Potestas manus mancipiumque

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1. Introduction

Gaius begins the first book of his Institutions analyzing the subject of the *personae*. There, he makes two divisions that will assist him in making a schematic analysis on the subject. Firstly, he divides all people into free and slave[1] and then, a bit further, he states that men can be either independent (*sui iuris*) or they can be under the power of another (*alieno iuri subiectae*[2]). On this last division he says that those who are under the power of another person can be under *manus*, *potestas* or *mancipio*:

> Gai.1.49
> *Sed rursus earum personarum, quae alieno iuri subiectae sunt, aliae in potestate, aliae in manu, aliae in mancipio sunt.*

Under the subdivision *potestas* we can find both the *filiifamilias*[3] and the slaves[4], while the other two subdivisions of powers would

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[1] Gai.1.9 *[III. De condicione hominum.] Et quidem summa diuisio de iure personarum haec est, quod omnes homines aut liberi sunt aut serui.*

[2] Gai.1.48 *Sequitur de iure personarum alia diuisio. nam quaedam personae sui iuris sunt, quaedam alieno iuri sunt subiectae.*

[3] Gai.1.55 *Item in potestate nostra sunt liberi nostri, quos iustis nuptiis procreauimus. quod ius proprium ciuium Romanorum est…*

[4] Gai.1.52 *In potestate itaque sunt serui dominorum. quae quidem potestas iuris gentium est: nam apud omnes peraeque gentes animaduertere possumus dominis in seruos uitae necisque potestatem esse, et quodcumque per seruum adquiritur, id domino adquiritur.*

only comprehend the wife that has celebrated a *conventio in manum*[5] and the descendants who have been given by their *paterfamilias in mancipio*[6]. Using this division of the powers of the *paterfamilias*, Gaius will develop his first book on persons. He will come back to this division in his other books on *res* and actions whenever he has to write on matters that are affected by their status[7]. We could say that this classification is fundamental in order to comprehend Gaius' systematic approach. His organization and analysis on the subject is essential for us, because it suggests a scheme that covers not only the power over *personae*, but also over *res*, due to the fact that the *potestas* over slaves is subsumed to *dominium*, while the *potestas* over descendants had undergone a sharp process of dissolution during the late Republic and early Empire. Regarding the position of women that have entered into their husband's *manus*, they are assimilated to the descendants by the use of the expression "*loco filia*" to describe her position[8], while the descendants who have undergone *mancipatio* are in a position similar to the slaves, utilizing the term "*servorum loco*[9]" to describe their position.

Nevertheless, we cannot be completely sure about the moment in which this division was established in Roman law. The works of Gaius belong to the Classical period, so they can only give us a *terminus ante quam* where we can consider it consolidated. Scholars have given much thought to this division, for the reason that through it, one can see the set of powers the *paterfamilias* had over both assets

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[5] Gai.1.108 *<Nunc de his personis uideamus, quae in manu nostra sunt. quod> et ipsum ius proprium ciuium Romanorum est. 1.109 Sed in potestate quidem et masculi et feminae esse solent; in manum autem feminae tantum conueniunt.*

[6] Gai.1.117 *Omnes igitur liberorum personae, siue masculini siue feminini sexus, quae in potestate pa- rentis sunt, mancipari ab hoc eodem modo possunt, quo etiam serui mancipari possunt.*

[7] See: C.F.AMUNÁTEGUI PERELLÓ, *Loco filia*, in Homenajes al Profesor Francisco Samper Polo, Santiago 2007, p.45-66 and C.F.AMUNÁTEGUI PERELLÓ, *Origen de los poderes del paterfamilias*, Madrid 2009, p.341-366.

[8] Gai.1.111.4, Gai.1.114.5, Gai.1.115b2, Gai.1.118.5, Gai.1.118.7, Gai.1.136.10, Gai.2.139.3, Gai.2.159.2, Gai.3.3.2. In the Epitome it is also used in 1.5.2.1. We can also find it, probably product of the influence of Gaius in the late writer Servius: Servius In Georg. 1.31.6 *coemptione vero atque in manum conventione, cum illa in filiae locum, maritus in patris veniebat, ut siquis prior fuisset defunctus, locum hereditatis iustum alteri faceret.*

[9] Gai.1.138 *Ii, qui in causa mancipii sunt, quia seruorum loco habentur, uindicta, censu, testamento manumissi sui iuris fiunt.*

and people. Most scholars that aimed to interpret the powers of the *paterfamilias* found themselves dealing with this division several times. This was especially true for the group of scholars who defended an approach to the powers of the *paterfamilias* that resembled a sort of sovereignty[10]. They attempted to reconstruct the development of the state as a consequence of the powers of the *paterfamilias*. This distinction was also fundamental for other rival theories that were endeavoring to make a similar construction, but starting from property as the basic structure that implied the formation of state[11] instead. This debate turned this simple syntagma into a true battlefield for rival ideologies of the late 19th and early 20th centuries.

To present these theories in an orderly manner, we could start by treating those theories that sustain that the division established by Gaius originally represented – originally meaning at the foundation of Rome- just one power that was known by one of the three names that the jurist gives. Part of the scholars at the beginning of the 20th century thought that in pre-Etruscan Rome the paterfamilias held just one power called *manus*[12]. According to some of them, this power

[10] See: V.ARANGIO-RUIZ, *Le genti e le città*, Messina 1914, followed by P.VOCI, *Esame delle tesi del Bonfante su la famiglia romana arcaica*, in Studi in onore di Arangio-Ruiz, vol.1, Napoli 1953, p.101; M.KASER, *La famiglia romana arcaica* in Conferenze romanistiche, Milano 1960 and G.PUGLIESE, *Aperçu historique de la famille romaine*, in Scritti giuridici scelti vol.3, Napoli 1985, p.11.

[11] See: F.DE VISCHER, *Mancipium et res mancipi,* in SDHI 2 (1936) p.213ff.; P.BONFANTE, *Corso di diritto romano*, *Diritto di famiglia*, Milano 1963, p.7, and from the same author *La gens e la familia* in Scritti giuridici, famiglia e successione Torino 1916; also acceepting partialy the political theory: F.DE MARTINO, *La gens, lo Stato e le classi in Roma antica*, in Studi in onore di Arangio-Ruiz, v.4, Napoli 1953 p.25.

[12] M.VOIGT, *Römisches Rechtgechichte,* Stuttgart 1892, v.1, p.348; P.BONFANTE, *Corso di diritto romano, La proprietà*, Milano 1966, v.2, p.1, p.230; F.LEIFER, *Mancipium und auctoritas*, in ZSS 56 (1936) p.154; M.KASER, *Der römische Eigentumsbegriff*, in Ausgewählte Schriften, Napoli 1976=1962, v.2, p.52; F.J.CASINOS MORA, *La noción romana de auctoritas y la responsabilidad por auctoritas,* Granada 2000, p.77; M.FUENTESECA DEGENEFFE, *La formación romana del concepto de propiedad,* Madrid 2004 p.26-135; G.CORNIL, *Du mancipium au Dominium*, in Festschrift Paul Koschaker zum 60 Geburstag, v.1, Weimar 1939, p.404-443. Nevertheless, this last author takes a somehow different perspective. He thinks that the power over assets and people that are directly involved in the domestic religion (that is to say, the children and wife) is called *manus*, while the power over the more distant participants (*clientes, aedes, fundi, domita animalia*), is called *mancipium*.

could also be called *mancipium*[13]. This power was exercised in an undifferentiated fashion over people and assets. Nevertheless, after the Etruscan[14] influence during the late kingship, or maybe after the emergence of property, the *potestas* would have been introduced as a more individualistic and absolute power, which would eventually generate this tripartition.

Other scholars were skeptical on this possibility[15] and proposed[16] that the syntagma points to the fact that the powers of the *paterfamilias* would have been developed in an analytic way, for there would not be an originally encompassing power that covered every dominion the paterfamilias had, whether that is over assets or people. Therefore, some of the powers of the division (*potestas* and *manus*) would be suitable to describe his position only regarding people, while the third element (*mancipium*) would be linked to the control he exercised over assets[17], which would gradually be substituted by *dominium* when this last concept is developed in the first century BC[18].

All these theories take for granted that the expression *potestas manus mancipioque* reported by Gaius is archaic. This matter was subject of a severe debate during the early '60s[19]. Until then, its age

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[13] F.DE VISSCHER, *Mancipium et res mancipi* (*supra n.11*) p.227; G.DIÓSDI, *Ownership in Ancient and Preclassical Roman Law*, Budapest 1970, p.54; B.ALBANESE *cum nexum faciet mancipiumque*, in Brevi studi di diritto romano, Palermo 1992, p.60; G.PUGLIESE, *Res corporales e res incoporales*, in Scritti giuridici scelti, Napoli 1985, v.3, p.252; F.PACHECO CABALLERO, *Las servidumbres prediales en el Derecho Histórico español,* Lleida 1991, p.20; E.LOZANO CORBI, *Origen de la propiedad romana y de sus limitaciones*, in Estudios de Derecho Romano en Memoria de Beito María Reimundo Yanes, Burgos 2000, v.1 p.573; F.SERRAO, *Diritto privato economia e società nella storia di Roma*, Napoli 2006, v.1, pp.196.

[14] G.CORNIL, *Du mancipium au Dominium* (*supra n.12*) p.413.

[15] A.WATSON, *Rome of the XII Tables,* New Jersey 1975, p.134.

[16] G.FRANCIOSI, *Famiglia e persone in Roma antica,* Torino 1992, p.46.

