

THE JURISTS—MARRIAGE AND THE FAMILY

I. INTRODUCTION

1. The name of the game in this, our last section of the course, is the relationship between the Roman jurists and Roman society. Our sources are much fuller here than they are in the case of the XII, and as a result we are going to have to study pieces of the puzzle. In the end, we may be able to come up with some tentative generalizations, but they must be tentative. There's too much evidence and not enough work of this kind has been done, although more has been done since I first made that remark 30 years ago.
2. The first topic that we will consider is marriage and family property. We'll spend two classes on this topic because we have five papers on it. In terms of legal categories, we are dealing largely with the law of persons, though the law of succession also plays an important role. We have already seen that the inheritance from the past in this area was substantial. The Roman family was a basic unit from the time of the XII, and although that family was not quite a nuclear family in our sense, it was pretty close. Marriage with and without *manus*, *patria potestas*, adoption (both *adoptio* and *adrogatio*) are givens, as are intestate succession, testaments and dowries, the basic elements in the scheme of family property and succession. We will see that not only were these basic elements well in place, but that at least upper-class Romans were quite familiar with them and manipulated them to achieve their purposes. Whatever other point comes out of an examination of a remarkable inscription known as the *Laudatio Turiae* that one must come out of it.
3. But the world of the classical jurists was hardly the world of Rome of the 5th century BCE. In particular, I would like to call attention to four developments. We lack, of course, a Kinsey report for Rome at any period, so our evidence for this must rely on moralists. Nonetheless, all our moralists report that in comparison with ancient Rome, traditional sexual morality was being flouted. Modern writers in the feminist tradition have put a feminist spin on this and have argued that what was really happening was that women were getting more independent. I'm not sure that we know enough to know whether this true, but we do know that the moralists argued that adultery was becoming a lot more common, and in Roman law adultery was an offense that could be committed only by or with a married woman. In a somewhat different vein the moralists also complain that divorce was becoming far too common. Thirdly, the birthrate among the upper classes was going down. At least some moralists blame this on women too, though not all. The fact, however, has been confirmed by modern studies of funerary inscriptions. (As we have already mentioned, it has been suggested that lead was the cause, but that conclusion is controversial.) Finally, and this, by and large is not a phenomenon that the moralists note, *manus* marriage was on the decline. The first major legal reaction to these phenomena was the Augustan legislation on marriage and the family. We have two papers on this topic, but let's start with the basics. How do you get married in Roman law?

II. THE FORMATION OF MARRIAGE

1. The basics:

D.23.1.1: "FLORENTINUS, *Institutes*, book 3: Espousals are the proposal and promise back of future nuptials."

D.23.2.1: “MODESTINUS, *Rules*, book 1: Marriage is the union of a man and a woman, a partnership for life involving divine as well as human law.”

D.23.1.11: “JULIAN, *Digesta*, book 16: Espousals, like nuptials, are made by the consent of the contracting parties. Hence, as in nuptials, so too in espousals, a daughter in power must consent.”

D.23.2.2: “PAUL, *Edict*, book 35: Marriage cannot take place unless everyone involved consents, that is, those who are being united and those in whose power they are.”

D.35.1.15 = D.50.17.30: “ULPIAN, *On Sabinus*, book 35: Where a legacy is left to a woman on condition “that she marry within the family,” the condition would seem to be fulfilled immediately when she is led (*ducta*) as wife, even though she has not yet gone to her husband’s bedchamber. It is consent, not bedding together, that makes nuptials.”

D.24.1.66: “SCAEVOLA, *Digesta*, book 9: Scia, who was about to marry Sempronius at an arranged date, before being led to his house and signing the dotal tables, gave [him] a certain number of gold pieces. I ask whether this gift is valid.¹ [He, i.e., Scaevola, responded:] The question need not have stated whether the gift was made before she was led to the house or before the time² of the signing of the dotal tables, which frequently happens after the marriage is contracted. Hence, unless the gift was made before the marriage was contracted, which is understood to be by consent, it is not valid.”

2. Consent or consent plus?

D.22.2.5–7

5. POMPONIUS, *Sabinus*, book 4: It is settled that a woman can be married by a man in his absence, either by letter or by messenger, if she is led to his house. But where she is absent, she cannot be married by letter or by messenger because she must be led to her husband’s house, not her own, since the former is, as it were, the domicile of the marriage.

