

Liber 3

49.14.15: Senatorial and Imperial rulings concerning delatores.

It is clear that discussion of the provisions of the lex Iulia et Papia was not confined to the books of commentary ad legem Iuliam et Papiam nor to these jurists alone. Some excerpts from other commentaries actually name the laws, while more suggest by their content that they belong to a discussion of the provisions of the laws or at least of issues which relate closely to these provisions.

Lenel (46) has attributed to the following books of commentary discussion of the provisions of the lex Iulia et Papia. His conclusions are based on the content of the excerpts from those books preserved in Justinian's Digest and on references to them by other jurists :

Celsus, 30-36 digestorum : in book 30 the jurist discussed permitted and forbidden marriages (47) and in books 31-36, caduca (48).

Julianus, 68-85 digestorum : rules relating to patrons and ex-slaves are discussed in books 68, 69 and 75 (49). The remaining books are mostly concerned with caduca. Book 69 also includes a discussion on incapacity (50), conditional legacies between husbands and wives (51) and the 'actio de dote'(52). Books 70-82 (excluding book 75) discuss legacies and inheritances which are conditional, 'pro non scripto', divided, or which involve 'optio' (53). In book 80 there is discussion of mortis causa donationes (54) and in book 81 of legacies which are void (55). The treatment of caduca continues in book 82 (56) and tacita fideicommissa are discussed in book 83 (57). An excerpt from book 85 (58) concerns the status of a child of an adoptee and suggests that Julian is discussing the benefits secured through the possession of children.

Marcellus 26-30 digestorum : the excerpts cover disreputable women, legacies of dowry, mortis causa donationes, caducous legacies and the destruction of a will (59).

Marcian 9-12 institutionum : book 10 includes discussion of marriage between a patron and his freedwoman, book 11, claims by the fiscus. Two excerpts from book 12 are concerned with concubinage and legacies (60).

Papinian 32-34 quaestionum : the excerpts discuss caducous legacies and inheritances, conditional legacies and inheriting between husband and wife (61).

Paul 19-21 quaestionum : Paul discusses incapacity between husband and wife, caducous legacies and inheritances and tacita fideicommissa (62).

Further excerpts in Justinian's Digest suggest that commentary on the marriage laws or on issues closely related to them was included in the libri disputationum of Ulpian and in the libri responsorum of Paul and of Papinian. Several other jurists seem to have commented on the law : Africanus, Atilicinus, Octavenus, Proculus, Sabinus, Scaevola, Servilus and Trebatius (63).

As has already been observed, there are difficulties involved in using the jurists' commentaries ad legem Iuliam et Papiam in an attempt to reconstruct the provisions of the laws and to establish their order. It is clear that there are variations in the jurists' order of commentary: for instance, Ulpian appears to have devoted the last two books of his commentary to privileges in the magisterial cursus and exemption from civil duties which were the reward for obedience to the laws. According to Gellius (64), the provision relating to privileges among consuls belonged to the seventh chapter of the lex Iulia, and was therefore one of the earlier provisions of the law. It is possible that Gellius made a mistake, or that the privileges awarded to such high-ranking officials as consuls were

separated from the other privileges granted by the law. But a more likely explanation is that Ulpian discussed these issues at the end of his commentary because that part was devoted to the provisions relating to public law.

There is also some variation in the place given by the jurists in their commentaries to the discussion of the rights of patrons and freedmen in the area of succession. Whereas a discussion of these rules occupies a fairly central position in the commentaries of Gaius, Ulpian and Terentius Clemens, it occupies the last three books of Paul's commentary. Ferrini (65) has suggested that the provisions concerning the property of freedmen appeared in the lex Papia in the middle of the provisions relating to caduca and that Gaius, Ulpian and Terentius Clemens chose to comment on it before going on to caduca, while Paul discussed it after his treatment of caduca. But this is not a convincing hypothesis: it is highly unlikely that the provisions concerning the property of freedmen would have been placed in the middle of the provisions de caducis in the lex Papia. It is much more likely that these rules preceded those concerning caduca (as the commentaries of Gaius, Ulpian and Terentius Clemens suggest), and that Paul combined the provisions of the lex Papia relating to caduca with those of the lex Iulia, leaving his commentary on the property of freedmen to the end.

Similarly, Ulpian is alone in commenting at an early stage on the provision of the lex Iulia which forbade a freedwoman married to her patron to leave him and to remarry (book 3). His evidence suggests that it was among the early provisions of the lex Iulia. The other jurists, however, deal with this topic at a later stage in their commentaries, and it is possible to conjecture that they incorporated it into a section devoted to all of the rules relating to patrons and ex-slaves.

It is interesting that the jurists Ulpian, Gaius, and Terentius Clemens do not appear to have discussed all of the issues relating to inheritance in one section of their commentaries. Instead they seem

to have discussed some of these issues at a fairly early stage in their commentaries while incorporating a longer discussion into the later books. Since it is clear that both laws introduced rulings relating to inheritance, it may well be that the later discussions belong to a commentary on those provisions of the lex Papia Poppaea regarding inheritance which could be treated separately from those of the lex Iulia.

In spite of the difficulties involved in drawing firm conclusions from the juristic evidence, it is nevertheless reasonable to provide a tentative reconstruction of the two laws in order to facilitate discussion of the provisions. The distinctions and order proposed are based partly on the hints provided by the juristic sources and partly on conjecture as to the most logical order for the provisions.

'LEX IULIA DE MARITANDIS ORDINIBUS'

Lifting of censorial penalties against marriages between non-senatorial ingenui and freedwomen who are not famosae.

Prohibition against marriages between non-senatorial ingenui and famosae.

Introduction of a legal ban against marriages of senators (and of their descendants in male line) with freedwomen or actresses, and of the daughters (and of female descendants in male line) of senators with freedmen or actors.

Withdrawal of right of a freedwoman married to her patron to divorce him and to remarry.

Obligation to marry within certain age limits, probably 25+ and 60 for men, 20+ and 50 for women, unless absent 'rei publicae causa'.

Obligation for women to remarry within a year of death of husband or

within six months of divorce.

Reservation of seats at theatre for married plebeians.

Grant of ius stolae to women who obey law.

(Chapter 7) Privileges in honores granted as a reward for lawful marriage and procreation: priority in taking symbols of consular imperium due to consul who is married or who has more children; magistracies to be obtained one year before the legal age for each child possessed.

Exemption from civil duties through the possession of children, e.g. from tutela and curatela.

Release of free-born women from tutors through ius trium liberorum.

Appointment of tutor by praetor for the constitution of dowry for a woman in tutela pupilli.

Obligation of a husband to restore to his wife any gain made from the manumission of a dotal slave.

Immunity of freedmen from the obligation to perform services for their patrons promised as a condition of manumission through the possession of two children.

Release of freedmen and freedwomen from oaths made to patrons that they will not marry.

Penalties:

Prohibition against spectating at games and partaking of banquets by the unmarried.

Imposition of a tax on unmarried women.

Total incapacity of the unmarried to inherit.

Grant of 100 days in which to obey the law.

Exemption of cognati to sixth degree from obligation to provide evidence in cases of incapacity.

Overruling by law of widowhood enjoined in a will.

(? Or introduced by lex Papia Poppaea?) Inheriting between husband and wife: taking of one tenth permitted, and an additional tenth for each child of a previous marriage, or for a common child who has been lost; grant of the usufruct of one third of the spouse's property, and ownership of this part on birth of children; grant of total capacity to spouses who are not within ages specified by laws or who are cognati to sixth degree, or if the husband is absent for the sake of the Republic; grant of right to make a will without restrictions to those who have obtained the ius liberorum from the Emperor, or who possess a common child etc.

(Chapter 35) Ruling against unreasonable opposition of a paterfamilias to the marriage of his daughters and granddaughters.

LEX PAPIA POPPAEA

Lifting of censorial penalties against marriages between non-senatorial ingenui and freedwomen who are not famosae.

Prohibition against marriages between non-senatorial ingenui and famosae.

Ban on marriages of senators and descendants with freedwomen or actresses and of daughters of senators with freedmen or actors.

Requirement of registration of births of legitimate children within 30 days.

Obligation for women to remarry within two years of death of husband and within 18 months of divorce.

Limitation of betrothals to two years or less if the betrothed are to enjoy the privileges of the law.

Grant of increased privileges to those possessing children: e.g. release of freedwomen by ius quattuor liberorum from tutors.

Rights of patrons, patronesses and children of patron to the estates of their freedmen and freedwomen who are testate or intestate; benefits gained by both patrons and ex-slaves by possession of children.

Prohibition against childless inheriting more than one half of bequests.

Exemption of adfines in addition to cognati to sixth degree from obligation to provide evidence in cases of incapacity.

Introduction of detailed rulings concerning caduca: Caducous legacies assigned to colegatees in will possessing children; claims of colegatees possessing children preferred to those of heirs; caducous inheritances granted to close relatives in will who enjoy ius antiquum.

Rules regulating inheriting between spouses (see lex Iulia)

Immunity of some women from restrictions of lex Voconia.

Offer of rewards to informers.

FORBIDDEN AND PERMITTED MARRIAGES

It is clear from the juristic evidence that provisions concerning forbidden and permitted marriages appeared in both the lex Iulia and the lex Papia (66) and at an early stage in the laws. Ulpian, Paul and Marcellus certainly discussed these provisions in the first books of their commentaries, and Gaius and Terentius Clemens may have done so also. The position of the provisions in the laws is indicative of their importance.

The jurist, Paul, purports to reproduce the exact wording of the lex Iulia :

(Lege Iulia ita cavetur:) 'Qui senator est quive filius neposve ex filio proneposve ex filio nato cuius eorum est erit, ne quis eorum sponsam uxoremve sciens dolo malo habeto libertinam aut eam, quae ipsa cuiusve pater materve artem ludicram facit fecerit neve senatoris filia neptisve ex filio proneptisve ex nepote filio nato nata libertino eive qui ipse cuiusve pater materve artem ludicram facit fecerit, sponsa nuptave sciens dolo malo esto neve quis eorum dolo malo sciens sponsam uxorem eam habeto' (67).

'Let no-one who is a senator, or who is or will be his son or grandson born to his son, or great-grandson born to his grandson born to his son knowingly and maliciously have as a fiancée or wife a freedwoman or a woman who, or whose father or mother, is, or has been, an actor or actress; and let no daughter of a senator, or granddaughter born from his son, or great-granddaughter born from his grandson born from his son be knowingly and maliciously engaged or married to a freedman or to a man who himself, or whose father or mother, is or has been an actor or actress, nor let any such maliciously and knowingly have her as fiancée or wife'.

This excerpt is taken from Paul's first book of commentary ad

legem Iuliam et Papiam : given the title of the lex Iulia de
maritandis ordinibus, it is likely that this provision appeared at
the beginning of the law. The ruling reported by Paul is confirmed
by Ulpian, who also assigns it specifically to the lex Iulia:

Lege Iulia prohibentur uxores ducere senatores quidem liberi eorum
libertinas et quae ipsae quarumve pater materve artem ludicram
fecerit, item corpore quaestum facientem (68).

Since there is no indication in the excerpt cited from Paul (D.
23.2.44pr.) that senators were not allowed to marry prostitutes,
Mommsen believes that the 'item corpore quaestum facientem' of Req.
13.1 should belong to the following paragraph (Req.13.2) in which
Ulpian describes various categories of women with whom marriage was
forbidden to all ingenui:

Ceteri autem ingenui prohibentur ducere lenam et a lenone lenave
manumissam et in adulterio deprehensam et iudicio publico damnatam et
quae artem ludicram fecerit: adicit Mauricianus et a senatu
damnatam.

Elsewhere (69) Ulpian describes these women generally as
'famosae' (70). Mommsen argues that prostitutes must be included in
the category of 'famosae', and that while senators were indeed
forbidden to marry prostitutes, it would hardly have been necessary
for Ulpian to say this when they were included in the category with
whom marriage was forbidden to all ingenui. In fact, Req. 13.1 and
13.2 are difficult texts: in 13.1 there should clearly be an 'eas'
after 'libertinas et' (line 2) and 'fecerit' should be 'fecerint'.
It is also doubtful whether the 'et quae artem ludicram fecerit'
should be in 13.2, since elsewhere the prohibition against marriages
to actresses is only applied to senators. Certainly 'item corpore
quaestum facientem' does not fit well into 13.1 where the other women
to whom marriage with senators is forbidden are listed in the plural.
It would fit more satisfactorily into 13.2, and therefore Mommsen's
argument that the phrase has been misplaced by a copyist is very
plausible.

To return to the purported quotation in D.23.2.44, Brenkmann and Schulting (71) rightly argue that 'nepote' needs to be inserted between 'ex' and 'filio' in line 1 (after 'proneposve'). In addition, the 'nata' of line 5 seems to be superfluous, given that there is no 'natus' in line 1 after 'ex filio nato', and should, perhaps, be omitted.

Castello (72) notes that Ulpian omits the 'sciens dolo malo' mentioned by Paul as part of the provision concerning the marriages of senators. He raises the question of whether this phrase (which is a common one in legislative language) was dropped from the text of Ulpian or added to the text of Paul. He cites D.23.2.58 where Marcianus (4 regularum) describes a constitution of Antoninus Pius which granted an action to a senator married to a freedwoman who had passed herself off as an ingenua, because the dowry is void. He believes that, since the Emperor's intervention was necessary in the case of this senator whose marriage to a freedwoman was not made 'sciens dolo malo', this qualification did not appear in the original lex, but was added later. In fact D.23.2.58 is a rather doubtful text and the constitution of Antoninus seems to be related to the changed status of marriages contracted against the rules of the lex Iulia. The evidence suggests that such marriages were rendered null and void following Imperial enactments of this period (see below). In addition Ulpian, in the text cited, does not, like Paul, claim to be giving a verbatim quotation from the law. It is possible that, since the qualification 'sciens dolo malo' was such a common one, it was added to this ruling at some stage out of sheer habit on the part of a jurist or a copyist, but it seems to be more likely that it was indeed part of the original lex Iulia.

Volterra (73) believes that the appearance of 'sponsa' as well as 'uxor' in the excerpt is due to interpolation by Justinian's codifiers. He refers to passages such as D.23.2.27. (Ulpian 3 ad leg. I. et P.), regarding a senator who 'amiserit dignitatem', to show that senatorial status was not necessarily permanent, while the application of the sanctions of the law presupposed that this was the

case. In addition, he cites D.23.1.16 where Ulpian (3 ad leg.I.et P.) describes an oratio of Antoninus and Commodus concerning marriages prohibited to senators and says 'de sponsalibus nihil locuta est'. However, his arguments are rather doubtful. As Riccobono (74) argues, senatorial status was more or less permanent and would surely have been assumed to be so for the purpose of the law. It is clear from the evidence that betrothal was regarded as equivalent to marriage in relation to other aspects of the law: thus bachelors were able to gain the privileges of married men by becoming betrothed, and according to Suetonius and Dio (75), this necessitated the placing of a time limit on the duration of betrothals. As for D.23.1.16, the absence of any mention of betrothal in the oratio certainly does not provide conclusive evidence for a similar omission in the original lex. The evidence suggests that the Imperial enactments made null and void marriages contracted against the provisions of the lex Iulia et Papia which previously merely exposed participants to the penalties of the law and deprived them of its privileges (see also D.23.2.16 and D.24.1.3.1). Such sanctions would not have been relevant to betrothal which by this time was not in any case actionable.

The excerpts from the jurists' commentaries ad legem Iuliam et Papiam show that they discussed at some length the limitations placed on senatorial marriages, but that they did not always discriminate between provisions of the original law and later additions. Paul goes on to say in the excerpt cited that a person whose grandfather or grandmother is an actor or actress is not included in the forbidden category and that it is irrelevant whether or not he is a natural or an adopting father. This sounds like juristic interpretation rather than an original provision of the law. The whole of the excerpt is taken up with determining precisely the people with whom marriage was forbidden to those of senatorial rank, as are the other excerpts relating to this subject (76). An excerpt from Ulpian (77) shows that a later sc forbade senators to marry a woman 'damnatam publico iudicio'.

One of the main sources of debate in relation to this aspect of

the lex Iulia is the apparent conflict between the evidence from Paul and Ulpian and that of Dio. Dio does not mention any prohibition, but portrays the measure of 18 B.C. as a concessionary one which, for the first time, gave licence to all ingenui except senators to marry freedwomen (78) :

ἔπειδή τε πολὺ πλεῖον τὸ ἄρρεν τοῦ θήλεος τοῦ εὐγενοῦς ἦν, ἐπέτρεψε καὶ ἐξελευθεράς τοῖς ἐθέλουσι, πλὴν τῶν βουλευόντων, ἄγεσθαι, ἔννομον τὴν τεκνοποιίαν αὐτῶν εἶναι κελεύσας.

Dio implies that such marriages were not formerly permitted, nor was the offspring from them legitimate (ἔννομον). Similarly, the jurist Celsus attributes to the lex Papia a concession which allowed all ingenui except senators to marry freedwomen (79) :

Lege ^{Papia} Iulia cavetur omnibus ingenuis praeter senatores eorumque liberos libertinam uxorem habere licere.

The evidence for the status of marriages between free-born persons and ex-slaves during the Republic is poor. There was certainly a provision forbidding marriage between patricians and plebeians in the last two tables which were added by the decemviri to make up the Twelve Tables (80). Agitation for the repeal of this rule led to the passing of the lex Canuleia in 445 B.C.. This is the only law regulating marriage between the orders for which there is evidence in the Republic, and scholars who believe that marriages between free-born persons and ex-slaves were valid before the enactment of the lex Iulia have generally associated this freedom of intermarriage with the lex Canuleia.

Mommsen (81), however, believed that the Twelve Tables merely reaffirmed a long-standing tradition that patricians should not marry plebeians, that this was unaffected by the passing of the lex Canuleia, and that marriages between free-born persons and ex-slaves were regarded in the same way.

The main source usually cited in this argument is Livy 39.19.5.

Livy records a senatusconsultum of 18⁶/B.C.. which granted various privileges to a freedwoman and prostitute, Hispalla Fecenia, as a reward for her part in exposing the involvement of some citizens in Bacchanalian rites. Among the privileges granted to her was one allowing her to marry a free-born man :

...utique ei ingenuo nubere liceret neu quid ei qui eam duxisset ob id fraudi ignominae esset.

Mommsen argued from this text that such a marriage would normally have been invalid. He rightly observed that the concession made to the woman was not merely to overcome the restrictions placed on the marriage of a prostitute, since there is, at least for this period, no evidence for a specific prohibition against marriages between prostitutes and free-born men. Mommsen believes that a marriage between an ingenuus and a libertina during the Republic would have been regarded legally as concubinage.

There are considerable difficulties involved in explaining this passage. Livy's use of the word 'liceret' does suggest a prohibition against such a marriage and it obviously does not refer to a release from the ignominy associated with such a union which is mentioned as well. It might be argued that the 'liceret' phrase has some connection with the 'gentis enuptio' mentioned elsewhere in the sc in the list of privileges. Thus the phrase could be taken to mean that she was permitted to marry any free-born man even if he belonged to a gens other than that of her patron. But Livy, in fact, mentions the 'gentis enuptio' as a privilege additional to and distinct from, that to which the phrase 'utique...liceret' refers.

However, the problem with Mommsen's view is that there is no other evidence to support the existence of a prohibition introduced by law against a marriage of this kind in the Republican period. Mommsen tries to get around this by suggesting that the law forbidding such marriages in the Republic was not strictly enforced. This is a very unsatisfactory explanation. Livy must be referring not to a legal prohibition but to a censorial one which gave rise to

censorial penalties. The view that marriages between freeborn and freed during the Republic were not invalid but were regarded as socially and morally reprehensible is widely held (82). Other theories have been suggested, such as that of Jörs (83), who makes the very speculative and unsubstantiated suggestion that Augustus in 28 B.C. placed a legal prohibition on marriages between ingenui and libertae (which had formerly been permissible) and that this prohibition was removed in 18 B.C..

Another, more plausible, view has been proposed by Humbert (84) who, while not going as far as Mommsen, believes that Livy's use of the word 'liceret' implies the removal of more than mere social and moral disapproval. He argues that, while the prohibition derived from mores rather than from ius and did not (as Mommsen believed) render such marriages null and void, yet it was no less constraining than a statutory prohibition, the sanctions of the censor (he argues) being just as effective as those of the praetor. He believes that a marriage between freeborn and freed under the Republic would have been regarded as a matrimonium iniustum, even illicitum. Humbert argues that the penalties involved in incurring the disapproval of the censor would have been, for senators, loss of senatorial status, for equites, loss of the public horse and, for ordinary citizens, exclusion from their tribe and demotion to an inferior century. (He believes that the sanctions only applied to the upper ranks of citizens). The children born from such marriages were, he believes iniusti and not of the same social rank as their father, nor could the freedwoman wife be regarded as a materfamilias.

The attraction of Humbert's arguments is that they provide a more satisfactory explanation for the apparent contradiction between Dio (and Celsus) and Paul (and Ulpian) concerning the Augustan marriage laws than do the arguments of those who believe that marriages between free-born and freed in the Republic merely involved moral and social disgrace. Humbert believes that the Augustan legislation lifted the Republican censorial penalties against marriages between ex-slaves and non-sentorial ingenui, and introduced, for the first time, a statutory prohibition against

marriages between ex-slaves and those of senatorial status. He argues that Dio (and Celsus) and Paul (and Ulpian) are merely describing different provisions of the Augustan marriage legislation and that a reconstruction from the evidence of Celsus and of Paul could be made to run as follows :

Omnibus ingenuis, praeter senatores, libertinam uxorem habere licet; qui senator est erit ne quis ...uxorem libertinam habeto.

The main problem with Humbert's arguments is the lack of evidence (which he acknowledges) for the application of the penalties which he describes in the late Republic to those who entered into the forbidden marriages. He cites Cicero pro Sestio 110, where an eques, L.Gellius Poplicola, who has lost his status, is accused of having married a freedwoman. Humbert argues that, if he had already lost his status for another reason and not because of his marriage, there would have been no need for Cicero to harangue him for entering on such a marriage. Humbert also cites the case of Anthony who was reproved by Cicero for marrying the freeborn daughter of a freedwoman (85). However, neither of these cases provides conclusive evidence for his arguments : indeed, the pro Sestio passage rather provides support for the view that marriages between freeborn and freed were merely regarded as disgraceful. Humbert's view of "mixed marriages" as iniusta is supported only by the evidence of Dio, who says that Augustus made the offspring of such marriages legitimate (86) : in the absence of any other supportive evidence, it is reasonable to conclude that Dio, not uncharacteristically, has failed to achieve strict accuracy here.

This is not to deny that Humbert is right to argue that censorial penalties were incurred by "mixed marriages" as well as social and moral disapproval. However, his conclusions concerning the nature of these penalties are rather speculative and his belief that such marriages were iniusta seems, in fact, to differ little from Mommsen's view which he himself criticizes. In addition, his insistence that the Augustan marriage legislation brought no change whatsoever for senators is dubious : the replacement of censorial by

statutory penalties must surely have had considerable significance.

It is not, however, necessary to accept all of Humbert's arguments in order to be able to reconcile the accounts of Dio and Celsus and of Ulpian and Paul. Clearly the former had in mind the lifting of the censorial penalties from "mixed marriages" by Augustus, whereas the latter were concerned with the introduction of a statutory prohibition against marriages between members of the senatorial order and ex-slaves.

The issue of statutory penalties leads on to the other main area of contention among scholars, the question of the exact legal status of marriages contracted in defiance of the rules of the lex Iulia et Papia. Most scholars agree (87) that marriages contracted against the provisions of the Augustan laws were not null and void, but that they failed to qualify the participants for enjoyment of the privileges and exemption from the penalties associated with the laws. Thus such offenders, although married, were regarded, for the purposes of the law, as caelibes. This places the lex Iulia et Papia in the category of a 'lex minus quam perfecta', defined as follows by Ulpian (88):

Minus quam perfecta lex est quae vetat aliquid fieri et si factum sit, non rescindit, sed poenam iungit ei qui contra legem fecit.

This helps to explain the purpose of the subsequent Imperial enactments mentioned in the juristic sources (89). The texts suggest that marriages which had previously been subjected to the penalties and deprived of the privileges of the lex Iulia et Papia, were later rendered void.

This view is disputed by Mommsen (90) and by Nardi (91). They argue that marriages contracted contrary to the provisions of the lex Iulia et Papia were always void, and that the sc merely reaffirmed this.

All of the evidence seems to go against this view. Ulpian

says, in connection with inheriting between spouses (92) :

Aliquando nihil inter se capiunt, id est si contra legem Iuliam Papiamque contraxerint matrimonium...

Ulpian does not say here that such a marriage is void: he refers to one of the penalties imposed on those who enter on it. There would have been no need for the jurists to have outlined the penalties attached to a marriage contracted in defiance of the rules of the lex Julia et Papia if such a marriage had been void, since it would have incurred the penalties applied to any other invalid union. Moreover, Ulpian in describing a union 'contra legem Iuliam Papiam Poppaeamque' employs the words 'matrimonium' and 'uxor', terms which he would have avoided had the marriage been null and void.

While Nardi denies that the jurists consistently avoided such terms in connection with invalid marriages, he is unable to give any convincing examples. The use of the terms was not due to a poverty of vocabulary, and in Justinian's Insts. 1.10.12, concerning invalid marriages, we find:

Si adversus ea quae diximus aliqui coierint, nec vir, nec uxor, nec nuptiae, nec matrimonium, nec dos intelligitur.

Another important text is Frag. Vat. 168 (Ulp. de excusationibus):

...quidam tamen iustos secundum has leges putant dici...sed, iustorum mentio ita accipienda est, ut secundum ius civile quaesiti sint.

Here a contrast is drawn between children born 'secundum has leges' (lex Julia and lex Papia), and those born 'secundum ius civile'. Nardi suggests that the contrast is between the ius civile before and after the Augustan laws which enlarged the category of marriages forbidden by the ius civile. However, this is a distortion of the text: there is no indication that the ius civile mentioned here was that in existence previous to the lex Julia et Papia. If marriages

contrary to these laws were invalid, children who were 'iusti secundum has leges' would also have been 'secundum ius civile quaesiti' and there would have been no need to mention them as two distinct categories. A comparable text is found in Paul, Sent. 4.8.4, and Collatio 16.3.4:

Sui heredes sunt hi: primo loco filius filia in potestate patris constituti: nec interest, adoptivi sint an naturales et secundum legem Iuliam Papiamve quaesiti: modo maneat in potestate.

This text clearly implies that children who were not born from a marriage 'secundum legem Iuliam et Papiam' could still be sui heredes; hence such a marriage must have been valid iure civili.

As Jörs observes (93), in the texts cited by Mommsen to demonstrate that marriages contrary to the lex Iulia et Papia were invalid, the jurists were, no doubt, commenting on the lex Iulia and the lex Papia combined with the subsequent enactments. There are three excerpts from Justinian's Digest which refer to later measures concerning marriages between those of senatorial rank and those of freed status: in 23.1.16, (Ulpian 3 ad leg. I. et P.) we find:

Oratio imperatorum Antonini et Commodi, quae quasdam nuptias in personam senatorum inhibuit...

Again, D.23.2.16 (Paul 32 ad edictum):

Oratione divi Marci cavetur ut, si senatoris filia libertino nupsisset, nec nuptiae essent: quam et senatus consultum secutum est.

The third text is D.24.1.3.1 (Ulp. 37 ad Sabinum):

...ergo si senatoris filia libertino contra senatus consultum nupserit...valebit donatio, quia nuptiae non sunt.

Since the latter two texts cited mention only daughters of senators some scholars, such as Corbett (94) believe that the purpose of the

later enactment was to extend the prohibition against marriages between senators and freedwomen to marriages between daughters of senators and freedmen (95). Corbett believes that D.23.2.44pr. represents not the wording of the original lex Iulia (as is purported) but an amalgamation of the text of the lex Iulia and of those of later enactments. In favour of his view is the fact that Ulpian (86) does not say anything about a prohibition affecting female descendants of senators and freedmen. In addition, it does seem odd, if the lex Iulia mentioned restrictions on the marriages of both senators and of the daughters of senators, that the oratio of D.23.1.16 ignored the latter group, so that another oratio was needed: on Corbett's view the oratio of D.23.1.16 was the first enactment to make any reference at all to the marriages of daughters of senators. However, it is significant that in D.23.2.16 and D.24.1.3.1, marriages between daughters of senators and freedmen are clearly designated as null. Since those marriages forbidden by the lex Iulia et Papia were not (as has been argued) rendered null, it is clear that the purpose of the Imperial enactments was not to place marriages between daughters of senators and freedmen in the same position as those contracted between senators and freedwomen. Moreover it is difficult to believe that the entire second part of the purported quotation from the lex Iulia preserved by Paul (98) is an interpolation. Presumably in D.23.2.16 and D.24.1.3.1 the jurists simply happen to be referring to that part of the later rulings which applied to marriages between daughters of senators and freedmen. Thus the evidence suggests that marriages contracted against the rulings of the lex Iulia et Papia (that is by senators as well as by daughters of senators), although initially valid legally, were at some stage rendered void. The Imperial enactments mentioned in the texts cited are the only measures attested by the sources to which the introduction of sanctions of nullity may be attributed.

MARRIAGES OF PATRONS WITH THEIR FREEDWOMEN

The provision which forbade freedwomen married to their

patrons to leave them and to remarry is specifically attributed by Ulpian to the lex Iulia de maritandis ordinibus:

'...liberta ab invito patrono divortit: lex Iulia de maritandis ordinibus retinet istam in matrimonio, dum eam prohiberet alii nubere invito patrono...' (98)

The existence of this provision is also attested in D.24.1.62.1, D.24.2.10 and CJ 5.5.1. Elsewhere, Ulpian purports to give the exact wording of the provision :

Quod ait lex : 'Divortii faciendi potestas libertae, quae nupta est patrono ne esto'....Ait lex : 'Quamdiu patronus eam uxorem esse volet'(99).

Deinde ait lex 'invito patrono' (100).

These excerpts have caused a great deal of debate. Levy (101) argues that the law only forbade divorce and not remarriage, on the ground that a second valid marriage would have been impossible in the absence of a valid divorce. He believes that the 'invito patrono' does not refer to remarriage, but that the jurists added the second prohibition in order to make clear the practical consequences of the first prohibition. He reconstructs the provision as follows :

Divortii faciendi potestas libertae, quae nupta est patrono invito eo non esto, quamdiu patronus eam uxorem esse volet.

On the other side, Solazzi (102) rejects any prohibition against divorce in the law, and believes that it was only remarriage against the will of the patron which was forbidden. He believes that it would have gone against the traditional Roman idea of liberum matrimonium to have forbidden a liberta to divorce her patron, and argues that the nullity of the second marriage would have implied the continuation of the first in spite of the divorce. Bonfante (103) also doubts that divorce was forbidden until after the classical period on the same grounds. Volterra (104) believes that there were,

indeed, two distinct rules, each applying to a different case.

Solazzi's arguments are more convincing than Levy's, but a rejection of the texts cited does not seem to me to be necessary. It is important to remember that there was no set form of divorce laid down in Roman law (except for that laid down for the application of the lex Iulia de adulteriis coercendis), so that it must sometimes have been difficult to ascertain whether or not a true divorce had actually taken place. By incorporating the double prohibition into the lex Iulia, the legislator presumably wished to ensure that the freedwoman could not evade the obligation. In addition, while the concept of liberum matrimonium was important, it was perhaps thought to be less so for a freedwoman than for an ingenua. In any case, one of the interesting things about the marriage laws of Augustus is the way in which they sometimes rode roughshod over traditional Roman institutions.

Ulpian discusses the definition of a patron to whom this right applies (105), the exclusion of men who are engaged from the right (par.4) the meaning of 'invito patrono' (par.5) and the right of a patron who is in captivity (par. 6). In the same book of commentary, Ulpian mentions the opinion of the jurist Julian that the law also forbade concubines to leave their patrons (106) : this extension of the provision of the lex Iulia was, no doubt, due to later interpretation. Ulpian also discusses here the various circumstances in which it is clear that the patron no longer wishes to have a freedwoman as his wife (par. 2).

In his eighth book of commentary ad legem Iuliam et Papiam, Terentius Clemens discusses the extension to the son of a patron of the right to a freedwoman enjoyed by his father (107). He says that the patron has no right in relation to a freedwoman who is 'ignominiosa' (par.1). An excerpt from Modestinus (108) suggests that the prohibition does not apply to a freedwoman who has been manumitted because of a trust.

Since (as has already been observed), the evidence for

marriages between ingenui and libertae before and after 18 B.C. is poor, we do not know how common marriages between patrons and their freedwomen were. But the presence of such a provision in the lex Iulia and the evidence which we have in Justinian's Digest that the jurists discussed it in considerable detail in their commentaries leads us to believe that such marriages were not uncommon. A patron could not have hoped for any pecuniary gain from a marriage with his ex-slave, but he may have wished to elevate her position and to make any offspring from their union legitimate. The purpose of the rule cannot have been merely to confirm the validity of marriages between these two orders, although Augustus may have hoped to encourage such marriages by the grant of this privilege to the patron. The most obvious purpose of this provision of the law is the prevention of the situation whereby a slave woman might marry her patron in order to gain her freedom and subsequently divorce him.

Concubinage

Both Paul and Ulpian discuss issues related to concubinage in their commentaries ad legem Iuliam et Papiam (Ulpian book 2, Paul book 10) (109) and some scholars have therefore presumed that the marriage laws contained provisions regulating concubinage.

Jörs (110) has concluded from D.25.7.3 (Marcianus 12 inst.) that the lex Iulia et Papia contained provisions of considerable significance for concubinage:

In concubinato potest esse et aliena liberta et ingenua...¹I...nam quia concubinatus per leges (lex Iulia and lex Papia he believes) nomen assumpsit, extra legis (lex Iulia de adulteriis coercendis) poenam est ..

Jörs believes that the laws of Augustus first gave legal recognition to concubinage. This view is supported by other scholars such as

Buckland (111).

Csillag (112) points out the difficulty ^{of?} in distinguishing between marriage and concubinage (113) and suggests that the Augustan marriage laws introduced a formality by which a distinction could be made. He also suggests that the Augustan laws limited concubinage to unions existing between parties to whom marriage was forbidden by the lex Iulia et Papia. of Aug policy?

These suggestions are largely speculative, and in those excerpts from the jurists' commentaries ad legem Iuliam et Papiam which discuss concubinage, there is no mention of any rule introduced by these laws. It is true that the evidence for concubinage in the Republic suggests that there were no legal consequences attached to this institution then (114) whereas some rules did develop under the Empire (115). But the development of such rules cannot be conclusively linked to the lex Iulia et Papia and Jörs' assumption that the 'leges' of D.25.7.3 are the two marriage laws cannot be substantiated. No doubt the jurists found it necessary to discuss various issues relating to the institution of concubinage in their commentaries ad legem Iuliam et Papiam because it was an institution so similar to marriage. Questions would have been raised concerning the application of certain provisions of the marriage laws to concubinage. Thus, for example, Ulpian discusses the question of whether or not the concubine of a patron is permitted to leave him against his will and to become the concubine or wife of another. He also discusses the minimum age of a concubine (116). In addition, the penalising of stuprum by the lex Iulia de adulteriis coercendis meant that it became important for men to ensure that they did not lay themselves open to a charge of stuprum by taking a concubine of a certain status. Hence the jurist Marcian lists those women who may be taken as concubines without the risk of accusation of stuprum (117).

Csillag has also suggested that the ban on marriages between senators and freedwomen resulted in an increased frequency of concubinage as an alternative. But since marriages between an

ingenuus and a freedwoman had previously been subjected to censorial penalties and regarded as degrading, senators would certainly not have been in the habit of marrying freedwomen during the Republic. They would therefore have been just as likely to have had freedwomen as concubines before the lex Iulia as after it. What is more likely to have resulted in an increase in concubinage was the introduction of a ban on the marriages of soldiers. This ban, which seems to have been lifted by Septimius Severus (118) and was certainly introduced in the early Empire (119) cannot, however, be conclusively linked with Augustus. Buckland (120) also suggests that the ban on governors of provinces marrying women from their province encouraged concubinage: this, however, would have affected a very small number of people (121).

Ages within which the law demanded marriage/children

Having dealt with forbidden marriages and the restriction placed on a freedwoman married to her patron, the lex Iulia went on to state the obligation placed on men and women to marry. The evidence suggests that people were obliged to marry and to procreate by a certain age in order to enjoy the privileges and to avoid the penalties of the law, and that after a certain age they were freed from the obligation. There is no specific evidence for the ages laid down by the lex Iulia, but, according to Ulpian, the lex Papia specified the ages of 25 and 20 (for men and women respectively) and 60 and 50, as the limits within which people were obliged to have children:

...velut si uterque vel alteruter eorum nondum eius aetatis sint, a qua lex liberos exigit, id est si vir minor annorum XXV sit aut uxor annorum XX minor: item si utriusque lege Papia finitos annos in matrimonio excesserint, id est vir LX annos, uxor L (122).

We do have the evidence of Tertullian (123), who asserts that the lex Papia required people to have children at an earlier age than the lex Iulia required them to marry:

Nonne vanissimas Papias leges, quae ante liberos suscipi cogunt quam Iuliae matrimonium contrahi, post tantae auctoritatis senectutem heri Severus constantissimus principem exclusit?

If Tertullian is not exaggerating, the lex Iulia must have set limits higher than 25 and 20 as the ages by which men and women must marry in order to avoid the penalties and to enjoy the privileges of the law.

The wording of Ulpian Reg. 16.3 suggests that the upper age limits set by the lex Iulia were the same as those set by the lex Papia:

Qui intra sexagesimum vel quae intra quinquagesimum annum neutri legi paruerit, licet ipsis legibus post hanc aetatem liberatus esset..

The words 'neutri legi' must refer to the lex Iulia and the lex Papia. The distinction between the provisions of the two laws was probably that the limits of 60 and 50 laid down by the lex Iulia referred to the obligation to marry, whereas those of the lex Papia referred to the obligation to have children. Certainly, while there is no justification for asserting that the lex Iulia provided incentives only to marriage and not to procreation as well, there was undoubtedly an increased emphasis in the lex Papia on the procreation of children (124). In addition, in Reg.16.1, Ulpian seems to assign specifically to the lex Papia the demand for children by certain ages.

The age limits prescribed by the laws are confirmed by the evidence of the Gnomon of the Idios Logos, a papyrus from the Antonine period (125). It is worth noting that the ages of 50 (for women) and 60 for men) frequently appear as dividing criteria for the application of rulings on inheritance.

Ulpian provides information (126) about later senatusconsulta which regulated the rules of the lex Iulia et Papia in cases where the husband or wife or both were outside the 20/25 - 50/60 age limits. The sc Pernicianum subjected men over 60 and women over 50 to penalties if they had failed to obey the law before then. The sc Claudianum provided that a man over 60 who married a woman under 50 was regarded as having married before 60. The sc Calvisianum provided that where a woman who was over 50 was married to a man under 60, the marriage was 'impar' and of no benefit towards rights to inheritances, legacies and dowries. It is easy to guess at the abuses which the senatusconsulta were designed to preclude.

Requirement of a second marriage after the dissolution of the first

It is clear from a text of Ulpian (127) that where a marriage was dissolved through death or divorce, women were obliged to remarry within a specified period, in order to enjoy the privileges and to avoid the penalties of the lex Iulia et Papia:

Feminis lex Iulia a morte anni tribuit vacationem, a divortio sex mensum, lex autem Papia a morte viri biennii, a repudio anni et sex mensum.

Here a clear distinction is made between the provisions of the two laws. The lex Iulia allowed a vacatio after the death of a husband of one year, and of six months after divorce. The lex Papia increased the vacatio, allowing two years after the husband's death, and eighteen months after divorce. Probably the brevity of the periods set by the lex Iulia provoked opposition, so that Augustus was obliged to extend them in the lex Papia.

Gaius deals with the issue of second or subsequent marriages in his third book of commentary (128), Terentius Clemens in his fourth

and fifth (35.1.62, (129) 64, 40.9.31), and Ulpian in his eighth (130). The implication of the provision of a vacatio specifically for women is that no similar concession was provided for men. Presumably the only concession made to them was the grant of a hundred days made to all caelibes in which to obey the law if they wished to enjoy its privileges (131). Here we encounter the Republican idea of reverentia due to a husband by his wife. The remarriage of a woman following the death of her husband without an intervening tempus lugendi would have brought dishonour to the memory of her husband. A widow who remarried within this period was penalised under the praetorian edict (132).

When the vacatio had ended, the widow or divorcee was designated as caelebs and therefore subjected to the terms of the lex Iulia et Papia.