[17] P.KRETSCHMAR, *Das Nexum und sein Verhältnis zum Mancipium*, in ZSS 29 (1908) p.235.

[18] L.CAPOGROSSI COLOGNESI, *La struttura della proprietà e la formazione dei iura praediorum nell'eta republicana*, Milano 1969, v.I, p.464-465; G.FRANCIOSI, *Famiglia e persone in Roma antica* (*supra n.16*) p.44.

[19] See: F.CASAVOLA, *Lex Cincia. Contributo alla storia delle origini della donazione romana*, Napoli 1960, p.58-60; Ph.MEYLAN, *Origine de la formule "in potestate manu mancipioque"*, in Études à Jean Macqueron, Aix-en-Provence 1970, p.503-513; L.CAPOGROSSI COLOGNESI, *La struttura della proprietà e la formazione dei iura*

was guaranteed by the authority of Mommsen, who included it in the *lex Cincia* (204 BC) and, therefore, took the tripartition right before the emergence of secular jurisprudence and into the traditional knowledge of the *pontifices*. Casavola, in the early '60s defended very persuasively a critical perspective. He showed that the inclusion of the expression in the *lex Cincia* would be an ideological misinterpretation of a manuscript notation of the Fragmenta Vaticana, specifically of *manuscritus vaticanus* 5766, which can be more accurately read as *potestas manus matrimoniove*, rather than *potestas manus mancipiove*, as Mommsen did. Nowadays, specialized literature tends to believe that the syntagma *potestas manus mancipioque* is a creation of the 2nd century jurisprudence and therefore specific to Gaius' vocabulary[20]. This has shed new lights on both the origins of the distinction and the nature of the powers that the *paterfamilias* would have held in the archaic period. We aim to come back to the syntagma *potestas manus mancipioque* and its textual difficulties to then try to solve the problem of the division of the powers of the *paterfamilias* over the different subjects that are dependent on him.

2. Textual problems

The division of the *paterfamilias*' powers into *potestas manus mancipioque* is not only mentioned in the quoted texts of Gaius, but also in the *lex Salpensanum*. It is a statute given during Domitian's reign (circa 81-84 AD) that gives the city of Salpensa the status of *municipium*[21]. It was found in a bronze tablet in 1851 in Malaga. In its chapter XXII one can read[22]:

> *Qui quaeque ex h. l. exve edicto imp(eratoris) Caesaris Aug(usti) Vespasiani, imp(eratoris)ve Titi | Caesaris Aug(usti), aut imp(eratoris) Caesaris Aug(usti) Domitiani p(atris) p(atriae), civitatem*

praediorum nell'eta republicana (*supra n.18*), p.151; M.BRETONE, *La nozione romana di usufrutto*, Napoli 1962, p.22, n.4.

[20] L.CAPOGROSSI COLOGNESI, *La struttura della proprietà e la formazione dei iura praediorum nell'eta republicana (supra n.18)*, p.253; Ph.MEYLAN, *Origine de la formule "in potestate manu mancipioque"* (*supra n.19*), p.513.

[21] Regarding the politics of the Flavian dynasty towards Hispania there is quite a lot of recent literature. See: M.LEMOSSE, *Les affranchis latins*, in TR 62 (1994), pp.309-316; M.J.BRAVO BOSCH, *El largo camino de los hispani hacia la ciudadanía*, Madrid 2008, p.185-230.

[22] P.F.GIRARD et F.SENN, *Les Lois des Romains,* Napoli 1977, p.40-41.

Roman(am) | consecutus consecuta erit : is ea in eius, qui c(ivis) R(omanus) h(ac) l(ege) factus erit, potestate | manu mancipio, cuius esse deberet, si civitate Romana mutatus | mutata non esset, esto idque ius tutoris optandi habeto, quod | haberet, si a cive Romano ortus orta neq(ue) civitate mutatus mu|tata esset.

This disposition simply tries to keep the *status familiae* of those who acquire the Roman citizenship. So, if they were *alieni iure subiectos*, they stay in such position after becoming Roman citizens, a matter which is described analytically as being under[23] *potestate manu mancipio*. Many aspects of the text are interesting, due to the fact that its authenticity cannot be questioned[24]. Firstly, the expression seems to be a stereotyped way to describe the position of those who are under family power[25] by cumulatively mentioning the faculties of the *pater*. Nevertheless, the statute does not use the more synthetic expression *alieno iuris subiectae* that would have implied a rather general theorization on the subordinate position of the family members. This is unsurprising, taking into consideration the conservative nature of Roman legal vocabulary, especially regarding statutes. It would have been too innovative to use such a new technical expression as *alieno iuris subiectae* in a statute. Innovative technical expressions usually appear firstly in the jurisprudence and only later do they permeate into legislation. If we should assume that the expression *potestas manus mancipio* does not come from Republican times and it is a creation of imperial age, then the evident question that arises: What is such an expression doing as a stereotyped sentence in a statute of the 1st century[26]? Meylan[27] tried to

[23] G.FRANCIOSI, *Famiglia e persone in Roma antica* (*supra n.17*), p.46.

[24] Even those who are extremely critic with the authenticity of the expression have to accept its presence in the disposition. See: Ph.MEYLAN, *Origine de la formule "in potestate manu mancipioque"* (*supra n.19*), p.507; L.CAPOGROSSI COLOGNESI, *La struttura della proprietà e la formazione dei iura praediorum nell'eta republicana* (*supra n.18*), p.247; M.BRETONE, *La nozione romana di usufrutto* (*supra n.19*), p.22, n.4.

[25] J.GAUDEMET, *Observations sur la manus*, in RIDA 2 (1953) p.326

[26] In fact, Volterra, arguing for the ancientness of the expression, says that it would be difficult to find any legal value to a formulation different to *potestas manus mancipioque*. Vid: E.VOLTERRA, *Nuove ricerche sulla conventio in manum* in Scritti giuridici v.3, Napoli 1991, (=Lincei-Mem. Scienze morali, 1966- Ser. VIII, Vol. XII) p.28-29.

solve this problem by proposing a different question: If the *patria potestas* and the subordinate status of family members in the agnatic family are particular of the Roman people and of the *ius civile*, as Gaius[28] states, which function could such a clause fulfill in a statute designed to confer citizenship to a city in Hispania? The author proposes a rather risky theory by which the syntagma would point to *potestate matrimoniove* and the expression *manu mancipio* would mean a woman that is married and that has celebrated a *coemptio* with her husband, something that would give her the status of *matrona*. So, the text would intend to keep the status of *matronae* to those women that held it (assuming that *matrona* means woman married to a *sui iuris* who has celebrated *coemptio*) before citizenship has been given to the city. Meylan's theory is not only risky, but also unsatisfactory. It does not only assume one particular meaning of the word *matrona* ,which finds itself under debate[29], but also because if the status of *alieni iuris* is a particularity of Roman law, *manus*, and the ways to enter it are even more exceptional to Roman legal system[30]. We really know nothing about Salpensan law and it is hard to imagine that this city had anything that resembled *manus* among its family institutions. Actually, it is even harder to accept that a woman could enter into this unlikely institution through something similar to *coemptio* and even stranger would be the fact that this Hispanic *coemptio* would or could grant her the title of *matrona*. In few words, Meylan's theory creates more problems than the ones it intends to solve.

The whole point of the disposition is to keep the *status familiae* that the new citizens had in their own traditional law once they entered into the new legal order would be granted to them on behalf of a newly acquired Roman citizenship. It is true that when granting citizenship to distant people whose traditions are very different to Roman customs, it is rather unlikely that there could be any

[27] Ph.MEYLAN, *Origine de la formule "in potestate manu mancipioque"*, (*supra n.19*) p.509.
[28] Gai.1.55.
[29] See: W.KUNKEL, *Mater familias*, in RE 14-2, Stuttgart 1930, p.2183ff. and also R.FIORI, *Materfamilias*, BIDR XXXV-XXXVI (1993-1994) p.455-498.
[30] Gaius states that *manus* is also particular of the Roman people (Gai.1.108), although it is not worthwhile to insist in this point, for Gaius does not intend to do Comparative law when he makes these assertions. He just tries to fit institutions into the *ius civile* or *gentium*.

equivalence or anything in common with Roman family institutions. Nevertheless, if the law was originally given to favor people who were culturally similar to Rome, the disposition would have been quite useful, for there would have been more cases of cultural equivalence.

In this context, the disposition seems to have been designed to solve a very specific problem that took place when people, closely related to Rome and with very similar traditions and family institutions, changed their citizenship and, therefore, needed to have their *status familiae* recognized in the new legal frame that Roman citizenship implied. This would explain the analytic style used in the wording, that would intend to cover all the possible cases that might arise, as when, for instance, the law says "*consecutus consecuta erit*", making a *partitio* to expressly include men and women.

Considering the use of stereotyped forms in Roman legal practice, the *lex Salpensana* does not seem to be an instrument specifically designed for the city of Salpensa, but it is rather likely that it is based on a general disposition which would be in use for most cities that acquired roman citizenship[31]. In fact, it is possible to find equivalents in the dispositions contained in most municipal laws. Even among some of the oldest laws, such as like the *lex Tarentina*[32], taking us back to the Social Wars in the Late Republic. For instance, as the *leges Malacitana* and *Salpensana* are quite close in time and context, it is usual to complete the clauses of one while using the other. On the other hand, the *lex Malacitana* and the *lex Tarentina* also have twin clauses[33], which would indicate that the general form for all municipal laws does not come from imperial times, but from the Republic.