6. ULPIAN, *Sabinus*, book 85: Finally according to Cinna, where a man married a woman in her absence, and on his way back from dinner by the side of the Tiber, he died, it was held that she ought to mourn for him as his wife.

7. PAUL, *Lex Falcidia*, sole book: So it is possible here for a virgin to have a dowry and an action for dowry.

C.5.3.6

The Emperor Aurelian to A. Donata (270 X 274):

Since you say that a simple gift was made to you on the day of your nuptials, and it could be doubted whether it was given to you by your fiancé or you husband, this distinction is to be made: If the gift was received in your house, the gift seems to have been made before the nuptials, but if your fiancé gave it in his house (*penes se*), it can be retracted; you were then his wife.

III. THE LEX JULIA DE ADULTERIIS (?18 B.C.)

Listed below is a palimpsest of the statute derived from numerous sources:

¹ Roman law forbade gifts between husband and wife. See generally D.24.1.

² Transposing, with Mommsen, *tempus*.

No one after this is to commit adultery or *stuprum sciens dolo malo*, covers those who urge as well as those who commit both adultery and *stuprum*.

Allows a father who has given his daughter *in manum* or who has a married daughter *in potestate* to kill the adulterer caught in the act if he also kills the daughter

The husband may kill only the adulterer caught in the act and only adulterers of certain kinds: pimp, actor, dancer, singer, condemned and unrestored criminal, a freedman of any of these or their children or slave; another source adds gladiators.

The husband must divorce his wife immediately after he slays the adulterer and must make a public acknowledgement to him whose jurisdiction it is in.

He may retain the adulterer for 20 hours if he does not wish to kill him.

Very broad powers are given to accusers including having the slaves of the accused tortured.

Penalties stiff, loss of 1/2 of goods, power of testation, loss of dowry, relegation, death (the last not completely clear).

If a man catches (*deprehensum* may not be the same thing as *in flagrante*) his wife in adultery and does not divorce her he is guilty of *lenocinium*, similarly if he does not prosecute the adulterer. He has 60 days to do so, after which a private accuser can charge him with *lenocinium* for not doing so. We do not know what the classical penalties for this were, but we know that *infamia* was one of them.

A man cannot sell dotal land, his wife unwilling.

A women taken in adultery may not look at the games. [This provision is said to be in the *ll. Iuliae et Papia Poppaeae* (see below)].

What is going on in this statute?

An example of juristic writing about this statute (Watson trans. 4.318–319):

D.48.5.2. ULPIAN, *Disputations*, book 8: In the *lex Julia* it is laid down that anyone who has to begin with the male adulterer because the woman has married [again] before the notification [of intended prosecution], cannot arrive at [an action against] the woman unless he has completed [the action against] the man. But no one is regarded as having completed an action unless he has obtained a condemnation. **1.** This rule deservedly bars someone making an accusation by the right of a husband if he is alleged to have betrayed the [intention of the] statute on the grounds that, having begun on an accusation of adultery, he has dropped it. **2.** The crime of *lenocinium* is laid down by the *lex Julia* on adultery, since a penalty is appointed by the statute for the husband who acquires anything from the adultery of his wife and also for him who keeps her after she has been caught in adultery. **3.** But he who permits his wife to offend and despises his marriage and who is not angry at the defilement is not inflicted with the punishment for adultery. **4.** A person who says he [committed adultery] by the *lenocinium* of the husband is indeed seeking to extenuate his offense, but a set-off of this kind is not admitted. And so if a man accused of adultery wishes to have the husband accused of *lenocinium*, he shall not be given a hearing once he has himself been accused. **5.** If in a criminal trial a husband makes an accusation against his wife, should an allegation of *lenocinium* deny the husband his accusation? I would think it does not; the *lenocinium* of a husband therefore hampers him but does not excuse his wife.

6. From this it can be asked whether he who hears a case of adultery can proceed against the husband for *lenocinium*. And I think he can. For Claudius Gorgus, a man of senatorial rank, who accused his wife, was condemned for *lenocinium* by the deified Severus without any accuser when he was discovered to have kept his wife caught in adultery. 7. But a third party who raises [the issue of] *lenocinium* after he has been accused shall in no way alleviate his own case, nor shall he make the husband liable to a penalty.