NOTES

(1) Ulp.Req.11.20, Frag.Vat.197 (Ulp.lib.de off.pr.tutel.), D.38.11.1.1 (Ulp.4 ad edictum), D.37.14.6.4 (Paul 2 ad legem Aeliam Sentiam).

(2) DA 34.

(3) 54.16

(4) CIL 6.32323-4, FIRA 2.273-6, Bruns (ed.), Fontes Iuris Romani Antiqui, Tubingen, 1909, repr.Aalen 1958, pp.191-3.

(5) cf.Dio 54.30.5 where there is a reference to a similar dispensation granted by sc in 12 B.C..

(6) 56.10.3.

(7) e.g. Ulp.Req.1.21, 16.2, 19.17, 24.12, 24.31, 29.3, 29.5, Tac.Ann.3.25.1, 3.28.4., Dio 56.10.3.

(8) e.g. Gai.Insts.2.206,207,208,286a; 3.42,44,46,47, Ulp.Req.14, 16.1,18,29.6, Frag.Vat.218 etc..

(9) Noc.Att. 2.15.3.

(10) Ann.3.25.

(11) 56.10

(12) The number of books of commentary written by Paul has been the subject of considerable debate. The 'inscriptio' of D.25.7.7 is 'Paulus libro duodecimo ad legem Iuliam et Papiam', yet the Index Florentinus has βιβλια δέκα, and there is no other evidence for an eleventh and twelfth book. Lenel (Palingsensia Iuris Civilis I, Graz, 1960) believes that the compilers possessed two editions of Paul's commentary, one in 10 books and the other in

12. It seems to me much more likely that the 'duodecimo' of D.25.7.2 is a scribal error and should be 'decimo'. The following Digest excerpt (25.7.3) has the 'inscriptio' 'Marcianus libro duodecimo institutionum', and it is easy to imagine a scribe accidentally transposing the 'duodecimo' to the previous 'inscriptio'. Further support for this argument is found in the connection between the content of D.25.7.2 and that of D.50.16.144 (Paul 10 ad legem Iuliam et Papiam).

(13) Either this term or a similar one appears in Frag.Vat.158, 214, Ulp.Reg.16.2, Gai.Insts.1.145, Paul, Sent.4.8.4 (Coll.16.3.4)

(14) e.g. D.38.11.1.1, 37.14.6.4, 23.2.44, 23.2.19, 23.2.23.

(15) Gothofredus, Fontes Iuris Civilis, 1563, Heineccius, Commentarius ad legem Iuliam et Papiam Poppaeam, Geneva 1726, Jörs, Über das Verhältnis der lex Iulia de Maritandis Ordinibus zur lex Papia Poppaea, Diss. Bonn 1882.

(16) e.g. D.23.2.43,44,47, 1.5.25, 1.9.5,6,7 etc.

(17) For an extensive discussion of the commentaries ad legem Iuliam et Papiam see Ferrini, "Commentario di Terenzio Clemente e di Gaio 'ad legem Iuliam et Papiam'" in RIL 34 (1901) pp.304-18 and "Commentario di Ulpiano e di Paulo 'ad legem Iuliam et Papiam'" in RIL 34 (1901) pp.394-405.

(18) cf. Frag.Vat. 216-8.

(19) Ferrini, op.cit.pp.263-4, suggests that the chronological order of the deaths of mother and son was important for determining the capacity of the father in relation to his wife's property.

(20) cf. Ulp.Reg.17.3.

(21) This excerpt seems to be rather out of place here. Lenel,

op.cit.II.940, suggests that it should be assigned to book 4 of Ulpian's commentary. Ferrini, op.cit.pp.243-4 makes the rather far-fetched suggestion that the codifiers confused the 'inscriptio' of this excerpt with that of D.23.2.31 which, although attributed to book 6 of Ulpian's commentary, would fit more satisfactorily into chapter 1.

(22) Pothier, Pandectes de Justinien XII Paris 1882, p.151, suggests that this excerpt belongs to a section on 'exceptae personae'.

(23) This excerpt has been the subject of considerable debate and is discussed in detail below.

(24) cf.Frag.Vat.218.

(25) cf.Ulp.Reg.16.1.

(26) This excerpt seems out of place here, but it may belong to a discussion on succession between spouses by comparison with Ulp.Reg.16.2 : 'Aliquando nihil inter se capiunt, id est si contra legem Iuliam Papiamque Poppaeam contraxerint matrimonium, verbi gratia si famosam quis uxorem duxerit, aut libertinam senator.'

(27) cf.Ulp.Reg.15.3.

(28) Lenel, op.cit.II,946, compares this excerpt with D.34.9.3 and attributes it to the forfeiting of successorial rights by a husband who has caused his wife's death.

(29) cf.D.29.2.79.

(30) cf.Gai Insts.3.42.

(31) cf.Gai.Insts.3.42, 44, 47.

(32) Lenel, op. cit.II.948, believes that servitudes given in a

legacy, if attached to property, were exempt from the law.

(33) cf. Ulp. Reg. 17.1, 24.31.

(34) cf. Gellius, Noc. Att. 2.15.4.

(35) cf. Frag. Vat. 197.

(36) This probably belongs to a discussion of the rules concerning inheriting between husbands and wives, since those without children might inherit one tenth etc..

(37) Presumably the ius trium liberorum is being discussed here.

(38) cf. Ulp. Reg. 16.1.

(39) cf. Ulp. Reg. 16.1a.

(40) It looks as though Paul is discussing, in this book of commentary, later extensions of the rules regarding inheritance, see below.

(41) cf. Ulp. Reg. 24.12.

(42) See n.12 above, where I conclude that this excerpt is to be attributed to book 10 of Paul's commentary.

(43) Lenel, op.cit. II.335, suggests that this excerpt is related to a section 'de his qui se ipsi detulerint' by comparison with D.22.6.6 and D.40.14.13.10, 15pr.. Ferrini, op.cit. pp.252-3, believes that the jurist is discussing here the position of those who, in ignorance, contract marriages which are contrary to the provisions of the law. Given that the excerpt is taken from T.C.'s second book of commentary, this suggestion is the more plausible one.

(44) Ferrini, op.cit. pp.252-3, connects this excerpt with D.22.6.5

by suggesting that the jurist is listing marriages which are not merely contrary to the provisions of the lex Iulia et Papia but are null, such as those contracted between persons within a certain degree of relationship to one another.

(45) This book of T.C. was clearly concerned (among other things) with the registration of the births of legitimate children by the terms of the lex Iulia et Papia, see ch.3, cf.D.50.16.147.

(46) Ferrini, op.cit.p.258, believes that this excerpt has been interpolated and originally read '..non admittitur'.

(47) D.22.3.13, 23.2.23.

(48) D.7.1.29, 50.16.97, 1.3.19, 50.17.191, 31.27, 32.80, 34.7.1, 31.29.

(49) D.23.2.51, 24.2.11pr., 23.2.45, 38.1.37.1a,6, 43.24.14, 1.5.26, 49.15.23, 37.14.6pr., 38.2.37, 38.4.1.8, 38.4.38.

(50) D.28.5.73, 28.6.6, 35.1.62.1,2.

(51) D.35.1.25,64.

(52) D.31.53.

(53) D.29.7.20, 30.99, 36.2.19, 1.7.26, 44.7.19, 30.100, 6.1.56, 28.6.30, 30.101, 38.4.8, 33.2.10, 34.8.6.

(54) D.39.6.8,12,19.

(55) D.30.102, 31.60, 34.3.13.

(56) D.31.61.1, 35.1.26, 50.16.142.

(57) D.49.14.3pr.; 30.103.

(58) D.1.7.27.

(59) D.23.2.41, 35.2.57, 39.6.34, 31.50pr., 30.28.1, 33.3.3,
50.17.192, 28.4.3, 48.10.26.

(60) D.23.2.28, 24.3.35, 48.5.7, 25.7.3, 50.7.5.

(61) D.23.2.61, 34.9.14, 35.1.74,75, 34.9.13.

(62) D.24.3.46, 29.7.18, 31.84, 33.1.11, 33.3.7, 34.4.27, 35.1.81,
49.14.40.

(63) D.25.7.1, 39.6.35.2,3, 37.14.10, 31.49.2.

(64) Noc.Att.2.15.

(65) op.cit.p.257.

(66) Paul Sent.4.8.4, Ulp.Req.16.2.

(67) D.23.2.44, Paul 1 ad legem I. et P.

(68) Req.13.1

(69) Req.16.2

(70) See D.3.2.1, Julian 1 ad edictum, commenting 'de his quae notantur infamia' : 'qui artis ludicrae pronuntiandive causa in scaenam prodierit; qui lenocinium fecerit; qui in iudicio publico calumniae praevaricationisve causa quid fecisse iudicatus, erit; qui furtis, vi bonorum raptorum, iniuriarum de dolo malo et fraude suo nomine damnatus pactus erit'.

(71) Brenkmann, Schulting, Notae ad Digesta ad h.t.

(72) In tema di matrimonio e concubinato nel mondo romano Milan 1940, pp.89ff..

- (73) BIDR 40.109.
- (74) Scritti di diritto romano, Palermo 1957, p.385.
- (75) Suetonius DA 34.2, Dio 54.16.7.
- (76) D.23.2.27,31,32,44,47, 1.5.25, 1.9.5,7, 40.16.4, 50.17.207 etc..
- (77) D.23.2.43.10.
- (78) 54.16.2, confirmed in 56.7.
- (79) D.23.2.23.
- (80) Livy 4.1-4 etc., Cicero De Republica 2.37.63, Dionysius of Halicarnassus 10.60.5.
- (81) Römisches Staatsrecht III, Leipzig 1887 (repr.Graz 1969), pp.429-31.
- (82) e.g. Corbett, The Roman law of marriage, Oxford 1930, pp.31-34, Last, CAH X, Cambridge 1934, p.449, A. Watson The law of persons in the later Roman Republic, Oxford 1967, p.32f., Karlowa, Römische Rechtsgeschichte II, Leipzig 1901, p.172, Kaser, Das Römische Privatrecht I, 2nd ed., Munich 1971, p.315.
- (83) Die Ehegesetze des Augustus, Marburg 1894, p.24.
- (84) Article to appear in Mélanges à la mémoire de Gérard Boulvert.
- (85) Cicero, Philippics 2.2.3, 3.17, 13.23; ad Att.16.11.2.
- (86) 54.16.2.

- (87) e.g. Savigny, System des heutigen Römischen Rechts II, Berlin 1840, Jörs, Ehegesetze cit. pp.20ff., Corbett, op.cit pp.35-39, Astolfi, La lex Iulia et Papia, Padova 1970, p.38.
- (88) Ulp. lib.sing.req.2.
- (89) D.23.1.16, 23.2.16, 24.1.3.1.
- (90) Staatsrecht cit. p.472.
- (91) La reciproca posizione successoria dei coniugi privi di conubium, Milan 1938, pp.17ff, "Sui divieti matrimoniali delle leggi Augustee", SDHI 7 (1941), pp.112-46.
- (92) Req.16.1.
- (93) Ehegesetze cit.p.22 n.1
- (94) op.cit
- (95) This view is contested by Solazzi, Scritti di diritto romano IV, Naples 1963, pp.81-98, "Sui divieti matrimoniali delle leggi augustee".
- (96) Req.13.1.
- (97) D.23.2.44pr.
- (98) D.38.11.1.1, Ulp. 47 ad edictum.
- (99) D.24.2.11pr.-1, Ulp.3 ad leg.I.et P.
- (100) D.23.2.45.5, Ulp.3 ad leg.I.et P.
- (101) Levy, Der Hergang der römischen Ehescheidung, Weimar 1925, pp.137ff.

(102) op.cit.pp.81-98.

(103) Corso di diritto romano I, Rome 1925 (2nd ed. Milan 1963) pp.250-280.

(104) "Sul divorzio della liberta", Studi in honore di Salvatore Riccobono III, Palermo 1936, 203-30.

(105) D.23.2.45pr.-3.

(106) D.24.2.11.

(107) D.23.2.48pr.,2.

(108) D.24.2.10, 1 regularum.

(109) see D.25.7.1,2; 50.16.144.

(110) Verhältnis cit. p.17.

(111) A Textbook of Roman Law, 3rd.edn. P.Stein ed., Cambridge 1963, p.128

(112) Il concubinato e la legislazione di diritto familiare dell'Imperatore Augusto, Rome 1963.

(113) One practical difference might be the absence of a dowry in the case of concubinage. Concubinage was often chosen as an alternative to marriage when one of the partners was of a lower social order than the other.

(114) See evidence cited by Watson, Persons cit.pp.1-10.

(115) e.g.the rule that a man might not have both a wife and a concubine, P.Sent.2.20.1. This was clearly not the case in the Republic, see Cicero, De Oratore 1.40.183, where Cicero, considering the case of a Roman citizen who left his wife in Spain

and subsequently married a wife in Rome, says that unless the second marriage implies automatic divorce, the second wife will be a concubine.

(116) D.25.7.1, Ulp.2 ad leg.I.et P.

(117) D.25.7.3pr., Marcianus 12 institutionum.

(118) Herodian 3.8.4-5.

(119) See B.Campbell, "The marriage of soldiers under the Empire", JRS 68 (1978) pp.153ff..

(120) op.cit.p.128, citing D.25.7.5.

(121) See S.Treggiari, "Concubinae", PBSR 49 (1981), pp.59-81, who examines the epigraphical evidence.

(122) Ulp.Req.16.1.

(123) Apology, 4.8.

(124) Gai. Insts. 2.111, for example, shows that the lex Papia introduced a rule whereby the married but childless lost a half of inheritances left to them, see below.

(125) BGU 6.1210. See especially Lenel-Partsch, Zum sog.des Idios Logos, 1920. Some of the provisions in this papyrus can be attributed to Augustus, but it is often difficult to disentangle Augustan from post-Augustan regulations.

(126) Req.16.3-4.

(127) Req.14.

(128) D.35.1.63.

(129) D.35.1.62, 64; 40.9.31.

(130) D.31.51, 35.1.61.

(131) Ulp.Req.17.1.

(132) See M.Humbert, Le remariage à Rome, Milan 1972.

CHAPTER 3

THE 'LEX IULIA ET PAPIA' II

PRIVILEGES

Before considering the main block of privileges accorded to those who conformed to the demands of the lex Iulia which are associated with the ius liberorum, two other minor privileges should be observed. Firstly, Dio, writing about the events of 12 B.C., mentions a dispensation made by Augustus on his birthday to those who were unmarried, allowing them to watch the public games, and to eat with married people (1):

καὶ αὐτὸν διὰ τε ταῦτα... ἐτίμησαν καὶ τῷ τοῖς τε ἀγύνοις καὶ ταῖς ἀνάδροις καὶ συνθεᾶσθαι τοῖς ἄλλοις καὶ συνδελπνεῖν ἐν τοῖς γενεθλίοις αὐτοῦ δοῦναι. οὐ γὰρ ἔξῃν οὐδέτερον.

The implication is that on normal occasions, married people enjoyed special privileges in these areas. This is supported by the evidence of the sc de ludis saecularibus, already mentioned, which granted a dispensation on the occasion of the ludi saeculares to the unmarried who would normally have been debarred from watching public games.

Suetonius further mentions the assigning of certain seats at the theatre to those who were married (2):

Maritis e plebe proprios ordines adsignavit.

These measures were probably all part of the lex Iulia.⁽¹⁾

Secondly, the evidence of Propertius suggests the introduction of a ius stolae whereby women who obeyed the law were granted the privilege of wearing distinctive clothing (3) :

Et tamen emerui generosos vestis honores / nec mea de sterili facta rapina domo.

If this evidence is to be taken seriously, the date of the poem and the nature of the privilege would support the inclusion of such a provision in the lex Iulia.

'Ius liberorum'

The remaining privileges, although very diverse, are generally all associated with the ius liberorum, since they are privileges granted to those possessing children, and this is the term employed in connection with them. For example, Pliny employs the terms in connection with privileges in holding magistracies (4) and Gaius in connection with the grant of freedom from tutorship (5). The term also appears in the areas of inheritance and of the rights of patrons and freedpersons, but these are complex areas to be discussed later.

There is evidence that the career of a senator could be accelerated if he possessed a iusta uxor and legitimate offspring. Gellius attributes provisions of this nature to the seventh chapter of the lex Iulia (6) :

Sed postquam suboles civitati necessaria visa est et ad prolem frequentandam praemiis atque invitamentis usus fuit, tum antelati quibusdam in rebus qui uxorem quique liberos haberent senioribus neque liberos neque uxores habentibus...capite 7 legis Iuliae priori ex consulibus fasces sumendi potestas fit, non qui plures annos natus est, sed qui plures liberos quam collega aut in sua potestate habet aut bello amisit... etc.

Hence priority in assuming the fasces was given to the consul who possessed, or had possessed, more children, and not, as previously, to the elder of the two. Gellius goes on to say that where both consuls have an equal number of children, the married man is preferred; if both are married with the same number

of children, priority goes to the elder, as previously.

Ulpian seems to be commenting on these provisions of the law in book twenty ad legem Iuliam et Papiam (7) :

Proconsules non amplius quam sex fascibus utuntur.

Elsewhere, Ulpian in a discussion on whether or not children lost in war are of any use in securing freedom from tutorship, mentions the Julian law 'de fascibus sumendis' (8) :

An bello amissi a tutela excusare debeant? Nam in fascibus sumendis et in iudicandi munere pro superstitibus habentur, ut lege Iulia de maritandis ordinibus de fascibus sumendis...cavetur.

This text confirms the statement of Gellius already cited: '...aut in sua potestate habet aut bello amisit...'

According to Dio, as early as 27 B.C. a privileged position was granted to proconsuls through the possession of a wife or children. These annual magistrates were normally assigned to provinces by lot (9).

Tacitus informs us that possession of children brought advantages at the elections of praetors (10). Elsewhere (11), describing the principate of Nero, Tacitus mentions the corrupt practice which existed at that time, whereby fictitious acts of adoption were made before elections or the allotment of provinces, and were followed by acts of emancipation immediately after the governorships had been obtained.

Pliny, writing under the principate of Trajan, mentions the 'liberorum ius' in connection with the tribunate (12):

Simul militavimus, simul quaestores Caesaris fuimus. Ille me in tribunatu liberorum iure praecessit, ego illum in praetura sum consecutus cum mihi Caesar annum remisisset.

There is evidence that the ius liberorum further excused men from jury service (13) and from other munera civilia, including the duties of being a tutor or curator. There are several texts which refer to such exemptions (14). The number of children required for exemption varied according to the place of residence:

Excusantur autem tutores vel curatores variis ex causis; plerumque autem propter liberos, sive in potestate sint sive emancipati. Si enim tres liberos quis superstites Romae habeat vel in Italia quattuor vel in provinciis quinque, a tutela vel cura possunt excusari exemplo ceterorum munerum (15).

Some difficulty, however, is involved in assigning a provision of this nature specifically to the lex Iulia et Papia. In Frag. Vat. 197, where Ulpian is discussing whether children lost in war bring exemption from tutorship, the fact that he draws a parallel with other exemptions gained through such for the purposes of the lex Iulia suggests that this was not a part of that law. Furthermore, some of the texts seem to suggest that release from civil duties through the possession of children was introduced by later Imperial enactments. For example, Paul in Frag. Vat. 247 purports to quote from a constitution granting exemption from civil duties by the possession of three, four or five children, and adds:

idque imperator noster et divus Severus...rescripserunt.

Whether a provision of this nature was introduced by the lex Iulia or the lex Papia and subsequently modified by Imperial constitutions (16) or first introduced by a constitution, there is no doubt that possession of the requisite number of children did at some stage bring release from the duties of tutorship, and since this was a topic at least closely related to the lex Iulia et Papia, the jurists discuss it in their commentaries ad legem Iuliam et Papiam. For example, in D.27.1.18 (Ulpian 20 ad leg. I. et P.) we find:

Bello amissi ad tutelae excusationem prosunt.

There is further evidence that freeborn women could be released from the legitima tutela of their patron by the ius trium liberorum, as could freedwomen under the authority of a tutor Atilianus or a tutor fiduciarius. (17) Freedwomen in the legitima tutela of their patrons, however, needed four children in order to gain this privilege. This rule was made, presumably, as a concession to patrons.

There are several juristic texts which support the introduction of release from the authority of a tutor by the lex Iulia et Papia:

Tutela autem liberantur ingenuae quidem trium liberorum iure, libertinae vero quattuor, si in patroni liberorumve eius legitima tutela sint; nam ceterae quae alterius generis tutores habent velut Atilianos aut fiduciarios, trium liberorum iure tutela liberantur (18).

Sed postea lex Papia cum quattuor liberorum iure libertinas tutela patronorum liberaret... (19)

...tantum enim ex lege Iulia et Papia Pop(pae)a iure liberorum a tutela liberantur feminae... (20)

Lex Papia Poppaea postea libertas quattuor liberorum iure tutela patronorum liberavit; et cum intulerit iam posse eas sine auctoritate testari, prospexit, ut pro numero liberorum libertae superstitem virilis pars patrono debeatur. (21)

The text of Ulpian 29.3 is disjointed, and it is difficult to see how it fits together. However an important point is made, namely that a woman possessing the ius could make a will without the authority of a tutor, who in the case of a freedwoman would be her patron.

The texts suggest that the lex Iulia de maritandis ordinibus introduced exemption from tutela for ingenuae through the ius trium liberorum, and that the lex Papia extended this to libertinae in tutela legitima through the ius quattuor liberorum. Two well known juristic passages explain why traditionally all Roman women who were sui iuris were placed under the authority of a tutor:

Tutores constituuntur...feminis autem...propter sexus infirmitatem et propter forensium rerum ignorantiam (22).

Veteres enim uoluerunt feminas, etiamsi perfectae aetatis sint, propter animi leuitatem in tutela esse (23).

Nevertheless, there is evidence to suggest that the institution of tutela mulierum became less important from the late Republic onwards. In one of his speeches (24), Cicero complained that at his time some women ruled their tutors instead of the other way round and texts of Gaius show that the praetor might compel a tutor to give his consent to certain transactions which the woman wished to undertake and that a woman might replace an uncooperative tutor (25). Nevertheless, given that the Twelve Tables only exempted Vestal Virgins from tutela (26), even if, in practice, release from tutela was not the great privilege that it at first appears, the formal release of some women from it was still a significant departure from tradition.

It may well have been at this point in the lex Iulia that another provision relating to tutela appeared. There is evidence that the lex Iulia contained a provision which authorised the urban praetor to appoint a tutor to a woman who was in tutela pupilli, for the constitution of dowry :

Ex lege Iulia de maritandis ordinibus tutor datur a praetore urbis ei mulieri virginive, quam ex hac ipsa lege nubere oportet, ad dotem dandam dicendam promittendamve, si legitimum tutorem

pupillum habeat (27).

Nam et lege Iulia de maritandis ordinibus ei, quae in legitima tutela pupilli sit, permittitur dotis constituendae gratia a praetore urbano tutorem petere (28)

Thus provision was made for a woman whose tutor was unable to arrange for the provision of a dowry for her and a tutor might no longer try to hinder a woman's marriage by refusing to arrange a dowry. This represents an extension of the provision of the Republican lex Atilia whereby the praetor and a majority of the tribunes of the plebs were allowed to appoint a tutor to a person who had none. Obviously marriage would be facilitated if provision were made for the smooth settlement of dowry and it is easy to see why such a provision should have appeared in the lex Iulia.

This was not the only provision of the Augustan laws concerning the issue of dowry. According to Papinian, if couples contracted a marriage contrary to the provisions of the lex Iulia et Papia, the dowry had to be forfeited to the treasury on the death of the wife (29) :

Dote propter illicitum matrimonium caduca facta exceptis impensis necessariis quae dotem ipso iure minuere solent, quod iudicio de dote redditurus esset maritus solvere debet.

In addition, there seems to have been a provision in the lex Iulia which restricted the right of a husband to manumit dotal slaves. Ulpian says that a husband must restore to his wife any gain made from the manumission of a dotal slave and purports to quote from the law (30) :

Si vero negotium gerens mulieris non invitae maritus dotalem servum voluntate eius manumiserit, debet uxori restituere quidquid ad eum pervenit...Dabit eum, ut ait lex, quod ad eum pervenit...Adicitur in lege, ut si dolo malo aliquid factum sit

quo minus ad eum perveniat, teneatur...Quod ait lex 'quanta pecunia erit, tantam pecuniam dato'.

Bruns (31) has suggested the following reconstruction:

'...quod ad eum pervenit, et si dolo malo aliquid factum est, quominus ad eum perveniat...quanta pecunia erit, tantam pecuniam dato.'

Such a reconstruction is too speculative to be acceptable, especially given that in paragraphs 6 and 7 of this excerpt, Ulpian does not actually claim to be quoting the ipsissima verba of the law (although, since he discusses the implication of 'pervenit' in paragraph 6, it is likely that this word at least appeared in the law). However, there is no reason to doubt that Bruns' reconstruction provides an adequate description of the rule. The purpose of this provision of the law seems to have been the protection of a woman's dowry, presumably in order to facilitate a subsequent marriage in the case of death or divorce. It was comparable to the actio rei uxoriae instituted towards the end of the Republic, whereby a wife, on the termination of the marriage, might recover a part or the whole of the dowry (32). Dowry was an institution of great significance in Roman law, for it was designed to ensure that a wife was provided for both in the duration of the marriage and upon the death of her husband, should she not be provided for in his will.

To return to the ius liberorum, a provision which released freedmen from performing operae for their patrons promised as a condition of manumission by virtue of the possession of two children, is attributable to the lex Iulia (33) :

Qui libertinus duos pluresve a se genitos natusve in sua potestate habebit, praeter eum, qui artem ludicram fecerit quive operas suas, ut cum bestiis pugnaret, locaverit; ne quis operas doni muneris aliudve quicquam libertatis causa patrono patronae liberisve eorum, de quibus iuraverit vel promiserit obligatusve

erit, dare, facere praestare debeto.'

The existence of such a provision is also attested by a constitution of Alexander (34). As for the purported quotation, the 'a se genitos' of line 1 is rather odd, and it would be preferable to replace it, as Cuiacius (35) does, with 'ex se natos'. I am also doubtful about the 'natasve', since one would expect an 'eamve' after the 'eum' of line 2 if it were genuine. Seckel (36) suspects that the 'vel promiserit' of lines 4-5 is an interpolation. There seems little reason, however, for rejecting it on the ground of its sense as he does: the jurist, in fact, provides several examples of promises made to the patron by the freedman (paragraphs 3,4). However, the construction 'vel...-ve' seems extremely clumsy and I am suspicious of 'vel promiserit' for this reason.

Freedwomen who married with the permission of their patrons enjoyed the same privilege. Thus we find in D.38.1.14 (Terentius Clemens ad legem I.et P.):

Plane cum desierit nupta esse, operas peti posse omnes fere consentiunt.

There is one other provision concerning relations between patrons and ex-slaves which certainly belonged to the lex Iulia (37). According to Paul (38), freedmen and freedwomen were released by the lex Iulia from oaths made to their patrons that they would not marry:

Lege Iulia de maritandis ordinibus remittitur iusiurandum, quod liberto in hoc impositum est, ne uxorem duceret, libertae ne nuberet, si modo nuptias contrahere recte velint.

This provision was reinforced in the lex Aelia Sentia.

PENALTIES

Most of the penalties inflicted on the unmarried and childless by the lex Iulia et Papia seem to have been in the area of inheritance, although it is important to bear in mind the fact that, because the innovations made in this area were of particular interest to the jurists, they perhaps devoted a disproportionate amount of space to it in their commentaries. There is, indeed, evidence for the introduction of other penalties by the lex Iulia. As has already been observed, the sc de ludis saecularibus shows that the unmarried were forbidden by the law to watch public games (39). Dio confirms this (40) and mentions a further prohibition against partaking at banquets by the unmarried. In addition, there is evidence in P.Gnomon (par.29)(41) that an annual tax was imposed on unmarried women if their property was worth more than 20,000 sesterces :

Ρωμαλα εὐγενῆς ἔχουσα οὐδὲν βηστερτίων ἔμεχρι
ἀγαμος ἐστὶν δίδωμι κατ'έτος ἑκατοβτήν καὶ ἀκελευθερικὴν
δε ἔχουσα βηστερτίων ἔ τοῦ αὐτοῦ δίδωμι, ἕως ἂν γαμηθῆ.

If this is indeed an Augustan provision, it probably belongs to the lex Iulia, since it concerns caelibes.

Provisions relating to inheritance in the 'lex Iulia' (42)

A very complex system of rules governing inheritance was incorporated into the lex Iulia et Papia. The manipulation of the law of inheritance to encourage marriage and procreation was a concept introduced by the lex Iulia and expanded in the lex Papia Poppaea. It has already been suggested that the jurists in their books 'ad legem Iuliam et Papiam' commented first on the provisions of the lex Iulia together with those of the lex Papia Poppaea which were inseparably connected with them, and later

dealt with the remaining provisions which only appeared in the lex Papia Poppaea. This, together with other evidence, provides some help in distinguishing the provisions of the lex Iulia in this area from those of the later law.

Gaius shows that by the terms of the lex Iulia unmarried people (caelibes) were forbidden to inherit from a will. He also mentions that the lex Papia Poppaea introduced a limitation which forbade married but childless people (orbi) to inherit more than a half :

Caelibes quoque qui lege Iulia hereditatem legataque capere vetantur, item orbi, id est qui liberos non habent, quos lex Papia plus quam dimidias partes hereditatis legatorumque capere vetat...(43).

Item orbi, qui per legem Papiam ob id quod liberos non habebant dimidias partes hereditatum legatorumque perdunt...(44)

Since Gaius refers to the incapacity only of caelibes under the lex Iulia and to the loss of 'dimidias partes' under the lex Papia, the implication is that orbi were not penalised by the lex Iulia. This is endorsed by another text of Gaius (45) :

...aut propter caelibatum ex lege Iulia summotus fuerit ad hereditate.

Similarly, Ulpian says (46) :

..Idem iuris est in persona caelibis propter legem Iuliam.

This, however, appears to be contradicted by Dio (47) who says, when writing about the events of A.D.9, that Augustus increased the rewards offered by the law (lex Iulia) and made a distinction between married and unmarried by imposing different penalties :

...μετὰ δὲ δὴ τοῦτο τοῖς μὲν τὰ τέκνα ἔχουσι τὰ γέρα προέπηύξησε, τοὺς δὲ γεγαμηκότας ἀπὸ τῶν

ἀγόνων τῶ τῶν ἐπιτιμίων διαφορῶ διεχώρισε...

This suggests that the penalties were the same for both caelibes and orbi under the lex Iulia, and this is the view taken by, for example, Last (48). Jörs (49) tried to reconcile the texts by arguing that Augustus passed another marriage law in A.D.4 which imposed equal penalties on the unmarried and childless. However, the evidence for the existence of a third marriage law is extremely flimsy. The only reasonable explanation for the conflict in the texts is that Dio failed to achieve strict legal accuracy here. In describing the terms of the lex Iulia earlier in his narrative (50) he mentions the imposing of penalties 'τοῖς τε ἀγάμοις καὶ ταῖς ἀνάδροις' but says nothing about the imposing of similar penalties on orbi. His account of the lex Iulia is not very specific or detailed, and he does not even name it. Moreover, the introduction of limitations on the capacity of orbi to inherit fits in with the other evidence which we have that, while the lex Iulia was especially directed towards encouraging marriage, the lex Papia Poppaea was directed rather towards promoting procreation.

A period of 100 days was granted (from the opening of the will) within which the caelebs could acquire the capacity to take under the will by marrying:

...caducum appellatur...si caelibis...legatum fuerit, nec intra dies centum vel caelebs legi paruerit...(51).

Since the grant of 100 days was aimed at the caelebs rather than the orbus, this was probably a provision of the lex Iulia.

As the issue of orbitas has been raised, it seems appropriate to discuss it here although it is relevant to the lex Papia Poppaea rather than to the lex Iulia. The juristic sources suggest that the possession of one child brought freedom from orbitas. Orbi are described by Gaius (52) as those 'qui liberos non habent' and excerpts from the jurists' commentaries 'ad legem

Iuliam et Papiam show that to possess one child is 'liberos habere' (53) :

Non est sine liberis, cui vel unus unave filia est: haec enim enuntiatio 'habet liberos' 'non habet liberos' semper plurativo numero profertur, sicut et pugillares et codicilli.

nam quem sine liberis esse dicere non possumus, hunc necesse est dicamus liberos habere.

This, however, seems to conflict with the evidence of Dio (54) whose account of the honorary award of the ius trium liberorum to Livia in 9 B.C. implies that the possession of three children was necessary to free women at least from the penalties of orbitas :

αλλ' ὁ μὲν προαπώλετο, ἢ δὲ δὴ Λιουία εἰκόνων τε ἐπὶ παραμυθία ἔτυχε, καὶ ἐς τὰς μητέρας τὰς τρεῖς τεκούσας ἐβεγράφη. οἷς γὰρ ἂν τὸ δαιμόνιον, εἴτ' οὖν ἀνδρῶν εἴτε γυναικῶν, μὴ δῶ τοσαυτάκις τεκνώσασθαι, τούτων τιβὴν ὁ νόμος, πρότερον μὲν διὰ τῆς βουλῆς νῦν δὲ διὰ τοῦ αὐτοκράτορος, τὰ τῶν τρεῖς γεγεννηκότων δικαιώματα χαρίζεται, ὥστε βφᾶς μήτε τοῖς τῆς ἀπαιδίας ἐπιτιμίοις ἐνέχεσθαι καὶ τὰ τῆς πολυαιδίας ἄθλα πλὴν ὀλίγων τιμῶν καρποῦσθαι. καὶ αὐτὰ οὐκ ἄνθρωποι μόνον ἀλλὰ καὶ θεοὶ εὐρίσκονται, ἔν ἂν τίς τι αὐτοῖς τελευτῶν καταλίπη λαμβάνωσι.

This passage of Dio has led to the view that, while men needed to have only one child to be free from the penalties of orbitas, the ius trium/quattuor liberorum was necessary for women to be able to inherit (55). Corbett (56) believes that the ius trium liberorum was only necessary in order to exempt a person from the penalties of celibacy for failing to remarry after the dissolution of a marriage. Dio's account, in fact, implies that the ius trium liberorum was necessary for both men and women to be able to take

under wills. However, the whole passage is suspect, since, as has just been argued, there were no penalties associated with orbitas in 9 B.C. when the award to Livia was made; these were introduced by the lex Papia Poppaea in A.D.9. Thus a special dispensation made to Livia which permitted her to take bequests as though she had three children would have been meaningless at the time. No doubt Dio overlooked this and his account derives from the fact that the honorary award of the ius trium liberorum by the Emperor developed into a right which seems to have given to the recipient a general dispensation from the penalties of the law. The grant of the ius clearly became a useful way for the Emperor to reward favoured individuals (57). For those who gained the ius trium liberorum by actual possession of three children, there were special privileges, such as release from tutela and from munera, but possession of one child was sufficient for men and women to be able to inherit. Adoptive children were clearly included as well as natural children, hence the need for the measure attested by Tacitus (58), enacted at the time of Nero, which was designed to prevent people from adopting children in order to gain the benefits accorded by the law and subsequently emancipating them.

The rules of the lex Iulia concerning inheritance appear to have been discussed (so far as can be deduced from the excerpts preserved in Justinian's Digest) by Gaius in books 3-6, by Ulpian in books 2-8, by Paul in books 2-4 and by Terentius Clemens in books 3-5 of the commentaries ad legem Iuliam et Papiam. It is impossible, using the evidence for these commentaries, to disentangle all of the original provisions of the lex Iulia from juristic interpretation and later additions, but it is still interesting to look at the issues discussed by the jurists. Gaius discusses such issues as the role of substitutes in wills (59) and legacies of usufruct (60). Ulpian deals with the acquisition of an inheritance through another party (61), partial incapacity of a legatee (62) and the implementation of a condition in a legacy (63).

We possess very few excerpts from Paul's commentary in this

area. In D.32.87, he discusses the term 'legatum', including in it 'fideicommissum' and 'mortis causa donatio' (a gift made in contemplation of death which took full effect on the donor's death) and in D.50.16.138 he includes in the term 'hereditas', 'bonorum possessio'. Paul's comments show that the sanctions which affected the taking of legacies and of inheritances came also to apply to these other categories, presumably because their exclusion by the terms of the Augustan laws had provided useful loopholes for those unwilling to conform to the provisions of the law. Paul, in fact, specifically attributes the extension of the sanctions of the laws to mortis causa donationes to a senatusconsultum (64). Gaius attributes the extension of the sanctions to fideicommissa to the sc Pegasianum (65):

Caelibes quoque, qui per legem Iuliam hereditates legataque capere prohibentur, olim fideicommissa videbantur capere posse....Sed postea senatusconsulto Pegasiano proinde fideicommissa quoque ac legata hereditatesque capere posse prohibiti sunt;

Terentius Clemens discusses such issues as the institution of an heir to an insolvent inheritance (66) and the use of a 'pupillus' as a substitute (67). Elsewhere he discusses conditional legacies (68) and the implications of the terms of the lex Falcidia in determining the legatee's capacity (69).

Excepted Persons

The juristic sources attest the existence of certain groups of people who were 'lege Iulia et Papia excepti'(70). These are sometimes thought to be people who were exempted from the sanctions imposed by the law in the area of inheritance on those who failed to marry and to procreate in accordance with its provisions.

Important texts are Fragmenta Vaticana 216 and 218 in which Ulpian describes those who, because they are 'lege Iulia Papiave

excepti' are not permitted to transfer the burden of tutela to another party:

Excipiuntur autem lege quidem Iulia cognatorum sex gradus et sex septimo sobrino sobrinave natus, sed et nata per interpretationem, quive in alicuius horum potestate sunt quaeve in matrimonio, vel hi qui sunt cognatorum nostrarum hoc gradu nos contingentium mariti, vel eorum qui sunt in potestate nostra, cognati contingentes eos ea cognatione, quae supra scriptum gradum non excedit (71).

Lege autem Papia ii adfines excipiuntur, qui vir et uxor et gener et nurus et socer et socrus umquam fuerunt (72).

These passages seem to imply that the lex Iulia exempted cognati to the sixth degree from the sanctions of the law, while the lex Papia extended this to adfines (73). There are also a few excerpts preserved in Justinian's Digest which appear to bear some relation to this topic by the mention of the terms 'gener', 'socer', 'nurus' etc.. These suggest that the topic was discussed by Gaius in book 4 of his commentary ad legem Iuliam et Papiam (74), by Ulpian in book 5 (75), by Paul in book 2 (76) and by Terentius Clemens in book 2 (77).

However, the relevance of the content of the texts cited above to exemption from the rules of the law on incapacity is rendered suspect by a comparison of Frag.Vat.218 with the detailed regulation of succession between spouses set out in Ulpian Reg.15,16 and discussed fully below. If, as the Frag.Vat. text suggests, the 'vir et uxor' etc. were among those totally exempted from the sanctions imposed by the marriage laws on inheriting, then the limitations outlined by Ulpian on inheriting between husband and wife are meaningless. In fact, the lists of persons excepted from the terms of the marriage laws preserved in Frag. Vat.216 and 218 are far too extensive to be applicable to the restrictions placed on caelibes and orbi.

The implication is that Ulpian's list of excepted persons is not related to capacitas but to something else. Kaser (78), supported by Astolfi (79), has proposed that the exceptions refer to release from the obligation of giving evidence (presumably in cases relating to the application of the terms of the marriage laws) against cognati and adfines to the sixth degree. Such exceptions also featured in the judiciary laws, the leges de vi and the lex Aelia Sentia. Two excerpts from the jurists' commentaries ad legem Iuliam et Papiam are relevant here :

Lege Iulia iudiciorum publicorum cavetur, ne invito denuntietur, ut testimonium litis dicat adversus socerum generum, vitricum privignum, sobrinum sobrinam, sobrino sobrina natum, eosve qui priore gradu sint, item ne liberto ipsius, liberorum eius, parentium, viri uxoris, item patroni patronae : et ut ne patroni patronae adversus libertos neque liberti adversus patronum cogantur testimonium dicere (80).

In legibus, quibus excipitur, ne gener aut socer invitus testimonium dicere cogeretur, generi appellatione sponsum quoque filiae contieri placet : item soceri sponsae patrem (81).

In the first text, Paul lists those exempted from acting as witnesses by the terms of the lex iudiciorum publicorum, and includes not only cognati and adfines but also patrons and freedmen. In the second text, Gaius only mentions 'gener' and 'socer'. The other excerpts from Justinian's Digest related to this subject give definitions of 'nurus', 'gener', 'socer' and 'socrus' (82). These excerpts have an obvious connection with Frag.Vat.216-218, and since they are taken from the commentaries ad legem Iuliam et Papiam, there is good reason to believe that the exemptions from giving evidence set out in them are relevant to the application of the marriage laws.