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[31] In fact, D'Ors established that they were all dependant on a general form used by Augustus firstly for all Italian *municipia*. See: A.D'ORS, *Un aviso sobre la "ley municipal", lex rescripta*, in Mainake 23 (2001) p.97-100.

[32] On the matter, although the information we have for the different municipia is quite incomplete, we can find enough equivalences among the different texts to deduce the existence of a common form which would be the model for all of them. See: P.F.GIRARD/F.SENN, *Les Lois des Romains* (*supra n.22*) p.188.

[33] For instance, the clause 4 of the *lex Tarentina* declares: *Nei quis in oppido quod eius municipi e[r]it aedificium detegito neive dem[olito] | neive disturbato, nisei quod non deterius restituturus erit, nisei d[e] s(enatus) s(ententia). | sei quis adversus ea faxit, quant[i] id aedificium f[u]erit, tantam pequni[a]m | municipio dare damnas esto, eiusque pequniae [que]i volet petiti[o] esto. | magi(stratus) quei exegerit dimidium in [p]ublicum referto, dimidium in l[u]deis, quos | publice in eo*

It is likely that the general form for the *leges municipalis* was established while conferring citizenship to the Italians during the Social Wars as a pre-draft legal form to give the status of romanship to an allied city. It was during this period that Rome was forced to draft municipal laws massively in order to confer citizenship to its former allies, who had obtained it by force. The need to design a general instrument that could be used as a base for all municipal laws became a need, as Lamberti recently defended[34]. As these people were closely related to Rome, both culturally and geographically, the inclusion of a clause designed to keep the *status familiae* of the new citizens makes sense and it probably was considered a compelling social need. Although the *manus* and the *patriae potestas* are specific of Roman law, it is likely that somehow similar institutions would have existed among the Latin people that were destined to benefit by the granting of citizenship, or even among people which were ethnically non Latin who might have adopted similar institutions for cultural assimilation with the dominant power of Italy after receiving the status of *latinitas* or even without it, just for cultural influence. In short, the inclusion in the *lex Salpensana* of the formula *potestas manus manicipioque* does not probe that the syntagma, and therefore the tripartition of the powers of the *paterfamilias*, is a creation of imperial times, but, on the contrary, it leads us to the period of the Social Wars. Nevertheless, the distinction could be older, for its inclusion in a legal statute in such a period; the concept should have been elaborated even earlier, in order to permeate into Roman legal technique.

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magistratu facie[t] consumito, seive ad monumentum suom | in publico consumere volet, l[icet]o idque ei s(ine) f(raude) s(ua) facere liceto. While the clause 62 of the *lex Malacitana* says: *Ne quis in oppido municipii Flavii Malacita|ni quaeque ei oppido continentia aedificia | erunt, aedificium detegito destruito demo|liundumve curato, nisi [de] decurionum con|scriptorumve sententia, cum maior pars | eorum adfuerit, quod restitu[tu]rus intra proxi|mum annum non erit. Qui adversus ea fece|rit, is quanti e(a) r(es) e(rit), t(antam) p(ecuniam) municipibus municipi | Flavi Malacitani d(are) d(amnas) e(sto), eiusque pecuniae | deque ea pecunia municipi eius municipii, | qui volet cuique per h(anc) l(egem) licebit, actio petitio || persecutio esto*.

[34] F.LAMBERTI, *Civitas Romana e diritto latino fra tarda repubblica e primo principato*, Index 39 (2010) p.227-235.

Our next document is the very same *lex Cincia* (204 BC). Its text is preserved in a quotation made by Paulus in the Fragmenta Vaticana:

> *298. Paulus libro LXXI ad edictum, ad Cinciam. Personae igitur cognatorum excipiuntur his uerbis : 'siue quis cognatus cognata inter se, dum sobrinus sobrinaue propiusue eo sit, siue quis in alterius potestate manu m[ancipioue] erit, qui eos hac cognatione attinget quorumue is in potestate m[anu mancipio]ue erit, eis omnibus inter se donare capere liceto'.*
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> *300. Item. Excipiuntur et ii, qui in potestate eorum uel manu mancipioue, item quorum in potestate manu mancipioue erunt.*

We have quoted the traditional Mommsen[35] edition, but all the main editions keep this syntagma[36]. On the matter, the quotation has a textual problem that was put forward by Casavola[37] in the '60s. In FV 298, when the text of the *lex Cincia* is quoted an abbreviation is used which reads "*mmniove*" and not *manus mancipiove*. Mommsen thought that the lex Cincia should have defined the people who are under dependence in the same terms used by Paulus in FV 300, that is to say, using the expression "*in potestate manu mancipiove*", although the manuscript Vaticanus 5766 does not say so[38]. In fact, the simplest reading of "*mmniove*" is naturally *matrimoniove*, something that was put forward by Casavola and that has been usually followed by the scholars that have analyzed the matter ever since[39]. The biggest exception is Volterra[40], who directly rejected the possibility of

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[35] See: Th.MOMMSEN, *Collectio librorum iuris anteiustiniani*, Berlin 1890, v.3

[36] See: C.G.BRUNS, *Fontes iuris romani antiqui*, Tübingen 1909: *sive quis cognatus cognata inter se, dum sobrinus sobrinave propiusve eos, et sive quis in alterius potestate manu mancipiove erit, qui eos hac cognatione attinget, quorumve <is> in potestate manu mancipiove erit, eis omnibus inter se donare capere liceto*. As also: M.CRAWFORD, *Ancient Roman Statutes,* London 1996, v.2: *siue quis cognatus cognata inter se, dum sobrinus sobrinaue propiusue eo s<i>t, siue quis in alterius potestate <manu mancipioue> erit qui eos hac cognatione attinget, quorumue in potestate <manu mancipioue> erit, eis omnibus inter se donare capere liceto*.

[37] M.CASAVOLA, *Lex Cincia* (*supra n.19*), p.58-60

[38] For a brief history of the manuscript see: F.BETANCOURT, *El libro anónimo "de interdictis". Codex Vaticanus Latinus 5766*, Sevilla 1997, p.51-521

[39] Ph.MEYLAN, *Origine de la formule "in potestate manu mancipioque"* (*supra n.19*); L.CAPOGROSSI COLOGNESI, *La struttura della proprietà e la formazione dei iura praediorum nell'eta republicana* (*supra n.18*), v.1, p.151; M.BRETONE, *La nozione romana di usufrutto* (*supra n.19*), p.22, n.4.

[40] E.VOLTERRA, *Nuove ricerche sulla conventio in manum* (*supra n.26*).

replacing the traditional lecture of *in potestate manu mancipiove* for *in potestate matrimoniove*. He pointed out that this second lecture seems to have no legal sense and that this last expression cannot be found in any other ancient text, while the traditional tripatition is a popular syntagma very much in use and full of legal sense. He also states that the correction of *mmniove* to *manu mancipiove* is not the product of Mommsen's speculation, but a correction made by Cardinal Angelo Mai himself[41].

It is difficult to take a side in this hard philological discussion. Anyway, there are three matters that should be solved. Firstly, there is the problem of the method used by Mommsen to interpret the notation; secondly, the problem of the Roman legal language and its correspondence with the different lectures of the fragment and finally, the dogmatic meaning that a variation in the traditional interpretation could imply.

On Mommsen's technique, we can agree with Casavola that the most natural reading should be *matrimoniove*, although this should not be exaggerated. If in paragraph 300 -whose reading is not under discussion, which comes from the same book and seems to be the natural continuation of FV 298, for Paulus is referring to the same matter and he is widening the interpretation of the disposition. The jurist states that they are also exempted from such prohibition those who are under the *potestas*, *manus* or *mancipio*, and those people that are under the exception for having been *alieni iuris* and are, therefore, *in potestate manu mancipiove*. This makes very difficult to read in FV 298 something different than the old Mommsenian tripatition. In fact, in FV 300 Paulus is amplifying the scope of FV 298, and to do that he needs to use the very same legal language of the statute. If FV 298 would have said *potestas matrimoniove*, then what has mancipio to do with all of this in FV 300? Why would Paulus have said that the people that are *in potestas manu mancipiove* are also exempted? Paulus' interpretation intends to except the grandson and the daughter in law married under *manus* from the prohibition of the *lex Cincia* to receive donations and, therefore, he says that the disposition of the *lex Cincia* liberates from the prohibition not only the *filiifamilias* and the women married with *manus*, but also those who are under the dependence of those people and, in order to legally define them, he

[41] E.VOLTERRA, *Nuove ricerche sulla conventio in manum* (*supra n.26*), p.28-29.

utilizes the tripartition. If such a syntagma would not be included in the original disposition of the *lex Cincia*, then it would have made no sense to amplify the scope of the norm by using it. FV 300 appears to be an interpretation of the original sense of the disposition, and it would have been incoherent with the jurist's technique to try to interpret it by modifying the wording of the statute. The dogmatic sense of Paulus' interpretation is very clear if we assume that FV298 uses the tripartition, but, if we accept that the norm states *in potestate matrimoniove*, its meaning comes to be very hard to understand. The people that are under *potestas, manus* or *mancipium* do not have a patrimony and everything they acquire becomes property of their *paterfamilas*[42]. Therefore, it seems natural that the *lex Cincia* makes an exception with them regarding the prohibition of receiving donations, because if the *pater* makes a donation to them this does not imply an act of patrimonial consequences. It is, in a way, like taking something out of one pocket to put it in the other. In an analogous situation, we can find the people who are under the *potestas*, *manus* or *mancipium* of these *alieni iuris*, because they are also deprived from patrimony, so if the *pater* (who would now be the grandfather or the father in law) makes a donation to them, it would also lack of any legal consequences, as in the previous case, because all their acts of acquisition enter the *pater*'s patrimony.

