ADOPTION, SUCCESSION, GUARDIANSHIP *TEMP*. XII – OUTLINE

(The primary sources referred to in this outline are attached, and cited in the outline as 'Mats.' with a hyperlinked number (it's there, though not always in blue) indicating where they appear. Clicking on the heading of the item in the Mats. will, in most cases, bring you back to where you were in the outline.)

1. Adoption and adrogation:
   a. Read Aulus Gellius, *Attic Nights* 5.19.9 (Mats. 1).
   b. The key is the power of life and death (*ius vitae necisque*) – Read Dionysius of Halicarnassus, *Roman Antiquities* 2.26 (Mats. 2) – on this to remember the family council and the notion that not all law is encompassed within what the public law is.
   c. Watson argues that *adrogatio* but not *adoptio* existed temp. XII Tables (p. 40–42) – his argument is that *adrogatio* is complicated and the fiction of the *adoptio* makes it simpler – there's some *a priori* argumentation here but it's hard to imagine them creating a more awkward institution when an easier one existed – I have some doubts about this argument because *adrogatio*, at least in classical times, was confined to those *sui iuris*.
2. XII Tables tab. 5.3
   a. Cicero, De Inventione ['On Invention'] 2.148 and [Anonymous] to Gaius Herennius 1.13 "As the paterfamilias has legated (or 'legated') about his *familia* and his money/property (*res*), so let the law be."[1] (Mats. 3a) – why add the subject? Also tab. 5.4 and 5.5 are collated in another passage in the same works, indicating that there's a rhetorical version of the text that is smoothed out.
   b. Gaius (GI.2.224): "As he has legated about his thing (*res*), so let the law be (Mats. 3b)."[2]
   c. Ulpian (Epitome Ulpiani ['Rules of Ulpian'] 11.14) "As he has legated about his money/property (*res*) or the tutelage of his thing (*res*), so let the law be (Mats. 3c)."[3]
   d. According to Watson, Ulpian is right. *Super* meaning 'about' in this context is impossible in classical Latin; 'tutelage' (*tutela*) is mysterious; 'money/property' (*pecunia*) is also in tab. 5.7a (Mats. 4) – *familia* means the family as a unit, later *hereditas*; no mention of the *familia* as in the later *testamentum per aes et libram* (GI.2.104, Mats. 5) – 'legate' (*legare*) never means institute an heir – no other provision on testate succession, but tab. 5.4 (Mats. 6) suggests that there must have been another form – *testamentum per aes et libram*, even for legacies, needs an authorizing provision – "so do I give, so do I legate, so do I call to witness, and so, *Quirites*, do you bear me witness"[4] also suggests legacies only (GI.2.104, Mats. 5) – acts like a legacy *per vindicationem* (G.2.193, 196, Mats. 7) – no transfer by *familiae emptor* – this is why legator must have *dominium ex iure Quiritium* and why 'so do I give, so do I legate' used – no legacy *per damnationem* – no

[1] Paterfamilias *uti super familia pecuniaque sua legassit/legaverit, ita ius esto*

[2] *Uti legassit suae rei, ita ius esto*

[3] *Uti legassit super pecunia tutelave suae rei, ita ius esto.*

[4] *ita do, ita lego, ita testor, itaque vos Quirites testimonium mihi perhibitote*

one to sue and the form is in its infancy – thus the *mancipatio* is developing – need not be a transfer. Watson's argument has problems:

e. What was the function of the *familiae emptor*?

f. Doesn't this undercut Watson's argument on 'if a father sells his son three times' (p. 118–119), i.e., they were already using *mancipatio* fictitiously?

g. *Testamentum comitiis calatis* (GI.2.101, 102, Mats. 8) may be the only form of testament for one 'to whom there is no *suus heres*' (tab. 5.4, Mats. 6);[5] the *proximus adgnatus* takes without succession per stirpes or grades because it cuts down gentiles' rights – otherwise the *gens* takes with usucapion (tab. 5.5, Mats. 9; GI.2.52, Mats. 10) (Watson's argument is derived from *usucapio pro herede*) – *cretio*, argument derived from the provision about debts (tab. 5.9, Mats. 11; D.10.2.25.9, 13; Mats. 12): debts are divided among the heirs according to the XII) – *sacra* (Cicero *On the laws* (*de legibus*) 2.20.49, Mats. 13): heirs bound to perform the deceased's *sacra familiaria*– *legis actio sacramento in rem* to claim an inheritance – action for partitioning an inheritance (*actio familiae erciscundae*)(note use of *familia* here) (GI.4.17a, Mats. 14) – GI.3.154a (Mats. 15):[6] *ercto non cito*, of a whole series of possibilities as to what this might mean the simplest may be the best: "division not called for," an ablative absolute; the grammar is only slightly dicey; *erctum ciere*, to call for division has the *erctum* in the supine; from this we get an idiom *ercto non cito*, in which the verbal noun does not functions in way that it normally does but which is perfectly intelligible.