While the references in Frag.Vat.216 and 218 to those 'lege Iulia et Papia excepti' are clearly not concerned with exemption from the penalties associated with celibacy and childlessness,

some scholars argue on other grounds that the Augustan marriage laws did provide exemption from these penalties for those in a close relationship to the testator. Voci (83) cites Ulp.Req.18.1 which attributes to relatives of the testator to the third degree the right to caducous inheritances by the ius antiquum and argues that such relatives must, therefore, have been eligible to inherit. Astolfi (84) argues that, since in the case of intestate succession, bonorum possessio might be claimed by relatives to the sixth degree, such relatives, whether married or not, should have had the same rights to the property of a testator. Wallace Hadrill (85), cites a passage from the church historian Sozomen (86) which claims that close relatives were exempt from the rules concerning inheriting. He also cites the rules outlined by Ulpian concerning succession between spouses (87). Here the restrictions did not apply if the spouses were relatives to the sixth degree, and, since the other exceptions outlined by Ulpian also applied, for the most part, to the general rulings regarding caelibes and orbi, he infers that this exception applied. In addition, he observes that the Republican lex Furia testamentaria, which placed a limit on the size of legacies which might be bequeathed, also excepted relatives to the sixth degree.

The issue is an important one, for if there were such exemptions in the legislation, this would affect any assessment not only of its severity but also of its purpose. The main problem with the theory that close relatives were exempt from the rules governing inheritance by caelibes and orbi is the complete absence of any mention of this by Gaius when he outlines the rules (88). Nor is there any indication whatsoever in the sources of such exceptions having been introduced at a later date. In addition, the argument based on inference from the rules relating to inheriting between spouses is very shaky, for these rules are distinct from those regulating other areas of inheritance. Nevertheless, the silence of Gaius, while odd, does not provide conclusive evidence for the absence of such exceptions, and in view of the strength of many of the arguments cited above, I favour the view that Augustus excepted at least some close

relatives from the rules concerning caelibes and orbi.

There was another, less important, exception provided by the law (or laws). According to the Gnomon, people whose property was worth less than 100 sesterces were exempt from the sanctions (89).

Inheriting between husband and wife.

The rules laid down for inheriting between husband and wife were distinct from the more general rulings on inheritance. The subject was undoubtedly dealt with in the lex Papia Poppaea, for Ulpian specifically mentions the lex Papia when laying down the age-limits within which the sanctions introduced in this area were applicable. Moreover, the emphasis in the provisions on the procreation of children suggests the lex Papia rather than the lex Iulia. However, the jurists' remarks on the subject appear, for the most part, in the earlier sections of their commentaries, perhaps suggesting that there were rules relating to this area in the lex Iulia which were expanded upon in the lex Papia Poppaea. It would, indeed, be surprising if the lex Iulia made no provision for this special area of inheriting, so that the rules relating to inheriting in general were applied.

Detailed information on inheriting between husband and wife appears in Ulpian Req. 15 ('De Decimis') and 16 ('De solidi capacitate inter virum et uxorem'). The rules set out there are as follows: men and women are permitted to inherit one tenth from each other by virtue of being married. A further tenth may be claimed for each child of a previous marriage, and for a common child who has died 'post nomen diem'. In addition, they are allowed the usufruct of a third part of their spouse's property, and the ownership of this part when they have children from a new marriage. A woman is permitted to take dowry which is given in a legacy to her (90).

Ulpian goes on to say that a husband and wife may inherit from each other without restriction if they are outside the age limits within which the lex Papia requires children (i.e. 20/25 - 50/60), if they are cognati to the sixth degree, if the husband is absent, if they have obtained the ius liberorum from the Emperor, if they have one common child or have lost a son of at least 14, a daughter of 12, two children of 3 years old, or three 'post nomen diem' or if they have lost an impubes within 18 months. A wife may inherit without restriction if she has a child of her husband's within 10 months of his death. They may, however, inherit nothing from one another if they have married contrary to the provisions of the lex Julia et Papia. (91)

A paragraph of the Gnomon confirms that a wife might only leave a tenth of her property to her husband if they had no children (par.31) (92):

Ῥωμαία ἔξοι ἀνδρὶ [κ]αταλείπειν τὸ δεκάτου ὧν
κεκτητ[αί] ἔαν δε πλεονα ἀναλαμβάνε[ται].

Quintilian (93) draws attention to the anomaly created by these provisions. A man might leave a greater part of his property to a meretrix if he had no children, than to his wife:

Placet hoc ergo, leges diligentissimae pudoris custodes, decimas uxoribus dari, quartas meretricibus.

The absence of a husband mentioned by Ulpian as bringing freedom from the restrictions imposed by the laws, no doubt had to be 'rei publicae causa'. This is confirmed by the juristic discussions found in several excerpts from Justinian's Digest concerning the exact definition of 'rei publicae causa abesse' (94).

The limitations imposed in this area on those without children were severe and innovatory. Since manus marriages were, by this time, very rare, men and women depended on being named as heirs by their spouses if they wished to inherit from them, for they did not have a strong claim in case of intestacy. (95)

Alibrandi (96) believes that the laws also provided some regulation of gifts between husbands and wives. Gifts between spouses were certainly forbidden at some point, and in D.24.1.1 we find the following statement by Ulpian (32 ad Sabinum):

Moribus apud nos receptum est, ne inter virum et uxorem donationibus valerent, hoc autem receptum est, ne mutuo (mutuato F) amore invicem spoliarentur donationibus non temperantes, sed profusa erga se facilitate.

From this excerpt, it appears that gifts were forbidden for the protection of both parties, should the marriage be dissolved.

Alibrandi believes that the fragment of Ulpian cited has been interpolated, and that the prohibition of gifts was a provision of the Augustan marriage laws. He agrees that gifts between spouses were not possible in very ancient times when the wife was regarded as a filiafamilias, but he cites evidence to demonstrate that gifts were permissible during much of the Republican period. He also cites the lex Cincia of 204 B.C. which forbade gifts above a certain sum but excepted husbands and wives from the prohibition, and a constitution of Constantine (97) concerning gifts between spouses in which Constantine repeals the prohibition of 'prisca legum aequitas' and describes acts committed against it as 'ad eludendas legum sanctiones'. Alibrandi relates these expressions to the lex Iulia and the lex Papia. He argues that the reason given in D.24.1.2 for the prohibition ('ne cesset eis studium liberos potius educendi') sounds very much Augustan. His proposed reconstruction of D.24.1.1. is as follows:

Moribus antiquis penes nos receptum erat ne inter virum et uxorem donationes valerent, quum uxores apud viros filiarum familias loco essent. Postea Divus Augustus in lege Iulia et Papia decimaria eas prohibuit, ne coniuges mutuo amore invicem spoliarentur....

If Alibrandi's hypothesis be correct, it is surprising that

the sources do not once specifically mention the lex Iulia et Papia in connection with the introduction of this prohibition, and that Ulpian should have used the word 'moribus' regarding a rule originating in the Augustan period. There is one excerpt in the title of Justinian's Digest 'de donationibus inter virum et uxorem' taken from a commentary ad legem Iuliam et Papiam (98). Here, Terentius Clemens discusses the admission of a wife to the usucapio of a gift made to her by her husband. But it is easy to see how discussion of such a topic would have arisen from a consideration of the rules of Augustus's legislation regarding inheriting between spouses. The absence of any other excerpts from the commentaries on the Augustan laws seems to confirm that the jurists did not regard the lex Iulia et Papia as having been of any great significance in the history of donationes inter virum et uxorem.

Bequests forbidding or limiting the marriage of a spouse

There is evidence that the lex Iulia intervened in the case of a conditional bequest which forbade or limited the remarriage of a surviving spouse if she were to benefit from a legacy or inheritance. A testator might do this to ensure that his widow remain faithful to his memory, and that his property should not fall into the hands of a future husband of the widow. Thus, according to Paul:

Condiciones contra leges et decreta principum vel bonos mores adscriptae nullius sunt momenti: veluti "si uxorem non duxeris" "si filios non susceperis". (99)

That the 'leges' referred to by Paul include the Augustan marriage laws is supported by excerpts taken from the jurists commentaries ad legem Iuliam et Papiam relating to this subject. Thus, in an excerpt from his 3rd book of commentary on these laws (100) Gaius

gives various examples of conditional legacies which limit the remarriage of the widow. He concludes that the law only overrules a condition when it forbids remarriage altogether, or limits it to a person who is 'indignus'. Terentius Clemens in his 4th book of commentary on the laws (101) observes the difference between the permanent injunction of widowhood by a condition and a temporary injunction for the sake of 'cura liberorum'. The former is overruled by the law, whereas the latter is not. In his 5th book of commentary ad legem Iuliam et Papiam (102) he describes cases in which such conditional bequests are not acceptable because they are designed to evade the requirements of the law: he ends with the words '...legem enim utilem rei publicae subolis scilicet procreandae causa latam, adiuvandam interpretatione'.

Further evidence to support the association of a provision of this kind with the lex Iulia de maritandis ordinibus is found in CJ 6.40.2, a constitution of Justinian (A.D. 531), which refers to the 'lex Iulia miscella', in connection with testamentary viduitas indicta (103). Scholars are generally agreed that Justinian is referring to the Augustan lex Iulia, and that the constitution aims to free widows from the obligation to pronounce a 'sacramentum procreandae subolis gratia' in order to take inheritances and legacies subjected to the condition of widowhood. There is a further reference to the lex Iulia miscella in Novellae 22.43: apparently the law granted to widows a period of one year in which to take this oath and so to inherit. This suggests that a widow who wished to be freed from a condition of widowhood in a will must remarry within a year of her husband's death, and swear that she had done so 'procreandae subolis gratia'. The only problem with this is that the vacatio after the death of a husband was extended by the lex Papia to two years, and it is strange that Justinian should have overlooked this. Humbert suggests that, while there was a vacatio of two years, one year was set as the period within which the widow must actually take the oath. It is clear from CJ 6.40.2 (as from the text of Paul cited) that subsequent enactments also provided rulings on the subject of conditional bequests of this nature, and it is, therefore, not

possible to ascertain exactly what was ruled by the lex Iulia de maritandis ordinibus. However, it is easy to see how a provision of this nature which encouraged remarriage and procreation would have been very much in the spirit of the Augustan marriage laws.

Overruling of unreasonable opposition by a 'paterfamilias' to the marriage of his children.

There are two excerpts from Justinian's Digest concerning the marriages of those in potestate :

Non cogitur filius familias uxorem ducere (104).

Capite trigesimo quinto legis Iuliae qui liberos quos habent in potestate iniuria prohibuerunt ducere uxores vel nubere, vel qui dotem dare non volunt ex constitutione divorum Severi et Antonini, per proconsules praesidesque coguntur in matrimonium collocare et dotare prohibere autem videtur et qui condicionem non quaerit (105).

The second excerpt has been the subject of much debate, and will therefore be discussed first. It appears to attribute to the lex Iulia (and to a complementary Imperial constitution), a provision which overruled the unreasonable opposition of a paterfamilias to the marriage of his children. The passage has justifiably been suspected of interpolation. The relationship between the lex Iulia and the 'constitutio divorum Severi et Antonini' is totally obscure, and if the reference to one were deleted, the whole provision could be attributed to the other. Further, while there is reference at the beginning of the excerpt to a father's opposition to the marriage of 'liberi', the subsequent words 'collocare' and 'dotare' can only refer to daughters.

Moriaud; (106) supported by Castelli (107) and Bonfante

(108), believes that neither 'liberos' nor 'ducere uxores vel' is genuine, and that the original text read:

qui filias neptesve quos habent in potestate iniuria prohibuerint nubere...'

This would make the whole text apply only to the marriage of daughters and granddaughters: Moriaud thinks that alterations were made by Justinian's codifiers.

Jörs (109) on the other hand, has suggested that 'liberos' is genuine, and that the ruling of the lex Iulia applied to all descendants, whereas that of the complementary constitution only applied to female descendants. Thus, the constitution was designed to prevent parents from practically obstructing the marriages of their daughters by refusing to provide a dowry even though they might have given verbal consent. However, it is very difficult to deduce this from the text, and it is an unlikely explanation. Moriaud argues that the paterfamilias was much more likely to have been concerned to have complete authority over the marriage of his sons than of his daughters: it would certainly have been surprising if the rights of a paterfamilias in the question of the marriage of his son was so curtailed at this time, particularly since any offspring of the marriage would also be in his potestas. Moriaud also argues that, since there was doubt as to the validity of the marriage of a son of an insane paterfamilias, it is unlikely that the opposition of a sane paterfamilias could be overruled (110). There is no doubt that this excerpt has been interpolated, and the arguments for the original application of this provision only to daughters and granddaughters are the most convincing.

Moriaud further wishes to insert the words 'per praetorem urbanum' just before 'vel ex constitutione', in order to make the reference to the Imperial constitution fit more easily into the excerpt. He refers to the extension of various rules originally applicable in Rome by the lex Iulia et Papia to the provinces by

later enactments (111), and suggests that this was the purpose of the 'constitutio divorum Severi et Antonini'. This is a plausible argument, but it is difficult to imagine how the words 'per praetorem urbanum' came to be left out of the text in Justinian's Digest. It may be that Marcian himself was unable to disentangle the provisions of the constitutio from those of the lex Iulia, and hence to dismiss the ambiguity.

Castelli (112) wishes to delete from the text 'vel qui dotem dare non volunt' and 'et dotare', thus removing all mention of dowry from the provision on the ground that the introduction of a legal obligation for a father to provide a dowry came much later than the lex Iulia. I do not believe, however, that the wording of D.23.2.19 certainly implies the existence of a statutory obligation on all fathers to provide a dowry for their daughters. Marcian is speaking here of those fathers who oppose the marriage of their daughters iniuria, and in the overruling of their opposition is implied a requirement that they provide a dowry. There is certainly no other evidence which suggests the introduction of a legal obligation to provide dowry through the lex Iulia, and while Castelli is, I believe, right to argue that such a ruling was introduced at a much later date (113), it is not necessary for him to alter the text of D.23.2.19 so dramatically in order to sustain his argument. His omission of the reference to dowry would indeed overcome the problem of explaining why a provision of the lex Iulia regarding dowry should have appeared in 35th chapter, given that the other rules concerning dowry appear much earlier. However, if one takes the view that this provision is not primarily concerned with the issue of dowry but with the issue of unreasonable opposition by a paterfamilias to the marriage of his daughters, so that dowry is an incidental issue, there is no problem in explaining why this provision is separated in the law from the others relating to dowry.

While the filiusfamilias therefore appears to have had no rights at this time against the unjust opposition of a paterfamilias to his marriage, the excerpt cited from Terentius

Clemens' 3rd book of commentary on the laws (114), shows that at the same time he could not be compelled (presumably by the paterfamilias) to marry. It is difficult to see how this fits in with the rest of the law and it looks as though it was the result of subsequent juristic interpretation. Probably Terentius Clemens, in this 3rd book of commentary, having discussed the general encouragement of marriage by the law (including the provision of a tutor for the constitution of dowry)(115), added in this context that there was no means by which a paterfamilias could actually compel his male descendants to marry. This is not to say that a filiusfamilias was exempt from the penalties of the lex Iulia et Papia for failing to marry but that he was induced to marry not by the authority of the paterfamilias but by the law, that is by the penalties and privileges of the lex Iulia et Papia.

LEX PAPIA POPPAEA

Having considered those provisions which are either specifically attributed in the sources to the lex Iulia or which one may reasonably assume to have appeared in the lex Iulia, let us now turn to those which are attributed specifically to the lex Papia Poppaea.

Betrothal

The evidence suggests that at some point after the passing of the lex Iulia, a limit was placed on the duration of betrothals and it is reasonable to assume that such a provision was incorporated into the lex Papia Poppaea. Betrothal was clearly regarded as equivalent to marriage for the application of the lex Iulia. Thus betrothed couples were able to enjoy the privileges introduced by the law, and to escape the penalties imposed on

ὡς δ' οὖν βρέφη τινὲς ἐγγυώμενοι τὰς μὲν τιμὰς τῶν
γεγαμηκότων ἔκαρποῦντο, τὸ δὲ ἔργον αὐτῶν οὐ παρέχοντο,
προέταξε μηδεμίαν ἐγγύην ἰσχύειν μεθ' ἧν οὐδὲ δυοῖν
ἔτοῖν διελεύοντων γαμήσει τις, τοῦτ' ἔστι δεκέτις
πάντως ἐγγυᾶσθαι τὸν γέ τι ἀπ' αὐτῆς ἀπολαύδοντα.
δώδεκα γὰρ ταῖς κόραις ἐς τὴν τοῦ γάμου ὥραν ἔτη
πλήρη, καθάπερ εἶπον, νομίζεται.

It is clear from this passage that men were abusing the law by betrothing themselves to girls well below marriageable age, and by prolonging the period of betrothal, enjoying all the privileges of marriage while evading its duties. In order to preclude this abuse, Augustus set a maximum of two years for the duration of betrothals.

Suetonius confirms the measures taken by Augustus to prevent abuse in this area of the law:

Cumque etiam immaturitate sponsarum vim legis eludi sentiret, tempus sponsas habendi coartavit...(117),

Dio implies that the measure taken to limit the period of betrothal followed quite closely on the passing of the lex Julia. Suetonius mentions the measure after describing the protest of the knights against the lex Julia (recorded by Dio under the events of AD 9) but there is nothing to suggest that he was recording events in chronological order. It is unlikely that this abuse of the lex Julia was noticed and dealt with as soon after the enactment of the lex as Dio's account suggests. He may well have mentioned it under the events of 18 B.C. because of its close connection with the terms of the lex Julia. The new limitation placed on the duration of betrothals certainly came into force by A.D. 9.

The existence of such a provision in the lex Papia is further supported by an excerpt from Gaius' 1st book of commentary ad

legem Iuliam et Papiam (118) in which he shows that some valid reasons for prolonging a betrothal came to be recognised :

Saepe iustae ac necessariae causae non solum annum vel biennium, sed etiam triennium et quadriennium et ulterius trahunt sponsalia, veluti valetudo sponsi sponsaevae vel mortes parentium aut capitalia crimina aut longiores peregrinationes quae ex necessitate fiunt.

Since two years was set as the maximum period for betrothals, Volterra (119) wishes to delete the 'annum vel' of the excerpt. This amendment, however, is based on a misunderstanding of the text. 'Annum vel biennium' is distinguished from 'triennium etc.' by the non solum...sed etiam': the implication is that a year or two is the normal length for a betrothal, whereas three or more years is an abnormal period which can only be justified by 'iustae ac necessariae causae.'

The decision reported by Paul (120) forbidding a person to marry the mother of his sponsa provides further evidence that betrothal was viewed as equivalent to marriage. Augustus did not alter this concept in the lex Papia : he chose to check the abuse by limiting the period of betrothal during which the privileges associated with marriage could be claimed.

Registration of Births

There is evidence which assigns to the lex Papia Poppaea (and to the lex Aelia Sentia) a provision which required that all legitimate births be registered. The evidence comes from an inscription:

L.Iulius Vestinus praef.Aeg. nomina eorum qui a lege Pap.Popp. et Aelia Sentia liberos apud se natos sibi professi sunt proposuit P.Mario L.Afinio Gallo cos.(121).

This inscription, together with others of a similar nature, has been discussed by Schulz. He shows that only legitimate children in possession of Roman citizenship were to be registered, and that the requirement was extended to include illegitimate children by a constitution of Marcus Aurelius (122). The passage which attests this later extension also shows that, at least by this time, such registration had to be made within 30 days of the birth of the child, and Schulz argues convincingly that this rule went back to Augustus. As for illegitimate children at the time of Augustus, the parents might apparently make a so-called testatio or statement of the birth before witnesses.

Some excerpts from Terentius Clemens' 3rd book of commentary ad legem Iuliam et Papiam suggest that the registration of births was discussed in this book:

Qui in continentibus urbis nati sunt Romae nati intelliguntur.
(123)

This is probably related to the requirement attested by the epigraphical evidence that the place of birth be registered. Another excerpt from the same book of commentary discusses the question of who is entitled to make the professio:

Etiam matris professio filiorum recipitur; sed et avi recipienda est (124).

It is easy to see the need for such a system of registration of births, given the various privileges granted by the marriage laws (and especially by the lex Papia Poppaea) to those who possessed children. However, as Schulz shows, the accuracy of the register depended on the good faith of those making the professiones and judges would therefore have been free to use their discretion in estimating the value of this evidence.

Rights of patrons and ex-slaves

An important group of provisions which Gaius attributes to the lex Papia Poppaea are those regulating the successorial rights of patrons and their ex-slaves (125). Since the lex Papia is specifically named in his discussion on this topic, while the lex Iulia is not mentioned at all, it is reasonable to assume that the rules appeared for the first time in the second law. There is also the evidence of Just. Insts.3.7 :

Postea lege Papia audacta sunt iura patronorum qui locupletiores libertos habeant...

The details provided by Gaius are as follows. In paragraphs 40 - 41 he outlines the position previous to the lex Papia. Under the law of the Twelve Tables, if a libertus died intestate without a suus heres, his patron inherited his property. However, the praetor's edict, granted to the patron half of the inheritance whether the libertus died testate or intestate. The patron could only be excluded by the freedman's natural children, including those who had been emancipated or given in adoption, but excluding those who had been disinherited. Gaius goes on to describe the measures introduced by the lex Papia. The law granted to the patron a share of the estate of a freedman who left a fortune of over 100,000 sesterces proportionate to the number of children left by the freedman, whether he died testate or intestate. Thus if the freedman died childless, or if he left one child, the patron inherited a half of his estate; if he left two children, the patron inherited a third; and if three, the patron was excluded (paragraph 42).

Previous to the lex Iulia de maritandis ordinibus, a freedwoman would always have had as tutor her patron who would therefore have authorised her will and could make himself heir. If she died intestate, he again received the inheritance, since a

woman could not have sui heredes who would exclude him (paragraph 43). The lex Papia, however, released some freedwomen from the tutela of their patrons by the ius quattuor liberorum, thus enabling them to make their wills without patronal auctoritas. At the same time, a proportion of her estate was granted to the patron according to the number of children who survived her: thus if none of her children survived her, all of her property on her death went to the patron. The rights of the patron also applied to his sons and agnatic descendants (paragraph 45).

While under the law of the Twelve Tables, female descendants of the patron enjoyed the same rights, they were excluded from bonorum possessio contra tabulas liberti by the praetor's edict. But under the lex Papia, a patron's daughter, by virtue of the ius trium liberorum, could claim bonorum possessio of a half of the estate against the will of her father's freedman, or, in the case of intestacy, against a freedman's adoptive son, wife, or daughter-in-law in manus (paragraph 46). Gaius acknowledges a degree of ambiguity in the law over the rights of the daughter of a patron to the estate of a freedwoman: he holds that, even if she had the ius liberorum, she had no right to a 'virilis pars' of the estate of a testate freedwoman with four children. However, the lex Papia granted to her a 'virilis pars' if the freedwoman died intestate. Her rights against the will of the testate freedwoman were the same as those which she had against the will of the freedman. The extranei heredes of the patron had no claims to succession whether the freedman died testate or intestate (paragraph 48).

Before the lex Papia, patronae had the same rights to the estates of their freedmen as patroni had by the law of the Twelve Tables: their rights were not improved at all by the praetor's edict (paragraph 49). The lex Papia gave to a patrona ingenua with two children, and to a patrona libertina with three children, nearly the same rights as the praetor's edict gave to a patronus; this law further bestowed on a patrona ingenua with three children (but not on a patrona libertina) exactly the same rights as it

granted to a patron (paragraph 50).

No new rights were granted to a patrona possessing children to the property of an intestate libertina. Hence, if neither had undergone capitis deminutio, the inheritance went to the patrona by the law of the Twelve Tables, thus excluding the children of the libertina, whether the patron had children or not. But if the right of the patrona had been affected by capitis deminutio of either woman, the freedwoman's children excluded the patrona (paragraph 51). The lex Papia granted to a patrona who had children the same rights against the will of a testate freedwoman as the praetorian edict granted to a patron against the will of a freedman (paragraph 52). The son of a patrona who possessed at least one child was granted by the lex Papia almost the rights of a patron (53).

Ulpian confirms these provisions of the lex Papia, although he gives less detail (126). After describing the rulings of the law of the Twelve Tables and of the praetor's edict, he mentions the release of the liberta from the tutela of her patron through the ius quattuor liberorum, and the right of her patron to a virilis pars of her property by the lex Papia. He confirms that male children of the patron enjoyed the same rights as the patron himself, while female descendants had no right of bonorum possessio against the will of the freedman or against the heirs 'non naturales' of an intestate freedman, unless granted to them by the lex Papia through the ius trium liberorum. He also confirms that ingenuae patronae possessing two children, and libertinae possessing three were granted the same rights as were granted to the patron by the praetorian edict and that ingenuae patronae possessing the ius trium liberorum were granted the same rights as the patron himself possessed.

It is clear from the comments of Gaius and Ulpian that Augustus intervened extensively in this area. Hence Terentius Clemens devoted (probably) four books of his commentary on these laws to the provisions on patronal succession (9-12), Gaius three (8-10), Paul three (8-10), and Ulpian two (10-11). The rules

governing patronal succession to testate, and especially to intestate, ex-slaves became much more complex than they had been before.

The outstanding feature of the rules introduced by the lex Papia was the provision of incentives to procreation both among patrons and among 'locupletiores liberti'. Hence patronae and daughters of patroni were encouraged to have children in order to improve their rights to the property of their ex-slaves, while liberti and libertae were encouraged to procreate in order to exclude their patrons from bonorum possessio. Patronae and female descendants of a patron could increase their rights by virtue of the ius liberorum, and the son of a patrona also improved his position by the possession of children. Libertae could dispose of their property as they wished if they possessed the ius quattuor liberorum.

The juristic excerpts ad legem Iuliam et Papiam preserved in Justinian's Digest which relate to this area of the law add little to the detailed picture provided by Gaius. Terentius Clemens discusses such issues as the rights of the disinherited children of patrons (127) and manumissions in fraud of creditors (128). Ulpian defines 'virilis' (129), and discusses the case of a freedman who tries to evade the law by making himself 'minor centario' (130) and of a freedman accused of a capital crime (131). Paul discusses the loss of patronal rights by contravention of the terms of the lex Aelia Sentia (132) and the effect of the ius anulorum on a patron's rights (133). Other issues are discussed by the jurists, but these are of no particular significance.

These provisions were not the only rules of the marriage laws concerning relations between patrons and ex-slaves. The provision of the law which excused freedpersons from the obligation of performing operae promised as a condition of manumission has already been mentioned. A liberta who was over 50 years of age was also exempt from the obligation of performing

operae for her patron:

Liberta maior quinquaginta annis operas praestare patrono non cogitur' (134).

Caduca

Some of the provisions of the lex Papia relating to inheritance modified those of the lex Iulia, and have already been discussed. But it is clear from the juristic evidence that the lex Papia introduced new and complex rulings on caduca, that is, property which could not be inherited because of the incapacity of a person or persons designated in the will. According to Ulpian (135):

Quod quis sibi testamento relictum, ita ut iure civili capere possit, aliqua ex causa non ceperit, caducum appellatur, veluti cecederit ab eo...

The provisions of the lex Iulia which denied to caelibes the capacity to inherit must also have resulted in an increase in vacant property (and hence Ulpian's reference to the lex Iulia caducaria (136)), but apparently it was the lex Papia Poppaea which brought in detailed rulings on the destiny of such property. Hence the introduction of rules governing caduca are generally associated by the jurists with the lex Papia:

post legem vero Papiam deficientis portio caduca fit... (137).

sed post legem Papiam Poppaeam, quae partem non adeuntis caducam facit (138).

sed post legem Papiam Poppaeam non capientis pars caduca fit (139).

In addition, most of the jurists' comments on inheritance and caduca are to be found in the latter books of their commentaries on these laws, where (as has been suggested) the provisions of the lex Papia Poppaea are under discussion.

The main innovation made by the lex Papia Poppaea in the area of inheritance has already been mentioned, namely the penalisation of orbi as well as caelibes:

Caelibes quoque, qui lege Iulia hereditatem legataque capere uetantur; item orbi, id est qui liberos non habent, quos lex... (140).

Item orbi, qui per legem Papiam [ob id quod liberos non habebant] dimidias partes hereditatum legatorumque perdunt... (141).

This in itself would have considerably increased the amount of property which became caducous.

Gaius provides details of the provisions of the lex Papia Poppaea relating to caduca (142). Previous to the lex Papia, under a legacy per damnationem, the share of a legatee who failed to take, stayed in the inheritance, while in the case of a legacy per vindicationem, it accrued to the colegatee. But after the lex Papia, if a legacy became caducous, it was assigned to those co-legatees possessing children. Gaius goes on to say (143) that in the case of caducous legacies, the lex Papia gave preference to the co-legatee with children over the heirs (even if they had children). The preference given by the lex Papia to co-legatees was the same for legacies per vindicationem and per damnationem (144). As has already been observed, the possession of one child was sufficient for a person to be classified as possessing children (145).

Ulpian informs us that in the case of heirs being incapaces, the lex Papia gave to descendants and ascendants of the

testator to the third degree, the ius antiquum. Thus they were allowed to inherit caducous property in a will in addition to their own share:

Item liberis et parentibus testatoris usque ad tertium gradum lex Papia ius antiquum dedit, ut heredibus illis institutis, quod quis ex eo testamento non capit, ad hos pertineat aut totum aut ex parte, prout pertinere possit (146).

He also shows that, by the terms of the lex Papia, a legacy did not go to the legatee, or else become caducous, until after the opening of the will, and not, (as previously), after the testator's death:

Legatorum, quae pure vel in diem certum relicta sunt, dies cedit antiquo quidem iure ex mortis testatoris tempore, per legem autem (Papiam) Poppaeam ex apertis tabulis testamenti... (147)

Thus the period of 100 days granted to the incapax in order to remedy his disobedience to the law ran from the time of the opening of the will.

When there were no parents nor close relatives designated in a will who might lay claim to caducous property, it was assigned to the treasury. Thus, according to Tacitus (148) :

Lege Papia Poppaea praemiis inducti, ut, si a privilegiis parentum cessatur, velut parens omnium populus vacantia teneret.

This is confirmed by a passage of the jurist Marcellus (149) :

Proxime in cognitione principis cum quidam heredum nomine induxisset et bona eius ut caduca a fisco vindicarentur, diu de legatis dubitum est a maxime de his legatis quae adscripta erant his, quorum institutio fuerat inducta.

Ulpian (150) describes a constitution of Caracalla which abolished

the right of legatees possessing children to caducous property, and claimed for the treasury all such property except that due to relatives of the testator by the ius antiquum :

Hodie ex constitutione imperatoris Antonini omnia caduca fisco vindicantur, sed servato iure antiquo liberis et parentibus.

How much caducous property actually went to the treasury before the enactment it is difficult to say. Tacitus implies that one of Augustus's main motives for introducing these rulings was a financial one, but this accusation needs to be regarded with caution. If, as may well have been the case, close relatives of the testator enjoyed exemption from the provisions of the laws regarding inheritance, then, bearing in mind also the rights of co-legatees who were parents and of those relatives who enjoyed the ius antiquum, it seems unlikely that the treasury acquired a great deal of property from this source.

The rulings of the lex Papia Poppaea on caduca clearly gave rise to numerous questions and problems of interpretation among the jurists. While there are difficulties involved in determining from the content of the many excerpts which we possess from the commentaries ad legem Iuliam et Papiam relevant to this issue, the exact provision under discussion and in distinguishing the terms of the lex Papia Poppaea from subsequent developments, it is still of interest to look at the issues discussed by the jurists. These are, for example, various excerpts relating to the opening of wills (151) and to entry into inheritances and the acceptance of legacies (152). In connection with the rights of coniuncti to take caducous legacies, Paul provides definitions of coniunctio (153). Other excerpts refer to the rôle of substitutes in wills (154) and to the use of third parties, such as slaves, for acquiring legacies (155). A large number of excerpts is concerned with various different types of legacy, such as one which is inutile (156) null (157) or pro non scripto (158). Conditional legacies were evidently of great interest to the jurists in their consideration of the rules of the law concerning

caducous property, for the fulfilment or failure of conditions also affected the destiny of property legated. Thus they are discussed by Gaius (159) by Paul (160) by Terentius Clemens (161) and by Ulpian (162). The jurists also discuss legacies left 'in diem' (163), legacies of optio (164) and legacies of usufruct (165): the nature of some of these legacies evidently raised interesting questions because they could not, if caducous, be appropriated by the treasury.

Some of the jurists' comments are concerned with the various loopholes obviously exploited by those who wished to avoid the penalties of the law without obeying its injunctions. It has already been observed that people resorted to leaving their property to incapaces by way of fideicommissa or mortis causa donationes which were evidently not subjected by the lex Papia Poppaea to the same restrictions as were legacies and inheritances. Enactments were thus needed to extend the restrictions to all types of bequest. There are excerpts which confirm that, by the time that the jurists were writing, mortis causa donationes and fideicommissa were treated in the same way as legacies in a will (166). Other excerpts provide further commentary on mortis causa donationes (167) and fideicommissa (168).

It is interesting that fideicommissa should have been used as loopholes by which the terms of the law might be avoided, for it was during the Augustan period that they became legally binding so that a testator no longer had to depend merely on the good faith of the trustee (169). An excerpt from Gaius' fifteenth book of commentary on these laws describes the tacitum fideicommissum as a fraus legis. This involved a person promising secretly to restore to an incapax property which the latter was forbidden to inherit (170).

One further provision of the lex Papia Poppaea in the area of inheritance is mentioned by Dio (171). Describing the events of A.D.9, he suggests that certain women were released from the rules

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of the lex Voconia of 169 B.C.. By this law, women were not allowed to inherit more than 100,000 asses (172). Dio does not actually specify who the privileged women were, but there is good reason to assume that they were the possessors of a certain number of children, and it is reasonable to associate this measure with the lex Papia Poppaea.

The large number of juristic excerpts from the commentaries ad legem Iuliam et Papiam is an indication both of the great interest which the jurists had in the provisions of the laws concerning inheritance and of the significance of these provisions. If close relatives of the testator were indeed exempt from the restrictions imposed by the laws on the unmarried and childless, then intestate succession would have been little affected, for the persons entitled to inherit on intestacy would, for the most part, have come within the circle of persons excepted by the laws (173). However, in relation to testate succession the laws were of enormous significance. placing as they did severe and unprecedented restrictions on the right of a testator to bequeath his property as he wished. Such restrictions were unknown during the Republic, when the only way in which the wishes of a testator might be frustrated was through the querela inofficiosi testamenti whereby a close relative of the testator might claim that he had been unjustly omitted from a will (174). The rules laid down by the laws concerning inheritance were of great interest to the jurists not only because they were innovatory but also because they would have affected a large number of people, especially those who had large amounts of property to dispose of in a will. The widespread Roman practice of legacy-hunting is well known, and since it played an important part in the patron-client relationship and in the concept of amicitia, the effect of Augustus' interference in the freedom of testators to leave legacies as they wished must have been profound.

Delatores

The lex Papia Poppaea provided no system for the application of the rules concerning inheritance and it was therefore left to informers (delatores) to expose incapaces and to claim for the treasury property which was due to it. One of the accusations which Tacitus makes against the lex Papia Poppaea is that it enabled informers to terrorise Roman society:

Acriora ex eo vincla, inditi custodes e lege Papia Poppaea praemiis inducti, ut, si privilegiis parentum cessaretur, velut parens omnium populus vacanti teneret, sed altius penetrabant urbemque et Italiam et quod usquam civium corripuerant, multorumque excisi status, et terror omnibus intentabatur' (176).

Similarly, he says elsewhere :

Cum omnis domus delatorum interpretationibus subverteretur, utque antehac flagitiis, ita tunc legibus laborabatur (177).

No doubt Tacitus gives an exaggerated picture of the horrors of this system, but since a portion of the caducous property was set aside for informers, the practice seems to have been fairly lucrative. There is no record of the proportion originally designated as due to the informer, but Suetonius tells us that it was reduced by Nero to one quarter of the property:

Nero praemia delatorum Papiae legis ad quartas redegit (178).

Hence it must originally have been greater than this. The jurists Paul, Ulpian and Mauricianus (179) provide details of a constitution of Trajan concerning those who provided information against themselves. Presumably, such people had formerly received no reward but some concession seems to have been made to them by this constitution.

Intermediary Measures

The accounts of Dio and (especially) of Suetonius imply that intermediary measures were enacted between 18 B.C. and A.D. 9 which modified the terms of the lex Iulia de maritandis ordinibus. However, as has been observed in Chapter two, neither author provides a comprehensive chronological account of Augustus' marriage legislation. Suetonius (180) mentions the lex Iulia and subsequent modifications but not the lex Papia, while Dio provides a very brief description of some provisions of the lex Iulia without naming the law, and then describes concessions made by Augustus in this area in response to a demonstration by a group of equites in A.D. 9 and the subsequent enactment of the lex Papia (181). These accounts give rise to great difficulty in determining how the measures described, if they were intermediary measures, were enacted, and whether they were later incorporated into the lex Papia or whether they were, in fact, introduced by the lex Papia.

The measures mentioned by Suetonius are as follows:

Hanc [the lex Iulia] cum aliquanto severius quam ceteras emendasset, prae tumultu recusantium perferre non potuit nisi adempta demum lenitave parte poenorum et vacatione triennii data auctisque praemiis.

Suetonius goes on here to describe the demonstration by the equites which Dio ascribes to A.D. 9 (182) before the passing of the lex Papia. If Suetonius' chronology is correct here, this would suggest that these modifications to the lex Iulia were indeed made between 18 B.C. and A.D. 9. Since the juristic sources make no mention of any Augustan enactment other than the lex Papia which modified the terms of the lex Iulia, it is reasonable to conclude that the modifications were subsequently incorporated into the lex Papia.

Suetonius continues his narrative by describing two further

measures which he does not assign to any particular law:

Cumque etiam immituritate sponsarum et matrimoniorum crebra mutatione vim legis eludi sentiret, tempus sponsas habendi coartavit, divortii modum imposuit.

Dio, in fact, mentions the same measure under 18 B.C. presumably because of its close connection with the lex Julia but, as has already been observed, it is highly unlikely that the abuse was noted and dealt with in the same year as the law itself was passed. The second measure described by Suetonius, 'divortii modum imposuit', is more difficult. Since there is no other evidence for the placing of a limit on divorce, this phrase has tended to be associated with the set form of divorce introduced for the purposes of the lex Julia de adulteriis coercendis, modus being taken as a mode or form rather than a limit. However, there are two main objections to this interpretation. Firstly, Suetonius is clearly speaking about Augustus' marriage legislation here and it is strange that he should suddenly shift to describe a measure of the adultery law. Secondly, the construction of the sentence implies that the first abuse of the law mentioned was dealt with by the first measure described, while the second ('matrimoniorum crebra mutatio') was dealt with by the introduction of a 'modus divortii'. It is difficult to understand why, if Augustus did place a limit on divorce, there is no other evidence for this measure, but it may be that it was a measure designed to discourage people from getting married in order to take legacies and subsequently divorcing. If so, such an abuse would probably have become less attractive with the penalisation of orbi as well as caelibes by the lex Papia Poppaea.

Since neither Suetonius nor Dio provides any indication of how the measures which they portray as intermediary ones were enacted, Jörs, as has been mentioned (184), has concluded that a third marriage law was passed in A.D. 4. He argues that Suetonius' description of the modifications made to the lex Julia implies the enactment of another formal law. He also refers to

Dio's description (185) of the agitation by the knights in A.D. 9 for the repeal of the law regarding the unmarried and childless, and concludes that this cannot refer to the lex Iulia which was only concerned with the unmarried. Further, Dio's account of the introduction of a distinction in the penalties for caelibes and orbi (186) leads him to believe that, while orbi were not penalised at all in the lex Iulia, they were subjected to the same penalties as were caelibes in the law of A.D. 4. Hence the lex Papia Poppaea mitigated this ruling by allowing them to inherit a half. Jörs dates the proposed law to A.D. 4 by assuming that the two vacationes (that is, periods during which the penalties of the law were temporarily lifted) of three and two years mentioned by Dio (187) followed on immediately from its passage, so that Augustus was never actually able to put it into effect. The vacationes were provided as a response to complaints against the severity of the law, and in A.D. 9, at the end of this period, the lex Papia was formulated, to modify some of the provisions of the previous law.