On the other hand, if the text of the *lex Cincia* said *potestas matrimoniove*, then an anomalous situation would be created, because the marriage *sine manus* seems to have been something quite common during the time of the *lex Cincia*[43], and, according to this interpretation, a woman married *sine manus* would be also excluded from such prohibition. These donations mean an act of disposition, for they take the donated assets out of the patrimony of the *pater* and

[42] Gai.2.86 *Adquiritur autem nobis non solum per nosmet ipsos, sed etiam per eos, quos in potestate manu mancipioue habemus…*

[43] We can quote many examples of married women who appear to have their own patrimony, and therefore, are not under *manus* well before the *lex Cincia*. For instance: the case of the women who made a contribution to the temple of Apollo after the siege of Vei (395 BC, Liv. A.U.C. 5.25.8,); women's donation to the Gallic rescue during the siege of Rome (390 BC, Liv. 5.50.7) and the fines paid by women who committed adultery in 290 BC (Liv. A.U.C.10.31.9). For a complete analysis of all these cases see: G.HANARD, *Manus et mariage a l'époque archaïque*, in RIDA 36 (1989) p.197-198 and also C.AMUNÁTEGUI PERELLÓ, *Casos de matrimonios sine manu en tiempos arcaicos*, in Revista General de Derecho Romano 10 (2008).

place them into the donee's patrimony. Although it is possible that the *lex Cincia* authorized these acts of disposition, it would have been odd that it had done so by mixing this situation with the case of people under *potestas*, where there would not be any act of disposition, but a mere enlargement of the donee's *peculium*. In few words, *manus* and *potestas* have symmetrical patrimonial effects, so authorizing donations in favor of those who are under *potestas* is analogous to validate it in benefit of those who are under *manus*. On the other hand, marriage, by itself, even by the time of the *lex Cincia*, does not imply similar effects to those of the *potestas*, meaning that these two situations are so different to the point of them hardly being able to come under one same disposition. In this sense, the correction of Vaticanus 5766 in FV298 seems to be the product of Mommsen's and Angelo Mai's mature consideration.

Finally, there is another aspect that has not been taken under account. The expression *in alterius potestate m[atrimonio]ve erit* implies an uncommon linguistic turn in Latin. In fact, the expression *in matrimonio esse*, underlying the text, is extremely unusual. The common thing to do is to combine *in matrimonio* with the verb *habere*[44] to imply marriage, but its combination with the verb "to be" is very rare and it only appears during the last years of the Classical period[45]. If the *lex Cincia* would have used such a combination, it would have been the first to do it in written Latin, something that seems unlikely. If we consider that the expression *potestas manus mancipiove* seems to appear in the Republican legal language, at least in the time of the Social Wars, Casavola's interpretations seems quite improbable and we are forced to accept Mommsen's reading of the fragment that would include the expression *potestas manus mancipiove* in the *lex Cincia*.

[44] See: Cic. *Quinct*. 16.7, *Ver*. 2.2.89.7, *Ver*. 2.3.168.6, *ad Brut*. 14.2.2; D.24.2.10*pr*-1; Liv.34.36.5.3; Cornelius Nepos Vit. pr.1.4.2 y Vit. Di. 1.1.3; Gaius Suetonius Tranquillu V.C. Cal. 7.1.1.; Cornelius Tacitus *Ann*. 12.46.4; Valerius Maximus Mem. 6.2.3.9 and 7.7.3.2.

[45] We can only find the expression "*in matrimonio fuit*" in two fragments: D.24.3.7*.pr*-7 and D.24.3.7.1.3, both belonging to Papinianus, *libro undecimo quaestionum diuortio*, who is a jurist whose Latin has been questioned. We also find "*in matrimonio est*" in D.49.15.12.5.1, which corresponds to the *libro quarto disputationum* of Tryphoninus, a pretty late author.

The immediate consequence that results due to the acceptance of this traditional reading is that the powers of the *paterfamilias* were diversified regarding its object at least from the 204 BC and probably before. The implications of this conclusion are the matter of our next chapter.

3. Different powers

If the traditional reading of the syntagma *potetas manus mancipiove* in the *lex Cincia* is basically correct, then we should accept that by the end of the 3rd century BC there was a set of different powers that the paterfamilias could hold, depending on the person under his dominion. Roman statute's language was even more conservative than that concerning legal science in general and an innovation in such language should correspond to a long evolution in legal vocabulary whose origins should be associated with the jurists. The main problem is that in an early period such as the 3rd century BC, legal science is merely starting to develop and it is still pretty much under the *Collegium Pontificalis*' control. Usually, to establish the origin of an expression we would try to explore social developments in language to detect the appearance of the tripartition, but, due to the time period under analysis, there is no Latin literature available to do such a study, besides some few fragments of the *Lex XII Tabularum* and the casual appearance in latter literature of some of these terms. In a few words, most of what we are about to say has no textual base and, therefore, it is a highly speculative interpretation of the function of the tripartition *potestas manus mancipioque*.

To investigate the meaning of the tripartition, we must firstly analyze if these three terms point to analogous powers and, more specifically, to their scope and limits. Both *manus* and *potestas* seem to clearly point to the personal powers of the *paterfamilias*, as *manus* is the power the husband has over his wife when she has celebrated a *conventio in manum* and *potestas* being the power that a *pater* holds over the *filiifamilias*[46]. However, since the 19th century part of the doctrine has tried to establish a wider meaning for the term *manus*[47],

[46] G.FRANCIOSI, *Famiglia e persone in Roma antica (supra n.17)*, p.44; F.SERRAO, *Diritto privato economia e società nella storia di Roma (supra n.13)*, p.196

[47] M.VOIGT, *Römisches Rechtgechichte* (*supra n.12*), p.348; P.BONFANTE, *Corso di diritto romano, La proprietà* (*supra n.12*), p.230; F.LEIFER, *Mancipium und*

but we do not need to enter this discussion. We must also leave aside, for the time being, the nominal identity –*potestas*- between the power the *pater* exercises over a slave and over his son. We will eventually come back to these questions, but what it is important for us at this stage is that both terms point to a personal power exercised by the *pater*. The debate has focused on the third of these terms, *mancipium*, and the possibility that this word held in the Archaic period a sense linked to a different kind of power. The debate started when De Visscher[48] identified *mancipium* with a power similar to sovereignty, a power to command over things and people. His interpretation excluded that *mancipium* ever meant an act, exclusively identifying its scope with a power. Such a theory was rejected[49], to the point that nowadays some of the scholars deny that *mancipium* ever meant a power in any context during the archaic period[50]. Anyhow, most scholars tend to limit the potestative meaning of *mancipium* to people acquired by the *pater* through *mancipatio*[51].

On the matter, there seems to be many documented examples where the word *mancipium* seems to mean *mancipatio*. In fact, the most ancient name of *mancipatio* seems to have been *mancipium*[52]. On this problem, the most important study belongs to Gallo[53], who

auctoritas (*supra n.12*), p.154; M.KASER, *Der römische Eigentumsbegriff* (*supra n.12*), p.52; F.J.CASINOS MORA, *La noción romana de auctoritas y la responsabilidad por auctoritas* (*supra n.12*), p.77; M.FUENTESECA DEGENEFFE, *La formación romana del concepto de propiedad* (*supra n.12*), p.26-135.

[48] F.DE VISSCHER, *Mancipium et res mancipi* (*supra n.11*), p.286. In the same sense see : F.LEIFER, *Mancipium und auctoritas* (*supra n.12*), p.154

[49] G.DIÓSDI, *Ownership in Ancient and Preclassicaql Roman Law* (*supra n.13*) p.52; P.BONFANTE, *Corso di diritto romano, La proprietà* (*supra n.12*) p.253; M.BRETONE, *La nozione romana di usufrutto (supra n.19)*, p.23; H.LEVY-BRUHL, *Autour de la mancipatio familiae* in Atti del congreso internazionale di diritto romano e di storia del diritto, Verona, 27-28-29-IX-1948, Milano 1948, p.71; F.SERRAO, *Diritto privato economia e società nella storia di Roma* (*supra n.13*), p.196.

[50] L.CAPOGROSSI COLOGNESI, *La struttura della proprietà e la formazione dei iura praediorum nell'eta republicana* (*supra n.18*), p.254.

[51] F.GALLO, *Studi sulla distinzione fra res mancipi e res nec mancipi*, in Rivista di Diritto Romano IV (2004) p.1-121, which is a reedition of *Studi sul transferimento della proprietà in diritto romano*, Torino 1958.

[52] F.GALLO, *Studi sulla distinzione fra res mancipi e res nec mancipi (supra n.51)*, p.47; F.SERRAO, *Diritto privato economia e società nella storia di Roma (supra n.13)*, p.194

[53] F.GALLO, *Studi sulla distinzione fra res mancipi e res nec mancipi (supra n.51)*, p.45-70

makes an exhaustive analysis of the different uses of the words *mancipium* and *mancipatio* in the Institutes of Gaius. He gives a solution to the apparent glossemes that Solazzi[54] found, pointing out that many of the linguistic incoherencies present in the work of Gaius may due to the fact that he replaced the word *mancipium* for *mancipatio* in many key points of his description of the institution. His thesis is very convincing and we follow it in this matter.