3. Guardianship

a. *Impuberes* – *legitimi* tab. 5.6: "For those for whom a tutor is not given by testament . . . for them the agnates are tutors according to the XII [Tables]" (GI.1.155, Mats. 16) – as to the *gens* only the *Laudatio Turiae* attests[7] – *testamentarii* tab. 5.3 (Mats. 3): "As he has made legacy about . . . the tutelage of his thing (*res*)" – note that it's in respect of the property (*tutela suae rei*); contrast the lunatic: "over him and his goods"[8] (tab. 5.7a, Mats. 4; cf. Maid of Ardea[9]) – tab. 8.20: remedies: action for separating accounts (*actio rationibus distrahendis*) (D.26.7.55.1, Mats. 17): charge of a suspect tutor (*accusatio suspecti tutoris*) (D.26.10.1.2, Mats. 18) – inadequate, the accounting does not take place until the end and only available against *tutores legitimi*, and the *accusatio* only leads to removal of the tutor.

b. *Mulieres* – Maid of Ardea[9] – perpetual tutelage must be assumed though we have no direct evidence of it – indirect evidence is provided by the peculiar position of Vestals (tab. 5.1=G.1.145, Mats. 19).

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[5] *cui suus heres nec escit*

[6] The non-Latinists might want to skip this one.

[7] Will be included later in the *Materials*.

[8] *in eo vel pecunia eius*

[9] See the outline on marriage.

c. *Furiosi – potestas* over both persons and property – no nomination by the father of the *furiosus*? – "But if there is not a *custos* (guardian) for him"[10] (unplaced fragment = tab. 5.7b, Mats. 20); Watson suggests that this may have been for testamentary nomination.

d. *Prodigi* specifically said to be by custom (but Table 5.7c has it as a provision, Mats. 21) – suggests survival of family ownership – economic crisis – cf. Tab 10 on funerals – note the suggestion of a will theory of management this early – *Opinions of Paul* (*Pauli Sententiae*) 3.4a.7 (Mats. 22): "By custom one is interdicted from his goods by the praetor in this way: 'Since you are dissipating your paternal and ancestral good by your profligacy, and are reducing you children to poverty, for that reason, I ban you from this property [read 'bronze'] and from dealing with it'."[11]

[10] *ast ei custos nec escit*

[11] Moribus per pretorem bonis interdicitur hoc modo: 'quando tibi bona paterna avitaque nequitia tua disperdis liberosque tuos ad egestatem perducis ob eam rem tibi ea re commercioque interdico'. (CD trans.). For the emendation of *ea re* to *aere*, see Watson, p. 78, with references.

ADOPTION, SUCCESSION, GUARDIANSHIP *TEMP*. XII – MATERIALS

1. *Aulus Gellius, Attic Nights 5.19.9 (Rolfe trans.)*:

When outsiders are taken into another's family and given the relationship of children, it is done either through a praetor or through the people. If done by a praetor, the process is called ?*adoptatio*; if through the people *arrogatio*. Now, we have *adoptatio*, when those who are adopted are surrendered in court through a thrice repeated sale by the father under whose control they are, and are claimed by the one who adopts them in the presence of the official before whom the legal action takes place. The process is called *adrogatio*, when persons who are their own masters deliver themselves into the control of another, and are themselves responsible for the act. But arrogations are not made without due consideration and investigation; for the so-called *comitia cruriata* are summoned under the authority of the pontiffs, and it is inquired whether the age of the one who wishes to adopt is not rather suited to begetting children of his own; precaution is taken that the property of the one who is being adopted is not being sought under false pretences; and an oath is administered which is said to have been formulated for use in that ceremony by Quintus Mucius, when he was *pontifex maximus*. But no one may be adopted by *adrogatio* who is not yet ready to assume the gown of manhood. The name *adrogatio* is due to the fact that this kind of transfer to another's family is accomplished through a rogatio or "request" put to the people.