There are, however, several objections to these arguments for a third marriage law. Firstly, it is very surprising that there is not one specific mention of such a law in the literary or juristic sources. The isolated reference to a lex Iulia caducaria by Ulpian (188) is very unlikely to refer to an enactment of A.D. 4, not least because by this time Augustus seems to have ceased to enact 'leges Iuliae', that is, plebiscita named after himself by virtue of his tribunicia potestas. Further, with reference to Dio's description of the call of the equites for a repeal of the law concerning the unmarried and childless, the lex Iulia did indeed provide some rulings concerning procreation as well as concerning marriage. In addition, while Dio's account of the provisions of the lex Papia gives the impression that before A.D. 9 the penalties for caelibes and for orbi were the same, he is at variance with the juristic sources in this, as has already been shown. Gaius, for instance, (189) speaks of orbi losing, rather than gaining, a half of inheritances and legacies by the lex Papia, implying that until A.D. 9 they were not penalised at

all.

It is very difficult to determine the dates and duration of the vacationes mentioned in the sources. Suetonius only mentions one 'vacatio triennii' (190) granted by Augustus to counteract the severity of the terms of the lex Iulia. Dio, however, as mentioned, puts into the mouth of Augustus a speech made in A.D. 9 just before the passing of the lex Papia in which he claims to have provided a vacatio of three years followed by another of two years. Dio's version seems to imply that the first vacatio at least was granted immediately after the passing of the lex Iulia in order to give people time to conform to its obligations. However, this conflicts with the evidence of the sc de ludis saecularibus (191) which indicates that at least some of the penalties applicable to the unmarried were in operation in 17 B.C. In addition, the implication of Suetonius' account is that the vacatio was granted in response to opposition to the application of the provisions of the lex Iulia. It is more likely that the rules of the lex Iulia went into effect in 18 B.C. but aroused such hostility that Augustus was obliged to raise the sanctions for a period of three years. Since Suetonius seems to have overlooked the second vacatio (of two years) mentioned by Dio, it is unlikely that this period of grace followed on immediately from the first. In addition, Dio's wording implies that the two periods were entirely separate. Presumably the application of the sanctions of the lex Iulia following the three year vacatio once again aroused sufficient hostility for Augustus to consider a further vacatio to be necessary.

Relationship between the 'lex Iulia' and the 'lex Papia'

The use of the term lex Iulia et Papia in the juristic sources is indicative of the close association between the two Augustan marriage laws, and the interest of scholars has thus generally been in the changes effected by the two laws together. The jurists clearly did discuss the collective effects of the two laws and there are several areas in which it is not possible to distinguish between the provisions of the individual laws. Nevertheless, as has already been indicated in Chapter 2, the jurists also mentioned a number of distinctions between the two laws and thus a comparison is, to a limited extent, possible. It is surely of value and of interest to draw a comparison between two statutes relating to the same area of the law which were separated by a period of about 27 years and thus belong respectively to the early and latter years of the Augustan period. It is interesting, for example, to consider why it was necessary for Augustus to initiate not merely a few amendments to the lex Iulia but another long and complex statute. Was the lex Iulia in some respects inadequate, or was it simply too unpopular? Does the lex Papia represent a change of policy or merely a mitigation or tightening up of the rules of the lex Iulia?

The picture which emerges from the non-juristic sources is not very clear, as has been shown above. Both Dio and Suetonius seem to imply that the second law was passed because of hostility to the first law (192). On the other hand, Tacitus (193) dwells on the 'acriora vincla' of the lex Papia Poppaea and Tertullian (194) complains about a specific area in which the second law was more severe than the first. If these writers are all to be believed, the picture which emerges is one of a law which was designed to supplement the inadequacies of the lex Iulia and which was in some respects more lenient, yet in others more severe, than the first law.

As for the juristic evidence, this has already been discussed in Chapter 2. As observed there, apart from the frequent references in Justinian's Digest to the commentaries ad legem

Iuliam et Papiam, the terms lex Iulia et Papia (or a similar one) is, in fact, not often employed by the jurists (195) while there is a fair number of references to the lex Iulia and to the lex Papia individually (196). Clearly there was some tralatician material carried over from the first to the second law, but the juristic evidence suggests strongly that the lex Papia was designed to revise and to complement, not to completely supersede, the lex Iulia. There are, of course, problems involved in attaching too much significance to the exact words of the jurists as preserved in the sources, such as suspected interpolation and corruption of the texts, lack of precision on the part of the jurists and our lack of knowledge concerning the process of transmission of the texts of laws and concerning the way in which the jurists worked. However, it is still justifiable to attach some significance to the fact that certain provisions are singled out to be assigned specifically to one law or the other. As observed in Chapter 2, if the jurists had mentioned the individual laws completely at random, one would expect frequent contradictions among them and this is not the case.

The most obvious distinction between the laws is the fact that the lex Iulia was a plebiscitum, proposed by Augustus by virtue of his tribunicia potestas, while the lex Papia Poppaea was a lex, proposed by the consuls of A.D.9. This illustrates a distinction already observed and discussed in Chapter 1 between the earlier and later statutes of the Augustan period.

To turn to details, the various distinctions made by the jurists between the two laws have already been mentioned as the provisions of the laws have been discussed, but it is useful to gather them together. Firstly, Tertullian claims that the lex Papia required people to have children at an earlier age than the lex Iulia required them to marry. His statement (if it is not an exaggeration) shows that the lex Papia was more severe than the lex Iulia in this respect, but it also seems to imply that the age-limits laid down by the lex Iulia applied to marriage, whereas those laid down by the lex Papia related to procreation. This

fits in with the other evidence which implies a much greater emphasis on procreation in the second law, and is confirmed by the wording of Ulpian Reg.16.1 which assigns specifically to the lex Papia the demand for children by certain ages.

On the issue of remarriage, however, the lex Papia Poppaea mitigated the terms of the lex Iulia, by increasing the vacatio after the death of a husband from one year to two years and that following divorce from 6 to 18 months (197). This particular concession provides support for the pictures presented by Suetonius and by Dio of the lex Papia Poppaea as a statute which mitigated the harsh terms of the lex Iulia. However, the concession made in the lex Papia Poppaea was not a very great one and it by no means represents a change of policy.

The provision which forbade a freedwoman married to her patron to divorce him and to marry another man is specifically assigned to the lex Iulia by Ulpian (198), as is the provision which overruled the unreasonable opposition of a paterfamilias to the marriage of his daughters and granddaughters by a controversial excerpt from the writings of Marcian (199). Since most of the rules relating to patrons and ex-slaves are assigned to the lex Papia, it is perhaps surprising that the rule regarding freedwomen married to their patrons belonged to the lex Iulia, but as the rule concerned marriages between ingenui and ex-slaves, there is, in fact, a clear connection with the lex Iulia. As for the second provision mentioned, it is easy to see how a ruling which removed a possible obstacle to valid marriage would have fitted in with the general tenor of the lex Iulia. The same applies to a further provision assigned to the lex Iulia by Ulpian and by Gaius which authorised the praetor to appoint a tutor for women in tutela pupilli for the constitution of dowry (200). Obviously a ruling which encouraged marriage by providing for a smooth settlement of the issue of dowry was in the interest of the aims of the lex Iulia.

The granting of certain privileges to those who were married

may confidently be assigned to the lex Iulia either because they are associated in the sources with a date prior to A.D. 9 or because the lex Iulia is specifically mentioned. This applies to the exclusion of the unmarried from watching games (201) and from eating with married people (202) and to the advantages acquired through the possession of children in the cursus honorum (203). Release of freeborn women from tutela by the ius trium liberorum is also assigned to the lex Iulia: this privilege was extended by the lex Papia Poppaea to freedwomen who possessed 4 children (204). The provisions regarding the cursus honorum and liberation from tutela show that, while much more emphasis was placed in the lex Papia on procreation, there were, nevertheless, some provisions in the lex Iulia which encouraged procreation.

A number of provisions are attributed specifically to the lex Papia Poppaea. Thus, for example, the introduction of a requirement that all legitimate citizen births be registered is associated with the lex Papia Poppaea in an inscription (205). No doubt it was obvious by this time that a law which granted privileges to the possessors of children could not be effectively applied in the absence of such a system. In addition, both Dio and Suetonius record Augustus' attempt to rectify an abuse of the lex Iulia by setting a maximum of two years for the duration of betrothals: this was designed to prevent men from betrothing themselves to girls well below marriageable age and enjoying the privileges associated with marriage over a prolonged period, while evading its duties. This ruling was probably incorporated into the lex Papia Poppaea and provides another example of the use of the second law to tighten up the provisions of the first.

An important area in which the lex Papia Poppaea seems to have introduced new rulings is that of relations between patrons and ex-slaves (206). The lex Iulia is not mentioned at all by the jurists in connection with these provisions, whereas there are frequent references to the lex Papia Poppaea. The rules provided incentives to procreation both for patrons and patronesses and also for freedmen and freedwomen.

The final area of the law in which both laws provided rulings is that of inheritance. The evidence shows that, in this particular area, the lex Iulia was more concerned with caelibes and the lex Papia Poppaea with orbi. The latter were not penalised at all by the lex Iulia in relation to taking bequests, whereas by the terms of the lex Papia Poppaea they lost one half of all bequests (207). In addition, the complex rulings concerning the destiny of caduca that is, property which might not be taken by those designated in the will because of incapacity, are assigned by the jurists to the lex Papia Poppaea (208). It is also likely that the rules regulating inheriting between spouses were introduced by the lex Papia Poppaea, as has already been suggested (209). On the other hand, the evidence suggests that a provision which forbade the inclusion in a will of a condition which prohibited or restricted the remarriage of a widow if she were to benefit from a will seems to be assigned to the lex Iulia (210). This is, in fact, similar to another provision assigned to the lex Iulia (211) which released ex-slaves from oaths made to their patrons as a condition of manumission that they would not marry. Overall, however, the lex Papia Poppaea seems to have considerably expanded the rules of the lex Iulia concerning inheritance and was clearly more severe in this area. The lex Papia Poppaea also made provision for more rigorous application of the rules by assigning a certain proportion of caducous property to be given to informers who exposed those who were not entitled to take bequests by the terms of the law (212).

To sum up, it is clear that the two Augustan marriage laws overlapped to a great extent and that there are areas in which the provisions of the two laws cannot, from the evidence, be separated from one another. However, there are other areas in which distinctions may be made. Some of these are not particularly significant, but others justify some interesting conclusions concerning the relationship between the lex Iulia and the lex Papia Poppaea. Firstly, there seems to be little difference in the motivation underlying the two laws, and in the problems at

which the laws were aimed. Secondly, Augustus appears in the lex Papia Poppaea not to have introduced totally new rules but to have developed those introduced by the lex Iulia. Thus, for example, the idea of the regulation of the rules of inheritance was present in the lex Iulia but was greatly extended and developed in the lex Papia Poppaea. Further, while there were some incentives to procreation in the lex Iulia, there were many more in the lex Papia Poppaea. Finally, it seems to me that the lex Papia Poppaea was a more severe law than was the lex Iulia. It is true that Dio and Suetonius both portray it as Augustus' benevolent response to complaints about the severity of the law of 18 B.C., and no doubt this is how Augustus wished the new law to appear. Dio says that Augustus increased rewards and mitigated penalties. However, the concessions attributed in the evidence to the lex Papia Poppaea, such as the prolonging of the vacationes allowed to widows and divorcees and the extension to freedwomen of release from tutela are not of great significance. On the other hand, there are many examples of a much more significant increase in severity in the lex Papia Poppaea. Loopholes were closed and abuses precluded, and far reaching provisions were introduced into areas barely touched by the lex Iulia.

While the lex Papia Poppaea was introduced by the consuls of A.D. 9 rather than by Augustus, there can be little doubt, given the content of the two laws that it was just as much initiated by Augustus as was the lex Iulia. Augustus was clearly aware of the need to make some concessions in the lex Papia Poppaea because of the hostility aroused by the lex Iulia, but he was also aware of the need to supply the inadequacies of the lex Iulia, to enforce the law more rigorously and to expand on the rulings in those areas which he perceived to be the most effective areas of manipulation for achieving his aims.

The purpose and significance of the 'lex Iulia et Papia'

The most obvious and generally acknowledged aim behind the enactment of the lex Iulia et Papia was Augustus' desire to expand the Roman citizen body. Most of the attested provisions of the laws may be interpreted as providing encouragement to valid marriage and procreation, and this is the aim proclaimed by contemporary poets, notably Horace (213). Some scholars, for examples, Jonkers (214), have emphasised the loss of life caused by the proscriptions and civil wars of the very late Republic in order to demonstrate the need for such legislation.

Hand in hand with this theme goes another alleged aim, the desire of the legislator to encourage a return to traditional Roman Republican values. The idea that Rome's recent catastrophes were due to an abandonment of traditional ideals, including those of valid marriage and procreation, is expressed in the Ode of Horace already cited, and the idea of Rome's greatness having been linked to these ideals is asserted in a speech attributed by Dio to Augustus and allegedly delivered in A.D. 9 to the equites in response to their complaints about the severity of the lex Iulia (215). Dio reports elsewhere (216) that Augustus claimed that his legislation was traditional, and there is indeed some (although dubious) evidence for the imposition of penalties by the censors in 403 B.C. on those who reached old age without being married(217). Better attested is the speech of the censor Metellus Macedonicus of 133 B.C., read out by Augustus to the people and the Senate (218) which urged contemporary Romans to marry and to produce children. Among modern scholars this theme has been emphasised especially by Gardthausen (219).

This dual purpose, expansion of the population along with a return to traditional Roman values, sounds straightforward enough. If, however, the marriage laws are to be explained purely in these terms, many questions arise. Why, for example, was Augustus so concerned to increase the number of citizens? Was he concerned to encouraged procreation among all groups of citizens? How can the imposition of a limitation on the marriages of senators be

explained? Finally, why was it necessary for laws with a fairly simple purpose to have been so large and complex and to have intervened so extensively in the laws of inheritance?

The obvious answer to the first question and one which seems to be supported by the testimonies of Horace and of Propertius, for example (220), is the need for a good supply of soldiers for the army. Strong arguments might be cited to support this view in terms of the loss of manpower in the catastrophic events of the end of the Republic and in terms of the essential rôle of the army in the Augustan, as in the Republican, system. However, a closer look at the details of the laws shows that, given the nature of the privileges and penalties introduced in order to encourage procreation, the rustic plebs from which the army was traditionally recruited would have been very little affected (221). For the sort of people likely to be affected by the laws were those with an interest in bequeathing or receiving property, in tutela and other munera civilia, in office holding, in relations with their ex-slaves or patrons and such like. It is therefore difficult to believe that the laws had, or were designed to have, an impact on military manpower. One can only conclude, as Wallace-Hadrill (222) does, that the testimony of the poets is ideological.

Before pursuing this question further, it is helpful to consider the other questions which are all very closely related. It has been suggested that the incentives to procreation provided in the laws would not have affected all types of citizen, and the theme of a "eugenic" policy has been taken up by scholars such as Last (223). It has been argued that Augustus had no desire to encourage procreation among the population in general, but only among those in the upper ranks of society. Thus his introduction of a prohibition against marriages between senators and ex-slaves may be seen as an attempt to uphold the social superiority of members of the senatorial order over the other orders. This view has been disputed, for example, by Brunt and by Humbert (224), who point to such provisions of the laws as the banning of the

unmarried from spectating at games and the assigning of certain seats at the theatre to those who were married, as well as to the provisions which provided incentives to ex-slaves to procreate in order to argue that the laws were, in fact, designed to encourage procreation among all classes of citizen. Such arguments, are not altogether convincing. The rules concerning the games and the theatre would only have affected the urban plebs rather than all citizens, and it is clear from the texts regarding relations between patrons and ex-slaves that the law was concerned with propertied or 'locupletiores liberti'. It is certainly true that the privileges and penalties of the law would have affected a large section of the citizen body, but the most important and hardest-hitting rules, notably those concerning inheritance, were in areas which were of interest only to those of the higher and richer orders of society, and this suggests that Augustus was at least primarily concerned with these citizens. It seems to me that the few rulings which can be interpreted as encouraging procreation in general (as, for example, the release of women possessing a certain number of children from tutela, which, as has been shown, was an institution of already declining significance) were less important and, like the military theme, to a great extent ideological and designed mainly to make a harsh law more palatable. A general increase in the citizen population would have enhanced Augustus' reputation as a restorer and bringer of prosperity, but the traditional Republican aristocratic outlook (which Augustus would surely have possessed) would have measured prosperity largely in terms of the state of the higher orders of society. In addition, since some passages of Dio suggest that Augustus encountered difficulty in finding enough people to fill the Senate and some of the magistracies, it was important that there should be enough citizens of the right calibre to ensure that these vestiges of Republican and aristocratic tradition be maintained.

To move on to the final question, why should laws designed to boost the population, particularly in the upper ranks of society, have been so complex and innovative? It is clear from the

jurists' commentaries ad legem Iuliam et Papiam that they regarded these statutes as enormously significant in the history of Roman law, for no Republican statute had intervened so extensively in so many areas and particularly in the area of inheritance. Does this suggest that Augustus was motivated by more than merely the desire to see the citizen population increase?

A number of theories have been proposed regarding other motives underlying this legislation. Tacitus (225) saw the complex rules concerning inheriting as designed primarily to augment the resources of the treasury which benefited from bequests which might not be taken by those designated in a will. It is unlikely, however, that this was one of the primary purposes of the law, for, as has been shown, co-legatees possessing children had a prior claim in the case of legacies, as did close relatives in the case of inheritances. Thus the revenue from this source cannot have been very great.

Among modern scholars, Wallace Hadrill has produced the interesting theory that the extensive intervention by the law in the area of inheritance was designed to "stabilise the transmission of property and consequently of status, from generation to generation" (226). He believes that relatives of the testator to the sixth degree were indeed exempt from the restrictions on inheriting introduced by the law, and that Augustus thus aimed to encourage the transmission of property within families and to discourage the breaking up of family estates through bequests to extranei and hence the widespread Republican abuse of legacy-hunting. This theory is not without flaws, not least the fact that it depends on the rather uncertain premise that a large group of family members was exempt from the inheritance rules. Nevertheless, it is interesting that it ties in with the view proposed by Nicolet that one of Augustus' main concerns was the protection of property. He argues, for example, (227) that the introduction of the vicesima hereditatum (228) was designed to encourage the handing down of property within families in order to prevent estates from being fragmented. The theory

that Augustus wished to discourage legacy-hunting is certainly an attractive one, for the influence possessed by those with wealth to bequeath to friends and clients would not have been welcome to him.

While it may well be that this was at least one motive underlying the rules concerning inheritance, there are other provisions of the law which cannot be explained in these terms. The law did not only affect inheritance : it affected many more issues, such as relations between patrons and ex-slaves, relations between patresfamilium and those in their power, tutela and dowry. I believe that Augustus grasped the opportunity to intervene, through this legislation, in as many areas of the law as possible, in order to introduce more uniformity and control over these areas and to curtail the comparative independence and free hand formerly enjoyed, within their spheres, by patresfamilium, patrons, tutors and testators. Thus, while the theme of these laws, the encouragement of marriage and procreation, was in harmony with Republican ideology (and, indeed, in harmony with Augustus' interest, for the promotion of such ideology and the boosting of the citizen population was, as has been argued, to his advantage), yet, at the same time, the laws rode roughshod over a number of revered institutions and principles. Thus this ostensibly traditional legislation was, in fact, far-reaching, innovatory and ruthless, intervening as it did in areas of life barely touched by legislation during the Republic.

NOTES

- (1) 54.30.5.
- (2) DA 44.
- (3) 5(4).11.61.62, 17 B.C..
- (4) Ep.7.16.
- (5) Insts.3.44.
- (6) Noc.Att.2.15.3.
- (7) D.1.16.14.
- (8) Frag.Vat.197, Ulp.de off.praet.tut.
- (9) 53.13.2.
- (10) Ann.2.51.
- (11) Ann.15.19.1
- (12) Ep.7.16.
- (13) Frag.Vat.197.
- (14) e.g.D.50.5.1pr., Ulp.2 opinionum, 27.1.2.2, Modestinus 2 excusationum.
- (15) Just.Insts.1.25pr.
- (16) as Jörs believes, Über das Verhältnis der 'lex Iulia de maritandis ordinibus' zur 'lex Papia Poppaea', Diss. Bonn 1892.

(17) A tutor Atilianus was one appointed by the terms of the lex Atilia, a law which permitted the praetor and a majority of tribunes of the plebs to appoint a tutor to a woman who did not have one. A tutor fiducarius was one appointed for the purpose of a change of tutor through the initiative of the woman (with the consent of her existing tutor) by coemptio fiduciae causa.

(18) Gai.Insts.1.194.

(19) Gai.Insts.3.44.

(20) Gai.Insts.1.145.

(21) Ulp.Req.29.3.

(22) Ulp.Req.11.1.

(23) Gai.Insts.1.144.

(24) Pro Murena 12.27.

(25) Gai.Insts.1.190,1.115.

(26) Gai.Insts.1.145.

(27) Ulp.Req.11.20.

(28) Gai.Insts.1.178.

(29) D.23.2.61., 32 quaestionum.

(30) D.24.3.64pr., 6, 7, 10, 7 ad leg.I.et P.

(31) Fontes Iuris Romani Antiqui ed.Bruns, Tubingen 1909, repr. Aalen 1958, p.88.

(32) Cicero Topica 17.66, De Officiis 3.15.61.

(33) D.38.1.37, Paul 2 ad leg.I.et P.

(34) CJ 6.3.7.1 (A.D.224).

(35) Opera 4, 1039.

(36) Heumanns Handlexicon zu den Quellen des römischen rechts,
Jena 1907 p.610.

(37) The detailed regulation of inheritance rights between patrons and ex-slaves as outlined in Gai.Insts.3.40-49 are attributed by the jurists to the lex Papia and are discussed below.

(38) D.37.14.6.4, 2 ad legem Aeliam sSentiam.

(39) See Chapter 2 n.4.

(40) See Chapter 2 n.5.

(41) See Chapter 2 n.125.

(42) Some of the rulings of the lex Papia Poppaea which cannot be dissociated from those of the lex Iulia must be discussed here, but the detailed rulings on caduca which were introduced by the lex Papia are discussed below.

(43) Gai.Insts. 2.111. Caelibes included those who had married in defiance of the rules of the lex Iulia et Papia.

(44) Insts.2.286a.

(45) Insts.2.144.

(46) Ulp.Reg. 22.3.

(47) 56.10. .

- (48) CAH X, Cambridge 1934, "The Social Policy of Augustus", p.454.
- (49) Die Ehegesetze des Augustus, Marburg 1894, pp.55ff.
- (50) 54.16.
- (51) Ulp.Reg.17.1.
- (52) Insts.2.111.
- (53) D.50.16.148, Gai.8 ad leg.I.et P., 50.16.149, Gai.10 .
- (54) 55.2.5-7.
- (55) See Astolfi, La Lex Iulia et Papia, Padova 1970 p.100 n.10 for a list of scholars who take this view. There is, in fact, evidence to associate the ius trium liberorum with capacity to inherit in the Gnomon par.28. The text states here that only women under 50 and possessing the ius trium (or quattuor) liberorum can inherit. But, as Astolfi shows, this relates to a particular type of woman, the mater solitaria, that is, a mother without a husband.
- (56) Corbett, The Roman Law of Marriage, Oxford, 1930, p.119.
- (57) Ulp.Reg.16.1, Paul Sent.4.9.9, Martial 2.9.1.
- (58) Ann.15.19.
- (59) D.28.6.5.
- (60) D.33.1.8, cf.36.2.23.
- (61) D.29.2.29.
- (62) D.31.51.

(63) D.39.6.36.

(64) D.39.6.35pr...

(65) Insts.2.286-286a.

(66) D.28.5.73.

(67) D.28.6.6.

(68) D.35.1.62.

(69) D.35.2.67. The lex Falcidia (40 B.C.) was designed to protect the interests of an heir by stipulating that, if the total sum of legacies exceeded three-quarters of the value of the inheritance, they were to be reduced proportionately in order to ensure that the heir received a quarter share.

(70) Frag.Vat.158 : '...qui lege Iulia et Papia excepti sunt..'.
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(71) Frag.Vat.216.

(72) Frag.Vat.218.

(73) These were the relatives who could claim bonorum possessio in case of intestacy under the praetorian edict.

(74) D.22.5.5.

(75) D.38.10.6, 50.16.136.

(76) D.22.5.4.

(77) D.50.16.146.

(78) Das Römische Privatrecht I (2nd ed.) Munich 1971, p.724 n.1.

(79) op.cit. pp.170-4.

(80) D.22.5.4, Paul 2 ad leg.I.et P.

(81) D.22.5.5, Gai.4.

(82) D.38.10.6, 50.16.136, 146.

(83) Diritto Ereditario Romano I, 1960, p.426.

(84) op.cit. pp.167-9.

(85) "Family and Inheritance in the Augustan marriage laws", PCPS
(1981) p.74.

(86) Hist.Eccl.1.9.

(87) Req.16.1, see below.

(88) Insts. 2.111, 144, 286.

(89) P.Gnomon 32.

(90) Req. 15.

(91) Req.16.

(92) P.Gnomon 31.

(93) Instit.Orat.8.5. This anomaly was rectified under Domitian,
Suetonius, Domitian 8.3.

(94) D.4.6.35, 36, 37, 38. These discussions suggest that this
exemption may also have applied to the general rules on
inheriting, although there is no other evidence to support this.

(95) By the terms of the lex Voconia, a man in the first property class might not, in fact, institute his wife as heir, but only as a legatee. Augustus, in fact, freed some women from the restrictions of the lex Voconia, see below.

(96) "Recherche sull'origine del divieto delle donazioni fra coniugi" in Opere Giuridiche e Storiche I, Rome, 1896.

(97) Frag.Vat.273.

(98) D.24.1.25, T.C.ad leg.I.et P.

(99) Sententiae 3.4B.2.

(100) D.35.1.63.

(101) D.35.1.62.2.

(102) D.35.1.64.

(103) See Jörs, Verhältnis etc., pp.14-16, Humbert, Le Remariage à Rome, Milan 1972.

(104) D.23.2.21, T.C.3 ad leg.I.et P.

(105) D.23.2.19, Marcianus 16 institutionum.

(106) "Du consentement du père de famille au mariage en droit classique" in Mélanges Girard II, Paris 1912, pp.291ff..

(107) "Intorno all'origine dell'obbligo di dotare in diritto romano" in Scritti Giuridici, Milan 1923, pp.129ff..

(108) Corso di diritto romano I, Rome 1925 (repr.Milan 1963), pp.408-9.

(109) Verhältnis p.13 n.1.

(110) CJ 5.4.25.

(111) e.g. release from tutela by the ius liberorum, Frag.Vat.191, 247.

(112) op.cit. pp.7ff..

(113) On the legal obligation for fathers to provide dowries for their daughters see Moriaud, op.cit., Castelli op.cit., Buckland, Textbook of Roman Law, 3rd ed. revised P.Stein, Cambridge 1963, (repr.1975), p.107, n.5.

(114) D.23.2.21.

(115) D.23.3.61.

(116) Dio 54.16.7, cf. Dio 56.7.7 where Augustus claims to have allowed prospective bridegrooms to be classed as husbands.

(117) DA 34.2.

(118) D.23.1.17.

(119) BIDR 40 p.98.

(120) D.23.2.14.4, Paul 35 ad edictum.

(121) FIRA 3.2, P.Oxy. 2565, see Guéraud, Bulletin de l'Institut Français d'Archéologie Orientale 27 (1927) 119, Études de Papyrologie (Société royale égypt.de papyrologie) vol.4 (1938) 17. For a commentary on the inscription see Schulz, JRS 32 (1942) pp.78ff., 33(1943) pp.55ff.

(122) SHA Vita Marci 9.7.9.

(123) D.50.16.147.

- (124) D22.3.16.
- (125) Insts.3.42-53.
- (126) Req.29.3-7.
- (127) D.38.2.38, 40.
- (128) D.40.9.24, 34.3.21.
- (129) D.50.16.145.
- (130) D.37.14.6.
- (131) D.37.14.7, cf. 37.14.10.
- (132) D.37.14.15.
- (133) D.40.10.5.
- (134) D.38.1.35, Paul 2 ad leg.I.et P.
- (135) Req.17.1..
- (136) Req.28.7.
- (137) Gai.Insts.2.206.
- (138) Ulp.Req.1.21.
- (139) Ulp.Req.24.12.
- (140) Gai.Insts.2.111.
- (141) Gai.Insts.2.286a.

(142) Insts.2.206.

(143) Insts.2.207.

(144) Insts.2.208.

(145) D.50.16.148, 149 etc.. Also see D.25.3.8 (Marcianus 1 ad leg.I.et P.) which implies that grandchildren through a daughter did not count.

(146) Req.18.

(147) Req.24.31.

(148) Ann.3.28.

(149) D.28.4.3, 29 digestorum.

(150) Req.17.2.

(151) D.29.3.11, 29.3.10.

(152) D.31.58, 32.90, 38.16.14.

(153) D.32.89, 50.16.142.

(154) D.29.2.81.

(155) D.50.16.140, 29.2.68, 29.2.82.

(156) D.30.29.

(157) D.35.2.62, 31.49, 31.54, 34.3.21.

(158) D.34.8.4.

(159) D.35.1.59, 60, 69, 40.7.31.

- (160) D.28.5.72, 35.1.60, 36.2.24.
- (161) D.31.59, 35.1.62.
- (162) D.39.6.36.
- (163) Ulp.Req.24.31.
- (164) D.33.5.16.
- (165) D.7.7.5, 33.1.8, 7.1.33.
- (166) D.32.87, 39.6.37.
- (167) D.12.4.12, 39.6.38.
- (168) e.g.D.31.51, 31.60, 31.61.
- (169) Just.Insts.2.23.1.
- (170) D.34.9.10, cf.D.29.2.83.
- (171) 56.10.1.
- (172) See Gai. Insts.2.274.
- (173) Gai.Insts.3.1,9,17, Ulp.Req.28.7.
- (174) Just.Insts.2.18.
- (175) See e.g. Horace Sermones 2.5.23-26, Juvenal Satires 6.39-40.
- (176) Ann.3.27.
- (177) Ann.3.25.

- (178) Nero 10.
- (179) D.49.14.13, 15, 16.
- (180) DA 34.
- (181) 54.16.1,2, 56.10.1,3.
- (182) 56.1.2.
- (183) 54.16.7.
- (184) Ehegesetze pp.55ff.
- (185) 56.1.2.
- (186) 56.10.
- (187) 56.7.3.
- (188) Ulp.Req.28.7.
- (189) Insts.2.286a.
- (190) DA 34.
- (191) See Chapter 2 n.4.
- (192) Suetonius DA 34, Dio 56.10.
- (193) Ann. 3.28.
- (194) Apologia 4.8.
- (195) See Chapter 2 n.13.
- (196) See Chapter 2 n.14.

- (197) Ulp.Reg.14.
- (198) D.38.11.1.1, 47 ad edictum.
- (199) D.23.2.19.
- (200) Ulp.Reg.11.20, Gai.Insts.1.178.
- (201) Attested by Dio 54.30.5 and by the sc de ludis saecularibus,
see Chapter 2 n.4.
- (202) Dio 54.30.5.
- (203) Gellius Noc.Att.2.15.3.
- (204) Gai.Insts.1.145, 3.44, Ulp.Reg.29.3.
- (205) See n. 121 above.
- (206) Gai.Insts.3.42-53, Ulp.Reg.29.3-7.
- (207) Gai.Insts.2.111, 144, 286, 286a.
- (208) Gai.Insts.2.206, 207.
- (209) Ulp.Reg. 15, 16.
- (210) D.35.1.62,63.
- (211) CJ 6.40.2.
- (212) Tac.Ann.3.27, Suet.Nero 10.
- (213) Horace Odes 3.6.
- (214) E.J.Jonkers, "A few reflections on the background of

Augustus' laws to increase the birth-rate", Symbolae van Oven,
Leiden, 1946, 285-96.

(215) Dio 56.2.2-3.

(216) 56.6.4ff.

(217) Valerius Maximus 2.9.

(218) Suet.DA 89.2, Gellius Noc.Att.1.6.1.

(219) Augustus und seine Zeit I, Leipzig 1896, pp.865-935.

(220) Horace Odes 3.6.37-41, Propertius 2.7.14.

(221) This view has been expressed, for example, by Brunt, Italian
Manpower 225 B.C.-A.D. 14, Oxford 1971, pp.562-6.

(222) op.cit.p.59.

(223) op.cit.pp.425-464.

(224) op.cit.

(225) Ann.3.25.

(226) op.cit.p.59.

(227) op.cit.p.110.

(228) See Chapter 1, p.15.

CHAPTER 4

THE 'LEX IULIA DE ADULTERIIS COERCENDIS'

The Lex Iulia de adulteriis coercendis is the name given in a number of juristic sources (1) to a law enacted by Augustus which regulated the consequences of adultery together with various issues related to this offence.

The term lex Iulia de adulteriis coercendis was probably the original and full title of the law : elsewhere it is abbreviated to lex Iulia de adulteriis (2). Justinian's codifiers also gave to it the name of lex Iulia de adulteriis et de stupro (3) and lex Iulia de pudicitia, (4) no doubt because of the content of the law. For the same reason, Suetonius calls it the lex de adulteriis et de pudicitia (5). There is also a reference in Justinian's Digest to the lex Iulia de fundo dotali : the jurist clearly has in mind the particular section of the law relating to dotal property.

Like the lex Iulia de maritandis ordinibus, this law belongs to the earlier period of Augustus's reign, during which he favoured the enactment through the concilium plebis of plebiscita, which, by virtue of his tribunicia potestas, bore his own name. The lex Iulia was a lengthy statute, of considerable significance in the history of criminal law.

The lex Iulia cannot be exactly dated, but there is enough evidence to suggest that it was passed around the same time as the lex de maritandis ordinibus, that is around 18 B.C.. The adultery law was certainly in force by 13 B.C. when Horace published his fourth book of Odes (7). Since Augustus was away from Rome between 16 B.C. and 13 B.C., this period is ruled out and Horace's Ode is

in any case addressed to an absent Augustus. It is interesting that Horace links the marriage and adultery laws together.

Dio's account of events suggests that both the marriage law and the adultery law belong to the period following Augustus' return from the East in 19 B.C. (8). Furthermore, there is evidence to show that the lex de maritandis ordinibus was in force by 17 B.C. when Horace composed the Carmen Saeculare (9), and from the sentiments expressed in this poem it is reasonable to deduce that the lex de adulteriis had also been passed by this date (10). Last (11) believed that the adultery law, as the fundamental reform, preceded the marriage law, while other scholars place it in 17 B.C. (12).

Since both laws are generally dated to around 18 B.C., some scholars have taken the view that the lex de adulteriis was merely one chapter of the lex de maritandis ordinibus (13). However, there is no evidence in the juristic commentaries on the marriage law of a chapter devoted to the offence of adultery. The sources show clearly that the lex de adulteriis was a separate statute made up of a number of chapters (14).

Most of the evidence for the lex Julia de adulteriis coercendis is found in the juristic sources. The existence of such a law is, however, attested in a number of literary sources. Suetonius, for example, mentions the enactment of a law de adulteriis (15) and Dio attributes to Augustus a speech in which he claims to have laid down restrictions on the disorderly conduct of women and young men (16). Seneca (17) mentions the adultery law in connection with the immoral conduct of Julia, and Pliny in relation to a woman, Galitta, who was prosecuted for committing adultery with a centurion (18). The poets also mention the introduction of the adultery law: Horace, as already mentioned, describes a law which sought to discourage impurity, while Ovid attributes to Augustus a law which enforced chastity on women

(19). Martial also describes the discouragement of adultery and the encouragement of chastity by the lex Iulia (20).

It is clear from the evidence that a number of jurists commented on the lex Iulia. There is a title in Justinian's Digest (21) ad legem Iuliam de adulteriis coercendis, and one in the Code ad legem Iuliam de adulteriis et de stupro (22), (23). Ulpian wrote a commentary ad legem Iuliam de adulteriis (or de adulteriis) and Paul and Papinian wrote two commentaries de adulteriis, while Marcian wrote 'Notae' on one of Papinian's commentaries.

Ulpian's first book de adulteriis is concerned with the prohibition of adultery and of stuprum (24), the father's ius necandi (25) and the husband's duty to repudiate an adulterous wife (26). In book two, he comments on the detaining of an adulterer (27), the prosecution of adultery (28), various circumstances of adultery and remarriage after divorce (29). Books three and four are concerned with the quaestio of slaves (30), and book four also contains comments on lenocinium (31), and on the time prescribed for the prosecution of adultery (32). The final book comments on rules relating to dotal property (33).

Paul's liber singularis de adulteriis is attested by an excerpt from Justinian's Digest relating to the prosecution of slaves (34) and by a passage in the Collatio (35). Here Paul mentions the abrogation of former laws by the lex Iulia (36), the ius necandi of a father and of a husband (37) and prosecution (38).

As for his other commentary de adulteriis, book one deals with the ius patris (39) and prosecution in general (40), and book two with the time limits prescribed for adultery trials (41), penalties for adultery (42), dowry (43) and divorce (44). The third book is concerned with the manumission of slaves within the time prescribed for prosecution (45), forms of inscriptiones libellorum (46), desisting from a prosecution (47) and dowry (48).

Paul gives further specific information on the lex Iulia in a section of the Sententiae Receptae entitled de adulteriis (49) and a comment on false witnessing in Collatio 8.2 belongs to a title ad legem Iuliam de adulteriis in Paul's liber singularis de poenis omnium legum.

The main source for Papinian's liber singularis de adulteriis is Collatio 4.7 - 11, where Papinian comments on the right of a father to prosecute an emancipated daughter, his vitae necisque potestas, the husband's right to kill and the provision of a quaestio de servis. Another excerpt discusses the offence of incest (50). There are also some excerpts in Justinian's Digest taken from this book which discuss the penalty for adultery (51), the offences of lenocinium and of incest, the prosecution of adultery, the ius mariti, the continuation of a marriage following adultery and the remarriage of an adulterous woman (52) and prosecution and calumnia (53). In book one of his other commentary de adulteriis, Papinian comments on the definition of adultery and of stuprum, the ius mariti (54), the paternal ius occidendi (55), the prosecution of adultery (56), prosecution of a slave (57) and dotal property (58). Book two is concerned with incest (59), the definition of materfamilias (60), the guilt associated with a person who aids the commission of adultery (61), prosecution (62), abolitio criminis (63) and penalties (64). Papinian also incorporated a title ad legem Iuliam de adulteriis into his 15th book responsorum in which he commented on the ius mariti (65).

There are further excerpts relevant to the lex Iulia which are taken from juristic commentaries not specifically devoted to the offence of adultery. Such excerpts are found in Ulpian's books ad legem Iuliam et Papiam (66), disputationum (67), ad edictum (68) and de omnibus tribunalibus (69), in Paul's books ad edictum (70), quaestionum (71) and responsorum (72), in Gaius's books ad edictum provinciale (73) and ad legem duodecim tabularum (74) and in Papinian's libri responsorum (75). Other jurists also provide comments relevant to the lex Iulia de adulteriis,

such as Marcian (76), Scaevola (77), Macer (78), Modestinus (79), Tryphoninus (80), Julian (81), Alfenus (82), Africanus (83), Iavolenus (84) and Marcellus (85).

The provisions of the 'lex Iulia de adulteriis coercendis'

The evidence for this law is sufficient to make possible a tentative reconstruction of the main provisions. A few juristic excerpts make reference to specific chapters of the law (86) and in Paul's commentary preserved in the Collatio (87) he proposes to discuss the points of the law in the order in which they appeared.

(Chapter 1) : Abrogation of all former laws by the lex Iulia.

Prohibition of adultery and of stuprum : 'Ne quis posthac stuprum adulterium facito sciens dolo malo' (88).

(Chapter 2) : Grant of authority to father to kill adulterer, together with his daughter, if caught in adultery, provided that she is in his potestas or was given by him into the manus of her husband, that they are found in his house or in that of his son-in-law and that he kills her immediately.

'in filia adulterum deprehenderit'

'in continenti filiam occidat' (89)

Liability of a father to be prosecuted for homicide if he has killed the adulterer but not his daughter.

Right of a husband to kill adulterer : restricted to adulterer of low extraction caught in husband's home.

Prohibition against killing of adulterous wife

(Chapter 5) : Right of husband to detain adulterer in his house for not more than 20 hours to call witnesses to the offence.

'testandae eius rei gratia'(90)

Husband's duty to make a statement within three days as to the

name of the man with whom he caught his wife and the place where adultery was committed.

Obligation of a husband to repudiate an adulterous wife.

Introduction of a requisite form of divorce for the purposes of the law.

Institution of a quaestio de adulteriis.

Grant of exclusive right of prosecution to father and to husband of alleged adulteress for 60 days.

Grant of preference to husband over father.

Freedom of husband and of father from various restrictions applicable to other prosecutors.

Provision of a quaestio in order to extract evidence by torture from slaves within 60 days of divorce.

Stipulation that slaves used as witnesses be made public.

Requirement that value of slave be paid to master as restitution if prosecution in which he gave evidence is unsuccessful

Extension of right of prosecution to extranei after 60 days if neither husband nor father has taken advantage of opportunity.