Anyhow, the most famous and controversial case where *mancipium* seems to mean an act is the disposition provided in the XIITab.6.1: *cum nexum faciet mancipiumque, uti lingua nuncupassit, ita ius esto*[55]. It is very difficult to argue that the word *mancipium* here means anything but an act, especially due to the fact that here it occupies an analogous position to *nexum*, which we know constitutes a legal operation, as does the verb *faciet* that also rules the case[56]. Scholars have given a lot of thought to the syntagma *nexum mancipiumque* and we can find lots of theories to explain it. Some believe that the two terms would be synonymous or, at the very least, that they were both to generate a very similar state of dependence, something that would justify the fact that they are treated together in a norm of the XII Tables[57]. Others believe that they mean two different acts[58], especially because the *nexi* remain free, while the *mancipii* do not, for they would be under a power, the *mancipium*, of the acquirer. It has been also alleged that Roman citizens are not *res mancipi*, but

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[54] S.SOLAZZI, *Glosse a Gaio*, in Studi in onore a Salvatore Riccobono, Palermo 1936, v.1, p.154.

[55] The text is taken from Festus: *Festus Verb 173.11. Nuncupata pecunia est, ut ait Cincius in lib. II de officio iurisconsulti, nominata, certa, nominibus propriis pronuntiata: "cum nexum faciet mancipiumque, uti lingua nuncupassit, ita ius esto": id est uti nominarit, locutusve erit, ita ius esto*. It seems to be a textual quotation of Cincius, a jurist of the 1st century BC. See: B.ALBANESE, *cum nexum faciet mancipiumque* (*supra n.13*), p.50.

[56] L.CAPOGROSSI COLOGNESI, *La struttura della proprietà e la formazione dei iura praediorum nell'eta republicana* (*supra n.18*), p.305-308. Nevertheless, the possibility that *mancipium* means a power in this specific case has been also put forward: M.SARGENTI, *Per una revisione della nozione dell'auctoritas come effetto della mancipatio*, in Studi in onore di Emilio Betti, Milano 1962, v.4, p.46.

[57] F.SERRAO, *Diritto privato economia e società nella storia di Roma* (*supra n.13*), p.176-184; B.ALBANESE, *Cum nexum faciet mancipiumque* (*supra n.13*), p.94.

[58] See: P.KRETSCHMAR, *Das Nexum und sein Verhältnis zum Mancipium* (*supra n.17*); M.KASER, *Römisches Privatrecht*, München 1971, v.1, p.166 n.5; C.St.TOMULESCU, *Nexum bei Cicero*, IVRA 17 (1966), p.94.

free men, so the norm should point to two different acts, one over *res* – the *mancipium* - and another over *sui iuris* people, the *nexum*. Lastly, it has also been argued that the children of those who are *in mancipio* are not themselves under *mancipium,* although the sons of the *nexi* are under *nexum*[59].

The problem takes us to the relation between *mancipium* and *nexum*, something in which Roman legal literature has been as abundant as it has been inconclusive. Generally speaking, scholars have focused in discussing if either we should identify *nexum* and *mancipatio* as one same act or if we should understand *nexum* as kind of libral act of a somehow different nature. Basically, the two most important theories are the traditional doctrine of Huschke[60], according to which *nexum* is a kind of liberal loan, and the theory of Mitteis[61], who understands it as a sort of "self *mancipatio"*.

The traditional theory assumes that *nexum* is a loan performed *per aes et libram*. *Nexum*, therefore, would be a contract of a public character through which the creditor has an extrajudicial *manus iniectio* over the debtor. This theory has been under severe attack and nowadays has fallen into oblivion. In fact, the *stipulatio* was older than what Huschke believed and now the whole idea of an extrajudicial *manus iniectio* has been abandoned[62].

According to the second theory, *nexum* would be a self *mancipatio* by which the debtor comes under the dependence of the creditor. This theory was incredibly controversial and it created an unusual quantity of debate at the beginning of the 20th century, especially because it stated that the debtor could perform a *mancipatio* of himself and therefore blurred the identification between *mancipatio* and *nexum*[63]. The debate was hard-hitting and different theories were proposed to solve the problem[64]. Although the variety of opinions seemed

[59] To support this theory scholars quote: Val.Max.6.1; Liv.8.28 and Dionisio 6.26. See: C.St.TOMULESCU, *Nexum bei Cicero* (*supra n.58*), p.94.

[60] P.HUSCHKE, *Ueber das Recht des nexum und das alte römische Schuldrecht,* Leipzig 1846, followed by E.I.BEKKER, *Die Aktionen des röm. Privatrechts*, Berlin 1871.

[61] L.MITTEIS, *Ueber das Nexum*, ZSS 22 (1901), p.96ff.

[62] M.KASER, *Mores maiorum und Gewohnheitsrecht,* ZSS 59 (1939), p.39ff.

[63] O.LENEL, *Das Nexum*, ZSS 23 (1902), p 84ff.; P.KRETSCHMAR, *Das Nexum und sein Verhältnis zum Mancipium* (*supra n.17*), p.227ff.

[64] Among the most important we can find: H.PFLÜGER, *Nexum und Mancipium* (Dunker & Humblot, Leipzig) who finally mixes *nexum* and *mancipatio* in one same

enormous, nowadays Mitteis' view seems to be assumed by the majority of scholars, although it has never become truly dominant in this matter.

From this debate we can now assume the most common opinion: that nexum was some kind of libral act[65]. Nevertheless, the exact kind of libral act is unclear and apparently there was dispute even among Republican jurists, as Varro reports:

> *Varr. L. 7.105 In Colace: 'nexum' Manilius scribit, omne quod per libram et aes geritur, in quo sint mancipia. Mucius, quae per aes et libram fiant ut oblige[n]tur, praeter quom mancipio de<n>tur. hoc verius esse ipsum verbum ostendit, de quo qu<a>erit: nam id <a>es[t] quod obligatur per libram neque suum fit, inde nexum dictum.*

In fact, the fragment of text reports a difference of opinion between two Republican jurists on the nature of *nexum*. The eldest one, Manilius, explicitly identifies *nexum* as the genus to which all libral acts belong, while *mancipatio* would be a species within it.

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act (See a critique of his theory: L.MITTEIS, ZSS 29 (1908), p.498ff.); Th.MOMMSEN, *Nexum*, ZSS 23 (1902), p.348ff., who tries an intermediate solution by which *nexum* would be a loan contract that would be latter executed by the *mancipatio* of the debtor; G.PACCHIONI, *Nexum, Impressioni e reminiscenzi*, in Melanges Paul Frédéric Girard, v.2, Aalen 1979, p.319ff. who connects *nexum* and the *ius noxae dandi* proposing a unified theory for both institutions; O.LENEL, *Das Nexum* (*supra n.63*), who equals it to *vadimonium*; J.IMBERT, *Fides et Nexum* in St. in. on. Arangio-Ruiz, Napoli 1953, v.1, p.338, who tries to enlighten an obscure figure as *nexum* with an even darker concept: *fides*. He states that *nexum* is a act libral which leaves the debtor under de *fides* of the creditor; P.FUENTESECA, *Mancipium-mancipatio-dominium* in Labeo 4 (1958/2) p.135-149, who thinks *nexum* is an act of disposition, while *mancipium* would be its subject, a slave. C.St.TOMELESCU, *Nexum bei Cicero* (*supra n.58*) who believes it is a kind of *in iure cessio* of the debtor to the creditor, rebating its libral character, for it would have as its subject a *res nec mancipi*, the *opera* of the debtor; O.BEHRENDS, *La mancipatio nelle XII Tavole*, IVRA XXXIII (1982), p.46ff., who thinks *nexum* would be a way of transferring real estate. R.WESTBROOK, *Restrictions on Alienation in Early Law*, in Peter Birks (editor), New Perspectives in the Roman Law of Property. Essays for Barry Nicholas, Oxford 1989, who believes it would have an analogous nature to other institutions in the Near East where something is sold and pledged at the very same time, being *mancipium* the act of selling and *nexum* of pledging.

[65] On the matter, the references of ancient sources are quite clear: *Fest. Verb. 165.20 Nexum est, ut ait Gallus Aelius, quodcumque per aes et libram geritur: id quod necti dicitur. Quo in genere sunt haec: testamenti factio, nexi datio, nexi liberatio; Cic. De orat. 3.159 Nam si res suum nomen et vocabulum proprium non habet…ut nexum, quod per libram agitur…*

Mucius, on the other hand, prefers to exclude *mancipatio* from *nexum*, for this last one would be a libral act which produces an obligation. Varro supports this last opinion. Just by reading the fragment one can understand that the modern dispute between scholars is present in the very sources of Roman law. Those who see *nexum* as a self *mancipatio* usually give priority to Manilius' opinion, attested in the first part of the fragment[66]. These scholars argue that being Manilius' opinion the oldest one, it should be closer to traditional Archaic law. On the other hand, those who see *nexum* as an obligational act usually prefer Mucius' opinion established in the second part of the fragment[67]. These scholars argue that only through historical evolution the opinion that identifies *nexum* with *mancipatio* would have emerged[68]. We have few hopes to truly determine if originally *nexum* was only an obligational act or if it was also a self *mancipatio*, for, as we can observe, not even the Romans could agree on it. Anyway, the idea of identifying *nexum* and *mancipatio* is also present in Gaius' works[69]. For the time being, we can simply conclude that probably *nexum* was a liberal act, with a very present and very certain degree of relation to *mancipatio*.