The language of the request was as follows: "Express your desire and ordain that Lucius Valerius be the son of Lucius Titius as justly and lawfully as if he had been born of that father and the mother of his family, and that Titius have that power of life and death over Valerius which a father has over a son. This, just as I stated it, I thus ask of you, fellow Romans."[12]

Nether a ward nor a woman who is not under the control of her father may be adopted by *adrogatio*; since women have no part in the *comitia*, and it is not right that guardians should have so much authority and power over their wards as to be able to subject to the control of another a free person who has been committed to their protection. Freedmen, however, may legally be adopted in that way by freeborn citizens, according to Masurius Sabinus. But he adds that it is not allowed, and he thinks it never ought to be allowed, that men of the condition of freedmen should by process of adoption usurp the privileges of the freeborn. "Furthermore," says he, "if that ancient law be maintained, even a slave may be surrendered by his master for adoption through the agency of the praetor." And he declares that several authorities on ancient law have written that this can be done.

2. *Dionysius of Halicarnassus, Roman Antiquities 2.26 (Cary trans.)*:

But the lawgiver of the Romans gave virtually full power to the father over his son, even during his whole life, whether he thought proper to imprison him, to scourge him, to put him in chains and keep him at work in the fields, or to put him to death, and this even though the son were already engaged in public affairs, though he were numbered among the highest magistrates, and though he were celebrated for his zeal for the commonwealth.

And not even at this point did the Roman lawgiver stop in giving the father power over the son, but he even allowed him to sell his son, without concerning himself whether this permission might be

[12] Eius rogationis verba haec sunt: "Velitis, iubeatis, uti L. Valerius L. Titio tam iure legeque filius siet, quam si ex eo patre matreque familias eius natus esset, utique ei vitae necisque in eum potestas siet, uti patri endo filio est. Haec ita uti dixi, ita vos, Quirites, rogo."

regarded as cruel and harsher than was compatible with natural affection. And, – a thing which anyone who has been educated in the lax manners of the Greeks may wonder at above all things and look upon as harsh and tyrannical, – he even gave leave to the father to make a profit by selling his son as often as three times, thereby giving greater power to the father over his son than to the master over his slaves.

3. *XII tab. 5.3 (CD trans.)*:[13]

3a. *Cicero De Inventione ['On Invention'] 2.148 and [Anonymous] to Gaius Herennius 1.13*

As the paterfamilias has legated (or 'legated') about his *familia* and his money/property (*res*), so let the law be.[14]

3b. *Gaius, Institutes 2.224*

As he has legated about his thing (*res*), so let the law be.[15]

3c. *Ulpian (Epit. Ulp. 11.14)*:

As he has legated about his money/property (*res*) or the tutelage of his thing (*res*), so let the law be.[16]

4. *XII tab. 5.7a (CD trans.)*:

If there is a madman, let the power (*potestas*) over him and his goods (*pecunia*) belong to the agnates (reading *adgnatorum*) and the men of the *gens*.[17]

5. *Gaius, Institutes 2.104*:

104. The proceedings are as follows: The testator, as in other mancipations, takes five Roman citizens above puberty to witness and a scale-holder, and, having previously written his will on tablets, formally mancipates his *familia* to someone. In the mancipation the *familiae emptor* utters these words: 'I declare your *familia* to be subject to your directions and in my custody, and be it bought to me with this bronze piece and'(as some add) 'this bronze scale, to the end that you may be able to make a lawful will in accordance with the public statute.' Then he strikes the scale with the bronze piece and gives it to the testator as the symbolic price. Next the testator, holding the tablets of his will says as follows: 'According as it is written in these tablets and on this wax, so do I give, so do I bequeath, so do I call to witness, and so, *Quirites*, do you bear me witness.' This utterance is called the nuncupation, *nuncupare* meaning to declare publicly; and the testator is considered by these general words to declare and confirm the specific dispositions which he has written on the tablets of his will.

6. *XII tab. 5.4 (Crawford trans.)*:

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[13] Crawford rejects Watson's argument that 3c is the best version of the text and comes up with a portmanteau version that retains *familia*. His argument for doing so is not convincing.