Prescription of period of 6 months from divorce for such prosecution.

Exclusion of certain categories from prosecuting : libertini, infames, under 25s.

(Chapter 7) : Exemption from prosecution of those absent rei publicae causa.

'Ne quis inter reos referat eum, qui tum sine detrectatione rei publicae causa abierit'(91).

Obligation on extranei to give place to husband if, for good reason, he wishes to prosecute iure extranei.

Prohibition against prosecuting adulteress and adulterer simultaneously and grant of permission to choose whom to prosecute first unless the woman has remarried.

Extension, at discretion of judges, to extranei, of right to torture slaves to extract evidence.

Prohibition against the instigation of a prosecution after 5 years from the offence if divorce is delayed.

Prosecution of adulterous slaves : requirement of payment of double the value of the slave to his master if he is accused of adultery and acquitted.

Prosecution of offences related to adultery : Liability of a husband to be prosecuted for lenocinium if he fails to divorce his wife or to detain the adulterer.

'adulterum in domo deprehensum dimiserit'(92).

Liability for prosecution of an accomplice in an act of adultery or of a man who makes financial gain from the adultery of his wife.

Liability for prosecution of a wife who makes financial gain from the adultery of her husband.

Penalties for adultery etc. : for the adulterer, publicatio of a half of his property, relegation to an island.

For the adulteress, forfeiture of one third of her dowry to her husband and of one third of her property to the aerarium, relegation to an island and prohibition against remarriage.

Intestabilitas and prohibition against witnessing a Roman will.

Capital punishment for some cases of stuprum.

Prohibition against alienation of dotal property by husband without his wife's consent.

Fixing of retentiones ex dote.

Abrogation of former laws by the 'lex Iulia'

The evidence for this introductory provision of the lex Iulia is in the Collatio (93) :

Et quidem primum caput legis Iuliae de adulteriis prioribus legibus pluribus obrogat.

It is difficult to ascertain exactly which are the 'priors leges' referred to here, since the punishment of adultery was largely left to the ensor and to private individuals during the Republican period rather than being regulated by law as a crime. There is evidence that in particularly shocking cases women accused of adultery were occasionally brought before an assembly of the people by an aedile (94) but it was more usual for an alleged adulteress to be summoned before her father or husband (according to whether she was in potestate or in manu) surrounded by a domestic tribunal, whose members would pass a sentence on her (95). There is little evidence from the Republic for any regulation by law of the activities of these domestic tribunals in relation to adultery. Romulus was traditionally reputed to have permitted a husband to kill or to divorce an adulterous wife (96), and a few sources mention a lex Scantinia (97) which appears to have censured stuprum. This law cannot be exactly dated, but it was certainly in force by the time of Cicero, and Rotondi places it in 149 B.C.(98). According to Plutarch (99), Sulla introduced laws concerning adultery and related issues. However, there is no evidence more specific than this, and such regulations may have been part of another law (100). There is no evidence for a law specifically de adulteriis previous to the lex Iulia and the provision cited here by Paul looks suspiciously like a standard formula. Certainly the lex Iulia was the first statute to bring the offences of adultery and of stuprum, together with all related issues, under a comprehensive and uniform system of rules.

Prohibition against adultery and 'stuprum'

Ulpian (101) purports to quote the actual words of the lex Iulia :

Ne quis posthac stuprum adulterium facito sciens dolo malo.
Let no-one henceforth, knowingly and with evil intent, commit stuprum or adultery.

The content of this provision suggests that it appeared at the beginning of the lex Iulia, and this is confirmed by the fact that the excerpt is taken from Ulpian's first book of commentary de adulteriis. The 'ne quis...facito' formula was a standard one in statutes of the time, as comparison with D.23.2.44pr., concerning the lex Iulia de maritandis ordinibus shows.

The terms 'adulterium' and 'stuprum' were evidently not defined in the lex Iulia, but the jurists felt that some elucidation was necessary. Thus Papinian says that the terms were used indiscriminately in the lex Iulia but that, strictly speaking, sexual relations with a married woman constitute adultery, whereas relations with an unmarried woman or a widow constitute stuprum :

Lex stuprum et adulterium promiscue et *κατὰ χρῆσιν ἑτεροῦς* appellat. sed proprie adulterium in nupta committitur, propter partum ex altero concepto composito nomine : stuprum vero in virginem viduamve committitur, quod Graeci *φθοράν* appellant (102).

This is confirmed by Modestinus :

Inter 'stuprum' et 'adulterium' hoc interesse quidam putant, quod adulterium in nuptam, stuprum in viduam committitur. sed lex Iulia de adulteriis hoc verbo indifferenter utitur(103).

Adulterium in nupta admittitur : stuprum in vidua vel virgine vel puero comittitur (104).

Nevertheless, sexual relations with a married woman who was of low repute such as a prostitute or actress, did not constitute adulterium. Hence Papinian refers to a 'mulier quae evitandae poenae adulterii gratia lenocinium fecerit aut operas suas in scaenam locavit...' (105). According to Paul (106) :

Cum his quae publice mercibus vel tabernis exercendis procurant,

adulterium fieri non placuit.

This is confirmed by a story told by Tacitus (107) from the year A.D. 19. A woman from a praetorian family, Vistilia, registered herself with the aediles as a prostitute in the hope of evading prosecution for adultery, since prostitutes were exempt. A sc was therefore passed forbidding anyone whose father, grandfather or husband was a Roman eques to become a prostitute.

The term materfamilias is defined by the jurists commenting on the lex Iulia (108) ; it is likely that this is part of a discussion on the question of what sort of women might be prosecuted for adultery. Ulpian gives the following definition of a materfamilias (109) :

Matrem familias accipere debemus eam, quae non inhoneste vixit : matrem enim familias a ceteris feminis mores discernunt atque separant. proinde nihil intererit, nupta sit an vidua, ingenua sit an libertina : nam neque nuptiae neque natales faciunt matrem familias, sed boni mores.

Similarly, relations with an unmarried woman who was not an 'honesta mulier' did not constitute stuprum. Thus Ulpian, commenting on the issue of concubinage, mentions a category of women 'in quas stuprum non committitur'(110). 'Stuprum' thus appears to mean sexual intercourse with higher class unmarried or widowed women. It also included acts of pederasty and homosexuality :

Lex Iulia de adulteriis coercendis...punit et eos qui cum masculis infandam libidinem exercere audent (111).

Qui masculum liberum invitum stupraverit, capite punitur (112).

The prohibition against adultery and stuprum was qualified by the common phrase 'sciens dolo malo'. Thus, according to Gaius, a man who unknowingly marries a woman who has not been

formally divorced is not an adulterer (113).

The 'ius necandi' of a father and of a husband

After affirming the prohibition against adultery and stuprum, the lex Iulia proceeded to outline the rights of a father and of a husband to punish an adulterous woman. A paterfamilias was given the authority to kill his daughter along with the adulterer provided that he had caught her committing adultery in his own house or in that of his son-in-law (114) and provided that he kill her immediately. The rights of a husband, on the other hand, were less extensive. He was only permitted to kill an adulterer of low extraction whom he had found committing adultery with his wife in his own house, and he might not kill his wife with impunity. A further provision of the law gave to him the right to keep an adulterer in his house for up to twenty hours in order to call witnesses to the offence. A husband was obliged to declare within three days where and with whom he had found his wife and to dismiss her immediately.

Further details of these rights, outlined by the jurists Paul and Papinian, are found in the Collatio (115). Paul assigns to the second chapter of the lex Iulia the provisions which lay down the rights of the father. If a father failed to kill his daughter as well as the adulterer, he was liable for prosecution for homicide, and equally, if he failed to kill his daughter immediately. Papinian expands on this by saying that a father who kills only the adulterer is held by the lex Cornelia de sicariis, unless his daughter has escaped from him, so that he has not spared her dolo malo. This rather severe provision was mitigated by a rescript of Marcus Aurelius and Commodus (116) :

Nihil interest, adulterum filiam prius pater occiderit an non, dum utrumque occidat: nam si alterum occidit lege Cornelia reus est. Quod si altero occiso alter vulneratus fuerit, verbis quidem

legis non liberatur: sed divus Marcus et Commodus rescripserunt in punitatem ei concedi, quia, licet interempto adultero mulier supervixerit post tam gravia vulnera, quae ei pater infixerat, magis fato quam voluntate eius servata est.

Paul also says (117) that a father may even kill an adulterer who is of consular rank or his own patron. This ruling sounds more like the result of juristic interpretation than an original provision of the law, as does his statement that an adoptive father possesses the ius necandi in the same way as a natural father (118). A more difficult question is whether or not the ius patris applied in the case of daughters who were sui iuris, since there is conflict among the juristic texts. Thus Paul says that a father possesses the right whether his daughter is in his potestas or has passed into the manus of her husband with his authority (119). This is confirmed by a passage of Papinian (120). Paul goes on to cite a passage of Marcellus which assigns to the father this right over a daughter who is sui iuris (121). On the other hand, an excerpt from the commentary of Papinian de adulteriis (122) attributes the ius patris only in the case of a daughter who is in the potestas of her father :

Patri datur ius occidendi adulterum cum filia quam in potestate habet: itaque nemo alius ex patribus idem iure faciet: sed nec filius familias pater.

Corbett (123) suggests that the text of Papinian has been interpolated by Justinian's codifiers who had no experience of manus marriage. This may, in fact, be a case of a difference of opinion among the jurists in the absence of a clear statement in the lex. Presumably the law simply assumed that a daughter whose father was alive would have been either in his potestas or (rarely) in the manus of her husband. The text of Papinian cited also stipulates that a father who is himself a filiusfamilias does not possess the right and this is confirmed by Ulpian (124) and by Paul (125) who says that this was so according to the letter of the law but that in practice such a father did exercise the right:

Filius familias pater si filiam in adulterio deprehenderit, uerbis quidem legis prope est, ut non possit occidere : permittitur tamen etiam ei, ut occidat.

A further issue discussed by the jurists was the exact import of the limitation that the father might only kill an adulterer found in his own house or in that of his son-in-law :

Ius occidendi patri conceditur domi suae, licet ibi filia non habitat, vel in domo generi; sed domus pro domicilio accipienda est, ut in lege Cornelia de iniuriis (126).

A text of Ulpian (127) purports to provide two verbatim phrases from the lex Iulia, 'in filia adulterum deprehenderit' ((if) he has caught someone in the act of adultery with his daughter) and 'in continenti filiam occidat' ((provided that) he immediately kill his daughter)(128). By comparing the purported quotation with the description of the ius patris given by Paul in Collatio 4.2.3, Bruns (129) provides the following reconstruction:

[Pater si] in filia [sua quam in potestate habet, aut in ea quae <eo> auctore cum in potestate esset, viro in manum convenerit] adulterum [domi suae generive sui] deprehenderit, [isque in eam rem socerum adhibuerit [lex permittit] ut is pater eum adulterum sine fraude occidat, ita ut] in continenti filiam occidat.

Clearly the 'in filia adulterum deprehenderit' must have been preceded by 'si' and the 'filiam in continenti occidat' by something like 'ita ut', but, while there is little reason to doubt that the phrases provided by Ulpian are genuine, this does not justify such a reconstruction, especially since Paul, in the Collatio passage, does not claim to be quoting from the law.

The limitations of a husband's right to kill an adulterer taken in the act are described in an excerpt from Paul's liber singularis de adulteriis (130) :

Ergo secundam leges viro etiam filiofamilias permittitur domi suae deprehensum adulterum interficere servum, et eum qui auctoramento rogatus est ad gladium, vel etiam illum qui operas suas, ut cum bestiis pugnaret, locavit. Sed et iudicio publico damnatum licet interficere in adulterio deprehensum, vel libertinum vel suum vel paternum, et tam civem Romanum quam Latinum. Sed et patris et matris et filii et filiae libertum permittitur occidere, quo loco et dediticius habetur.

Elsewhere (131) the husband's right of killing is limited to 'infames et eos qui corpore quaestum faciunt, servos etiam et libertos...'. But even such persons were only killed with impunity if the husband then made a statement regarding the circumstances, and dismissed his wife (132). According to an excerpt from Macer's first book of commentary publicorum (133), a husband may kill a man found committing adultery with his wife in his (the husband's) home 'qui leno fuerit quive artem ludicram ante fecerit in scaenam saltandi cantandive causa prodierit iudiciove publico damnatus neque in integrum restitutus erit, quive libertus eius mariti uxorisve, patris matris, filii filiae utrius eorum fuerit...quive servus erit.' Macer goes on to say that a husband possesses the ius whether he is a filiusfamilias or sui iuris. This rule was in fact, the result of a rescript of Hadrian and not an original provision of the law as D.48.5.6.2 shows :

Filius familiae maritus ab eo, qui sui iuris est, in ea lege non separatur. divus quoque Hadrianus Rosiano Gemino rescripsit et invito patre filium hac lege reum facere.

Greater leniency towards a husband's illicit killing of an adulterer was shown in Imperial constitutions. Hence Paul states (134) :

Sciendum est autem divum Marcum et Commodum rescripsisse eum qui adulterum inlicite interfecerit, leviori poena puniri. Sed et

Magnus Antoninus pepercit, si quis adulteros inconsulto calore ducti interfecerunt.

This idea is repeated in a passage from the Collatio (135) :

Maritum, qui uxorem deprehensam cum adultero occidit, quia hoc inpatientia iusti doloris admisit, lenius puniri placuit.

A constitution of Alexander (136) expresses similar sentiments with regard to the illicit killing of an adulterer :

Sed si legis auctoritate cessante inconsulto dolore adulterum interemit, quamvis homicidium perpetratum sit, tamen quia et nox et dolor iustus factum eius relevat, potest in exilium dari.

Papinian discusses (137) the question of whether or not a husband who catches his wife in adultery and kills her is liable for prosecution by the lex de sicariis. He concludes that, since such an action may be partly excused on the ground of just anger, exile is regarded as a just penalty. In another excerpt from Papinian (138), two Imperial rescripts are quoted which mitigated the penalty for a husband who killed his adulterous wife :

Imperator Antoninus et Commodus filius rescripserunt : 'Si maritus uxorem in adulterio deprehensam impetu tractus doloris interfecerit, non utique legis Cornelia de sicariis poenam excipiet.' nam et divus Pius in haec verba rescripsit Apollonio : 'Ei qui uxorem suam in adulterio deprehensam occidisse se non negat, ultimum supplicium remitti potest, cum sit difficillimum iustum dororem temperare et quia plus fecerit, quam quia vindicare se non debuerit, puniendus sit. sufficiet igitur, si humilis loci sit, in opus perpetuum eum tradi, si qui honestior, in insulam relegari'.

Ulpian (139) attributes to the fifth chapter of the lex Iulia the provision which gave to a husband who did not wish, or who was not allowed, to kill the adulterer, the right to detain

him for up to twenty hours in order to obtain evidence against him. This is confirmed by Paul (140) :

Capite quinto legis Iuliae cavetur, ut adulterum deprehensum viginti horas attestando vicinos retinere liceat.

The text of Ulpian goes on to attribute this right to the father, and to the husband who has found the adulterer in a house other than his own, and to say that the adulterer may not be brought back after he has been dismissed, but if he has escaped, he may be brought back and detained. Ulpian purports (par.5) to quote from the law the words 'testandae eius rei gratia', and on the basis of his description of the provision in D.48.5.26(25)pr., Bruns (141) has proposed the following reconstruction :

[viro adulterum in uxore sua deprehensum, quem aut nolit aut non liceat occidere, retinere horas diurnas nocturnasque continuas non plus quam XX] testandae eius rei gratia [sine fraude sua liceto].

While there is little reason to doubt the accuracy of Ulpian's purported quotation and of his description of this provision of the law, this by no means justifies such a reconstruction.

The significance of these provisions of the law concerning the ius necandi enjoyed by the father and husband of an alleged adulteress has to be assessed in the light of the situation previous to the lex Iulia. According to Papinian (142), a paterfamilias had, from ancient times, enjoyed the vitae necisque potestas over his children (143). Augustus now extended this to the rare situation in which a woman was in the manus of her husband. More importantly, he curtailed the father's right to kill his daughter by introducing limitations, namely that the act of adultery must have taken place in his house or in that of his son-in-law and that he must kill her immediately. His right to kill the adulterer was also qualified by the stipulation that he must kill his daughter at the same time.

As for a husband under the Republic, it seems that he was permitted to kill his wife taken in adultery. Dionysius of Halicarnassus says that Romulus made adultery and wine-drinking punishable by death (144). A husband was still allowed to put to death a woman taken in adultery by the time of Cato (145):

...In adulterio uxorem tuam si prendisses, sine iudicio impune necares..

The words 'sine iudicio' imply that if the woman were not actually taken in adultery, the husband was under pressure to call together a domestic tribunal to try her. The tribunal might pass the death sentence, or else propose a more moderate course such as divorce, which would involve the forfeiture of part of the dowry; hence pecuniary issues could be involved. Although a domestic council had no legal status, the husband or father would have felt a strong obligation to call one together to deal with a woman's offence. The lex Iulia deprived a husband entirely of any right to kill his wife taken in adultery even when she was in his manus in which case the right to kill (although restricted) belonged to her father.

Papinian seeks to explain the reasoning behind this part of the lex Iulia (146), and concludes that a woman's adultery is more of an affront to the name of her father than to that of her husband. Further, he says that a husband might more easily be carried away by anger than a father:

...ceterum mariti calor et impetus facile decernentis fuit refrenandus.

The jurist's explanation is not very convincing. It is more likely that the father's right was regarded as more sacred, rooted as it was in the archaic institution of patria potestas.

Not only was the husband deprived of the right to kill his wife whom he apprehended in adultery, but as has been observed,

his licence to kill the adulterer was subjected to considerable restrictions. It was stipulated that he must have caught the guilty parties in his own house, and if he killed an adulterer who did not belong to one of the specified lower categories he was liable for prosecution under the lex Cornelia de sicariis (147). Since a husband would not always have been able to determine immediately the status of an adulterer on finding him in the act of adultery, he would have been deterred from exercising the ius through fear of killing a man of higher rank and being prosecuted for homicide.

Thus Augustus left the husband with a ius necandi which was very restricted indeed. He gave preference to the right of the father over that of the husband, yet even the father's ius necandi was not free from restrictions. Augustus' motive in so weakening the ius necandi must surely have been to ensure that as often as possible the adulterous parties, rather than being punished by private vengeance, would be brought to public trial. Obviously he was happy to allow an adulterer of low social status to be dealt with by the offended husband. He thus ostensibly retained the Republican ius so that his measure should not appear too drastic and untraditional, while depriving it of much of its value in practice.

While a husband was virtually deprived of any effective right to kill an adulterer, he was, as has been observed, allowed to detain him in his house for a period of up to twenty hours in order to gather witnesses. This provision was presumably designed to facilitate the prosecution of the adulterous parties. The husband was further obliged to report the circumstances to a competent magistrate within three days (148) and to divorce his adulterous wife (149), provided that he had caught her in the act of adultery. If he failed to comply with these stipulations of the law, he could not kill an adulterer, even of low rank, with impunity. The texts show that a husband who failed to divorce a wife discovered in adultery, who let the adulterer go free, or who made some profit by condoning the adultery of his wife, was guilty

of lenocinium :

...Maritus lenocinium lex coercoit, qui deprehensam uxorem in adulterio retinuit adulterumque dimisit: debuit enim uxori quoque irasci, quae matrimonium eius violavit (150).

Ulpian goes on, in the same text, to provide a purported quotation from the law:

... idcirco enim lex locuta est' adulterum in domo deprehensum dimiserit'.

'If he has sent away the adulterer apprehended in his house'.

As long as the marriage still existed, neither the husband nor the father could prosecute an adulterous woman, and an extraneus must first successfully charge the husband with lenocinium for his failure to divorce her. The texts suggest that the offence of lenocinium was regarded as comparable to adultery itself (151). Augustus seems to have been concerned that no agreement among those involved should prevent the guilty parties from being brought to trial, that the treatment of an adulterous woman should not be wholly dictated by the attitude of her husband, and that a profitable compliance with an act of adultery should be regarded as an offence similar to that of adultery itself. The duty of a husband to make a prompt report to a competent magistrate was also designed, presumably, to ensure a public trial.

The idea of a wronged husband being obliged to divorce his wife was not entirely new : the Republican censors might occasionally force a husband to divorce a wife taken in adultery since such an act was regarded as a serious affront to him. By incorporating this rule into his law, Augustus turned a traditional obligation enforced from time to time into a general rule with universal application.

The law further ensured that third parties who were

accomplices in an act of adultery should not escape punishment. Thus a person who knowingly provided his house for acts of adultery or stuprum to be committed there was punishable as a defendant of adultery (152). Ulpian says that a person who provides his house merely for the planning of an act of adultery, even though the act does not actually take place there, is also penalised by the law (153). According to Papinian (154), women were not excluded from this, but were liable under the law if they had provided their houses or had accepted a reward as accomplices in a known act of stuprum. This extension sounds as though it may be the result of juristic interpretation. According to Marcian (155) 'si uxor ex adulterio viri praemium acceperit, lege Iulia quasi adultera tenetur'. Clearly such offences were regarded as comparable to the lenocinium of a husband who failed to divorce his adulterous wife. Presumably the rules were aimed not only at discouraging the commission of acts of adultery and of stuprum but also at precluding blackmail and corruption. They are indicative of Augustus' concern that the law be comprehensive and relentless towards anyone who played a part in the committing of adultery.

In addition, a person who appeared to condone an act of adultery by marrying a woman successfully prosecuted as an adulteress was penalised :

Quod ait lex, adulterii damnatam si quis duxit uxorem, ea lege teneri (156).

The obligation on a husband to divorce an adulterous wife raises the question of forms of divorce. The evidence for the Republic indicates that, at least for a marriage without manus (such marriages were almost universal by the time of Augustus), there was no set form of divorce required by law. Thus, just as a marriage without manus was a factual rather than a legal act (although having legal consequences), so was its dissolution. According to Plutarch, Romulus allowed husbands to divorce their wives for various specific offences (158). However the evidence for the period after 230 B.C. (when Carvilius Ruga divorced his

wife in the absence of any such misdeeds) (159), shows that, if Plutarch is right, the requirement of such grounds became obsolete: a passage of Cicero (160) speaks of a 'divortium sine causa'. Thus, following a mutual agreement by a husband and wife to separate, or the issuing of a repudium to either party for adultery or other misconduct, any ensuing legal action would be concerned with the division of the dowry or such like (161). The only set form which seems to have been involved was a declaration of 'res tuas tibi habeto', or a similar formula (162). The problems arising from the absence of a set form of divorce are illustrated by a controversy reported by Cicero (163). A man left his wife in Spain without sending a formal repudium to her, and married again. When both wives subsequently had sons, the question arose as to the status of each woman and her child. It was not clear whether, in the absence of a formal repudium, the fact of the man's second marriage automatically dissolved the first.

There is evidence to suggest the introduction of a legal requirement of form for divorce by the lex Iulia de adulteriis. Some juristic texts suggest that by the terms of the lex Iulia a divorce must be witnessed by seven Roman citizens above puberty:

Nullum divortium ratum est nisi septem civibus Romanis puberibus adhibitis praeter libertum eius qui divortium faciet (164).

...item Iulia de adulteriis, nisi certo modo divortium factum sit, pro infecto habet (165).

Si non secundum legitiman observationem divortium factum sit, donationes post tale divortium factae nullius momenti sunt, cum non videatur solutum matrimonium (166).

There are, however, considerable problems involved in taking these texts at face value, and, consequently, there has been little agreement among scholars on this issue. Firstly, interpolation is suspected, especially in the case of the first two excerpts.

Next, the second text cited is the only one which attributes an obligatory form of divorce specifically to the lex Iulia. Further, there are other excerpts concerned with divorce from the writings of the classical jurists which do not mention the existence of any legal requirement of form: a text of Ulpian, for example, which discusses the issue of dowry, includes the words 'quoquo modo dirempto matrimonio' (167). The question of how a marriage was terminated is discussed by the jurists in connection with the prohibition of gifts between spouses, since it was requisite, for the application of this prohibition, to establish whether a man and a woman were husband and wife. Ulpian thus discusses a situation in which long separation does not end a marriage, surely implying that in other situations it did, and adds 'non enim coitus matrimonium facit, sed maritalis affectio' (168) ('maritalis affectio' presumably means the desire to be man and wife). Another important text, although a corrupt one, is D.24.1.64 (169) in which an opinion of Proculus and Caecilius is reported, namely that divorce is said to be 'verum' and hence a gift between spouses valid 'si aliae nuptiae insecutae sunt aut tam longo tempore vidua fuisset, ut dubium non foret alterum esse matrimonium'. A similar excerpt from Marcellus (170) says that if the same woman returns to the same man, this is 'idem matrimonium', unless there has been a long separation, or either party has married another person, or the husband has failed to restore the dowry.

The apparent implication of these texts is that a marriage could be dissolved without any set form, by the issuing of a repudium by either party, by a long separation, by the marriage of one of the spouses to a third party etc.. The issue is further complicated by a text of Gaius which associates the subject of divorce with the Twelve Tables (171), and which has been placed by Justinian's codifiers under the chapter heading 'ad legem Iuliam de adulteriis coercendis':

'Si ex lege repudium missum non sit et idcirco mulier adhuc nupta esse videatur, tamen si quis eam uxorem duxerit, adulter non erit.

idque Salvius Iulianus respondit, quia adulterium, inquit, sine dolo malo non committitur: quamquam dicendum, ne is qui sciret eam ex lege repudiatam non esse dolo malo committat'.

Scholars have discussed these texts endlessly. Levy (172) argues, since there are texts related to divorce which do not mention any special form, that the declaration with seven witnesses was a requirement not for divorce but for expelling a woman in a manus marriage from her husband's family if she had committed adultery. Corbett has raised objections to this view (173), the most convincing being, firstly, that manus marriages were very rare by the time of Augustus, and secondly, that in order to support his case, Levy is forced virtually to rewrite a number of Digest texts. Corbett believes that where the sources use terms such as 'discidium' and 'discidere' to indicate divorce (174), the implication is that the form required by the lex Iulia has already been observed. Regarding the texts which seem to imply that a marriage could be dissolved by a long separation or by the marriage of one of the spouses to a third party, he explains that this was required in addition to the form laid down by the lex Iulia in order to indicate a serious intention on the part of the husband and wife to divorce. Corbett further explains that this additional requirement was not needed in a case of adultery in order to protect the husband from accusations of lenocinium.

A differing view is expressed by Bonfante (175), who seeks to reconcile the texts by suggesting that the lex Iulia only introduced formal divorce when it was unilateral, and that those texts which do not mention the form set out by the lex Iulia are referring to divorce by mutual consent. However, this is mere conjecture, since none of the texts actually makes this distinction.

Much of the disagreement among scholars has centred on the excerpt of Gaius cited above (176). Since this excerpt is taken from a commentary on the Twelve Tables, but appears in a chapter on the lex Iulia, it is difficult to decide to which law the 'ex

lege' of the first line refers. Thus, it could be deduced that either the lex duodecim tabularum or the lex Iulia required a certain form of repudium for the dissolution of marriage. Levy suspects the text, as does Solazzi (177), and believes that the 'ex lege' refers to the law of the Twelve Tables, and that the absence of any evidence for a set form of divorce in the Republic is due to the fact that these forms were never legally binding. However, Volterra (178), followed by Thomas (179), believes that the text is genuine, and that the 'ex lege' refers to the lex Iulia which laid down a fixed form of divorce only for the application of the law, that is, only in cases of adultery. Thomas explains that Gaius, having dealt with the measures of the lex duodecim tabularum relating to divorce, then went on to discuss the measures introduced by the lex Iulia. Another view is expressed by Yaron (180), who believes that the Twelve Tables regulated the grounds rather than the form of divorce, and that Gaius, in considering the interaction of the two laws, concludes that a marriage subsequent to a divorce not based on the Twelve Tables does not involve adultery.

While several of the texts in question are undoubtedly suspect, the degree of interpolation which Levy claims cannot be justified, and the evidence for the introduction of a requisite form of divorce by the lex Iulia is too strong to be dismissed. It is difficult to see how the provisions of the lex Iulia concerning prosecution for adultery and for lenocinium could possibly have been put into effect in the absence of formal divorce. On the other hand, the existence of excerpts relating to the dissolution of marriage from the classical jurists which do not mention the requirement of the lex Iulia is undeniable, and there is no justification for presuming, as Corbett does, that in these cases, the requisite form has already been observed. The varied means of divorce which existed in the Republic, that is repudium, mutual consent, prolonged separation and such like, must have continued to exist in the Empire, since they are mentioned by the classical jurists. The only way to reconcile the texts is to conclude that Augustus introduced a requisite form of divorce only

for the application of the lex Iulia. Thus, in looking at Paul's statement in D.24.2.9 ('nullum divortium ratum est' etc.), the only plausible conclusion is that a divorce had to be legally 'ratum' only if the provisions of the lex Iulia were applicable. It was essential for the application of the law that divorce be strictly defined, and it is obvious that a means of divorce such as prolonged separation was completely irrelevant in the context of the lex Iulia. At the same time, the existence of other means of divorce outside the context of the lex Iulia is well attested, and it is clear that when a question arose in an area such as that of gifts between spouses, the jurists encountered the same problems in determining whether or not a marriage was still in existence as did Cicero in the Republican period.

It is difficult to determine the relevance of the law of the Twelve Tables to divorce as is suggested by Gaius in D.48.5.44(43). The measures attributed by Plutarch to Romulus related to divorce have already been mentioned, and it is not impossible that similar limitations on the grounds of divorce were repeated in the lex duodecim tabularum. Alternatively, there may have been a provision which dealt with the question of the dowry. Cicero mentions the Twelve Tables in connection with the dissolution of a marriage:

illam mimam suam suas res sibi habere iussit, ex duodecim tabulis clavis ademit, exemit (181).

Cicero's association of the words 'res suas sibi habere' with the Twelve Tables may suggest that this formula, which persisted into the classical period, was introduced by that law. The formula, however, was only relevant to the issue of dowry.

However, whatever rules were laid down by the law of the Twelve Tables, it appears (as has been shown), that by the later Republican period, there was no legal regulation of the form nor of the grounds of divorce. Hence Gaius cannot be implying in this excerpt that a woman who was not repudiated according to a

form set by the law of the Twelve Tables 'adhuc nupta esse videatur'. He must, as Thomas suggests, have passed on from a discussion of the provisions of the Twelve Tables on divorce to those of the lex Iulia, so that the 'ex lege' of the first line refers to the lex Iulia. The words 'quia adulterium....sine dolo malo non committitur' are reminiscent of the lex Iulia in which, according to Ulpian, appeared the words 'ne quis posthac stuprum adulterium facito sciens dolo malo' (182).

It is worth while looking at the report of Suetonius regarding Augustus's regulation of divorce (183):

Cumque etiam immaturitate sponsarum et matrimoniorum crebra mutatione vim legis eludi sentiret, tempus sponsas habendi coartavit, divortii modum imposuit.

The implication of this is that a 'modus' was placed on divorce in order to counteract the 'matrimoniorum crebra mutatio': thus Suetonius seems to be suggesting that Augustus limited the facility and hence the frequency of divorce. However, it is difficult to reconcile this statement with the evidence from the juristic sources which, while attributing to the lex Iulia the introduction of formal divorce for the application of this law, do not mention any legal measures which were designed to reduce the number of divorces. Suetonius' 'modus' could be taken to mean a mode or method of divorce and thus to refer to the form of divorce introduced by the lex Iulia, and this would fit in with the juristic evidence more easily. However, it would deprive the statement of all logic. Further, Suetonius is not describing the lex Iulia de adulteriis at this point: he has already mentioned it and has passed on to describe the measures taken by Augustus in order to deal with abuses of the marriage law of 18 B.C.. If the 'modus' was designed for this purpose, it is very unlikely to have been introduced by the adultery law in the same year as the marriage law was passed. Suetonius must be referring to some later measure introduced by Augustus which was designed to discourage people from entering into frequent marriages merely in

order to take bequests, for example, and subsequently divorcing. As has been suggested in chapter 3, the jurists perhaps fail to mention this measure because it became much less relevant after the passing of the lex Papia Poppaea which also penalised the married but childless (184). This measure may therefore be seen as an attempt to close loopholes which were being exploited by those anxious to gain the benefits associated with marriage without taking on the responsibilities. The absence of any evidence for such a measure other than that of Suetonius makes it impossible to be more specific about the nature of the action taken by Augustus in this area.

Prosecution of the adulterous parties

The 'ius mariti vel patris'

It was provided in the law that prosecution of the adulterous parties instigated by the husband or father of the adulteress might not take place unless she had first been divorced or her husband accused of lenocinium for failing to divorce her (185). Provided that she had been divorced, the woman's husband and father enjoyed an exclusive right of prosecution for a period of 60 days following divorce, preference being given to the husband over the father :

Marito primum, vel patri eam filiam, quam in potestate habet, intra dies sexaginta divortii accusare permittitur nec ulli alii intra id tempus agendi potestas datur(186).

Nisi igitur pater maritum infamem aut arguat aut doceat colludere magis cum uxore quam ex animo accusare, postponetur marito (187).

After the expiry of this period, prosecution was open to extranei for a period of 4 months, although even then the husband had precedence if he wished to prosecute, provided that he had good

reason for not having done so within the first 60 days. A new quaestio de adulteriis was set up specifically to deal with this offence. If divorce were delayed, no prosecution might be instigated more than 5 years after the commission of the offence.

The privileged position enjoyed by the husband and father of the alleged adulteress over other would-be accusers is clear from the comments of the jurists. In addition to the grant of 60 days specifically to them, they were exempt from various restrictions applicable to extranei. The jurists mention more frequently the ius mariti in connection with such exemptions, and while the ius patris is sometimes mentioned as well (188), and in other cases should, perhaps, be understood, there is no doubt that the position of the husband was more privileged than was that of the father. Thus Ulpian says (189) that a person under 25 is debarred from instigating a prosecution unless it be to vindicate his own marriage. This is confirmed elsewhere (190) and obviously only applied to a husband. Similarly, a husband who was a filiusfamilias did not need to obtain the consent of his pater in order to accuse, according to Papinian :

Filium familias publico iudicio adulterium in uxorem sine voluntate patris arguere constitutum est : vindictam enim proprii doloris consequitur (191).

A rescript of Hadrian later ruled that a husband who was a filiusfamilias and one who was sui iuris had the same rights (192). If a husband or father were infamis or a libertinus, he was permitted to accuse by the ius extranei, such categories otherwise being prohibited from prosecuting (193). A husband was further exempt from the charge of calumnia should the prosecution fail (194). In one text, Paul also attributes this privilege to the father (195) :

Iure mariti vel patris qui accusat, potest et sine calumniae poena vinci : si iure extranei accusat, potest calumniae poena puniri.

Elsewhere, however, he denies this (196) :

Pater sine periculo calumniae non potest agere.

Lenel (197) has suggested the insertion of the words 'qui iure extranei accusat' after the 'pater' in the second excerpt. A more plausible emendation is the omission of the 'non' of this excerpt, since it is easy to see how a 'non' might have crept into the text. Scaevola (198) even denies this right to the husband, but since all of the other evidence ascribes it to him (199), this excerpt must be regarded with suspicion.

If both husband and father wished to instigate proceedings, precedence was given to the former, as D.48.5.3, cited above, shows : a father might take precedence over a husband only if the husband were discredited. Ulpian says elsewhere that if a husband is debarred from prosecuting because he holds a magistracy, both his right and that of the father should be suspended until the termination of the period of the magistracy (200). According to another text of Ulpian, if a husband instigates proceedings, time no longer runs for the father, whereas if an extraneus has begun a prosecution after the expiry of the 60 day period, he, (as has already been observed), has to give place to the husband, provided that the latter's failure to prosecute before was not due to negligence (201). A text of Papinian (202) suggests that if the woman's husband is dead, the father enjoys no special right :

In accusationem viduae filiae non habet pater ius praecipuum.

Ulpian attempts to explain the reasoning behind the preference granted to the husband over the father by the law :

Si simul ad accusationem veniant maritus et pater mulieris, quem praeferri oporteat, quaeritur. et magis est, ut maritus praeferatur : nam et propensiore ira et maiore dolore executurum eum accusationem credendum est...(203)

This excerpt is comparable to D.48.5.23(22) in which Papinian explains that greater restrictions are placed on the right of the husband to kill the adulteress than on that of the father because the husband would more easily be carried away by anger (204). It is indeed curious that, while the father enjoyed a less restricted ius necandi than did the husband, it was the latter who enjoyed precedence in prosecution. The explanations offered by the jurists are not particularly convincing: it is more likely that, while the law was designed to encourage the bringing of adulterous parties to trial (and it was fitting that the husband, as the wronged party, should instigate the trial in order to defend his honour), it was appropriate, in view of the ancient ius vitae necisque of the pater, that he should enjoy the more extensive ius necandi.

The jurists commented at great length on the ius mariti vel patris and, judging from the nature of their comments, it is clear that, while Augustus laid down special rules for prosecution by a husband or father, these were developed by later enactments and especially by juristic interpretation. The provision of the 60 day period during which the husband and father had exclusive rights were, no doubt, Augustan, as were the various exemptions and privileges outlined above which were granted to the husband and, in some cases, to the father. Obviously, as the law was applied, questions arose concerning the exact extent of the ius mariti in particular. Might it be exercised with regard to a sponsa, a concupina, a uxor iniusta, a uxor vulgaris and such like? A rescript of Severus and Antoninus evidently laid down that a sponsa might not be prosecuted iure mariti (205), but that she might be prosecuted for adultery iure extranei (206). According to Ulpian, the same applied in the case of a concupina (207):

Si uxor non fuerit in adulterio, concubina tamen fuit, iure quidem mariti accusare eam non poterit, quae uxor non fuit, iure tamen extranei accusationem instituere non prohibetur, si modo ea sit, quae in concubinatum se dando matronae nomen non amisit ut puta

quae patroni concubina fuit.

It is very likely that this represents an extension of the lex Iulia through juristic interpretation, as does another ruling mentioned by Ulpian (208) concerning the ex-prostitute wife, the uxor vulgaris :

Sed et in ea uxore potest maritus adulterium vindicare, quae vulgaris fuerit....

In the same excerpt, Ulpian discusses the prosecution of a wife for incest, of a wife who has allegedly committed adultery before her marriage or who has been 'apud hostes' or who committed adultery before the age of 12. Ulpian attributes to the husband, in these cases, the right to prosecute only iure extranei, apart from the case of the wife who has been 'apud hostes', who, he claims, may be prosecuted iure mariti. This is a very odd ruling which has led scholars to suggest various emendations (209). Thomas (210) proposes that Ulpian is, in fact, referring to the situation in which both husband and wife are 'apud hostes'.

Another important question discussed by the jurists was that of the case of the iniusta uxor. We possess excerpts from the writings of Papinian and of Ulpian which are relevant to this issue :

Civis Romanus, qui civem Romanam sine conubio sive peregrinam in matrimonio habuit, iure quidem mariti eam adulteram non postulat (211).

Plane sive iusta uxor fuit sive iniusta, accusationem instituere vir poterit : nam et Sextus Caecilius ait, haec lex ad omnia matrimonia pertinet...(212).

The excerpt from Papinian states categorically that an iniusta uxor may not be prosecuted for adultery iure mariti, and it is therefore reasonable to assume that in the excerpt from Ulpian

prosecution iure extranei is envisaged. What is particularly interesting in the passage of Ulpian is the fact that he defends the inclusion of iniustae uxores in a way which suggests that they were not originally envisaged in the application of the lex Iulia but came to be included through juristic interpretation. It is, indeed, very likely that Augustus was primarily concerned to deter Roman citizen women whose marriages were iusta from committing adultery, since their adultery posed a threat not only to the reputations of their husbands and families, but possibly also (since an adulterous woman might try to pass off another man's child as her husband's), to the purity of the citizen body. As the Roman citizenship spread during the centuries after Augustus, the significance attached to iustae nuptiae would have been gradually eroded, and this perhaps partly accounts for the later application of the precepts of the lex Iulia to 'omnia matrimonia'.

There are several other juristic excerpts preserved in Justinian's Digest relevant to the ius mariti vel patris. Some of the rules outlined are quite obscure and are very unlikely to have originated in the lex Iulia itself. Thus, for example, Papinian (213) discusses such questions as whether the sixty days granted exclusively to the husband and father are 'dies utiles' and whether the ius mariti may be exercised over a woman by a man to whom she was engaged although subsequently given by her father to another man. Ulpian discusses the issue of a woman's remarriage to her former husband after having been divorced by him for adultery (214), the committing of stuprum by a woman before her marriage (215), praescriptiones which may be interposed against an accusing husband (216) and the remarriage of a woman in defiance of a prohibition by her divorcing husband (217). The jurist, Paul, discusses the issue of the remarriage of the alleged adulteress either to the adulterer or to her former husband (218) and Macer shows that the adulterous parties may not be prosecuted at the same time (219) although accomplices in the act may stand trial at the same time as either the adulterer or the adulteress. This may well have been an Augustan provision.