Another important aspect to be considered is that, following Westbrook's theory, the expression *nexum mancipiumque* is cumulative[70], not alternative, as scholars usually assume. We will come back to this matter, but for the moment we would just like to note that if we read *nexum* and *mancipium* as cumulative expressions, then it is mandatory that both acts are performed in order to fulfill the antecedent of the disposition in order to pass on to the norm's consequence, meaning, *uti lingua nuncupassit, ita ius esto*. From a superficial analysis of the disposition we should conclude that it is not enough just to do a *nexum* or a *mancipium* (=*mancipatio*) for the *nuncupationes* to have full strength: it is mandatory to enact both. Independent from the fact that pontifical or secular jurisprudence latter in history built form this norm a certain contractual freedom that

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[66] See: L.MITTEIS, *Ueber das Nexum* (*supra n.61*), p.100ff., as also O.BEHRENDS, *La mancipatio nelle XII Tavole* (*supra n.64*), p.80ff.
[67] See: Th.MOMMSEN, *Nexum* (*supra n.64*), p.348ff.
[68] See: C.St.TOMELESCU, *Nexum bei Cicero* (*supra n.58*) p.103ff.
[69] Gai.2.27 *aliter enim ueteri lingua a<ctus uocatur, et quod illis nexus, idem nobis est> mancipa<tio>*.
[70] R.WESTBROOK, *Restrictions on Alienation in Early Law* (*supra n.64*), p.209 .

allowed *mancipatio* to become a flexible and adaptable act, in its origin, the antecedent of the disposition demands the occurrence of both acts, the *nexum* and the *mancipium*, for its evident consequence to operate. This leads us to the conclusion that these should have been two different acts, although we need to discuss their nature.

We know *nexum* originally was some kind of loan, in the same way that the primitive *mancipatio* was a real sale, but the social consequences that *nexum* had for the debtor led to its prohibition through the *lex Poetelia Papiria* in 326 BC. This prevented any kind of evolution in the institution, while the *mancipatio* had the freedom to evolve into a whole set of different acts.

As we have seen, it is under discussion if *nexum* was originally performed as a libral act to which, in case of breach, should follow a real *mancipatio*[71], an *in iure cessio*[72] or some other similar act[73], or if it was a self-*mancipatio* that left the debtor under the power of the creditor[74]. Before entering into this discussion, we should observe the condition in which *nexum* left the debtor.

One of the most certain aspects of *nexum* is that the debtor should work under some kind of serfdom for the creditor:

> *Varr. L. 7.105 liber qui suas operas in servitutem pro pecunia quam debebat, dum solveret, nexus vocatur, ut ab aere obaeratus. hoc C. Poetelio Libone Visolo dictatore sublatum ne fieret, et omnes qui bonam copiam iurarunt, ne essent nexi, dissoluti.*

The debtor was in a position comparable to that of a slave until his debt was paid. Nevertheless, he is not properly a slave, only in the position of one, something that is proven not only in the word *liber* used by Varro, but in the fact that in other texts his *ingeniutas* is explicitly attested[75]. The debtor under *nexum* kept his citizenship and

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[71] Th.MOMMSEN, *Nexum* (*supra n.64*), p.348ff.
[72] C.St.TOMELESCU, *Nexum bei Cicero* (*supra n.58*), p.39ff.
[73] The idea of an extrajudicial *manus iniecto* is nowadays disregarded, especially after the critic of Mitteis and Kaser. See: M.KASER, *Mores maiorum* (*supra n.62*), p.39ff. Anyhow, in the vocabulary of the sources there seems to be some kind of voluntary surrender of the debtor to the creditor (See: C.ST.Tomelescu, *Nexum bei Cicero (supra n.58)*, p.57ff. and also Th.MOMMSEN, *Nexum* (*supra n.64*), p.348ff.) to avoid the *manus iniectio*, that might have been carried out in through a *mancipatio*.
[74] L.MITTEIS, *Ueber das Nexum* (*supra n.61*), p.100ff. and G.PACCHIONI, *Nexum, Impressioni e reminiscenzi* (*supra n.64*), p.319ff.
[75] Liv.8.28.

could be recruited in the army[76], so in the public sphere he was still a citizen and his condition was not affected by the *nexum*. On the other hand, the creditor was not allowed to abuse the *nexus*[77]. The procedure to liberate a *nexus* was probably the *nexi liberatio* mentioned by Festus[78]. This was probably regulated in the *nuncupationes* that were performed together with the *nexum* and his liberation was probably mandatory for the creditor.

This seems to fit well with what little we know of the *filii in mancipio*, one of the most important consequences of being *in mancipio*, and what differences their situation from real slaves, is that one can state that their civil rights and military obligations remain untouched[79]. As a consequence, the *filii in mancipio* cannot be ill-treated by their acquirer[80] - so, *a fortiori*, the acquirer has no *vitae necisque potestas* over them – and they can force the acquirer to liberate them through census[81]. All these particularities are common between the *nexus* and the *filii in mancipio*, except for the procedure to force their liberation[82]. This has led scholars to exclude the *nexi*

[76] See Liv.2.24 and 2.27 on the problem of recruiting the *nexi*.

[77] In fact, the abuses committed by the creditors are a constant complaint of the plebs. The plebs sees them as a manifestation of the illegalities performed by the patricians. See: Liv.2.27 with the interpretation of A.WATSON, *Rome of the XII Tables* (*supra n.15*), p.112ff. We can also quote on the matter Valerius Maximus (6.1), who reports an episode where the consuls intervene against a creditor who wants to abuse his *nexus*.

[78] Verb. 165.23, from Aelius Galus Iur. 9.4.

[79]Gai.1.162: *Minima est capitis diminutio, cum et ciuitas et libertas retinetur, sed status hominis conmutatur; quod accidit in his, qui adoptantur, item in his, quae coemptionem faciunt, et in his, qui mancipio dantur quique ex mancipatione manumittuntur; adeo quidem, ut quotiens quisque mancipetur aut manumittatur, totiens capite diminuatur*.

[80]Gai.1.141: *In summa admonendi sumus aduersus eos, quos in mancipio habemus, nihil nobis contumeliose facere licere; alioquin iniuriarum tenebimur. ac ne diu quidem in eo iure detinentur homines, sed plerumque hoc fit dicis gratia uno momento; nisi scilicet ex noxali causa mancipantur*.

[81]Gai.1.140: *Quin etiam inuito quoque eo, cuius in mancipio sunt, censu libertatem consequi possunt, excepto eo, quem pater ea lege mancipio dedit, ut sibi remancipetur; nam quodam modo tunc pater potestatem propriam reseruare sibi uidetur eo ipso, quod mancipio recipit. ac ne is quidem dicitur inuito eo, cuius in mancipio est, censu libertatem consequi, quem pater ex noxali causa mancipio dedit, ueluti quod furti eius nomine damnatus est et eum mancipio actori dedit: nam hunc actor pro pecunia habet*.

[82] On the matter see C.F.AMUNÁTEGUI PERELLÓ, *Orígenes de los poderes del paterfamilias* (*supra n.7*), p.115.

from the condition of real slaves and to differentiate their personal situation from those who have experienced *manus iniecto*. Scholars debate if the condition of the *nexi* is equal to the *filii in mancipio*, where a group is for their assimilation[83] , while others find themselves against it[84].

Anyway, there are some important arguments that are against the assimilation of the *nexi* to the *filii in mancipio*. The most relevant are the following: (1) the theoretical problems that a self *mancipatio* might imply; (2) the problem of whether one can apply the concept of *capitis diminutio* to the *nexus* and (3) the second part of the varronian text where it expressly makes a distinction between the *nexus* and those *quam mancipio dentur*, where *filii in mancipio* should find itself. Nevertheless, none of these arguments seem to be unbeatable. On the first argument, we can neither affirm nor refute the existence of self *mancipationes* in Roman law. The problem has never been solved and the *coemptio* is a clear example of the doubts this possibility has arisen[85]. On the problem of *capitis diminutio*, this

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[83] Among the first, the most extreme vision belongs to Th.MOMMSEN, *Nexum* (*supra n.64*), p.348ff., who assimilates both groups in every situation. Other scholars limit this similarity just to the *filii in mancipio* and the *filii* under *nexum*. Among them see: A.MARCHI, *Storia e concetto dell'obbligazione romana*, Torino 1912, p.60ff. and also A.WATSON, *Rome of the XII Tables* (*supra n.15*), p.117ff. There is also a third opinion that states that the *nexi* are under a *mancipatio fiduciaria*. The main problem of this last theory is that implies a very early date for *negotia fiduciaria*. See: S.SCHLOSSMANN, *Nexum. Nachträgliches zum Altrömisches Schuldrecht,* Leipzig 1904, p.1ff.

[84] See: C.St.TOMELESCU, *Nexum bei Cicero* (*supra n.58*) p.84ff., P.KRETSCHMAR, *Das Nexum und sein Verhältnis zum Mancipium* (*supra n.17*), p.245ff., G.PACCHIONI, *Nexum, Impressioni e reminiscenzi* (*supra n.64*), p.323ff.