[14] Paterfamilias *uti super familia pecuniaque sua legassit/legaverit, ita ius esto*

[15] *Uti legassit suae rei, ita ius esto*

[16] *Uti legassit super pecunia tutelave suae rei, ita ius esto.*

[17] *Si furiosus prodigusve essit, agnatum gentiliumque in eo familiaque pecuniaque eius potestas esto*. Crawford thinks that the tradistional text, translated here, is uncertain, and so produces a typographical wonder that is virtually impossible to read.

If he dies intestate, to whom there be no *suus heres*, the nearest agnate is to have the *familia* and goods.[18]

7. *Gaius, Institutes 2.193, 196*:

193. By vindication we legate, for example, thus: 'To Titius I give and legate the slave Stichus'; but if only one or other of the words is used, as 'I give' or 'I legate', it is equally a legacy by vindication; so also, according to the prevailing opinion, if the legacy be in the form: 'Let him take', or 'Let him have for himself', or 'let him seize'.

196. Only things belonging to the testator by Quiritary title can properly be legated by vindication. In the case of things reckoned by weight, number, or measure, such as wine, oil, corn, and money, it is held to be sufficient if they belong to the testator by Quiritary title at the time of death. But all other things, it is held, are required to belong to him by Quiritary title at both times, namely that of his making the will and that of his death; otherwise the legacy is void.

8. *Gaius, Institutes 2.101, 102*:

101. Originally there were two kinds of wills: men made them either in the *comitia calata*, which were held twice a year for the purpose of making wills, or *in procinctu*, that is when they were arming for battle, *procinctus* being the army mobilized and armed. Thus they made the former in the quiet of peace and the latter when on the point of sallying to battle. **102.** Later a third kind of will was added, that executed *per aes et libram*. A man who had not made a will either in the *comitia calata* or *in procinctu*, if threatened with sudden death, would mancipate his *familia*, that is his whole estate, to a friend, whom he would request to distribute it after his death to such persons as he desired. This is called the will *per aes et libram*, because it is executed by means of a mancipation.

9. *XII tab. 5.5 (Crawford trans.)*:

If there be no agnate, the *gentiles* are to have the *familia* and goods.[19]

10. *Gaius, Institutes 2.52*:

52. On the other hand, there are cases where one who knows that he is in possession of another's property will acquire it by usucapion. Thus, where a man takes possession of a thing which belongs to an inheritance, but of which the heir has not yet obtained possession, he is allowed to acquire it by usucapion, provided that it is a thing that is susceptible of usucapion. This kind of possession and usucapion is termed *pro herede* (as heir).

11. *XII tab. 5.9 (CD trans.)*:[20]

Gordian in C.3.36.6: Those things which are in *nominibus* (choses in action) . . . are according to the XII Tables automatically divided among the heirs in accordance with their portions. *Diocletian* in C.2.3.26: According to the XII Tables inherited debts are automatically divided according to the portions that each has obtained.

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[18] *Si intestato moritur, cui suus heres nec essit, agnatus proximus familiam pecuniamque habeto*. Crawford queries 'and goods'.

[19] *Si agnatus nec essit, gentiles familiam pecuniamque habento*. Once more, Crawford queries 'and goods'.

[20] Crawford does not believe that these late 3d-century texts provide any guide to what was in the XII tables, but he does use the Digest texts immediately below to come up with a much vaguer reconstruction of the tab. 5.9.

12. *Digest 10.2.25.9, 13 (Watson trans.)*:

PAUL, *Edict book 23*: **9**. It is doubted whether this action [the action for dividing an inheritance] covers a stipulation under which the individual heirs each have an action for the full amount, for instance, if a man has died after stipulating for right of way in person or with cattle; for according to the *Law of the Twelve Tables*, such a stipulation may not be divided, because it cannot be. . . . **13**. The same legal rule applies to money promised by the testator, if a penalty is attached to the promise; for although under the *Law of the Twelve Tables*, such an obligation may be divided, still paying one's own share does not help one to escape the penalty.

13. Cicero *On the laws (de legibus)* 2.20.49:[21]

[T]he doctrine of the older authorities is differently stated. For their rule was expressed in the following terms: that men are bound to perform the rites (*sacra*) in three different ways, either by being heirs, or by receiving the greater part of the property, or, in case the greater part of the property was bequeathed in legacies, by receiving anything whatever by that means.