It is thus clear that, while Augustus drastically curtailed the rights of the husband and of the father of an adulteress to deal with the guilty parties privately, he nevertheless upheld their right to take action against a daughter or (particularly) a wife by the introduction of the privileged ius. Thus it was seen to be the duty and prerogative of the woman's husband primarily and, failing him, of her father, to instigate a public prosecution, which, however, was regulated by the terms of the lex Iulia.

Prosecution 'iure extranei'

Prosecution iure extranei might take place either as soon as the husband (and, by implication, the father) had denounced any intention of prosecuting, or following the expiry of the 60 day period if neither the husband nor the father had taken advantage of the opportunity to instigate a prosecution. The period prescribed for prosecution iure extranei was four months :

Extraneis autem, qui accusare possunt, accusandi facultas post maritum et patrem conceditur : nam post sexaginta dies quattuor menses extraneis dantur et ipsi utiles (220).

The brevity of the prescribed period was presumably designed to bring alleged acts of adultery to justice without undue delay. This would help to ensure that such acts did not go unpunished. If divorce of the adulteress were delayed, no prosecution might be initiated more than 5 years after the committing of the offence :

Hoc quinquennium observari legislator voluit, si reo vel reae stuprum adulterium vel lenocinium obiciatur (221).

As has already been mentioned, various restrictions were placed on a prosecution iure extranei. Thus the accuser might not be infamis, nor a libertinus, nor under 25 (222) and, if the

accusation should be unsuccessful, he was liable to an accusation of calumnia (223). Even if an extraneus had already begun proceedings, he had to give way to a husband who wished to prosecute iure extranei provided that the latter had good reason for not having acted sooner (224).

An excerpt from Ulpian's second book of commentary de adulteriis in which he is describing a class of persons who may not be prosecuted for adultery, provides a purported quotation from the lex Iulia :

Legis Iuliae de adulteriis capite septimo ita cavetur : 'ne quis inter reos referat eum qui tum sine detrectatione (retrectatione F) rei publicae causa aberit (225).

Let no-one bring among the defendants a person who is at the time absent on public business without (attempt at) evasion.

There is no evidence elsewhere to support the existence of such a provision and doubt has, therefore, been cast on it. Some scholars suspect the whole paragraph (226) while others suspect the 'sine detrectatione'(227). 'Detrectatio' is rare, and does not appear in the juristic sources, but it does appear in, for example, Livy, Tacitus and Pliny (228). It does not seem to be a common post-classical word. 'Detrectatio' does make more sense than 'retrectatio', but the whole provision is indeed rather odd. Nevertheless, this does not provide sufficient justification for rejecting totally the evidence of this text.

According to a constitution of Severus and Antoninus, the lex Iulia contained a provision which forbade women to instigate prosecution for adultery (229) :

Publico iudicio non habere mulieres adulterii accusationem, quamvis de matrimonio suo violato queri velint, lex Iulia declarat, quae cum masculis iure mariti facultatem accusandi detulisset, non idem feminis privilegium detulit.

It is also likely that the rule which forbade the prosecution of the adulterer and of the adulteress to take place simultaneously went back to the lex Iulia (230) :

Si quis et adulterum et adulteram simul detulit, nihil agit.

The prosecutor might choose which party to prosecute first unless the woman had remarried before the trial, in which case the adulterer was to be tried first (231) :

Nuptam mihi adulteram ream postulari posse in priore matrimonio comissi dubium non est, cum aperte lege Iulia de adulteriis coercendis caveatur, si quidem vidua sit, de cuius adulterio agetur, ut accusator liberum arbitrium habeat, adulterum an adulteram prius accusare malit : si vero nupta sit, ut prius adulterum peragat, tunc mulierem.

The jurists describe various other rules relating to the ius extranei which are probably the result of interpretatio rather than originating with the lex Iulia. Thus Paul shows that no adjournment (dilatio) of an adultery trial is permitted (232) and that not more than two 'uxoris adulteri' may be prosecuted at one time (233). Elsewhere he discusses such issues as the exact reckoning of the 5 year period within which prosecution must take place (234), desisting from an accusation and bearing false witness (235). He also provides a description of the 'inscriptio libellorum' required by the lex Iulia (iudiciorum) publicorum for adultery cases (236). Papinian says that a woman accused of adultery may not be defended in her absence (237) and discusses the case of a man who abandons the prosecution of his daughter-in-law because he hopes to profit from her dowry, of a woman who seeks a dilatio because she has an under-age child. He discusses issues relating to the accusation of calumnia (238) and to the abolitio of an adultery prosecution (239).

Rulings concerning slaves

Slaves might be involved in an adultery trial either as defendants, or, more commonly, as witnesses, slaves being the most likely people to witness the adultery of their owners. In the latter case, the lex Iulia, according to Papinian, gave to the husband and to the father of the alleged adulteress the exclusive right to torture slaves in order to make them produce such evidence, although a judge might extend this right to an extraneus if he saw fit (240). A constitution of Severus and Caracalla (241) suggests that this right was later extended to all extranei. The use of slaves to provide evidence is confirmed by D.28.5.28.6 (Ulpian 3 de adulteriis) :

Haberi quaestionem lex iubet de servis ancillisve eius de quo vel de qua quaeretur, parentisve utriusque eorum, si ea mancipia ad usum ei a parentibus data sint.

A woman accused of adultery was forbidden by the law to manumit or to sell any slave within 60 days of her divorce in order to prevent her from evading this provision of the law (242). If a slave were used as a witness he must subsequently be made public (243). Ulpian says that this rule was introduced so that the evidence of a slave would not be influenced by the prospect of punishment or reward on return to his master (244). Should the prosecution be unsuccessful, the value of the slave who had given evidence was to be estimated and paid to his master as restitution (245).

Slaves might also be accused of adultery (246):

Servos quoque adulterii posse accusari nulla dubitatio est...

Elsewhere, Ulpian specifically mentions the ninth chapter of the law in this connection (247) :

Capite nono cavetur, si servus adulterii accusetur et accusator

quaestionem in eo haberi velit, duplum pretium domino praestari lex iubet...

According to Papinian, however, slaves were not punished according to the terms of the lex Iulia but by the terms of statutes which concerned slaves, such as the lex Aquilia (248). The lex Iulia ruled that, if the slave should be absolved, the accuser must pay to his owner twice the slave's value.

Penalties

The lex Iulia clearly prescribed a variety of penalties for adultery, stuprum and other related offences (249) :

Adulterii convictas mulieres dimidia parte dotis et tertia parte bonorum ac relegatione in insulam placuit coerceri : adulteris vero viris pari in insulam relegatione dimidiam bonorum partem auferri, dummodo in diversas insulas releguntur.

This passage shows that the penalties differed slightly for women and for men. Women convicted of adultery forfeited a half of their dowry and a third of their property, and were relegated to an island. Men convicted of adultery were also relegated to a (different) island and lost one half of their property.

A passage from Justinian's Institutes suggests that, when the later distinction between honestiores and humiliores emerged, different penalties according to status were applied (250) :

Poenam eadem lex irrogat peccatoribus, si honesti sunt, publicationem partis dimidiae bonorum, si humiles, corpus coercionem cum relegatione.

Thus relegatio became a penalty reserved for humiliores. That it was the penalty applied to offenders regardless of rank by the

terms of the lex Iulia is attested by the fate of Augustus' own daughter and granddaughter, who were punished for adultery by relegatio (251).

One of the crimes embraced by the lex Iulia seems to have incurred capital punishment (252) :

Qui masculum liberum invitum stupraverit, capite punitur.

This must have been regarded as the most heinous of all of the crimes embraced. The passage from Justinian's Institutes cited above also states, in fact, that the death penalty applies to 'temeratores alienarum nuptiarum', but this could be a reference to the continuing (although limited) ius necandi of the pater. Esmein (253) argues that the death penalty was inflicted for adultery in later times as a result of trial by cognitio extraordinaria, and he cites CJ 9.9.9 (constitution of Alexander Severus) and CJ 2.4.18 (constitution of Diocletian) to support this. This may well be so, but there is no doubt, especially in the light of the well-attested imposition of the penalty of intestabilitas (see below), that the death penalty was not prescribed by the lex Iulia except for the crime mentioned.

The penalty of intestabilitas, the inability to make a Roman will, is mentioned by Paul (254) :

Qui voluntate sua stuprum flagitiumque impurum patitur, dimidia parte bonorum suorum multatur nec testamentum ei ex maiore parte facere licet.

Papinian discusses (255) the question of whether a person convicted of adultery might validly witness a Roman will and concludes that he may not.

One final penalty attested in the sources was the prohibition against remarriage by a woman convicted of adultery on pain of involving her new husband in a charge of adultery (256):

Quod ait lex, adulterii damnatam si quis duxit uxorem, ea lege teneri.

It is likely that the forfeiture of a part of the dowry of an adulteress was also designed to discourage her remarriage.

As for the crime of lenocinium, this was very harshly punished : the same penalties seem to have been inflicted as were inflicted for adultery. Thus Papinian says that a person who knowingly provides his house for the committing of stuprum or adultery, or who makes some gain from his wife's adultery 'quasi adulter punitur' (257). The same is said by Marcian to apply to women, although, as has already been suggested, the extension of the rules regarding lenocinium to women may well have been a post-Augustan development (258) :

Si uxor ex adulterio viri praemium acceperit, lege Iulia quasi adulter tenetur.

Prohibition against the alienation of dotal land by husbands

The final provision of the lex Iulia de adulteriis coercendis, which, at first sight, seems to bear no relation to the other provisions, was a prohibition against a husband's alienation of dotal property :

Lege Iulia de adulteriis cavetur, ne dotale praedium maritus invita uxore alienet (259).

nam dotale praedium maritus invita muliere per legem Iuliam prohibetur alienare, quamvis ipsius sit, dotis causa ei datum (260).

The relevance of such a provision to the lex Iulia must be based

on the relationship between the issues of divorce and of dowry : dowry was clearly a very important issue in the event of divorce. Scholars also generally associate the rules concerning retentiones ex dote with the lex Iulia :

Retentiones ex dote fiunt aut propter liberos aut propter mores aut propter impensas aut propter res donatas aut propter res amotas (261).

Morum nomine graviorum quidem sexta retinetur, leviorum autem octava. graviores mores sunt adulteria tantum, leviores omnes reliqui (262).

Esmein (263) parallels the provision of the lex Iulia which regulated dowry with the iudicium de moribus attested in the Republic (264) : this provides further justification for the inclusion of such provisions in the lex Iulia.

The purpose and significance of the 'lex Iulia de adulteriis coercendis'

As in the case of the marriage laws, the lex Iulia de adulteriis coercendis, while no doubt regarded as severe by contemporary Romans, had what would have seemed, to those who hankered after Republican ideals, a laudable theme. If the catastrophes of the last years of the Republic were indeed due to Rome's decline from traditional moral standards, then the introduction of a law which penalised adultery so ruthlessly would have been in the interests of Rome's well-being.

Similar questions to those which arose in attempting to determine the purpose of the marriage laws present themselves here. Was Augustus genuinely concerned about moral standards?

Did he wish to discourage adultery and stuprum among all orders of citizen? Did he have any motives beyond these?

The first two questions need to be taken together. Any assessment of Augustus' concern for moral standards should be made against the background of traditional Roman morality. Marital infidelity in itself was not regarded in the ancient world as morally reprehensible. Thus, extra-marital sexual relations between a Roman citizen man and a lower-class woman were quite acceptable. What was unacceptable was adultery committed with a respectable citizen wife, for not only was this regarded as a gross affront to her husband and family and therefore improper, but it might also result in the birth of children of doubtful paternity and hence in "pollution" of a Roman citizen family and of the citizen body. The fact that the committing of adultery by a "respectable" man was not similarly regarded as an affront to his wife helps to explain why men had much more freedom in this area than did their wives. The attitude to sexual morality revealed in the lex Iulia de adulteriis coercendis which, as has been shown, penalised adultery (as it penalised stuprum) only when it was committed with women of respectable status is thus a typically Roman one. Like the Republican censors, Augustus did not disapprove of nor penalise all acts of adultery nor of stuprum, but only those acts which were regarded as a threat to the name and honour of husbands and families, to the stability of society, to the purity of the citizen body and thus to the general well-being of Rome and to the reputation of Augustus as a restorer and bringer of prosperity.

Nevertheless, the way in which Augustus carried through his "moral" purpose was by no means traditional. It has been observed that the punishment of adultery under the Republic was largely in the hands of patresfamiliarum, the regulation of the morality of individual citizens being regarded as the concern of the familia, so that intervention by the censors or aediles was unusual. Augustus now greatly weakened the authority of fathers and of husbands to deal with alleged adulterers and clearly wished to

ensure that such should, as often as possible, be brought to a public trial before the new quaestio de adulteriis. Adultery was thus transformed into a crime punishable by the terms of the lex Iulia. While the encouragement of a return to ancient moral standards was a useful ideological banner and, indeed, was desired by Augustus, it is more significant that the authority and independent action of fathers and of husbands were curtailed in favour of uniformity and of control by the law over this area of life and this, I believe, was Augustus' primary purpose. It is easy to see parallels here with the aims of the marriage laws.

NOTES

(1) D.4.4.37.1, 48.5 tit., 48.5.5, 43(42), Coll.4.2.1, 14.3.3, CJ 9.9.3, Just.Insts.4.18.4.

(2) D.22.5.18, 23.2.43.12, 38.11.1.1, 48.5.16, 40(39), 50.16.101, CJ.9.9.10, P.Sent.2.26.1,15, 2.2.18.2.

(3) CJ 9.9 tit.

(4) CJ 9.9.8,9.

(5) DA 34.

(6) D.23.5.1, Paul 36 ad edictum.

(7) Odes 4.5.21ff.: 'nullis polluitur casta domus stupris,
mos et lex maculosum edomuit nefas,
laudantur simili prole puerperae,
culpam poena premit comes.'

(8) 54.16.

(9) see chapter 2 n.4.

(10) 11.57ff. : 'iam Fides et Pax et Honor Pudorque
priscus et neglecta redire Virtus
audet, apparetque beata pleno
copia cornu.'

(11) CAH X, Cambridge 1934, p.443.

(12) See Raditsa, "Augustus' legislation concerning marriage" in ANRW II.13, Temporini ed., Berlin 1980, pp.296-7.

(13) See Biondi, Scritti Giuridici II, Milan 1965, p.154.

(14) e.g.D.48.5.16(15).1, Ulp.2 de adulteriis.

(15) DA 34.

(16) 54.16.

(17) De Beneficiis 6.32 : '...forum ipsa et rostra, ex quibus pater legem de adulteriis tulerat filiae in stupro placuisse...'

(18) Epistles 6.31.6 : '...damnata et Iuliae legis poenis relicta est.'

(19) Fasti 2.139.

(20) 6.2, 7-8.

(21) D.48.5.

(22) CJ 9.9.

(23) In using the comments of the jurists as a source, it is, of course, difficult to distinguish between the original provisions of the law and subsequent enactments or juristic interpretation.

(24) D.48.5,13(12).

(25) D.48.5.22(21), 24(23); 48.8.2.

(26) D.48.5.17.

(27) D.48.5.26(25).

(28) D.48.5.3,14(13), 16(15), 18(17).

(29) D,48.5.14(13).

- (30) Book 3 : D.48.5.28(27), 48.2.5, 48.18.7, 47.11.3; book 4 :
D.40.9.11,14.
- (31) D.48.5.10, 30pr.- 30.4
- (32) D.48.5.30.5 - 30.9.
- (33) D.23.5.2, 6, 13.
- (34) D.48.16.16.
- (35) 4.2,3,4,6.
- (36) 4.2.2
- (37) 4.2.3-7, 4.3.
- (38) 4.4, 4.6.
- (39) D.48.5.31(30).
- (40) D.37.9.8.
- (41) D.48.5.32(31).
- (42) D.22.5.18.
- (43) D.24.3.36.
- (44) D.24.2.9.
- (45) D.40.9.13.
- (46) D.48.2.3.
- (47) D.48.16.13.

- (48) D.23.5.14.
- (49) 2.26, see also Coll.4.12.
- (50) Coll.6.6.
- (51) D.22.5.14.
- (52) D.48.5.12.
- (53) D.48.16.11.
- (54) D.48.5.6.
- (55) D.48.5.21(20), 23(22).
- (56) D.48.2.7, 46.3.41, 22.5.13.
- (57) D.48.3.2.
- (58) D.23.5.12.
- (59) D.48.5.8 (Notae of Marcian).
- (60) D.48.5.11pr.
- (61) D.48.5.9, 11.1.
- (62) D.23.2.57a (Notae of Marcian).
- (63) D.48.16.8, 10.
- (64) D.24.2.8, 48.20.4.
- (65) Coll.4.5.
- (66) D.23.2.43.12.

(67) D.48.5.2, 4, 22, 27(26).

(68) D.24.1.35, 38.11.1.1.

(69) D.23.5.5.

(70) D.4.2.8, 23.5.1,3, 29.1.16.

(71) D.23.5.10.

(72) D.48.5.41(40).

(73) D.23.5.4, 48.5.38(37).

(74) D.48.5.44(43).

(75) D.23.5.15, 48.5.45(44).

(76) D.23,5,17, 48.5.7,8,29(28),34(33).

(77) D.24.3.47, 48.5.15(14).

(78) D.48.5.19(18), 25(24), 33(32).

(79) D.48.5.36(35), 50.16.101.

(80) D.23.5.16, 48.5.43(42).

(81) D.48.5.5, 44.

(82) D.23.5.8.

(83) D.23.5.9, 11.

(84) D.23.5.18.

(85) See Coll.4.2.4, where Paul attributes to Marcellus' book 31 digestorum comments on the lex Iulia de adulteriis.

(86) e.g.D.48.5.26, 16.11, 28.16.

(87) 4.2.1, Paul lib.sing.de adulteriis.

(88) D.48.5.13(12), Ulp.1 de adulteriis.

(89) D.48.5.24(23)pr.,4, Ulp. 1 de adulteriis.

(90) D.48.5.26(25).5, Ulp.2 ad legem Iuliam de adulteris.

(91) D.48.5.16(15).1, Ulp.2 de adulteriis.

(92) D.48.5.30(29), Ulp.4 de adulteriis.

(93) 4.2.2, Paul lib.sing.de adulteriis.

(94) Cicero, pro Rabirio 3.8, Livy 25.2.

(95) Valerius Maximus 6.3.7-8, Suetonius, Tiberius 35, Tac.Ann.13.32.

(96) Plutarch, Romulus, 22.3.

(97) Cicero ep.ad fam. 8.12.3, 8.14.4; Juvenal Sat.2.44.

(98) Leges Publicae Populi Romani, Milan 1962, p.293.

(99) Comp.Lysander & Sulla 3.2.

(100) see Rotondi, op.cit.p.359.

(101) D.48.5.13(12).

(102) D.48.5.6.1, 1 de adulteriis.

- (103) D.50.16.101, 9 differentiarum.
- (104) D.48.5.35(34).1, 1 regularum.
- (105) D.48.5.11(10).2, 2 de adulteriis.
- (106) Sent. 2.26.11.
- (107) Ann.2.85.
- (108) e.g.D.48.5.11(10)pr., Papinian 2 de adulteriis : 'Mater autem familias significatur non tantum nupta, sed etiam vidua.'
- (109) D.50.16.46, 59 ad edictum.
- (110) D.25.7.1.1, 2 ad legem Iuliam et Papiam.
- (111) Just.Insts. 4.18.4.
- (112) Paul Sent.2.26.12.
- (113) D.50.16.101, Modestinus 9 differentiarum.
- (114) D.48.5.23.2, Pap.1 de adulteriis, D.48.5.24.2,3, Ulp.1 de adulteriis.
- (115) 4.2,3,7,8,9,10,12, see also Paul, Sent.26.1-7.
- (116) D.48.5.33, Macer 1 de publicis iudiciis.
- (117) Coll.4.2.5.
- (118) Coll.4.12.
- (119) Coll.4.2.3.

- (120) Coll.4.7,1.
- (121) 31 dig., Coll.4.2.4.
- (122) D.48.5.21, Pap. 1 de adulteriis.
- (123) The Roman law of marriage, Oxford 1930, p.137.
- (124) D.48.5.22, 1 de adulteriis.
- (125) Coll.4.12.4.
- (126) D.48.5.23, Pap.1 de adulteriis, see also D.48.5.24.3, Ulp.1 de adulteriis.
- (127) D.48.5.24(23)pr.,4, 1 de adulteriis.
- (128) This quotation is confirmed by Coll.4.9.1 and by D,48.5.33(32).
- (129) Fontes Iuris Romani Antiqui, 7th ed. Tubingen 1909, repr.Aalen 1958, p.86.
- (130) Coll.4.3.2-4.
- (131) Coll.4.12.
- (132) Coll.4.3.5, 4.12.5,7.
- (133) D.48.5.25(24).
- (134) Coll.4.3.6.
- (135) 4.12.4, Paul lib.sent.secundo sub.tit.de adulteriis.
- (136) CJ 9.9.4.

- (137) Coll.4.10.1.
- (138) D.48.5.39(38), Pap.36 quaestionum.
- (139) D.48.5.26(25), Ulp. 2 ad legem Iuliam de adulteris.
- (140) Sent. 2.26.3.
- (141) op.cit.p.86.
- (142) Coll.4.8.
- (143) Dionysius of Halicarnassus 2.26.4, Gellius Noc.Att.5.19.9,
CJ 8.46(47).10.
- (144) 2.25.6.
- (145) Gellius Noc.Att.10.23.4,5.
- (146) D.48.5.23(22).4, 1 de adulteriis.
- (147) Coll.4.10.1 : this penalty was mitigated by subsequent
Imperial constitutiones, see above.
- (148) Paul Sent.2.26.6, Coll.4.3.5.
- (149) D.48.5.12(11).13, Pap.lib.sing.de adulteris, D.48.5.25(24).1,
Macer 1 publicorum.
- (150) D.48.5.30(29)pr., Ulp.4 de adulteriis, cf.Paul, Sent.2.26.8.
- (151) e.g.D.48.5.9(8)pr.
- (152) D.48.5.9(8).
- (153) D.48.5.10(9).2, Ulp.4 de adulteriis.

(154) D.48.5.11(10).1, Pap.2 de adulteriis.

(155) D.48.5.34(33).2, Marcian 1 de publicis iudiciis.

(156) D.48.5.30(29).1

(157) It does appear that, in the case of a manus marriage, a set form of divorce was necessary in order to remove the manus ; hence, for example, a marriage by confarreatio was dissolved by diffareatio, see A.Watson, The Law of Persons in the later Roman Republic, Oxford 1967, p.53.

(158) Romulus 22.3.

(159) Gellius, Noc.Att.4.3.1.

(160) Ep. ad familiares 8.7.2.

(161) Gellius says, in connection with the case of Carvilius Ruga, that until this time there were no 'actiones rei uxoriae'. Some scholars believe that the later rules regarding retentiones ex dote were introduced by the lex Iulia, see below.

(162) See Plautus Amphitruo 928.

(163) De Oratore 1.40.183-4, 1.56.238.

(164) D.24.2.9, Paul 2 de adulteriis.

(165) D.38.11.1.1, Ulp.47 ad edictum.

(166) D.24.1.35, Ulp.34 ad edictum.

(167) D.24.3.29.1, Ulp.3 disputationum.

(168) D.24.1.32.13 (33 ad Sabinum).

- (169) Iavolenus, 6 ex post.Labeonis.
- (170) D.23.2.33, 3 ad legem Iuliam et Papiam.
- (171) D.48.5.44(43), 3 ad legem duodecim tabularum.
- (172) E.Levy, Der Hergang der römischen Ehescheidung, Weimar 1925, pp.21ff.
- (173) op.cit.pp.231-33.
- (174) e.g.Frag.Vat.106-7.
- (175) Corso di diritto romano I, Milan 1963, pp.336ff. "Diritto di famiglia".
- (176) D.48.5.44(43).
- (177) "Studi del divorzio" in Bullettino dell'istituto di diritto romano, 34 (1925), pp.312ff..
- (178) "Per la storia del reato di bigamia in diritto romano", Studi in memoria di Umberto Ratti, Milan 1934, p.392f., Studi in onore di B.Biondi II, Milan 1965, p.129.
- (179) "Lex Iulia de adulteriis coercendis", Études Jean Macqueron, Aix-en-Provence, Faculté de droit et des sciences économiques d'Aix-en-Provence 1970, pp.643-4, also see "Accusatio adulterii", IURA 12 (1961) pp.65-80.
- (180) "De divortio Varia", Tijd 32 (1964), pp.554ff..
- (181) Philippics 2.28.69.
- (182) D.48.5.13(12).
- (183) DA 34.2.

(184) Bonfante, op.cit., p.336, suggests that Augustus placed limits on divorce by penalising adultery, its most common cause. However, divorce had become so commonplace that adultery was probably merely one of a large number of causes. Moreover, this theory would still associate the introduction of a 'modus' with the 'lex Iulia' in 18 B.C..

(185) D.48.5.12(11).10, 27(26)pr., CJ 9.9.11, cf.D.48.5.40(39) where, however, it may be that Papinian is referring to a woman who has, in fact, been divorced, but has remarried.

(186) D.48.5.15.2, Scaevola 4 regularum.

(187) D.48.5.3, Ulpian 2 de adulteriis.

(188) e.g.Coll.4.4.1.

(189) D.48.5.16(15), 2 de adulteriis.

(190) Coll.4.4.2.

(191) D.48.5.38(37), Papinian 5 quaestionum.

(192) D.48.5.6.2, Papinian 1 de adulteris.

(193) Coll 4.4.2.

(194) Coll.4.4.1, D.4.4.37.1, Tryphoninus 3 disputationum, CJ 9.9.6.

(195) Coll.4.4.1.

(196) D.48.5.31, lib.sing.de adulteriis.

(197) See Corbett, op.cit.p.144 n.2.

- (198) D.48.5.15(14).3, 4 regularum.
- (199) e.g. D.4.4.37.1.
- (200) D.48.5.16(15)pr., 2 de adulteriis.
- (201) D.48.5.4pr., 2, Ulp. 8 disputationum.
- (202) D.48.5.23(22), 1 de adulteris.
- (203) D.48.5.2.8, 8 disputationum.
- (204) D.48.5.23(22).4.
- (205) Coll.4.6.
- (206) D.48.5.14.3 : by the terms of the lex Iulia, a sponsa could presumably only be prosecuted for stuprum, D.48.5.6.1.
- (207) D.48.5.14pr.
- (208) par.2.
- (209) e.g. Volterra in Studi in onore di P.Bonfante II, Milan 1930, p.125.
- (210) IURA (1961) pp.75ff..
- (211) Coll.4.5.
- (212) D.48.5.14(13).1, Ulp.2 de adulteriis.
- (213) D.48.5.12(11).
- (214) D.48.5.14(13).9.
- (215) D.48.5.14(13).10.

- (216) D.48.5.16(15).7, Ulp.2 de adulteriis.
- (217) D.48.5.17(16), Ulp.1 de adulteriis.
- (218) D.48.5.41(40), Paul 19 responsorum.
- (219) D.48.5.33(32).1, Macer 1 de publicis iudiciis.
- (220) D.48.5.4.1, Ulp.8 disputationum.
- (221) D48.5.30.6, Ulp.4 de adulteriis.
- (222) Coll.4.4.2, D.48.5.16(15).6
- (223) Coll.4.4.1.
- (224) D.48.5.4.2.
- (225) D.48.5.16(15).1.
- (226) e.g.Ebrard, SZ 46 (1926), p.167 n.3.
- (227) e.g.Beseler, Beiträge zur Kritik der römischen Rechtsquellen, Tübingen, IV (1920), p.169.
- (228) e.g.Livy 3.69.2, 7.28.4, Tacitus, Hist.1.83, Pliny, Nat.Hist.18.37.
- (229) CJ 9.9.1.
- (230) D.48.5.16(15).9.
- (231) D.48.5.5, Iulianus 86 digestorum.
- (232) D.48.5.42(41), Paul 1 sententiarum, Sent.2.26.17.

- (233) Sent.2.26.10.
- (234) D.48.5.32(31).
- (235) D.48.16.13, 3 de adulteris, Coll.8.2
- (236) D.48.2.3, 3 de adulteriis.
- (237) D.48.5.12(11).2, lib.sing.de adulteris.
- (238) D.48.16.11, lib.sing.de adulteris, D.22.5.13, 1 de adulteriis.
- (239) D.48.16.8, 10, 2 de adulteriis.
- (240) Coll.4.11.
- (241) CJ 9.9.6.1.
- (242) D.40.9.12, 14.1, Ulp.4 de adulteriis.
- (243) D.48.5.28(27).11, Ulp.3 de adulteriis.
- (244) This purported reason is viewed cynically by Raditsa, op.cit., p.311, who argues that the use of slaves to provide evidence against their masters was contrary to Roman tradition and law.
- (245) D.48.5.28.15.
- (246) D.48.2.5, Ulp.3 de adulteriis.
- (247) D.48.5.28(27).16.
- (248) D.48.5.6pr., 1 de adulteris.
- (249) Paul, Sent.2.26.14.

(250) 4.18.4.

(251) Suetonius DA 64, Tacitus, Ann.2.63.

(252) Paul, Sent.2.26.12, confirmed in Just.Insts.4.18.4.

(253) Mélanges d'histoire du droit, Paris 1970, p.111.

(254) Paul, Sent.2.26.13.

(255) D.22.5.14, lib.sinq.de adulteriis.

(256) D.48.5.30(29).1, Ulp.4 de adulteriis.

(257) D.48.5.9(8)pr.

(258) D.48.5.34(33).2, Marcianus 1 de publicis iudiciis.

(259) Paul, Sent.2.21b.2.

(260) Just.Insts. 2.8.

(261) Ulp.Req.6.9.

(262) Ulp.Req.6.12.

(263) op.cit.pp.150ff.

(264) Cicero Topica 4.19, Gellius Noc.Att.10.23, Gai.Insts.4.102,
Ulp.Req.6.13 etc.

CHAPTER 5

THE 'LEX AELIA SENTIA' AND THE 'LEX FUFIA CANINIA'

THE 'LEX AELIA SENTIA'

The lex Aelia Sentia was a law which placed restrictions on the manumission and enfranchisement of slaves, and regulated relations between patrons and ex-slaves. Its name associates it with the consulship of Sex. Aelius Cato and C. Sentius Saturninus in A.D. 4. It was thus passed a few years after the less complex lex Fufia Caninia (2 B.C.) which also placed limits on manumission. Both of these laws belong to the latter part of the reign of Augustus when he seems to have ceased to pass plebiscita which bore his own name in favour of leges which bore the names of the consuls.

Neither Suetonius nor Dio specifically mentions the lex Aelia Sentia, but it is clear that they both have this law in mind when describing certain enactments of Augustus. Two passages of Dio are relevant: (1)(2)

πολλῶν τε πολλοὺς ἀκρίτως ἐλευθερούντων, διέταξε τὴν τε ἡλικίαν ἣν τὸν τε ἐλευθερώοντά τινα καὶ τὸν ἀφεθρόμενον ὑπ' αὐτοῦ ἔχειν δεῖσθαι, καὶ τὰ δικαιώματα οἷς οἱ τε ἄλλοι πρὸς τοὺς ἐλευθερούμενους καὶ αὐτοὶ οἱ δεσπόται βφῶν γενόμενοι χρῆσονται.

... ἄλλως τε καὶ ὅπως μήτ' ἀπελευθερῶσι πολλοὺς, ἕνα μὴ παντοδαποῦ ὄχλου τὴν πόλιν πληρῶσθαι, μήτ' αὖ ἐς τὴν πολιτείαν θυγνοῦς ἐβγράφωσιν, ἕνα πολὺ τὸ διάφορον αὐτοῖς πρὸς τοὺς ὑπηκόους ἦ.

Suetonius provides a description of Augustus' general attitude towards the freeing of slaves and the expansion of the citizen body, and characteristically illustrates this with anecdotes (3). He then goes on to say:

Servos non contentus multis difficultatibus a libertate et multo pluribus a libertate iusta removisse, cum et de numero et de condicione ac differentia eorum qui manumitterentur curiose cavisset, hoc quoque adiecit, ne vinctus unquam tortusve quis ullo libertatis genere civitatem adipisceretur.

The main evidence, however, for the details of the lex Aelia Sentia comes from the juristic sources, notably the Institutes of Gaius and Justinian's Digest which contains a chapter entitled 'Qui et a quibus manumissi liberi non fiunt et ad legem Aeliam Sentiam' (4). Justinian's Digest also provides excerpts from books of commentary 'ad legem Aeliam Sentiam' written by the jurists Paul (3 books) and Ulpian (4 books) as well as various references to the lex Aelia Sentia and comments on issues relating to it, in excerpts drawn from a variety of juristic writings. There are references to a number of enactments passed after the lex Aelia Sentia which modified or supplemented its rules, and the common problem therefore arises of disentangling the original content of the law from subsequent amendments as well as from juristic interpretation. None of the evidence provides any verbatim quotation from the law. Moreover, no provision of the law is assigned by the jurists to any particular chapter, nor are the jurists' commentaries 'ad legem Aeliam Sentiam' particularly helpful in determining the order of provisions in the lex Aelia Sentia. Hence the order of the main provisions summarised below is merely one which seems to be logical and is proposed for convenience. (The provisions will be discussed in detail later).

Manumission by a dominus under the age of 20 is void, unless for an honesta causa, accepted by a consilium, in which case manumission vindicta is valid.

(The acceptance of a causa by a consilium is also necessary if a person under 20 wishes to free a slave informally) (5)

The consilium at Rome consists of 5 senators and 5 equites and is convened on certain specified days. In the provinces it consists of 20 recuperatores and is convened on the last day of the conventus.

A slave manumitted under the age of 30 does not qualify for Roman citizenship unless he has been manumitted vindicta after the acceptance of a causa by the consilium.

(A manumitted slave under the age of 30 who has acquired Latin status may become a Roman citizen if he marries a woman who is a Roman citizen, a Latin colonist or a freedwoman of his own status and has so testified before 7 Roman citizen witnesses above the age of puberty, and if he has a son of a year old and applies, with proof of this, to the praetor or provincial governor). (6)

All legitimate births are to be registered within 30 days.

Manumission in fraud of creditors is invalid, except for the purpose of instituting a necessarius heres.

Manumission in fraud of patrons is invalid.

Those slaves who have been put in chains, branded, convicted of a crime following torture, made to fight with men or beasts or put into a gladiatorial school or prison, if freed, have the same status as peregrini dediticii.

A patron may formally accuse a freedman as ingratus.

A patron may not compel his ex-slave to swear an oath that he/she will not marry and have children.

A patron who fails to support his ex-slave forfeits his right to what was laid down as a condition of manumission, and, in some cases, to the inheritance and to bonorum possessio.

A patron may not force his ex-slave to pay money in lieu of operae.

Manumission by a 'dominus' under the age of 20

The ruling which made void manumission by a person under the age of 20, unless a just causa had been accepted by the consilium, is stated by Gaius (7) :

Item eadem lege minori XX annorum domino non aliter manumittere permittitur, quam [si] vindicta apud consilium iusta causa manumissionis adprobata [fuerit].

This is confirmed by Ulpian (8) who, however, omits any mention of 'vindicta':

Eadem lex eum dominum, qui minor viginti annorum est, prohibet servum manumittere, praeterquam si causam apud consilium probaverit.

Some scholars wish to emend Gaius, Insts. 1.38 by omitting 'vindicta', and this would bring it into line with Ulpian (9). However, if 'vindicta' be omitted, the implication is that manumission by will as well as vindicta was permitted after the acceptance of a causa by the consilium. It seems much more reasonable that a causa should be accepted in order that manumission might take place immediately before a magistrate. The text certainly needs emending : if 'vindicta' be the subject of 'adprobata fuerit' (which would in any case be very odd), then 'iusta causa' does not fit into the sentence at all. Other scholars suggest deleting 'si' and 'fuerit', or replacing 'si vindicta' with 'vindicta si'. This last proposed emendation is supported by David & Nelson (10) who suggest that the expansion of this section by Justinian's codifiers (11) to '...quam si vindicta

apud consilium iusta causa manumissionis adprobata fuerint manumissi' is based on the wording of Gai. Insts. 1.18 (regarding the exclusion of slaves under 30 from citizenship), where we find: '...quam si vindicta, apud consilium iusta causa manumissionis adprobata, liberati fuerint'. Given the fact that this latter section of Gai. Insts. 1.18 and that of 1.38 are parallel passages, and given the similarity of the wording of each, I would favour emending the 1.38 passage to bring it exactly into line with 1.18.

We possess a number of juristic excerpts in which manumission by a dominus under 20 is discussed : there is no doubt that the rules laid down in many of them are the result of juristic interpretation rather than having originated in the lex Aelia Sentia. Gaius comments that, whereas it is legitimate for a person of 14 years old to make a will, to institute heirs and to leave legacies, yet, if he is under 20, he may not free a slave (12).

Ulpian (13) provides a definition of 'minor viginti annis' and excludes from it a person who 'diem supremum agit anni vicesimi'. Modestinus shows that a filiusfamilias who is under 20 may free a slave with the authority of his paterfamilias, since the latter is the true manumitter (14), while according to Paul, a person under 20 may manumit a slave in order to fulfill a condition in a will (15). Ulpian says (16) that a person under 20 may manumit if asked to do so per fideicommissum provided that the slave is not his own (17) and Pomponius that if a person under 20 has asked his heir to free his (the heir's) slave, the manumission is valid (18). In the opinion of Paul, an under 20 who holds a slave in pignus may give assent to the manumission (19), since, while his consent is necessary, he is not the dominus and therefore not the manumitter.

While in these cases the law was interpreted leniently, other juristic excerpts reveal greater severity of interpretation. It is clear that attempts were made to circumvent the restriction

imposed by the lex Aelia Sentia, and that subsequent enactments were needed in order to close loopholes. According to Marcellus (20), if an under 20 sells a slave in order that he should be freed, the sale is void, even if the slave has been handed over and even if the master intends that the manumission should only take place after he has reached the age of 20 (21). Paul says that if a man under 20 hands over his part in a common slave to be freed, nothing is achieved (22). In the same book of commentary, he says that if a person under 20 releases a debtor on condition that he promises to manumit a slave, the stipulation is void (23).

Other rules mentioned by the jurists were certainly not Augustan. Thus, for example, Pomponius (24) says that the prohibition against testamentary manumission by an under 20 extends to military wills and this is confirmed by Marcellus (25). Since, however, the military will was not introduced until much later (26), this cannot have been a rule of the original lex. In addition, Gaius (27) asserts that it is necessary for an under 20 to have a causa approved by a consilium if he wishes to free his slave informally. This is a very surprising statement, given that slaves freed informally at this time were not regarded as legally free and depended on the intervention of the praetor for the upholding of their limited rights. Following the passage of the lex Iunia, however, (which I place in A.D. 19), such slaves became Latina Iuniani and legally free, and it therefore seems much more likely that the extension of the rule of the lex Aelia Sentia under discussion to the informal manumission of slaves took place at some stage after A.D. 19 (28).

There is also evidence for Imperial constitutiones which laid down further rulings relating to the provision of the lex Aelia Sentia on manumission by an under 20. According to a constitution of Severus and Antoninus (29), if a person over 20 makes a codicil bestowing liberty, the fact that the confirming will was made when he was under 20 is immaterial. Julian mentions a rule (30) which is elsewhere attributed to a constitution of Alexander (31) that if an under 20 gives a slave

to someone else to be freed, the manumission is void.

It was laid down in the lex Aelia Sentia that an under 20 might manumit if he had had a causa approved by a consilium. The jurists discuss at length what should be regarded as a iusta causa. According to Ulpian (32) :

Illud in causis probandis meminisse iudices oportet, ut non ex luxuria sed ex affectu descendentes causas probent : neque enim deliciis, sed iustis affectionibus dedisse iustam libertatem legem Aeliam Sentiam credendum.

Gaius (33) describes as a just cause the desire to manumit a father or mother, teacher or fosterbrother. The same applies to the manumission of a natural son or daughter, brother or sister, of a fosterchild, of a slave whom the manumitter intends to have as a procurator, or of a slave-woman whom the manumitter intends to marry (34). Ulpian provides a similar list: (35)

si collactaneus, si educator, si paedagogus ipsius, si nutrix, vel filius filiave cuius eorum, vel alumnus, vel capsarius, (id est qui portat libros) (36), vel si in hoc manumittatur, ut procurator sit, dummodo non minor annis decem et octo sit.