IV. THE LEGES JULIAE ET PAPIA POPPIAE (18 B.C. and 4 or 9 A.D.)

Listed below is a palingenesis of the topics of the statutes derived from numerous sources:

- all freeborn may marry freedwomen, except senators and their descendants
- senators and their descendants for 3 generations may not marry a freedwoman, an actress or the daughter on either side of one nor may the female descendant of senator for 3 generations marry an actor or the son of one on either side nor may any of these knowingly have such a betrothed or wife. Freeborn cannot marry prostitutes, procuresses, those manumitted by pimps or procuresses, a woman taken in adultery or condemned by public judgment or an actress
- nor may the children of such a marriage be entered into the *albus* (literally a white tablet, on which any thing is inscribed [L&S]; the reference may be to the official list of senators)
- the law does not apply to concubinage
- conditions against marriage and having children are void
- a widow compelled by will to remain such may keep the usufruct of her legacy if she swears an oath to have children
- the consul with more children is first in honors
- for 3 children in Rome, 4 in Italy, 5 in the provinces such persons are excused from being a tutor or curator
- freedmen with 2 children are excused from *operae*
- a freedman or woman is freed from an oath not to marry
- a woman who has an underage tutor is given one by the urban praetor to marry and constitute a dowry
- frees from perpetual tutelage a free woman with 3 and a freedwoman with 4 children
- limits placed on divorce (a vague statement in a literary author—Suetonius)
- husband and wife succeed to each other by a 10th with a 10th for each child and a usufruct of 1/3 the *lex Falcidia* notwithstanding?
- husband and wife can take the whole inheritance between themselves if they are not subject to the rules of the *lex* (under or over age) or if they have the *ius liberorum*
- incapacitates to take an inheritance those who marry contrary to the provisions of the rules

- changes the rules on times for *sponsalia*—some kind of prohibition on extending the time of marriage
- prohibits single persons from taking inheritances; allows those married but w/o children to take only 1/2 of an inheritance
- certain persons excepted
- provisions on the capacity of women
- on time to get remarried
- on dotal slave manumitted by the husband
- *c.35 = D.23.2.19 forbidding marriage: ‘By the 35th chapter of the *lex Julia* those who wrongfully [*iniuria*] prohibit children whom they have in power from taking a wife or being married or who do not wish to give a dowry are compelled according to a constitution of Severus and Antoninus to be compelled by the proconsuls and provincial presidents to place and endow [them] in marriage. “Prohibit” moreover is understood to include those who don’t make a positive effort.’
- provisions on freedmen’s wills, gives the patron the right to take if he has the *ius liberorum*
- on escheat (*caduca*), i.e., forfeiture to the *aerarium* when testamentary gifts forbidden by the statutes are made
- on void legacies (*caduca*), i.e., forfeiture to the *aerarium* when testamentary legacies forbidden by the statutes are made

Figuring out just what was in the laws is not easy. Below is one of the most important sources, titles 13–18 of the Rules of Ulpian, more precisely, Titles from the Body of Ulpian’s Work, a post-classical source that seems to preserve classical rules that are not always found in the Digest. Unfortunately, the work has been edited to take into account changes made by Constantine. Hence, the title of tit. 13 does not correspond to its contents. The translation is by S. P. Scott, revised from FIRA by CD.

TITLE XIII.³

CONCERNING A MAN WHO IS UNMARRIED, ONE WHO HAS NO CHILDREN, AND A FATHER WHO HAS BUT A SINGLE CHILD.

- (1) By the *Lex Julia* Senators, as well as their children, are forbidden to marry their freedwomen or any women when either they themselves, or their fathers or mothers were professional actors.
- (2) The same persons, and others who are freeborn, are forbidden to marry women who were public prostitutes, or procuresses, or any women manumitted by a procurer or a procuress; or one (who) had been taken in adultery or convicted of a crime, or who had belonged to the theatrical profession; and Mauricianus adds a woman who has been convicted by decree of the Senate.

TITLE XIV.

CONCERNING THE PENALTY OF THE LEX JULIA.

³ FIRA cites D.23.2.44.2, 8 in support.

(1) The *Lex Julia* granted exemption from its penalties to women for a year after the death of their husbands, and for six months after a divorce had taken place; the *Lex Papia* granted them two years from the death of their husbands, and a year and six months after a divorce.