[85] Rossbach, as a consequence of his theory that explains *coemptio* as a reminiscence of a primitive kind of marriage by the sale of the bride (A.ROSSBACH, *Untersuchungen über die römische Ehe*, Stuttgart 1853, p.77ff, followed on this by O.LENEL, *Das Nexum*, (*supra n.63*), p.84, n.1), believes that either the *pater* or the *tutores* would receive the *aes* and undertake the position of *mancipio dans* in the *coemptio*. On the contrary, Karlowa (O.KARLOWA, *Römische Rechtsgeschichte*, Leipzig 1885, v.II, p.159) believes that the woman should receive the *aes*, because she performs the *coemptio*, while the *pater* or the *tutores* would simply approve the ceremony. The basic question in the matter is who performs as the *mancipio dans* in the *coemptio*? The matter might be too subtle and scholars tend to leave it aside (See: P.E.CORBETT, *Roman Marriage*, Oxford 1930, p.80ff.; P.BONFANTE, *Corso di diritto romano, Diritto di famiglia,* Milano 1963, p.65; A.WATSON, *Rome of the XII Tables* (*supra n.15*), p.15ff.; S.TREGGIARI, *Roman Marriage,* New York 1991, p.25ff.).

institution is a creation of late Republican jurisprudence, that is to say, about 270 years after the enactment of the XII Tables, so we should not try to apply its consequences and possible influence to such an early institution. On the varronian fragment, we should remember that in its first part, where the opinion of the oldest jurist is quoted, it expressly includes *mancipatio* (and therefore the *filii in mancipio*) into *nexum*.

To summarize, we have two important aspects we should consider in other to answer the riddle of the syntagma *nexum mancipiumque*. Firstly, we should assume that *nexum* and *mancipium* are two different acts, for the *lex XII Tabularum* uses a cumulative expression which implies the performance of both, *nexum* and *mancipium*, for the consequence of the legal disposition to operate fully (*uti lingua…*). Secondly, the *nexi* seem to also be *servorum loco*, as the *filii in mancipio*. So, as an evident consequence, they are under the dependence of the creditor to whom the owe *opera*, however, keeping their citizenship and military obligations remain untouched.

Our final step will be to compare the norm with another disposition of the XII Tables which seems to be closely related, but has been generally neglected by scholars. The disposition is *Tabula* I, paragraph 5, which in Girard's version states[86]:

NEX[I MANCIPIIQUE – –] FOR<C>TI SANATI[SQUE – – IUS ESTO]

The norm is intriguing, not only for its incomplete conservation, but also for the express reference not to the acts –*nexum* and *mancipium*- but to the people, the *nexi* and the *mancipii*. The fragments from where the disposition – especially Festus - has been taken are very incomplete, something that makes its reconstruction quite debatable. Other editors give different versions of the norm. Both Bruns[87] and Riccobono[88] read only:

NEX . . . FORTI SANATI . . .

While Crawford[89] gives a slightly longer version:

nex[us (?) ---] for<c>ti sanatiq[ue ---]

[86] P.F.GIRARD/F.SENN, *Les lois des Romains* (*supra n.22*), p.22.
[87] C.G.BRUNS, *Fontes iuris Romani antiqui* (*supra n.36*), v.I, p.15-40
[88] S.RICCOBONO, *Fontes iuris Romani antejustiniani*, Firenze 1941, v.I, p.21-75.
[89] M.CRAWFORD, *Roman Statutes* (*supra n.36*), v.II, p.555-721, n.40

Huschke[90] gives a longer version:

NEX[I MANCIPIIQUE CUM P.R. IDEM] FORTI SANATI[QUE SUPRA INFRAQUE ROMAN IUS ESTO]

This last version is obviously the boldest one and has the merit of filling all the blanks. Anyway, it has been generally discarded because it requires, to some degree, to accept the author's perspective on *nexum*.

Scholars have not paid much attention to the norm[91], probably because its content is discussable and the sources where it has been taken from are very mutilated. The disposition is mentioned in the following fragments:

Fest. 321 <Sanates quasi sana> ti appellat<i> . . . Sulpicius . . . et Opillus <Aurelius> . . . dici inferio . . . ut Tiburtes . . . populo Tibur<ti> . . . Tiburti, idem . . . <infe> riorisque loci . . . in XII: "Nex <i> . . . forti sanatid . . . id est bonor<um> . . . qui et inf . . . que sunt; . . . <pris> cos Latinos . . . egerit secundum . . . <in> fra Romam in e . . . eosque sanati . . . praeter opinion . . . set sanavisse<t>q<ue> . . . cisci potuisset no . . . Cincius lib. II de <officio iuriscon-> sulti. Ne Valerius <quidem Messala> in XII explanatio<ne> . . . men in eo libro, quem . . . volute inscribi, forc . . . duas gentis finitimas . . . . . <l>egem hanc scrip<tam> . . . n ut id ius man<cipii nexique quod populu>s Romanus haberent. . . . <fo>rctos et sana<tes> . . . <sig>nificare exis- . . . atu. Multi sunt, . . . acuit displi <c> . . . ut. sant forcti . . . <s>anati insani.

Fest. 348 Sanates dicti sunt, qui supra infraque Romam habitaverunt. Quod nomen his fuit, quia cum defecisse<n>t a Romanis, brevi post redierunt in amicitiam, quasi sanata mente. Itaque in XII cautum est, ut idem iuris esset Sanatibus quod Forctibus, id est bonis, et qui numquam defecerant a populo Romano.

Gellius NA 16.10.6-8 Petimus igitur, ne annalem nunc Q. Ennii, sed duodecim tabulas legi arbitrere et, quid sit in ea lege "proletarius ciuis,"

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[90] P.E.HUSCHKE, *Über das Recht des Nexum und das alte römische Schuldrecht* (*supra n.60*), p.255.

[91] We can only mention two scholars that have commented this disposition. On one hand, there is A.ROSENBERG, *Zur Geschichte des Latinenbundes*, in Hermes 54/2 (1919), p.113-173. He, in page 127, incidentally mentions the norm, relating the *forti* and *sanates* with some *pagi*. The second reference is J.ELMORE, *Recovery of Legal competency in the XII Tables*, in Classical Philology 20-1 (1925), p.62-64. He, in a very short article, gives some light on the problem. We will come back to this article.

interpretere.' 'Ego uero' inquit ille 'dicere atque interpretari hoc deberem, si ius Faunorum et Aboriginum didicissem. Sed enim cum "proletarii" et "adsidui" et "sanates" et "uades" et "subuades" et "uiginti quinque asses" et "taliones" furtorumque quaestio "cum lance et licio" euanuerint omnisque illa duodecim tabularum antiquitas nisi in legis actionibus centumuiralium causarum lege Aebutia lata consopita sit, studium scientiamque ego praestare debeo iuris et legum uocumque earum, quibus utimur.'

Although it is true that Girard quotes a few more texts, these only reinforce his supposition that the disposition contains the words *nexi mancipiique*, something that is currently under debate. Firstly there is the syntagma *forti sanatique*. Its meaning was obscure even for the Romans. Festus 348 reports a strange legend regarding some communities that would have defected the Romans and then latter would have re-entered into Roman alliance. Then, they would have recovered their old rights, as if they would have temporarily lost their minds to recover it latter, acquiring, in consequence, the statute of "*sanati*". As *sanati*, they would keep the same position as the "*fortes*", those who never abandoned the Roman alliance. We really cannot tell how much truth the legend contains, but the norm seems to match the situation of those who have lost their mind, but recover it later, thanks to those who have always kept their minds. In fact, in the terribly mutilated Festus 322 it can be read a contraposition between the first opinion and a *praeter opinion* that would belong to Cincius, a Republican jurist, that seems to think that the *sanati* are exclusively those who have recovered their mental health. Although the details of the legend might be confusing and somewhat misleading, the disposition seems to point to those who have suffered some kind of health problem, probably mental[92]. In fact, the only case where we find the word *sanatum* used in a legal context is to mean someone's physical recovery, a use which is present in the *lex Aquilia*[93]. In a different context, when treating liability for latent defects (*vitia redhibitoria*), Pomponius defines the *sanatos*:

[92] This is the interpretation given by J.ELMORE, *Recovery of Legal competency in the XII Tables* (*supra n.91*), p.62-64.
[93] See: D.9.2.45.1 *[Paulus libro decimo ad Sabinum.] Lege Aquilia agi potest et sanato uulnerato seruo.*

D.21.1.16 *Pomponius libro uicesimo tertio ad Sabinum.*

Quod ita sanatum est, ut in pristinum statum restitueretur, perinde habendum est, quasi numquam morbosum esset.

The context of the disposition is the existence of *vita redhibitoria* when selling slaves while discussing a disposition of the edict of the ediles curules which, quite significantly, calls the slaves "*mancipia*":

D.21.1.1.1 *[Ulpianus libro primo ad edictum aedilium curulium]*

Aiunt aediles: 'Qui mancipia uendunt certiores faciant emptores, quid morbi uitiiue cuique sit, quis fugitiuus erroue sit noxaue solutus non sit: eademque omnia, cum ea mancipia uenibunt, palam recte pronuntianto. quodsi mancipium aduersus ea uenisset, siue aduersus quod dictum promissumue fuerit cum ueniret, fuisset, quod eius praestari oportere dicetur: emptori omnibusque ad quos ea res pertinet iudicium dabimus, ut id mancipium redhibeatur. si quid autem post uenditionem traditionemque deterius emptoris opera familiae procuratorisue eius factum erit, siue quid ex eo post uenditionem natum adquisitum fuerit, et si quid aliud in uenditione ei accesserit, siue quid ex ea re fructus peruenerit ad emptorem, ut ea omnia restituat. item si quas accessiones ipse praestiterit, ut recipiat. item si quod mancipium capitalem fraudem admiserit, mortis consciscendae sibi causa quid fecerit, inue harenam depugnandi causa ad bestias intromissus fuerit, ea omnia in uenditione pronuntianto: ex his enim causis iudicium dabimus. hoc amplius si quis aduersus ea sciens dolo malo uendidisse dicetur, iudicium dabimus'.