These causae listed by Gaius and by Ulpian may well have been those outlined in the lex Aelia Sentia. Other juristic excerpts mention rules which look more like the result of interpretation. Thus Gaius (37) mentions a juristic controversy over whether the desire of a pupillus to manumit a slave in order to make him a tutor is an acceptable causa. He believes that this does not constitute a valid causa on the ground that a person who needs the help of a tutor to run his affairs does not have sound enough judgment to choose a tutor. However, as Buckland (38) points out, this purported reason is not very convincing, and it is surely more relevant that by the terms of the Republican lex Atilia certain magistrates had the right to appoint a tutor to a pupillus who lacked one.

Paul (39) provides further examples of causae: if a slave has helped his master in battle; defended him against robbers; restored him to health; uncovered an ambush. He adds that each case had, however, to be taken on its own merit. Similarly, Marcianus (40) includes among iustae causae the case in which a slave has freed his master 'periculo vitae infamiaeve'. Elsewhere (41), he discusses the case of foster children (alumni) and says that, while it is more natural for women to free them, men may also do so, and that a foster-child may be freed who has gained his master's favour in the course of his upbringing.

Julian says that a common slave may be freed by his masters who are under 20 even though the causa has been approved by one 'ex sociis' (42), presumably meaning in the case of one of them being a member of the consilium. According to Paul (43), a pupillus who is not infans may free apud consilium with the authority of his tutor, provided that the peculium does not pass (44). A person under 20 may validly sell his part in a common slave with a view to manumission only if he can show a causa (45).

In the case of a slave being given or sold to an under 20 in order to be freed, Papinian mentions a constitution of Marcus Aurelius (46) which provides that the slave should automatically be freed even if the recipient does not actually manumit him. Ulpian mentions the same constitutio Marci (47) and says it made a causa superfluous in such a case. On the other hand, another text of Ulpian (48) states that, in this case, it is necessary for the manumitter to show a causa, that is, either the lex donationis or some evidence of the intention of the giver. It is odd that here Ulpian does not mention the constitutio Marci and its effects, and it is hardly likely that he had forgotten about it. Buckland (49) suggests that Ulpian is here talking about the need which might sometimes have arisen of referring a case to the consilium if the praetor were not satisfied with the circumstances of the manumission. If this is so, it is strange that Ulpian should use the term 'causam ... probare', but there seems to be no

more satisfactory explanation of the conflict between these texts.

The jurists also discuss the issue of trusts which, as in the case of the marriage laws, must have been seen as a means of evading the terms of the lex. A constitution of Alexander ruled that a person under 20 might not, in his will, leave liberty by a trust (50). It is surprising that this important issue should have been clarified so late: the constitution probably merely confirmed what had already been established by the jurists. Thus Ulpian says that a person under 20 may manumit per fideicommissum provided that he would have been able to show a causa had he freed when alive: only in this case is the gift valid (51). If a trust of liberty is made to an under 20, according to Papinian it is necessary for this person to show a causa (52): he contrasts this with the case mentioned above of a gift or sale of a slave in which the constitutio Marci intervenes to make the causa unnecessary (53). Presumably the causa needed is evidence of the fideicommissum, and this explains why in other texts which deal with this subject there is no mention of the need for a causa to be shown (54). Paul says that where a person under 20 has been given a trust of liberty or has bought a slave in accordance with the law, the sale of the slave with a view to manumission, is valid (55).

An important causa which made it permissible for an under 20 to free a slave woman was intended marriage. This rule was, no doubt, established by the lex Aelia Sentia but expanded upon by the jurists. Marcian says that women may free matrimonii causa but only if they have themselves been slaves and a fellow-slave has been left in a legacy. He adds that even a spado may free for this reason, but not a castratus (56). There were, however, various limitations on the right. Ulpian mentions a subsequent senatusconsultum which stipulated that the man must marry the woman within six months of her manumission (57). This is confirmed by Justinian (58). Celsus says (59) that if the woman was pregnant when manumitted before the consilium, and she meanwhile (presumably before marriage or the expiry of 6 months)

gives birth, the status of the child will be in the balance. The manumitter must not, of course, belong to a class to whom marriage to an ex-slave is forbidden (60) and, according to Paul, if two people (presumably joint owners) free a woman matrimonii causa, this is unacceptable (61). Modestinus says that a woman may not be freed matrimonii causa by anyone other than the man who wishes to marry her (62). If a third party does marry such a woman and subsequently divorces her to allow the manumissor to marry her within the 6 month period, the manumission is still invalid. According to Licinius Rufus, a slave-woman who is freed matrimonii causa may not marry anyone else unless the patron renounces his right to her (63). A controversial text of Ulpian (64) attributes to the lex Iulia de maritandis ordinibus a prohibition also against divorce by the freedwoman. This apparent double prohibition has been the cause of considerable controversy among scholars, and has been discussed in Chapter 2. Obviously the prohibition was designed to prevent a slave woman from gaining her freedom by agreeing to marry her master and subsequently divorcing him.

According to Marcianus (65), a rescript of Antoninus Pius laid down that if a causa has been accepted, liberty must be granted: approved causae may not be revoked. Similarly, a constitution of Valerian (66) provided that 'si probata causa libertas praestita est, restitutio in integrum contra libertatem locum habere non potest.'

Gaius describes the consilium which had to approve a causa before manumission by a person under 20 might proceed (67):

Consilium autem adhibetur in urbe Roma quidem quinque senatorum et quinque equitum Romanorum puberum (68); in provinciis autem viginti recuperatorum civium Romanorum, idque fit ultimo die conventus: sed Romae certis diebus apud consilium manumittuntur.

This is confirmed by Ulpian (69):

In consilio autem adhibentur Romae quinque senatores et quinque equites Romani, in provinciis viginti reciperatores cives Romani.

We also have two inscriptions (70) which provide evidence for the existence of such a consilium to deal with manumissions.

The jurists provide a few comments on the consilium: Pomponius says (71) that a pupillus may manumit before a praetor who is also his tutor. According to Paul (72), a person may appear before a consilium in a province other than his own. Ulpian comments (73) that a consul who is under 20 may not preside over the manumission of his own slave (74).

Manumission of a slave who is under 30

Whereas previously a slave formally manumitted automatically became a Roman citizen (75), the lex Aelia Sentia placed restrictions on the acquiring of citizenship by slaves manumitted when under 30:

Quod autem de aetate servi requiritur, lege Aelia Sentia introductum est. nam ea lex minores xxx annorum servos non aliter voluit manumissos cives Romanos fieri, quam si vindicta, apud consilium iusta causa manumissionis adprobata, liberati fuerint. Iusta autem causa manumissionis est veluti si quis filium filiamve aut fratrem sororemve naturalem, aut alumnum, aut paedagogum, aut servum procuratoris habendi gratia, aut ancillam matrimonii causa, apud consilium manumittat (76).

Eadem lege cautum est, ut minor triginta annorum servus vindicta manumissus civis Romanus non fiat, nisi apud consilium causa probata fuerit: ideo sine consilio manumissum Caesaris servum manere putat. Testamento vero manumissum perinde haberi iubet, atque si domini voluntate in libertate esset, ideoque Latinus fit

(77).

Thus, according to Gaius, slaves of under 30 who have been freed only become Roman citizens if the manumission was vindicta, following the approval of a causa by the consilium. Ulpian's version makes it clear that it is only in the case of manumission vindicta that a causa needs to be shown and, like Gaius, he says that without the approval of such by the consilium, the ex-slave does not become a citizen if he is under 30. He adds that a slave under 30 who has been freed by will is placed in much the same position as a slave who is 'domini voluntate in libertate' and thus has Latin status. According to Gaius (78), a senatusconsultum forbade a testator 'proprium servum minorem annis xxx liberum et heredem instituere.' What was added to the ruling of the lex Aelia Sentia by the senatusconsultum is not clear, since there could have been no doubt that a freed slave who was debarred from citizenship by the lex Aelia Sentia might not be instituted heir. David & Nelson (79) believe that the sc clarified the position of a freed slave on reaching the age of 30, while others think that 'senatusconsulto' should be emended to 'lege Aelia Sentia'. Perhaps the principle had to be clarified because of attempts to evade the law. Gaius goes on to say that, according to the prevalent opinion, a slave may lawfully be ordered to be free on reaching the age of 30, and may then have the inheritance transferred to him. This is confirmed by other texts (80).

The very odd phrase, 'ideo sine consilio manumissum Caesaris servum manere putat', in the text of Ulpian cited, has been the subject of considerable controversy. It seems to be explaining what happens to a slave freed vindicta but sine consilio, but makes little sense as it stands. There is no subject for 'putat' unless one supplies 'lex' which, in respect of sense, is highly unlikely, and there are even greater problems with the sense of 'Caesaris servum manere'. Vangerow (81) believes that the sentence is a gloss, while other scholars have suggested various emendations, most of which replace 'Caesaris' with a suitable

subject for 'putat', such as 'senatus' or the name of a jurist or a law. The implication of all such emendations is that, according to some enactment (or in the opinion of a jurist), a slave under 30 who has been freed vindicta sine consilio remains a slave. If 'Caesaris' be retained, the sentence could be referring to the exemption of Imperial slaves from the requirement of vindicta in order to be freed, but this still leaves 'putat' without a subject and does not fit well into the context. Since all of the proposed emendations are rather speculative, and since the sentence looks suspiciously like a gloss, I would favour rejecting it altogether. In any case, the sense resulting from most of the proposed emendations seems to me to be contradicted by the preceding words of Ulpian (82): here he says that a slave manumitted vindicta does not become a Roman citizen if he is under 30 (not that such a person remains a slave in which case he would, of course, not become a Roman citizen) unless a causa has been approved by the consilium.

If a slave under 30 who had been freed vindicta sine consilio did not remain a slave, what then was his status? It was presumably the same as that of a slave under 30 who had been freed testamento, in which case a causa was irrelevant. According to Ulpian, in the text cited, he was in much the same position as one who 'domini voluntate in libertate esset'. He is referring here to slaves who have not been manumitted by one of the three formal methods, that is, vindicta, testamento or censu but have been informally freed. A man might, for example, free a slave by merely declaring him free 'inter amicos': such an act did not result in freedom in the eyes of the civil law, but, from the late Republic, the praetor might intervene at his discretion to grant de facto liberty to the slave who would then be termed 'in libertate'. Gaius (83) refers to such persons as having been formerly slaves by the ius Quiritum but now 'auxilio praetoris in libertatis forma servari solitos' and adds that their possessions belonged to their patrons as peculium. The Fragmentum Dositheanum (84) suggests that the de facto liberty was confined to freedom from the obligation to work for a master. Obviously they did not

become citizens.

Ulpian's words 'ideoque Latinus fiat' raise the issue of Latinity and the lex Iunia. In the text of Gaius cited (85), the jurist describes the effect of the lex Iunia on slaves in libertate who received the protection of the praetor:

...postea vero per legem Iuniam eos omnes, quos praetor in libertate tuebatur, liberos esse coepisse et appellatos esse Latinos Iunianos.

He adds that the lex Iunia, while making these slaves legally free, did not make them citizens, and that those who have freed them still have a right to their possessions on their death.

The association of Latin status with the lex Aelia Sentia has led some scholars to believe that this law must have been later than the lex Iunia which introduced the category of Latini Iuniani (86). They would argue that the isolated reference in Justinian's Institutes (87) to the lex Iunia Norbana is insufficient ground for associating the lex Iunia with the year A.D.19 when, according to the Fasti, Iunius and Norbanus were consuls. However, there is no evidence which associates the law firmly with any other date (88) and it seems very arbitrary to select a date on other, less secure, grounds. Moreover, it is significant that in one text, Gaius uses the term 'per legem Aeliam Sentiam et Iuniam' (89), perhaps implying that the lex Iunia was the later law. Sherwin White (90) also argues that the amendments to the lex Iunia mentioned by Gaius (91) and by Ulpian (92), which belonged to the years 23 to 65 A.D., look like "the amendment of a recent and imperfect statute rather than the revival of interest in a law passed some 40 years earlier". More significantly, if the lex Iunia followed closely on the lex Aelia Sentia, it is easy to see how the jurists would have written as though Latin status already existed at the time of the enactment of the lex Aelia Sentia: Ulpian's words cited above, 'ideoque Latinus fit' do not imply that the lex Aelia Sentia made the

person concerned a Latin, but that he was then (that is, after the enactment of the lex Iunia) a Latin. There are, in fact, other problems associated with placing the lex Iunia in A.D.19, not least the provision assigned by Gaius to the lex Aelia Sentia which permitted a slave manumitted before the age of 30 (who before the lex Iunia would legally have still been a slave) to apply for citizenship upon marrying a citizen woman or Latin colonist and having a son (93). Nevertheless, the most satisfactory explanation seems to me to be that the lex Aelia Sentia gave to slaves under 30 who had been freed vindicta sine consilio the status already enjoyed by slaves freed informally whose de facto freedom was protected by the praetor, and that the lex Iunia subsequently classed them as Junian Latins. Since the lex Iunia followed on so closely after the lex Aelia Sentia, the jurists tended to treat the rules introduced by both laws as though they had been laid down at the same time.

Gaius (94) lists those causae which provide acceptable grounds for the enfranchisement of a slave under 30 on manumission:

Iusta autem causa manumissionis est veluti si quis filium filiamve aut fratrem sororemve naturalem, aut alumnum, aut paedagogum, aut servum procuratoris habendi gratia, aut ancillam matrimonii causa apud consilium (95) manumittat.

Such cases came before the same consilium as did cases involving a master under 20. In addition to these causae, Gaius and Ulpian say that a slave under 30 becomes a citizen when granted freedom in the will of an insolvent master to whom he is solus et necessarius heres:

Ab eo domino qui solvendo non est servus testamento liber esse iussus et heres institutus, et si minor sit triginta annis vel in ea causa sit, ut dediticius fieri debeat, civis Romanus et heres fit: si tamen alius ex eo testamento nemo heres sit. (96) (97)

The freedom given by the lex Aelia Sentia to an insolvent master to manumit a slave by will and to institute him as solus et necessarius heres is confirmed in Justinian's Institutes (98) where, however, there is no mention of the case of a slave who is under 30. Since the texts in Justinian's Digest which deal with this aspect of the lex Aelia Sentia also make this omission (99), it is reasonable to suppose that the provision mentioned by Gaius and Ulpian was no longer applicable by the time of Justinian.

According to Gaius, the lex Aelia Sentia designated the means whereby a slave under 30 who became a Latin on manumission might subsequently achieve Roman citizenship:

Statim enim ex lege Aelia Sentia minores triginta annorum manumissi et Latini facti si uxores duxerint vel cives Romanas vel Latinas coloniarias vel eiusdem condicionis cuius et ipsi essent, idque testati fuerint adhibitis non minus quam septem testibus civibus Romanis puberibus, et filium procreaverint, cum is filius anniculus esse coeperit, datur eis potestas per eam legem adire praetorem vel in provinciis praesidem provinciae, et adprobare se ex lege Aelia Sentia uxorem duxisse et ex ea filium anniculum habere: et si is apud quem causa probata est, id ita esse pronuntiaverit, tunc et ipse Latinus et uxor eius, si et ipsa [eiusdem condicionis sit, et filius, si et ipse] (100) eiusdem condicionis sit, cives Romani esse iubentur. (101)

Thus, such a person merely had to present to the praetor or to the provincial governor evidence of possessing a one year old child, the offspring of a marriage with a Roman citizen woman, a Latin colonist or a woman of his own status. Gaius adds that according to a sc of the time of Hadrian, if the wife is a Roman citizen, the child will be born a Roman citizen (par.30) and that another sc of the time of Vespasian extended the right to all ex-slaves who became Latins on manumission, not just to those under 30 (par.31). Furthermore, if the Latin dies before he can make his claim, the mother, if a Latin, may make it and thus gain citizenship for herself and for her child. If not, the son's

tutors or the son himself on reaching puberty may make the claim, and if the son is born a Roman citizen because he has a Roman citizen mother, he must prove his status in order to become suus heres to his father (par.32). Gaius goes on to describe various other later enactments which granted citizenship to a slave who has become a Latin on manumission if he serves for 6 years in the vigiles at Rome, completes 3 years of military service, builds a certain size of ship for importing corn to Rome over a period of 6 years, spends a certain amount of money on a house at Rome or produces a specified daily amount of wheat for 3 years (pars.32b-34). In order to achieve citizenship on reaching the age of 30, a Latin must be manumitted again by one of the three formal methods (par.35) (102).

These rulings are confirmed by Ulpian (103) who, however, attributes to the lex Iunia the provision which granted citizenship to a slave under 30 who has become a Latin on manumission and subsequently, having married a Roman citizen or Latin wife liberorum quaerendorum causa, is able to demonstrate to the praetor or to the praeses that he has a child of one year old from this union. If Ulpian is right, a major objection to placing the lex Iunia chronologically after the lex Aelia Sentia would be removed, that is, the absurdity of a situation whereby a slave in libertate (the status of a slave manumitted under the age of 30 after the lex Aelia Sentia but before the lex Iunia if this be the later law) might contract a valid marriage with a Roman citizen woman or a woman of Latin status and subsequently gain citizenship on providing evidence of having a child of one year old from the union. On the other hand, Gaius' treatment of this topic is more detailed than that of Ulpian, and he clearly attributes this ruling to the lex Aelia Sentia (104). If the later date for the lex Iunia be maintained, the only explanation for the apparent absurdity and for the contradiction between the two jurists is that, as has already been observed, the lex Iunia was passed very soon after the lex Aelia Sentia, and because the content of the two laws was, in some respects, closely related, the jurists sometimes treated them as one enactment when considering the joint

effects of the two laws, as, for example, they often treated the lex Iulia de maritandis ordinibus and the lex Papia Poppaea. Thus Gaius, in describing the status of children born from certain marriages, mentions the granting of conubium 'per legem Aeliam Sentiam et Iuniam' (105) (106). The ruling concerning the offspring of the marriage between a Latin and certain specified women cannot, even for a short time, have applied to people who were still legally slaves, and must, therefore, have been introduced with the lex Iunia, but since it concerned a group of people who formed a distinct category as a result of the lex Aelia Sentia, it is not difficult to see how Gaius might assign the ruling to the lex Aelia Sentia when he is considering the effects of the two laws together (107).

It is worthwhile observing here the close link between the marriage laws and the manumission laws of this period. A text in Justinian's Digest (108) which is taken from Paul's second book of commentary ad legem Iuliam et Papiam provides a definition of the term 'anniculus' and this might be cited as evidence that the provision regarding anniculi probatio first appeared in the lex Iulia de maritandis ordinibus. Certainly a ruling of this nature would have fitted in well with the content of the lex Iulia, providing as it did an incentive to would-be citizens to marry and procreate. However, the evidence provided by the Digest text is far too ambiguous to justify associating this ruling with the lex Iulia, and there is no other evidence to suggest such an association. There is no reason why encouragement to would-be citizens to procreate should not have been introduced by the lex Iunia, given that all of these laws were passed within a short period. The close association between the marriage and manumission laws is further borne out by the content of an inscription dated to A.D. 62 (109) which provides evidence for the introduction of an obligation to register citizen births and includes the words '...nomina eorum qui e lege Papia Poppaea et Aelia Sentia liberos apud se natos sibi professi sunt...' (110). This ruling has already been discussed under the lex Papia Poppaea.

Manumission in fraud of creditors or of patrons

The lex Aelia Sentia placed further restrictions on the manumission of slaves: manumissions in fraud of creditors or of patrons were void :

Nam is qui (111) in fraudem creditorum vel in fraudem patroni manumittit, nihil agit, quia lex Aelia Sentia inpedit libertatem (112).

Eadem lex in fraudem creditoris et patroni manmittere prohibet.(113)

A definition of manumission in fraud of creditors is found in Justinian's Institutes:

In fraudem autem creditorum manmittere videtur, qui vel iam eo tempore quo manumittit solvendo non est, vel qui datis libertatibus desiturus est solvendo esse (114).

The passage goes on to say that a manumissor is only guilty if his defrauding of creditors is conscious and deliberate. The text is based on a passage of Gaius found in Justinian's Digest (115) where, however, there is no mention of the intentions of the manumissor. However, in the same text, Gaius mentions situations in which a manumissor who breaks this rule of the lex is not guilty of fraus, thus indicating that intentions were indeed relevant (116).

Paul seems to have discussed this issue in more than one book of commentary ad legem Aeliam Sentiam :

Ne quis creditorum fraudandorum causa servum manumittat, hac lege cavetur: creditores autem appellantur, quibus quacumque ex causa

actio cum fraudatore competat (117).

The jurists describe various rules relating to this aspect of the law, many of which are, no doubt, the result of juristic interpretation. Paul discusses, in his third book of commentary, issues such as manumission by a person who owes under a condition (in which case a slave becomes a statuliber while the condition pends), and the prohibition against manumission by a son acting with the approval of his father who is not solvent if either of them is aware of this (118). He also mentions the inclusion of debtors to the fiscus in this ruling of the lex ; a comparable text of Marcian (119) shows that this rule was introduced by later enactments.

In an excerpt taken from his first book of commentary ad legem Aeliam Sentian (120), Paul argues that an insolvent testator may make free and institute as heir a person to whom he owes freedom by a fideicommissum because this is not done in order to defraud creditors (121). Elsewhere (122) Paul says that if an inheritance has become insolvent by the time of the entry of the heir, testamentary manumissions will be ineffectual, but if the inheritance has become solvent, they will be valid. A comparable text of Julian (123) explains that the validity of freedom granted in a codicil depends on the intention of the manumissor at the time of the drawing up of the codicil, not at the time of its confirmation in a will. Another text of Julian (124) states that if an inheritance is insolvent, the wealth of the heir cannot save testamentary manumissions (125). Julian goes on to show that this provision of the law is not contravened when an insolvent testator grants freedom on the condition that his creditors have been paid (126), but it is contravened when one of two slaves pledged as a gift is freed. Paul says (127) that slaves freed in fraud of creditors become statuliberi while it is uncertain whether the creditors will pursue their claims (128).

According to Hermogenianus (129), manumission in fraud of creditors occurs no less if the debt is conditional or 'in diem'

than if the time for paying has expired. He adds that, in the case of a conditional legacy, the legatee does not qualify as a creditor before the condition is met, even though a legatarius does in other cases, as does a fideicommissarius. No exemption is made in the case of a well-deserving slave, according to Pomponius (130). Terentius Clemens (131) discusses the case of a debtor who frees more than one slave, and shows that the freedom of all is not invalidated. Both Ulpian (132) and Julian (133) mention the important exception that manumission in fraud of creditors is permissible for the sake of instituting a solus et necessarius heres, and this is confirmed in Justinian's Institutes (134). A text of Africanus (135) states that a military will which grants freedom in fraud of creditors is not exempt from the rule. This was certainly not an original provision of the lex Aelia Sentia, given that (as has already been mentioned) the military will was not introduced until much later.

The prohibition against manumission in fraud of creditors initially applied only to Roman citizens, but, according to Gaius, it was extended to peregrini by an sc of the time of Hadrian:

In summa sciendum est, cum (136) lege Aelia Sentia cautum sit, ut creditorum fraudandorum causa manumissi liberi non fiant, hoc etiam ad peregrinos pertinere senatus ita censuit ex auctoritate Hadriani, cetera vero iura eius legis ad peregrinos non pertinere (137).

The ruling against manumission in fraud of patrons is not mentioned in Justinian's Institutes and scarcely in the Digest (138), but was clearly part of the lex Aelia Sentia, as Gai.Insts.1.37 and Ulp.Reg. 1.11, cited above, show. There is no indication in the Justinianic evidence of this specific rule having been revoked, and scholars have therefore suggested that it was included in the general revocation of acts committed in fraud of patrons (139). The problem with this view is the absence of any mention of manumission in the Digest title concerning such acts (140), but it is not possible to find a more satisfactory

explanation. It is hardly likely that the rule had merely fallen into desuetude.

The two Digest texts which do seem to bear some relation to manumission in fraud of patrons are not at all informative. A text of Paul (141) merely states that a patron is not defrauded if he has consented to an act of his freedman, and since this is taken from his third book of commentary ad legem Aeliam Sentiam, it may be assumed that manumission in fraud of creditors is being discussed. In the other text (142), Gaius mentions manumission in fraud of patrons in connection with his discussion 'de liberali causa', but does not shed any light on this issue. The lack of evidence makes it difficult to ascertain exactly what constituted manumission in fraudem patroni. Presumably it occurred when a manumitted slave would otherwise have been inherited by a patron on the death of his freedman, or when a manumission affected the rendering of services or duties due to a patron by a freedman (143). The aim of these rules must have been to protect the rights of creditors and of patrons, and to restrict manumissions by ex-slaves who still owed obligations to their former masters and by debtors, two groups of people who may well have been regarded as unworthy of the right to manumit.

Dediticii

The lex Aelia Sentia designated certain disreputable slaves who, on manumission, were to be categorised with surrendered enemies (peregrini dediticii). Although legally free, they suffered various disabilities, notably permanent exclusion from Roman citizenship:

Lege itaque Aelia Sentia cavetur, ut (144) qui servi a dominis poenae nomine vincti sint, quibusve stigmata inscripta sint, de quibus ob noxam quaestio tormentis habita sit et in ea noxa fuisse convicti sint, quive ut ferro aut cum bestiis depugnarent traditi sint, in ludum custodiamve coniecti fuerint, et postea vel ab eodem domino vel ab alio manumissi, eiusdem condicionis liberi

fiant, cuius condicionis sunt peregrini dediticii (145).

Gaius explains that peregrini dediticii are those who have surrendered after taking up arms against the Roman people and being defeated.

Ulpian also provides a description of these slaves:

Dediticiorum numero sunt qui poenae causa vincti sunt a domino, quibusve stigmata scripta fuerunt, quive propter noxam torti nocentesque inventi sunt, quive traditi sunt, ut ferro aut cum bestiis depugnarent, vel in ludum (146) vel custodiam coniecti fuerunt, deinde quoquo modo manumissi sunt: idque lex Aelia Sentia facit (147).

Another, less comprehensive, definition is provided in the Epitome of Gaius :

Dediticii vero sunt, qui post admissa crimina suppliciis subditi et publice pro criminibus caesi sunt, aut in quorum facie vel corpore quaecumque indicia aut igne aut ferro impressa sunt, et ita impressa sunt, ut deleri non possint. Hi si manumissi fuerint, dediticii appellantur. (148).

Suetonius also briefly mentions Augustus' ruling regarding slaves who have been put in chains or tortured :

...hoc quoque adiecit, ne vinctus umquam tortusve quis ullo libertatis genere civitatem adipisceretur (149).

An important question which arises from this ruling of the law is whether or not such slaves, if informally manumitted, became dediticii. In the text of Gaius cited (150), the words 'quocumque modo...manumissos' appear, and in that of Ulpian (151) 'quoquo modo manumissi sunt', apparently implying that informal manumissions were included. Gaius says, too, that the rules apply at whatever age the slave was manumitted, implying that

manumissions of slaves under 30 vindicta were also included. In addition, when commenting on the destiny of the property of dediticii on death, Gaius mentions a category who, but for some offence, would, on manumission, have become Latins (152): this would include slaves manumitted informally or under the age of 30 vindicta, all of whom became Latini by the terms of the lex Iunia. There are, however, major difficulties with this if the lex Iunia be placed in A.D. 19. The implication is that after the enactment of the lex Aelia Sentia, slaves informally manumitted (or those debarred from citizenship on manumission by this law) who had committed crimes which placed them in the category of dediticii, although subjected to various penalties, were legally free, whereas those who had not committed these crimes, while protected by the praetor and in libertate, were still legally slaves. In other words, a slave who had committed certain crimes might find himself in a better position than one who had not done so. This cannot, of course, have been the case, and it provides one of the strongest arguments for those who favour an earlier date for the lex Iunia which gave legal freedom to those who were previously slaves in libertate. If, however, one holds to the later date for the lex Iunia, an alternative explanation is necessary. I believe that the rules concerning dediticii must have originally applied only to formal manumissions and that they were extended to informal manumissions by a subsequent enactment passed at some stage after A.D. 19. As for criminal slaves freed informally after the lex Aelia Sentia, since it is unlikely that, simply by virtue of their informal manumission, they gained the status of Latini Iuniani by the terms of the lex Iunia rather than being classed as dediticii, the most plausible explanation is that such disreputable slaves were not protected by the praetor (who might use his discretion) and were not regarded as being in libertate : the lex Iunia would therefore not have made them Latins.

As has already been observed, those manumitted slaves who were classed as dediticii, although legally free, were forever debarred from Roman citizenship. So low was their position that they were forbidden to live within 100 miles of the city of Rome,

serious consequences following disobedience to this stipulation :

Pessima itaque libertas eorum est qui dediticiorum numero sunt; nec ulla lege aut senatusconsulto aut constitutione principali aditus illis ad civitatem Romanam datur. Quin etiam in urbe Roma vel intra centesimum (153) urbis Romae miliarium morari prohibentur; et si qui contra ea fecerint, ipsi bonaque eorum publice venire iubentur ea condicione, ut ne in urbe Roma uel intra centesimum urbis Romae miliarium seruiant neue unquam manumittantur; et si manumissi fuerint, serui populi Romani esse iubentur. Et haec ita lege Aelia Sentia comprehensa sunt (154).

A question which clearly caused some controversy among the jurists was whether or not manumitted slaves classed as dediticii enjoyed the capacity to make a will. There was no doubt that they might not take under a will :

Dediticiorum numero heres institui non potest, quia peregrinus est, cum quo testamenti factio non est (155).

Hi vero qui dediticiorum numero sunt, nullo modo ex testamento capere possunt, non magis quam quilibet peregrinus...(156).

According to Gaius, the prevalent opinion among the jurists was that they might not make wills either :

...nec ipsi testamentum facere possunt secundum id quod magis placuit (157).

Ulpian confirms this on the ground that dediticii did not belong to any state by whose laws they might draw up wills, implying that they were not only debarred from Roman citizenship but from any other citizenship as well :

Latinus Iunianus, item is qui dediticiorum numero est testamentum facere non potest : Latinus quidem, quoniam nominatim lege Iunia prohibitus est, is autem qui dediticiorum numero est, quoniam nec

quasi civis Romanus testari potest, cum sit peregrinus, nec quasi peregrinus, quoniam nullius certae civitatis civis est, ut secundum leges civitatis suae testetur (158).

The reason for the controversy comes to light in another text of Gaius (159) which is concerned with the destiny of the property of manumitted slaves who are classed as dediticii :

Eorum autem, quos lex Aelia Sentia dediticiorum numero facit, bona modo quasi civium Romanorum libertorum, modo quasi Latinorum ad patronos pertinent. Nam eorum bona qui, si in aliquo vitio non essent, manumissi cives Romani futuri essent, quasi civium Romanorum patronis eadem lege tribuuntur. Non tamen hi habent etiam testamenti factionem; nam id plerisque placuit, nec immerito; nam incredibile videbatur pessimae conditionis hominibus voluisse legis latorem testamenti faciendi ius concedere. Eorum vero bona qui, si non in aliquo vitio essent, manumissi futuri Latini essent, proinde tribuuntur patronis, ac si Latini decessissent. Nec me praeterit non satis in ea re legis latorem voluntatem suam verbis expressisse.

Gaius distinguishes here between those who would have become Roman citizens had they not fallen into the category of dediticii and those who would, in this case, have become Junian Latins. The property of the former group reverts to their patrons as if they were Roman citizens, whereas that of the latter reverts as if they were Latins (160). The implication of this seems to be that the property of both groups is regarded as if the owners were not dediticii, and this is confirmed in the Berlin Fragment (161) :

..sed cum lege de bonis rebusque eorum hominum ita ius dicere iudicium reddere praetor iubeatur, ut ea fiant, quae futura forent, si dediticiorum numero facti non essent, videamus, ne verius sit, quod quidem senserunt, et de universis bonis et de singulis...(162).

Gaius, however, strongly rejects the view that those who would have

been Roman citizens if not dediticii might, by this fiction, make wills like Roman citizen freedmen, on the ground of the pessima condicio of dediticii. This suggests that the fiction was limited to the claim of their patrons to their property, although it appears, from the text of Gaius, that the lex Aelia Sentia was not very clear on this matter (163). Given the other disabilities associated with the status of dediticius, it would indeed have been surprising if some dediticii had been permitted by a legal fiction to make Roman wills, especially considering that Junian Latins were not allowed to do so.

Gaius ends his description of the disabilities associated with the status of dediticius with the words 'et haec ita lege Aelia Sentia comprehensa sunt' (164) and there is no reason to doubt that all of the rules outlined above were indeed part of the lex Aelia Sentia, apart from the inclusion of informal manumissions in its application. In addition to the evidence cited, there are some excerpts which seem to represent juristic interpretation rather than the original provisions of the law. Paul, for example (165), describes various circumstances in which placing a slave in chains does not affect his prospect of full freedom, as for example, if it is done by a person placed under a fideicommissum to free him, by one owner of a common slave, by a debtor or creditor where a pledge is involved and by a master who is furiosus or a pupillus. The slave is, however, not immune if placed in chains by someone acting on the authority, or with the approval, of the master. Ulpian, in his first book of commentary ad legem Aeliam Sentiam (166), explains that a person who is imprisoned is not 'vinctus' unless he actually has chains attached to him.

Regulations of relations between patrons and ex-slaves

The remaining provisions which are attributed by the sources

to the lex Aelia Sentia regulate relations between patrons and their ex-slaves :

...καὶ τὰ δικαιώματα οἷς οἱ τε ἄλλοι πρὸς τοὺς ἐλευθερο-
μένους καὶ αὐτοὶ οἱ δεσπότες ἐφ' ὧν γενομένοι χρήσονται.

...and the regulations which people in general and also those who had been their masters should observe towards freed slaves (167).

The evidence suggests that the lex Aelia Sentia introduced a formal process whereby a patron might accuse his freedman of ingratitude. Whereas there is no juristic evidence for formal accusations of this nature under the Republic, there are two texts relating to the lex Aelia Sentia which lay down rules concerning such accusations, and there was a fair amount of subsequent legislation.

The relevant texts are D.40.9.30 (Ulpian 4 ad legem Aeliam Sentiam) and D.50.16.70 (Paul 73 ad edictum). In the former text, Ulpian merely discusses exactly who is entitled to bring an accusation of ingratitude against a freedman, the general impression being that, by the terms of the law, it was the exclusive right of the patron. Thus, Ulpian discusses the case of a person who has bought a slave for the purpose of manumission: if the slave is subsequently freed, not by him but by the terms of the constitutio Marci (168), he does not have the right (169). He adds that, if a son has manumitted with his father's approval, his father, as patron, has the right (par.1) (170) unless the son has freed a castrensis servus, in which case, he himself, as patron, has the right (par. 2). According to Ulpian, a person may accuse for as long as he is patron (par. 3) and in the case of a freedman with several patrons, if one of them has cause to accuse him of ingratitude, he may do so, but only with the consent of the others (par.4). Ulpian also mentions the opinion of Julian that if a father has assigned a freedman to one of his sons, only the latter, as patron, may accuse (par. 5). In the text of Paul mentioned (D.50.16.70), the jurist says that, by the

terms of the lex Aelia Sentia, a filius heres of the patron may instigate an accusation.

These texts supply no information regarding what constituted punishable ingratitude on the part of a freedman, nor regarding the penalties attached to such accusations. Another text of Paul (1 senteniarum) provides the following general definition :

...Ingratus libertus est, qui patrono obsequium non praestat vel res eius filiorumve tutelam administrare detractat (174).

There are other texts which shed further light on these questions but, since these also show that the issue was regulated by several Imperial constitutions, it is difficult to ascertain what exactly was the situation at the time of the lex Aelia Sentia. Ulpian mentions various punishable offences, together with the appropriate penalties, without assigning them to any Imperial enactment, but the severity of some of them makes it unlikely that this reflected entirely the Augustan situation:

...sed si quidem inofficiosus patrono patronae liberisve eorum sit, tantummodo castigari eum sub comminatione aliqua severitatis non defuturae; si rursus causam querellae praebuerit, et dimitti oportet. enimvero si contumeliam fecit aut convicium eis dixit, etiam in exilium temporale dari debet: quod si manus intulit, in metallum dandus erit: idem et si calumniam aliquam eis instruxit vel delatorem subornavit vel quam causam adversus eos temptavit (172).

This text shows that the penalty for ingratitude to a patron varied according to the severity of the offence. Ulpian does not mention as a punishment reenslavement by the patron which clearly did become a punishment. For example, a text of Marcian (173) assigns to Claudius a ruling which permitted the reenslavement of certain offenders :

Divus Claudius libertum, qui probatus fuit patrono delatores

summississe, qui de statu eius facerent ei quaestionem, servum patroni esse iussit eum libertum.

In addition, a passage of Tacitus (174) describes agitation in the reign of Nero to have patrons empowered to reenslave disrespectful freedmen. The same passage also implies that the penalty at the time was exile to a place at least 100 miles from Rome. It is reasonable to assume that the penalty of relegatio was introduced by Augustus.

The absence of evidence for accusations of ingratitude to patrons during the Republic does not imply that freedmen at this time owed no obligations to their patrons. The evidence shows clearly that a system of rights and obligations existed between patrons and freedmen during the Republic, the main duty of the freedman being the rendering of obsequium (respect). Treggiari (175) has, however, shown that obsequium was not enforced by law but depended on the moral concept of fides. The juristic evidence suggests that, whereas in earlier times an agreement setting out certain obligations might be made between patron and freedman at the time of manumission which was enforceable at law, praetorian intervention brought an end to this on the ground that it placed too great a burden on the freedman. Patrons did possess a legal right to demand from their freedmen a certain number of operae (days' work) which had been promised on oath at the time of manumission, but here too there was praetorian intervention to protect the freedman :

"In Republican times at least, obsequium does not seem to have been enforced by law, but only through an agreement of the parties, as was the performance of operae. But the idea of respect and dutifulness, obsequium, honor, reverentia, formed part of the moral obligation imposed by fides" (176).

Treggiari believes that, because the law favoured the freedman by the end of the Republic, Augustus intervened in order to redress the balance. The principle of reverence to a patron was

similarly upheld in the lex Iulia de maritandis ordinibus which forbade freedwomen married to their patrons to divorce them and to marry someone else against their will.

Another rule of the lex Aelia Sentia regarding relations between patrons and their ex-slaves provides a further link with the lex Iulia de maritandis ordinibus. This rule was concerned with oaths taken by ex-slaves to their patrons that they would not marry and have children. The lex Iulia seems to have made it possible for such oaths to be rescinded, while the lex Aelia Sentia went a step further and forbade patrons to compel their freedmen and freedwomen to make them in the first place. A rather corrupt text of Paul relates to this issue (177) :

Adigere iureiurando, ne nubat liberta vel [sic FB, libertus ins.Mo.] liberos tollat, intelligitur etiam is, qui libertum iurare patitur....Lege Iulia [Iuria F.] de maritandis ordinibus remittitur [sic S cum B, permittitur F] iusiurandum, quod liberto in hoc impositum est, ne uxorem duceret [duxerit F, dixerit F] libertae, ne nuberet, si modo nuptias contrahere recte velint.

The text also exonerates a patron whose son does the compelling without his consent, and shows that the imposition of a stipulation that a freedman perform operae (or substitute a monetary payment) is not forbidden. Paul further says that the prohibition is only relevant to those who are capable of having children, and that a patron may only compel a freedwoman to swear an oath that she will marry him if he intends to marry her and not if he wishes simply to prevent her from marrying someone else.

Another text of Paul also ascribes to the lex Aelia Sentia a provision which forbade patrons to compel freedmen to swear an oath, although the nature of the oath is not specified:

Qui contra legem Aeliam Sentiam ad iurandum libertum adegit, nihil iuris habet nec ipse nec liberi eius (178).

This implies that the penalty for contravening the law in this respect was a total loss of patronal rights over the freedman in question, not only by the patron but also by his children. The loss of inheritance rights is confirmed in a text taken from Ulpian's 14th book of commentary ad Sabinum (179):

Si quis libertam sic iureiurando adegit 'ne illicite nubat', non debere incidere in legem Aeliam Sentiam. sed si 'intra certum tempus ne ducat' 'neve aliam, quam de qua patronus consenserit' vel 'non nisi conlibertam' aut 'patroni cognatam', dicendum est incidere eum in legem Aeliam Sentiam nec ad legitimam hereditatem admitti.

Two further texts which mention this ruling of the lex Aelia Sentia are taken from the juristic commentaries ad legem Iuliam et Papiam (180) of Terentius Clemens. In his fifth book of commentary, Clemens says that a patron does not contravene the law if he only enjoins temporary widowhood on a freedwoman (181), and in his eighth book of commentary, he, like Paul, discusses a case of compulsion without the patron's consent by a person in his power (182).