14. *Gaius, Institutes 4.17a*:

17a. One proceeded by *iudicis postulatio* in any case in which statute had authorized such procedure: thus the law of the Twelve Tables authorized it in a claim arising out of stipulation. The procedure was somewhat as follows. The plaintiff said: 'I affirm that under a *sponsion* you ought to pay me 10,000 sesterces. I ask whether you affirm or deny this.' The defendant denied the debt. The plaintiff said: 'Since you deny, I ask you, Praetor, to grant a *iudex* or *arbiter*.' Thus in this kind of action one denied without penalty. The same law authorized procedure by *iudicis postulatio* likewise in suits for the partition of an inheritance between coheirs.

15. *Gaius, Institutes 3.154a*:

154a. But there is another kind of partnership peculiar to Roman citizens. For at one time, when a *paterfamilias* died, there was between his *sui heredes* a certain partnership at once of positive and of natural law, which was called *ercto non cito*, meaning undivided ownership: for *erctum* means ownership,[22] whence the term *erus* for owner, while *ciere* means to divide, whence the words *caedere* and *secare*.

16. *Gaius Institutes 1.155 (=XII tab 5.6)*:

155. Those to whom no tutor has been appointed by will have under the law of the Twelve Tables their agnates as tutors; these are called *legitimi*.

17. *Digest 26.7.55.1 (=XII tab. 8.20) (Watson trans.)*:

TRYPHONINUS, *Disputations, book 14*: **1.** But if the tutors themselves have stolen the property of the pupillus, let us see whether, by the action [called in T.'s time *actio rationibus distrahendis*] which is set out in the Law of the Twelve Tables against a tutor for double the sum involved, they are liable as individuals for the whole sum and whether, even though one of them has paid the double amount, the others, nonetheless, are liable. For in other cases, where several thieves have stolen the same property, the rest cannot plead for pardon from punishment by reason of the fact that one of them has already paid the penalty. Tutors, however, because they have accepted the

[21] Cicero, De Republica, De legibus, translated by Clinton Walker Keyes, Harvard University Press, 1928.

[22] Gaius is mistaken in his etymology here. *Erctum* is from *ercisco*, which means'to divide' and is unrelated to *erus*, the word for 'heir'.

administration, are seen not so much as appropriating the property against the owner's will, as betraying their trust. Finally, let no one say that one tutor should pay both the double amount on this action and either the property itself or its estimated value as if under the pretext of a condictio.

18. *Digest 26.10.1.2*:

ULPIAN, *Edict, book 35*: **2**. It must be known that the offense of untrustworthiness [*crimen suspecti*, the provision in the edict was known as *accusatio suspecti tutoris*] comes down to us from the Law of the Twelve Tables.

19. *Gaius Institutes 1.145 (=XII tab 5.1)*:

145. Thus, if by his will a man has appointed a tutor to his son and daughter and both reach puberty, whereas the son ceases to have a tutor, the daughter none the less remains under *tutela*; for it is only by the *ius liberorum* (as mother of several children) that women are freed from *tutela* by the *L. Iulia et Papia Poppaea*. From this statement, however, we except Vestal virgins, whom even the early lawyers out of respect for their priestly office desired to be free from *tutela*; and so again it was provided by the law of the Twelve Tables.

20. *XII tab 5.7b (?unplaced fragment) (CD trans.)*:

But if there is not a *custos* (guardian) for him.[23]

21. *D.27.10.1pr. (=XII tab 5.7c) (Watson trans.)*:

ULPIAN, *Sabinus, book 1*: The Law of the Twelve Tables prevents a prodigal's dealing with his property, and this was originally introduced by custom.

22. *Opinions of Paul (Pauli Sententiae) 3.4a.7 (CD trans.)*:

By custom one is interdicted from his goods by the praetor in this way: 'Since you are dissipating your paternal and ancestral good by your profligacy, and are reducing you children to poverty, for that reason, I ban you from this property [read 'bronze'] and from dealing with it'."[24]

[23] Ast ei custos nec escit. The fragment is derived from the grammarian Festus, the surviving text of whom is notoriously corrupt. Its placement here is plausible, but by no means certain.

[24] Moribus per pretorem bonis interdicitur hoc modo: 'quando tibi bona paterna avitaque nequitia tua disperdis liberosque tuos ad egestatem perducis ob eam rem tibi ea re commericioque interdico'. (CD trans.). For the emendation of *ea re* to *aere*, see Watson, p. 78, with references.