TITLE XV.
CONCERNING TENTHS.

(1) Husband and wife may, under a will, take one tenth of the estate of either on account of marriage; but if either of them have surviving children by a previous marriage, he or she may, in addition to the tenth on account of marriage, take as many more tenths as there are children.

(2) Any son or daughter born to both of them, who dies after the day when he or she was named adds another tenth; and two of them dying after the day when they were named add two tenths.

(3) In addition to the tenth, either of the parties can take the usufruct of the third portion of the estate of the other, and when they have children, the ownership of the said portion, as well; and further, the woman, in addition to the tenth, can take her dowry if it is left to her.

TITLE XVI.
CONCERNING THE CAPACITY OF HUSBAND AND WIFE TO RECEIVE IN FULL
WHAT MAY BE LEFT BY THE OTHER.

(1) Sometimes husband and wife can take the entire amount which one leaves to the other; for instance, where both, or either of them are not yet of the age at which the law requires children, that is, where the husband is under twenty-five, or the wife under twenty; and likewise, if both of them have passed the age in marriage prescribed by the *Lex Papia*, that is to say where the husband has reached sixty years, and the wife fifty; and also if they are related to one another as far as the sixth degree.

(1a) They are free to make wills in favor of one another if they have obtained the right of children (*ius liberorum*) from the Emperor; or if the husband is absent on business for the State for a year and afterwards returns; or if they have a son or daughter; or have lost a son fourteen years of age, or a daughter of twelve; or if they have lost two children of three years of age, or three after they have been named; and if a child of any age, under puberty, should be lost within eighteen months, the right will be granted them to take in full all that is left. Again, if the wife should have a child by her deceased husband within ten months after his death, she can take in full whatever he may have left her out of his estate.

(2) Sometimes they take nothing from one another; that is when they have contracted marriage in violation of the *Lex Julia Pappia Poppaea*; for example, where a freeborn man marries a woman of infamous character, or a senator a freedwoman.

(3) Any man who has failed to comply with either provision of the law within his sixtieth year, or a woman within her fiftieth (although, after this age, he or she may be released by the same law), are always liable to the penalties of the Persicium Decree of the Senate.

(4) By the Claudian Decree of the Senate, however, if a man over sixty years of age marries a woman under fifty the result will be the same as if he had married her while under sixty. But, on the other hand, if a woman who is over fifty marries a man under sixty, the marriage is called unequal, and provision is made by the Calpurnian Decree of the Senate, that it shall be of no avail for the purpose of receiving an estate, a legacy, or a dowry. Hence, if the woman dies, the dowry will be without an owner.

TITLE XVII.
CONCERNING LAPSED LEGACIES (*De caducis*).

(1) Anything which is left to a person by a will in such a way that he could take it under the Civil Law, and he, for some reason failed to do so, is called “caducous” (as if it had fallen from his hands) ; for instance, where a legacy is bequeathed to an unmarried man, or to a Junian Latin, and the unmarried man does not comply with the law within a hundred days, or the Latin does not obtain the right of Roman citizenship; or where an heir appointed to a portion of an estate, or a legatee dies, or becomes an alien before the opening of the will.⁴

(2) At present, by a Constitution of the Emperor Antoninus, all lapsed legacies are confiscated to the Treasury; but by the ancient law they were preserved for the descendants and ascendants of the testator.

(3) Legacies lapse with the burdens attaching to them; hence grants of freedom, bequests, and trusts with which the party on whose account the estate became caducous was charged, still remain operative. Both legacies and trusts, however, become caducous along with their burdens.⁵

TITLE XVIII.
WHO ARE GOVERNED BY THE ANCIENT LAW IN THE CASE OF LAPSED LEGACIES.

(1) Moreover, the *Lex Papia* granted the ancient right to the descendants and ascendants of the testator as far as the third degree, so that if they were appointed heirs, what any one of them did not take under the will would belong to the others, either wholly or in part, according to circumstances.⁶

⁴ FIRA cites Tit. Ulp. 28.7, 19.17, 22.3; GI.2.111, 114 in support.

⁵ FIRA cites Tit. Ulp. 1.21 in support.

⁶ FIRA cites Tit. Ulp. 1.21, 25.17 in support.