It is easy to see why a provision which freed ex-slaves from an oath that they would not marry should have been a part of the lex Iulia de maritandis ordinibus, concerned as this law was with the encouragement of valid marriage and procreation, even among ex-slaves. It is more difficult to see the relevance to the lex Aelia Sentia of a provision which went a step further and forbade such oaths to be required by patrons. However, it does further illustrate the close connection between these two Augustan laws and fits in with the other provisions of the lex Aelia Sentia which regulated relations between patrons and ex-slaves.

The lex Aelia Sentia, in fact, seems to have provided a fair degree of protection for ex-slaves in relation to their patrons. There is evidence, for example, of a provision which penalised a patron who failed to support his ex-slave:

Si patronus non aluerit libertum, lex Aelia Sentia adimit eius libertatis causa imposita tam ei, quam ipsi (183) ad quem ea res pertinet, item hereditatem ipsi et liberis eius, nisi heres institutus sit, et bonorum possessionem praeterquam secundum tabulas. (184)

This is confirmed in another passage taken from the same book of commentary:

Alimenta liberto petente non praestando patronus amissione libertatis causa impositorum et hereditatis liberti punietur: non autem necesse habebit praestare, etiamsi potest. (185) (186)

The fact that a patron was expected, if necessary, to provide for his freedman is an indication of the continuing close bond between the two in spite of the latter's manumission.

The final rule of lex Aelia Sentia relating to patrons and their ex-slaves for which there is evidence is one which forbade patrons to compel their ex-slaves to pay money in lieu of performing operae:

Non prohibentur lege Aelia Sentia patroni a libertis mercedes capere, sed obligare eos: itaque si sponte sua libertus mercedem patrono praestiterit, nullum huius legis praemium consequetur. Is, qui operas aut in singulas eas certam summam promisit, ad hanc legem non pertinet, quoniam operas praestando potest liberari. idem Octavenus probat et adicit: obligare sibi libertum, ut mercedem operarum capiat, is intellegitur, qui hoc solum agit, ut utique mercedem capiat, etiamsi sub titulo operarum eam stipulatus fuerit. (188)

It is interesting to compare this with a ruling of the lex Iulia de maritandis ordinibus which, however, only concerned ex-slaves who had two or more children and which gave exemption to such from the obligation to provide 'operas doni muneris aliudve quicquam

libertatis causa...de quibus iuraverit vel promiserit obligatisve erit'. (189)

THE 'LEX FUFIA CANINIA'

The lex Fufia Caninia preceded the lex Aelia Sentia by about six years, but was a less complex and significant statute. The jurist Gaius, Ulpian and Paul all provide summaries of its contents, but the only book of commentary devoted to it for which there is evidence is a liber singularis of Paul (190). It was passed in 2 B.C. when the consuls were L. Caninius Gallus and C. Fufius Geminus (191) and was abrogated by Justinian (192).

The lex Fufia Caninia placed limits on the number of slaves to be manumitted by will: it had no bearing on any other form of manumission. Suetonius seems to be referring to it when he observes that Augustus 'manumittendi modum terminavit' (193).

The limit placed on the manumission of slaves by will is described by Gaius (194) :

Praeterea lege Fufia Caninia certus modus constitutus est in seruis testamento manumittendis. Nam ei, qui plures quam duos neque plures quam decem seruos habebit, usque ad partem dimidiam eius numeri manumittere permittitur; ei uero, qui plures quam x neque plures quam xxx seruos habebit, usque ad tertiam partem eius numeri manumittere permittitur. At ei qui plures quam xxx neque plures quam centum habebit, usque ad partem quartam potestas manumittendi datur. Nouissime ei qui plures quam C nec plures quam D habebit, non plures manumittere permittitur quam quintam partem; neque plures <.....>tur: sed praescribit lex, ne cui plures manumittere liceat quam C. Quodsi quis unum seruum

omnino aut duos habet, ad hanc legem non pertinet, et ideo liberam habet potestatem manumittendi.

Thus, according to the terms of the law, a master might free only a certain proportion of his slaves, the proportion depending on the total number of slaves he possessed. Thus, if he possessed 1 or 2 there were no restrictions, if he possessed between 2 and 10 he might free half, between 10 and 30 one third, between 30 and 100 one quarter and between 100 and 500 one fifth. One hundred was the maximum number of slaves who might be freed by any master. This is confirmed in Gai. Epitome 1.2pr. and by Ulpian (195):

Lex Fufia Caninia iubet testamento ex tribus seruis non plures quam duos manumitti, et usque ad decem dimidiam partem manumittere concedit: a decem usque ad triginta tertiam partem, ut tamen adhuc quinque manumittere liceat aequè ut ex priori numero: a triginta usque ad centum quartam partem, aequè ut decem ex superiori numero liberari possint: a centum usque ad quingentos partem quintam, similiter ut ex antecedenti numero uiginti quinque possint fieri liberi. Et denique praecipit, ne plures omnino quam centum ex cuiusquam testamento liberi fiant.

A similar description of these rules is provided by Paul.(196).

The passage of Gaius cited goes on to say that the ruling only applies to manumission by will so that there is no restriction placed by this law on those 'qui vindicta aut censu aut inter amicos manumittunt' (197). A rather corrupt portion of Gaius (198) shows that the law ensured that one master should not be allowed to free fewer slaves than another master who possessed a smaller number of slaves than he (199).

Paul says (200) that in reckoning the number of slaves who might be freed by the law, fugitive slaves should be taken into account on the ground that they still belong to their master. If a master frees more than the permitted number of slaves, the freedom of those manumitted after that number has been reached is

invalid (201), and since the order of manumission is therefore important, Paul also says that liberties granted by codicil are in all circumstances regarded as subsequent to those granted by the will which confirms them.

In order to facilitate the enforcement of this provision, the lex Fufia Caninia also laid down that slaves must be freed by name:

Eadem lex cavet, ut libertates servis testamento nominatim dentur (202).

Nominatim servi testamento manumitti secundum legem Fufiam possunt (203).

Paul adds here that, by the terms of the sc Orfitianum, a description such as 'opsonator' or 'qui ex ancilla illa nascetur' is acceptable, provided that no more than one person fits that description. It may therefore be presumed that the lex Fufia Caninia itself was rigid in its requirement that manumission be made nominatim.

According to Gaius, certain provisions of the lex Fufia Caninia, together with subsequent senatusconsulta, were designed to preclude fraudes. Thus the lex provided that if a testator tried to get around the rule by writing the names of his slaves in a circle so that there was no discernable order, none of the slaves would be free (204). This is confirmed by Gaius' Epitomator (205) who also says that if a testator grants freedom to all of his slaves without naming them, the gift will be invalid. He adds that, if a dominus frees several slaves when ill and on the point of death, the rule of the lex is to apply as though he had freed them by will, so that only a certain number will be free (206). Some of these rules were, no doubt, responses to attempts to evade the terms of the law and may well be attributable to the later sca which were enacted to preclude fraudes legis, although the jurists provide no details concerning

these.

Regarding the question of the relevance of the rule to trusts, this is discussed by Buckland (207) who rightly argues that trusts must have been affected, if not at the time of the enactment of the lex Fufia Caninia (since fideicommissa only became legally binding at this time), at least subsequently through juristic interpretation. If fideicommissa were not affected by the rule, an enormous loophole would have existed, and an excerpt from Paul's book of commentary ad legem Fufiam Caniniam suggests strongly that they were (208). In addition, as Buckland observes, a description of a slave which, according to Paul, is acceptable in a will by the terms of the lex Fufia Caninia, 'qui ex ea ancilla nascetur', is only relevant to a trust.

The Purpose of the Manumission Laws

In assessing the purpose of the manumission laws, we need to look again at the relevant passages of Suetonius and of Dio mentioned earlier:

Magni praeterea existimans sincerum atque ab omni colluvione peregrini ac servilis sanguinis incorruptum servare populum, et civitates Romanas parcissime dedit et manumittendi modum terminavit (209).

Moreover, considering it of great importance to keep the people pure and untainted by all impurities of foreign or servile blood, he very sparingly granted Roman citizenship and placed a limit on manumission.

...καὶ τὸ τέταρτον ἐντολὰς καὶ ἐπιβλήψεις τῷ Τιβερίῳ καὶ τῷ κοινῷ, ἄλλας τε καὶ ὅπως μὴτ' ἀπελευθερῶσι πολλοὺς, ἵνα μὴ παντοδαποῦ ὄχλου τὴν πόλιν πληρώσωσι, μὴτ' αὖ

ἔς τὴν πολιτείαν βυχνούς ἐβγράφωδεν, ἵνα πολὺ τὸ
διάφορον αὐτοῖς πρὸς τοὺς ὑπηκόους ᾗ.

...and the fourth [book contained] commands and injunctions for Tiberius and for the public, among them that they should not free many (slaves) in order that the city should not be full of a mixed rabble, and not to enrol large numbers as citizens, so that there should be a big difference between them and their subjects (210).

πολλῶν τε πολλοὺς ἀκρίτως ἐλευθερούντων,
διέταξε τὴν τε ἡλικίαν ἣν τὸν τε ἐλευθερώοντά
τινα καὶ τὸν αφεθγόμενον ὑπ' αὐτοῦ ἔχειν δεῖσθαι,
καὶ τὰ δικαίωματα οἷς οἱ τε ἄλλοι πρὸς τοὺς
ἐλευθερουμένους καὶ αὐτοὶ οἱ δεσπόται βφῶν
γενόμενοι χρήσονται.

As many were freeing many slaves indiscriminately, he laid down the age which the person freeing and the slave to be freed by him must be, and the regulations which people in general and also those who had been their masters should observe towards freed slaves.

These passages, together with juristic evidence for the nature of some of the provisions of the manumission laws of Augustus, have given rise to the commonly held view that through these laws Augustus aimed to stem a massive tide of manumissions in order not only to limit the number of freed slaves in the population but also to stop the citizen body from being further polluted by the continuing admission into it of foreign, especially oriental, ex-slaves. This was the view put forward by Last (212) and reiterated by several other scholars (213). More recently, however, attempts have been made to show that the concept of a massive tide of manumissions in the late Republic and very early Empire is a misleading one. Hopkins (214) demonstrated that most slaves would, in fact, have always remained slaves, and this is the view also held by Treggiari (215). Atkinson (216) argued particularly against the view of huge

numbers of slaves being manumitted by will on the basis of the absence of any firm evidence to support this view and of the fact that most Roman testators would have been concerned that the value of their property should not be diminished by the manumission of large numbers of slaves by will. She rejects the testimonies of both Suetonius and of Dio and believes that the manumission laws were, in fact, designed to encourage the freeing of slaves (at least of slaves of the right calibre) in order to supply freedmen for the army and vigiles and for commercial activity.

One of Atkinson's main arguments in support of the view that Augustus aimed to encourage rather than to discourage the growth of the freed population is based on the provision of the lex Aelia Sentia (or of the lex Iunia which she believes to be Augustan) which gave to Junian Latins the right to full citizenship by the so-called anniculi probatio. This, she observes, provided an incentive to those ex-slaves who became Junian Latins on manumission to marry and to procreate, and falls into line with several provisions of the marriage laws which provided similar incentives to ex-slaves to procreate (217). Atkinson further argues that, by waiving the rules of the lex Aelia Sentia for masters who wished to free slave women in order to marry them, Augustus was hardly aiming to preserve the "purity" of the citizen body (218). As for the lex Fufia Caninia, while she admits that it may well have reduced the number of manumissions, she believes that the purpose was rather to protect the interest of heirs and of creditors.

The traditional view of the manumission laws as indicating Augustus' concern about the numbers and racial origins of ex-slaves in the citizen body, has also been contested by Bradley (219), who points out that there is little evidence to support the idea that Augustus in general opposed the extension of the citizenship to foreigners. Bradley also observes that, if Augustus wished simply to reduce the number of slaves being freed, he did not choose a very effective method of doing so. Thus, for example, while the lex Fufia Caninia limited the number of slaves

to be freed by will, masters might still free any number of slaves by the other methods. Bradley cites the passage of Dionysius already mentioned (220) to argue that the lex Fufia Caninia was designed to curb ostentation by the upper classes who saw the freeing of large numbers of slaves by will as a way of ensuring that they were remembered as benevolent and generous. He also argues that, if masters were allowed to free by will only a limited number of slaves who had to be named, testamentary manumission would have thus become more selective. This ties in with the lex Aelia Sentia which, he believes, was concerned not so much with the numbers and racial origins of slaves being freed but rather with their moral and social qualities. Thus slaves might not be freed by immature masters, ex-slaves under 30 might not be granted the citizenship and morally disreputable slaves, dediticii, were forever debarred from access to the citizenship. Unlike Atkinson, Bradley does not reject the testimonies of Suetonius and Dio but interprets their accounts (together with that of Dionysius) as supportive of his arguments.

Can the accounts of Suetonius and of Dio indeed be made to fit in with this view of the manumission laws? There is no problem with Dio 55.13.7: here Dio merely says that Augustus was concerned about masters who were freeing their slaves 'ἀκρίτως'. The other passage, Dio 56.33.3 is more problematic: Bradley interprets Dio's statement that Augustus did not wish the city to be filled with ἀπαντοδακτος ὄχλος' as having a social and moral rather than a racial sense. However, Dio also says that Augustus ordered his successors 'μήτ' ἀπελευθερῶσι πολλούς ...μήτ' αὖ ἐς τὴν πολυτείαν βυχνούς ἐβγράψωσιν, ἕνα πολὺ τὸ διάφορον αὐτοῖς πρὸς τοὺς ὑπηκόους ἤ'. These words can only be interpreted to indicate concern about numbers of ex-slaves in the population and concerning the "pollution" of the citizen body. Atkinson totally rejects the passage and believes that the whole idea of a fourth book of instructions left by Augustus for Tiberius was a later fabrication. Her arguments against accepting this passage are not at all convincing and a total rejection of the testimonies of

Dio and of Suetonius does not seem to me to be justified. It is true that some rulings in the Augustan marriage laws encouraged procreation among ex-slaves, as they encouraged procreation among freeborn, but this is not the same as encouraging the manumission of more slaves. Moreover, while the number of slaves freed by will towards the end of the Republic may have been exaggerated by scholars, the fact that an upper limit of 100 was set by the lex Fufia Caninia suggests that it was indeed (as Dionysius asserts) a popular method of manumission which must have been curbed by the terms of the lex Fufia Caninia and, while the other avenues of manumission were, as Bradley argues, left open by the lex, they did not hold the attraction of providing a means of being remembered in a favourable light after death.

There are even stronger arguments for upholding the testimonies of Suetonius and Dio regarding Augustus' desire to preserve the citizen body from pollution. It has to be acknowledged, for example, that the denial of citizenship by the lex Aelia Sentia to manumitted slaves who were under 30 was very restrictive, and the admission of ex-slaves to the citizen body through the anniculi probatio was not, I believe, Augustan, having been introduced by the lex Iunia. Non-senatorial ingenui were indeed encouraged to marry freedwomen by the terms of the marriage laws, but, because of the restrictions placed on the acquiring of citizenship by manumitted slaves, only the offspring of marriages in which the ex-slave partner was considered to be worthy of citizenship would have been citizens.

This idea of "worthiness" is important in the Augustan manumission laws. Augustus placed limits on manumission and especially on the admission of ex-slaves to the citizen body, but clearly had no desire to forbid it altogether. Rather, his concern seems to have been to make manumission and admission to citizenship more selective and controlled, thus curbing the free hand formerly enjoyed by masters. By the terms of the lex Aelia Sentia, a master under 20 who was evidently not regarded as sufficiently mature to judge the suitability of a slave for

manumission might not free a slave, and a slave under 30 whose worth had not yet stood the test of time might not become a citizen. This latter rule would presumably also have had the effect of providing an incentive to manumitted slaves under 30 to behave well in the hope of attaining the citizenship on reaching 30. Both of these rules were waived in the case of certain relationships, or at the discretion of a prestigious consilium, consisting of senators and equites. The list of exemptions provides a further indication of the importance attached to family ties and relationships by Augustus, while the right of the consilium to judge the merit of individual cases illustrates the degree of control which might now be exercised over manumissions.

Control over the enfranchisement of ex-slaves was also introduced by the permanent refusal of citizenship to criminal ex-slaves now classed with dediticii. It is easy to see why such ex-slaves were not regarded as worthy of citizenship and the lex Aelia Sentia provided an explicit list of those in this stigmatised category. Masters were further restricted by the prohibition against manumission in fraud of creditors and of patrons, clearly designed to protect the interests of such and perhaps thus to remedy a common abuse. Similarly, the safeguarding of inheritances from leaving a familia was evidently the motive for exempting from all of the restrictions manumission for the purpose of providing a solus et necessarius heres.

By the terms of the lex Fufia Caninia, masters might no longer make sweeping, indiscriminate grants of freedom to unlimited numbers of slaves in their wills, but were now limited to a certain number who had to be named.

While these various measures were designed to make manumission more selective, some other provisions of the lex Aelia Sentia increased control by the law over relations between patrons and their ex-slaves. As already observed, there had always existed certain reciprocal obligations between patrons and ex-slaves, but by the end of the Republic these rested on the concept

of fides rather than on any legal basis. Augustus now placed a heavier obligation upon ex-slaves to render due reverence to their former masters by the introduction of a formal accusation against freedmen for ingratitude, probably with the penalty of relegatio attached. For their part, patrons were obliged to support their freedmen, if necessary, and to allow them to choose whether to perform operae for their patrons or to pay money in lieu. The provision of the lex Aelia Sentia which forbade patrons to compel their ex-slaves to swear oaths that they would not marry and have children introduced further control over the behaviour of patrons.

Given the nature of many of the provisions of the manumission laws, there is no justification for regarding the presence of provisions of this nature in the laws as evidence that they were primarily designed to encourage the growth of the freed population, as Atkinson suggests. Rather, this provision provides evidence for the close links between these laws and the marriage laws which did indeed provide incentives to procreation among freeborn and freed.

NOTES

(1) 55.13.7 : these passages of Dio will be discussed in more detail below.

(2) 56.33.3.

(3) DA 40.

(4) D.40.9.

(5) I believe that this was a later ruling, but include it here, since some scholars associate it with the lex Aelia Sentia.

(6) I favour assigning this provision to the lex Iunia, but it is frequently assigned to the lex Aelia Sentia.

(7) Insts.1.38.

(8) Req.1.13.

(9) For proposed emendations and references, see Biondi op.cit., p.293 n.2.

(10) M.David & H.L.W.Nelson, Gai Institutionum Commentarii IV, Leiden 1954-68, 1 Lieferung, pp.53-4.

(11) Just.Insts.1.6.4.

(12) Insts.1.40.

(13) D.40.1.1, 6 ad Sabinum.

(14) D.40.1.16, 1 regularum.

(15) D.40.2.15pr., 2 ad legem Aeliam Sentiam.

(16) D.40.2.20pr., 2 de officio proconsulis. See below for further comments on fideicommissa.

(17) This would not have been a common situation; the manumitter would have to buy the slave from someone with a view to freeing him.

(18) D.40.5.34.1, 3 fideicommissorum.

(19) D.40.2.4.2, Iulianus 42 digestorum.

(20) D.18.9.4, 24 digestorum.

(21) This was presumably because the decision to manumit was taken with the "immature judgment" of an under 20.

(22) D.40.9.16.1, 3 ad legem Aeliam Sentiam, cf.40.2.4.2.

(23) D.45.1.66.

(24) D.40.4.3, 1 ad Sabinum.

(25) D.29.1.29.2, 10 digestorum.

(26) D.29.1.1pr.

(27) Insts.1.41.

(28) See below for further discussion of the lex Iunia and informal manumission.

(29) CJ 1.2.1.

(30) D.40.9.7.1, 2 ad Urseium Ferozem.

(31) CJ 7.11.4.

(32) D.40.2.16pr., 2 ad legem Aeliam Sentiam.

(33) Insts.1.139.

(34) Insts.1.19, see also Gai.Epitome 1.1.7, D.40.2.11.12.

(35) D.40.2.13, 6 de officio proconsulis.

(36) 'id...libros' looks like a gloss.

(37) D.40.2.25, 1 de manumissionibus.

(38) W.W.Buckland, The Roman Law of Slavery, Cambridge 1970,p.540.

(39) D.40.2.15, 1 ad legem Aeliam Sentiam.

(40) D.40.2.9pr., 13 institutionum.

(41) D.40.2.14, 4 regularum.

(42) D.40.2.6, 2 ad Urseium Ferocem.

(43) D.40.2.24, 2 ad Neratium.

(44) This is rather odd : it was usual for peculium to go with the ex-slave.

(45) D.40.9.16.1, Paul 3 ad legem Aeliam Sentiam.

(46) D.40.1.20, 10 responsorum.

(47) D.40.2.20.1, 2 de officio consulis.

(48) D.40.2.16.1, 2 ad legem Aeliam Sentiam.

- (49) op.cit.p.541.
- (50) CJ 7.4.5.
- (51) D.40.5.4.18, 60 ad edictum.
- (52) D.40.1.20.1, 10 responsorum.
- (53) D.40.1.20pr.
- (54) D.40.2.20pr., 40.5.34.1.
- (55) D.40.9.16pr.
- (56) D.40.2.14.1, Marcianus 4 regularum.
- (57) D.40.2.13, 6 de officio proconsulis.
- (58) Insts.1.6.6.
- (59) D.40.2.19, 29 digestorum.
- (60) D.40.2.20.2, Ulpian 2 de officio consulis.
- (61) D.40.2.15.4, Paul 1 ad legem Aeliam Sentiam.
- (62) D.40.9.21, Modestinus 1 pandectorum.
- (63) D.23.2.51, Licinius Rufus 1 regularum.
- (64) D.24.2.11, 3 ad legem Iuliam et Papiam.
- (65) D.40.2.9.1, 13 institutionum.
- (66) CJ 2.30.3pr.
- (67) Insts.1.20.

(68) David & Nelson, op.cit.vol.1 p.32, believe that 'puberum' was a later addition, on the ground that it was only relevant when equestrian status became hereditary so that the Emperor might grant this status to a young person. There is no mention of it in the parallel passage of Ulpian.

(69) Req.11.13a.

(70) ILS 1910, 1984.

(71) D.40.2.1, 1 ad Sabinum.

(72) D.40.2.15.5, 1 ad legem Aeliam Sentiam.

(73) D.1.10.1.2, 2 de officio consulis.

(74) Such a case would have been so rare as to make the argument almost hypothetical.

(75) Sherwin White, The Roman Citizenship, 2nd ed., Oxford 1973, p.323f., shows that this principle goes back to very early times when the ideas of postliminium and exchange of citizenship regulated the Romans' dealings with their Latin neighbours.

(76) Gai.Insts.1.18-20.

(77) Ulp.Reg.1.12.

(78) Insts.2.276

(79) op.cit.II on this text.

(80) D.10.2.39.2, 40.4.46.

(81) See Buckland, op.cit.p.543 n.6.

(82) Req.1.12.

(83) Insts.3.56.

(84) 4,5.

(85) Insts.3.56.

(86) e.g.Schneider, ZSS 5 (1884) 225ff., Mommsen, Römisches Staatsrecht 3, Tübingen 1952 (repr.) p.626.

(87) 1.5.3.

(88) A.D.19 is the only year in which a Junius and a Norbanus were consules ordinarii, although in A.D.15 there was an ordinarius and a suffect consul with these names.

(89) 1.80.

(90) op.cit.p.333.

(91) Insts.1.31-4, 3.63.

(92) Req.3.5-6.

(93) This is discussed at greater length below.

(94) 1.19.

(95) 'apud consilium' is regarded by some scholars as a gloss.

(96) Ulpian Req.1.14, see also Gai. Insts.1.21.

(97) See Beseler ZSS 50 (1930) p.18.

(98) 1.6.1.

(99) D.28.5.43, 58, 89.

(100) 'eiusdem....ipse' supplied by Mommsen.

(101) Gai. Insts.1.29.

(102) The fact that citizenship was not automatically granted on attainment of the age of 30 is an indication of the importance attached to the "worthiness" or otherwise of the would-be citizen which had to be reassessed.

(103) Req. 3, de Latinis.

(104) Insts.1.31,66,68,69,70,71,73.

(105) Insts.1.80.

(106) Schulz, Epitome 28.3, thinks that the excerptor added 'et Iuniam' and in Ulpian Req.3.3 substituted 'lege Iunia' for 'lege Aelia Sentia'.

(107) Sherwin White, op.cit.p.333, argues that the lex Aelia Sentia introduced the 'anniculi probatio' provision and that it created a special kind of conubium between those who would later become Junian Latins (but who were still legally slaves) and Roman citizens. He sees this as the first step towards granting to them legal freedom, this being completed later by the lex Iunia.

(108) D.50.16.134.

(109) See ch.3 n.121.

(110) It is easy to see how such a system of registration would have facilitated the application of the marriage laws, given the various rewards offered to those who had children. As for its relevance to the lex Aelia Sentia, Riccobono suggests that it might have been necessary in order to ascertain the age of would-

be manumitters, or to maintain the distinction between citizens and either Latins or dediticii. I favour the latter suggestion.

(111) 'Nam is qui' supplied by comparison with Just.Insts.1.6pr.

(112) Gai.Insts.1.37.

(113) Ulp.Req.1.15.

(114) 1.6.3.

(115) D.40.9.10, 1 cottidiarum sive aureorum.

(116) Buckland, op.cit.p.561, suggests that Gaius, in not mentioning the intentions of the manumissor, may be reflecting an earlier view. This would imply that there was no requirement of animus fraudandi in the lex Aelia Sentia. Buckland's view, however, is very speculative and his arguments unconvincing. There is, in fact, no reason why the absence of any mention of animus in this particular text of Gaius should imply that he considered intentions to be irrelevant, especially in the light of the rest of the excerpt. Whether or not the lex Aelia Sentia mentioned intentions it is difficult to say, but it is clear that the jurists generally interpreted the law to apply only to those with fraudulent intentions.

(117) D.40.9.16.2, Paul 3 ad legem Aeliam Sentiam.

(118) D.40.9.16.3-5.

(119) D.40.9.11.1, 3 institutionum.

(120) D.28.5.56(55).

(121) Similarly, a debtor may free a slave given to him in order to be manumitted, D.40.1.10, 49.14.45.3.

(122) D.40.9.18pr.

(123) D.40.9.7pr., 2 ad Urseium Ferocem.

(124) D.40.9.5, 64 digestorum.

(125) The text, as it stands, actually says that such freedom is safeguarded, but, in view of the rest of the text, a 'non' must have been omitted.

(126) In another text (D.40.4.57), Gaius suggests that Julian took a different view, but this seems to have been the most widely held view.

(127) D.40.7.1.1, 5 ad Sabinum.

(128) cf.D.40.9.16.4 mentioned above.

(129) D.40.9.27pr., Hermogenianus 1 iuris epitomarum.

(130) D.40.9.23, 4 ex variis lectionibus.

(131) D.40.9.24, 9 ad legem Iuliam et Papiam.

(132) 1.14.

(133) D.28.5.43, 64 digestorum.

(134) 1.6.1.

(135) D.40.9.8, 3 quaestionum.

(136) 'cum' not in Codex Veronensis.

(137) 1.47.

(138) D.40.12.9.2, 38.5.11.

(139) D.38.5.1.3, see Buckland, op.cit.p.560.

(140) D.38.5.

(141) D.38.5.11.

(142) D.40.12.9.2, ad edictum praetoris urbani titulo de liberali causa.

(143) It is useful, in this connection, to examine the evidence for general fraus patroni, D.38.5.

(144) 'Ut' is preferable here to 'vel' in terms of sense, but necessitates replacing 'sunt' with 'sint' and 'fiunt' with 'fiant' below. De Zulueta, The Institutes of Gaius, II, Commentary, Oxford, 1953, p.4, argues that, if the text is a quotation from the lex, 'sunt' and 'fiunt' are correct and the 'ut' (or 'vel') should be omitted altogether.

(145) Gai. Insts.1.13.

(146) 'vel in ludum' supplied to bring it into line with Gai.Insts.1.13.

(147) Req.1.11.

(148) 1.3.

(149) DA 40.3.

(150) Insts. 1.15.

(151) Req. 1.11.

(152) Insts. 3.76.

(153) cf. Isidorus Origines 9.52, who says : 'ceteris autem libertus prohibebatur ne vel in urbe Roma vel intra septimum ab urbe miliarum commaneret.' The juristic evidence, however, carries more weight.

(154) Gai. Insts. 1.26-27.

(155) Ulp. Req. 22.2.

(156) Gai. Insts. 1.25.

(157) Insts. 1.25.

(158) Req. 20.14.

(159) Insts. 3.74-76.

(160) Gaius deals at some length with the many differences between the rights of patrons to the property of Junian Latins and to that of Roman citizen freedmen (Insts. 3.57ff). The differences stem from the fact that the property of Junian Latins belonged to their patrons 'iure quodammodo peculii' (3.56), in other words, as if their slave status had been unaffected by the lex Iunia, whereas that of Roman citizen freedmen was regulated by the rules of succession by patrons.

(161) Fragmenta Berolinensia de iudiciis 2, FIRA 2.625-6.

(162) Alibrandi, Opere I, 1896, p.386, supplies '...rebus posse eos homines per testamentum statuere.'

(163) Another, very fragmentary, section of the Berlin Fragment (3) has been reconstructed by Alibrandi (op.cit. 384) as follows : '(post obitum illorum hominum qui dediticiorum numero sunt bona patronis eorumque liberis pollicita) est, an(tiquam ius iis) restituendo : deinde ex abundantia praecepit praetoribus, uti e(o)

nom(ine iudicia) redderent'. This reconstruction is, however, far too speculative to be acceptable.

(164) Insts.1.27.

(165) Sent.4.12.4-8.

(166) D.50.16.216.

(167) Dio 55.13.7.

(168) CJ 4.57.1. This constitution provided that, in the case of a slave being sold in order to be freed, if the recipient did not free him he would automatically become free.

(169) D.40.9.30pr.

(170) This seems to have been changed by a ruling of Diocletian, CJ 6.3.12, which allowed sons of patrons to accuse.

(171) D.37.14.19.

(172) D.37.14.1, Ulpian de officio proconsulis, see also D.1.12.1.10, Ulp.lib.sing.de officio praefecti urbi.

(173) D,37.14.5pr., 13 institutionum.

(174) Ann.13.26.

(175) S.Treggiari, Roman freedmen during the late Republic, Oxford 1969.

(176) op.cit.p.81.

(177) D.37.14.6, Paul 2 ad legem Aeliam Sentiam.

(178) D.37.14.15, 8 ad legem Iuliam et Papiam.

(179) D.38.16.3.5.

(180) D.40.9.31, 32pr.

(181) D.40.9.31.

(182) D.40.9.32pr.

(183) 'tam ipsi quam ei' Mommsen.

(184) D.38.2.33, Modestinus lib.sing.de manumissionibus.

(185) D.25.3.6pr.

(186) The differences between these two texts has led some scholars, e.g. La Pira, La successione ereditaria intestata e contro il testamento, 1932, p.195, to believe that the words 'tam ei, quam ipsi ad quem ea res pertinet' and 'ipsi et liberi eius' in the first passage are interpolated. While it is possible that the second text reflects the actual rule of the lex Aelia Sentia which was later expanded upon, this is not necessarily the case, since Modestinus, in the first passage, may be providing a more detailed description of this provision.

(187) 'hac' ins. F2.

(188) D.40.9.32.1-2, Terentius Clemens 8 ad legem Iuliam et Papiam.

(189) D.38.1.37pr., Paul 2 ad legem Iuliam et Papiam.

(190) D.35.1.37, 50.16.215.

(191) Dessau I 9250.

(192) Just.Insts.1.7.

- (193) DA 40, see also Tac.Ann.10.7 : 'Servos urbanos omnes manumisit utriusque sexus, intra centum tantum, ne Caninia transiri videretur.'
- (194) Insts.1.42,43.
- (195) Reg.1.24.
- (196) Sent.4.14.4.
- (197) Par.44, cf.Gai.Epitome 1.2.1 : '...aut in ecclesia, aut ante consulem, aut inter amicos, aut per epistolam manumittere potest his manumissionibus omnem familiam iugo servitutis absolvere.'
- (198) Par.45.
- (199) For example, a master possessing 12 slaves should be allowed to free 5 rather than 4 (one third), since if he possessed 10 he might free 5 (one half).
- (200) Sent.4.14.3.
- (201) cf.Gai.Epitome 1.2.2.
- (202) Ulp.Reg.1.25.
- (203) Paul Sent.14.4.1.
- (204) Gai.Insts.1.46.
- (205) Gai.Epitome 1.2.2.
- (206) Epitome 1.2.3.
- (207) op.cit.pp.547-8.

- (208) D.35.1.37.
- (209) Suetonius DA 40.3.
- (210) Dio 56.33.3.
- (211) Dio 55.13.7.
- (212) CAH X, Cambridge 1934, pp.429ff..
- (213) e.g. Buckland op.cit., Westermann, The slave systems of Greek and Roman Antiquity, Philadelphia 1955.
- (214) Conquerors and Slaves, Cambridge 1978.
- (215) op.cit...
- (216) "The Manumission laws of Augustus", Irish Jurist I (1966) pp.368 ff..
- (217) For example, the encouragement of marriages between non-senatorial free citizens and ex-slaves, the release of freedwomen possessing four children from tutela, rules regulating inheriting between patrons and ex-slaves.
- (218) She compares this with the provision of the lex Iulia de maritandis ordinibus which forbade a freedwoman married to her patron to divorce him and to marry another.
- (219) K.R. Bradley, "Slaves and masters in the Roman Empire, a study in social control", Latomus 188 (1984), pp.81ff.
- (220) 4.24.1-8.

CONCLUSION

Having looked briefly at law-making under Augustus in general and at the most important and best documented Augustan statutes in detail, what conclusions can be drawn concerning the significance of the Augustan period in the history of Roman law and concerning the aims and achievements of Augustus as reflected in his law-making activities and in the nature of the enactments themselves?

It is clear that Augustus initiated a vast legislative programme and the question therefore arises as to the extent of his personal responsibility for it. All of the Republican law-making channels continued to be employed under Augustus and, since this implies the involvement in law-making of the popular assemblies and the Senate as well as of various magistrates, it might be argued that much of the legislation of this period was initiated not by Augustus but by others, and therefore provides little help in determining his aims and policies. It was argued in chapter 1, however, that the way in which Augustus established a rôle for himself within all of the law-making channels, together with the nature of many of the enactments (especially of the most important ones), suggests very strongly that he was, indeed, responsible for these, however they were made law. Thus, for example, the two marriage laws are very clearly the work of one legislator in spite of the fact that the second one was proposed not by Augustus himself but by the consuls. There are, indeed, as has been shown, many links between the various Augustan enactments. Clearly it would not have been possible nor discreet for him to have undertaken such a programme of legislation without the co-operation of magistrates, senators, jurists and the like, but this by no means implies that he did not exercise overall control over law-making during this period.

A number of different motives have been ascribed to Augustus in connection with the various enactments surveyed. Among these are the desire to enhance his image as a restorer of old ways and

of peace and prosperity, by encouraging procreation, especially within the all-important upper orders, by emphasizing the return to ancient moral standards and by stabilising the transmission of property. In addition, he revealed a desire to keep the citizen body free from "pollution", to enhance the distinctions between the orders and, naturally, to safeguard his own position.

There are, however, other trends of greater significance observable in many of the enactments of Augustus. For example, it has been argued, in connection with the marriage and adultery statutes, that they intervened in a number of areas of life and law to an extent unknown in the Republican period when many of these areas were regulated at the discretion of private individuals and groups. The authority and independent activities of such were now curtailed, and it is not difficult to see why this would have enhanced Augustus' own authority. The fact that he was responsible for a huge programme of legislation relating to such a vast number of issues confirms that he wished to influence and gain some control over as many areas of law and life as possible. Since he created for himself a rôle within all of the traditional channels of law-making, he was able to exercise this control not only through statutes but also through edicts which were often addressed to the provinces or to the army and therefore provided a means of exercising influence in these areas, and through senatusconsulta which enabled him to influence areas within the Senate's sphere of competence.

Another observable theme of considerable significance is the introduction of uniformity and improved organisation into many areas of the law. For example, it was shown in chapter 1 that the little we know about the important judiciary laws of Augustus suggests that they were designed to introduce better organisation and uniform rules to the civil and criminal courts. Similarly, the leges de vi seem to have been introduced in order to consolidate the Republican rulings concerning vis, to make them more comprehensive, and to introduce effective redress against this offence. It is well known that the rules governing many

areas of Roman law had developed in a typically ad hoc and piecemeal manner, (largely because the praetors and other magistrates involved in law-making were annually elected and therefore had a very limited period of office during which to oversee legislation), and that new rules and institutions were often introduced alongside the old without actually replacing them. Thus it was that the ius honorarium or magisterial law had developed alongside the ius civile, and thus it was that certain areas of the law needed to be systematised and consolidated.

Much of Augustus' legislation, then, was innovative and far reaching because it encroached on areas regulated little or not at all by Republican statutes, because it covered such a vast range of issues and because it made sweeping reforms in certain confused areas of the law. It is interesting that many of his reforms and innovations were incorporated into statutes such as the marriage and adultery laws, which had ostensibly traditional themes. The adoption of Republican ideology, as has been argued, both suited Augustus' interests as he consolidated his position, and was designed to appeal. Indeed, other Augustan enactments such as the lex de ambitu, the lex de collegiis and the lex sumptuaria were traditional in content as well as in name.

It was observed in chapter 1 that the privileged position held by Augustus within the various law-making channels laid the foundation for the later situation whereby the Emperor came to be regarded as the primary source of law. Similarly, Augustus' unprecedented position as princeps enabled him to undertake a comprehensive and ruthless law-making programme which no Republican magistrate would have had the authority, the opportunity nor, perhaps, the inclination and courage to undertake. For the first time, the changes effected in the law were, year after year, dictated largely by the aims and policies of one man. The effect of the transition from Republic to Principate on Roman law was thus profound.

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ABBREVIATIONS

Suet. <u>DI,DA</u>	Suetonius, <u>Divus Iulius</u> , <u>Divus Augustus</u> .
Tac. <u>Ann.</u>	Tacitus, <u>Annales</u> .
<i>born</i> Gell. <u>Noc^bAtt.</u>	Aulus Gellius, <u>Noctes Atticae</u> .
<u>SHA</u>	<u>Scriptores Historiae Augustae</u> .
Gai. <u>Insts.</u>	<u>Institutes</u> of Gaius.
Ulp. <u>Req.</u>	<u>Regulae</u> of Ulpian.
Paul <u>Sent.</u>	<u>Sententiae Receptae Paulo tributae</u> .
<u>Coll.</u>	<u>Mosaicarum et Romanorum legum Collatio</u>
<u>Frag.Vat.</u>	<u>Fragmenta Vaticana</u> .
D.	<u>Digest</u> of Justinian.
<u>CJ</u>	<u>Codex</u> of Justinian.
Just. <u>Insts.</u>	<u>Institutes</u> of Justinian.
<u>C.Th.</u>	<u>Codex Theodosianus</u>
<u>FIRA</u>	<u>Fontes Iuris Romani Anteiustiniani</u> ed.S.Riccobono etc., 3 vols., 2nd ed.Naples, 1941, 1940, 1943.
<u>CAH</u>	Cambridge Ancient History.
<u>ANRW</u>	<u>Aufstieg und Niedergang der Römischen Welt</u>

<u>P.Oxy.</u>	<u>The Oxyrhynchus Papyri.</u>
<u>CIL</u>	<u>Corpus Inscriptionum Latinarum.</u>
<u>ILS</u>	<u>Inscriptiones Latinae Selectae.</u>
<u>BGU</u>	<u>Berliner Griechische Urkunden.</u>
<u>JRS</u>	<u>Journal of Roman Studies.</u>
<u>PCPS</u>	<u>Proceedings of the Cambridge Philological Society.</u>
<u>PBSR</u>	<u>Papers of the British School at Rome.</u>
<u>CJ</u>	<u>Classical Journal.</u>
<u>RIDA</u>	<u>Revue internationale des droits de l'antiquite</u>
<u>RHD</u>	<u>Revue historique de droit français et étranger</u>
<u>RIL</u>	<u>Rendiconti dell'Istituto Lombardo di scienze e lettere.</u>
<u>IURA</u>	<u>Iura. Rivista internazionale di diritto romano e antico.</u>
<u>BIDR</u>	<u>Bullettino dell'Istituto di diritto romano</u>
<u>SDHI</u>	<u>Studia et documenta historiae et iuris.</u>
<u>ZSS SZ</u>	<u>Zeitschrift der Savigny-Stiftung für</u>

Rechtsgeschichte. Romanistische Abteilung

Ti Tijd

Tijdschrift voor Rechtsgeschiedenis. Revue
d'histoire de droit.

ZRG

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