In conclusion, the word *sanatum* is used both in legal literature and legislative language with the meaning "to recover from a mental disease". Therefore, considering the possible presence of the word in the *lex Aquilia*, a statute made only 150 years after the XII Tables, we can establish that this is its probable meaning in the XII Tables. The syntagma *fortes sanatique* seems to also match the meaning given earlier: that of sane people (*fortes*) with those who suffered a mental disease and afterwards recovered from it. This is quite remarkable if we relate it with the other syntagma under discussion, *nexi mancipiique*. Apparently, the word *nexi* is out of question, although the inclusion of *mancipiique* immediately after does not seem to be crystal clear. Nevertheless, in Festus 321, although it is certainly mutilated, an express reference to *mancipii* is made and its reconstruction seems accurate. The Festus fragment declares "*Nex <i> . . . forti sanatid"* while commenting a disposition of the XII Tables where some characters of the literal quotation are missing, and

then he comments the *ius man<cipii nexique quod populu>s Romanus haberent* to explain the decemviral disposition. Although part of the Festus text is a reconstruction, the inclusion of the word *mancipiique* in the first part should be accepted, due to the fact that it is present in the second. If the literal quotation would only include the *nexi*, then it would have no sense to speak of the *nexi mancipiique* in connection to the *fortes sanatique*, present in the latter part of the text. To restrict the norm to just the three remaining words of the literal quotation, as Crawford, Burns and Riccobono do, is unnecessarily timid.

Now, after accepting the presence of the syntagma *nexi mancipiique* in the disposition, what can one conclude from it? The possibility that the norm regulated the case of *nexi mancipiique* who have been mentally ill and have recovered their sanity, in a similar way as in the *vitia redhibitoria*, where also the word *sanatum* was used to describe the situation is likely. The problem described would be: what happens if someone that has performed a *nexum* and a *mancipatio* acquiring the *servorum loco* when he found himself under the condition of a *forti sanatique*? Possibly, if he had recovered his mental health by the time he performed the *nexum* and the *mancipium*, then the consequence of the disposition would be activated – *ita ius esto* – and, therefore, the act would be validated.

From our point of view, what finds itself to be most important about this disposition is that, just like XIITab.6.1, it confirms the need to make two separate acts, the *nexum* and the *mancipium*, in order to have the consequence take place. Therefore, the *nexi* fall in a state of dependence only when, as a consequence of the *nexum*, a *mancipatio* is performed by which the debtor enters into the power of the acquirer. This brings us back to the old theory of Huschke and Mommsen, for we believe that *nexum* would be a kind of libral loan that would provide the debtor the possibility of avoiding the creditor's *manus iniectio* through a *mancipatio* that would place the debtor *servorum loco*. This would explain both dispositions of the XII Tables, for XIITab.6.1 would give legal force to the *nuncupationes* – probably referring to time and conditions of serfdom- made between creditor and debtor at the moment of performing the *nexum* and the *mancipium*, while the second disposition - XIITab.1.5 - would regulate the people that can validly celebrate both acts.

It is very interesting that the syntagma *nexi mancipiique* is used to mean the people who are *servorum loco* of the acquirer, while in 6.1 *nexum mancipiumque* indicates the acts. In none of these cases, the *lex XII Tabularum* uses the word *mancipium* in the sense of power, neither to mean property nor some kind of personal relation of submission. This is relevant, given that a large number of scholars defend that *mancipium* would be equivalent to property in archaic legal vocabulary[94]. Nevertheless, Capogrossi[95] made a detailed study of the uses of the word *mancipium* in Republican and Early Imperial times and concludes that this equivalence between property and *mancipium* is very marginal and concerns some specific literary texts that appear only in Imperial times[96], while all the other earlier texts where *mancipium* was interpreted as related to property, could and should be read in a different sense, whether meaning slaves[97], the person *in mancipio*[98] or the act of *mancipatio*[99]. In fact, the whole idea that *mancipium* meant property in Archaic times involves the problem of excluding from it the legal control that the *paterfamilias* has over the *res nec mancipi*. This last problem is important, for neither *mancipium* nor *meum esse* are identical to *dominium*[100]. Scholars that identify *mancipium* and *dominium*, usually say the *res nec mancipi* would be come under *possessio*[101]. The equivalence between *dominium* and *mancipium* becomes rather strained. It is not only due to the fact that we lack any sort textual evidence –neither legal nor literary- to sustain it, but it also creates too many asymmetries in the system of legal control of goods in Early Rome. Too many assets of

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[94] See: P.BONFANTE, *Corso di diritto romano, La proprietà* (*supra n.12*), p.205; F.SERRAO, *Diritto privato economia e società nella storia di Roma* (*supra n.13*), p.58; M.KASER, *Geteiltes Eigentum im ältesteren römisches Recht* (*supra n.12*), p.80; F.GENNARO, *Res mancipi e res nec mancipi,* Labeo 5 (1959/3), p.380; B.ALBANESE, *Cum nexum faciet mancipiumque* (*supra n.13*), p.94.

[95] L.CAPOGROSSI COLOGNESI, *La struttura della proprietà e la formazione dei iura praediorum nell'eta republicana* (*supra n.18*), p.305-348.

[96] See: Ovid. *Ex Pont*, 4.5.40; Sen. *de ben*. 5.19.1 and *ad lucil*. 74.17; Tab. Herc. 65.

[97] Cic *ad fam*. 7.29.1

[98] Cic *ad brut*. 1.16.4

[99] Varr l.l. 5.163; Varr. L.l. 6.74; Cic. de off 3.67; Cic. *De orat*. 1.173 and *De orat*. 1.178; Cic *ad fam*. 7.30.2

[100] G.DIÓSDI, *Ownership in Ancient and Preclassical Roman Law* (*supra n.13*), p.58-60.

[101] See: G.FRANCIOSI, *Res mancipi e res nec mancipi*, Labeo 5 (1959/3), p.380.

considerable economic value would remain legally unprotected, such us jewels, *instrumenti fundi*, amours, town houses and swords, among others. These scholars have never been able to explain how *actiones reales* eventually came to protect *res nec mancipi*, and if theoretically they were not in the *mancipium*/property of the claimant. We have already discussed elsewhere this problem, discarded the theory and proposed that the distinction roots its origins in the gentile control of certain productive assets[102]. If *mancipium* would have somehow meant property, then it is simply inexplicable why slaves fell into the *potestas* of the *paterfamilias* and not into his *mancipium*. On the matter Gaius is very clear[103] and, although Gaius writes in the Classical period and he is very far from the conceptions of Archaic law, still one would have to explain how it is that the sons and the slaves acquired such a similar position and why did the XII Tables did not use the word *mancipium* to describe the slaves and in which moment, after the decemviral code, would the word *potestas* replaced *mancipium*.

The word *mancipium*, in one of its meanings, slave, is rather common in literary language[104]. Gallo believes that this would be the original sense of the word and that the concept of *res mancipi* would develop from it. Nevertheless, as Franciosi asserts, this is rather difficult, for the origins of slavery in Rome are under discussion[105] and yet to be determined. As we have discussed elsewhere[106], scholars agree that slavery was not an institution that belonged to the primitive Roman legal order[107]. It seems that slavery was not necessary for the

[102] See C.F.AMUNÁTEGUI PERELLÓ, *Origen y función de la mancipatio*, Revista de Estudios Histórico-Jurídicos 33 (2011) p.37-63.

[103] Gai.1.52 *In potestate itaque sunt serui dominorum. quae quidem potestas iuris gentium est: nam apud omnes peraeque gentes animaduertere possumus dominis in seruos uitae necisque potestatem esse, et quodcumque per seruum adquiritur, id domino adquiritur*.

[104] Some scholars even think that *dominium ex iure quiritium* would have been originally conceived only in regard to slaves. See: P.FUENTESECA, *Mancipium-mancipatio-dominium* (*supra n.64*), p.143.

[105] G.FRANCIOSI, *Res mancipi e res nec mancipi,* Labeo 5 (1959/3), p.374.

[106] See, C.F.AMUNÁTEGUI PERELLÓ, *Origen y función de la mancipatio* (supra n.102) p.37-63.

[107] G.FRANCIOSI, *Res mancipi e res nec mancipi* (*supra n.105*), p.375; F.DE MARTINO, *Clienti e condizioni materiali in Roma arcaica*, in Diritto economia e società nel mondo romano, Napoli 1997, v.III, p.82-83; F.DE MARTINO, *Intorno*

gens to get dependent labor to apply to its production processes. Such a function seems to be fulfilled by the *clienti*, who had, among their most ancient obligations, the duty to give *opera*[108], that is to say, to work in benefit of the *gens*. On the other hand, the possibility that a Roman citizen might fall into slavery seems quite rare in Archaic law. As a matter of fact, in the procedure of *manus iniecto* this was possible only if, as a consequence of it, the debtor was sold at the other side of the Tiber[109]. Although by the time of the XII Tables, the *fur manifestus* could eventually become a slave through the magistrate's *addictio*[110]. We believe that this norm survived the historical system of noxality[111]. Through it, the offender is delivered to the victim in other to allow private revenge for the offenses committed. Although in practice this could lead to slavery, this does not seem to be a general method to acquire subordinate labor. It is more of an archaistic element in roman penal system that was kept only for the severest cases.

The main source of slaves seems to be war, especially from the Etruscan kingship onwards[112]. It is during Tarquinus Priscus' government that the sources attest the first massive enslavement of war prisoners[113]. There is also a connection between the word *servus*

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all'origine della schiavitù a Roma, in Diritto economia e società nel mondo romano, Napoli 1997, v.III, p.27-57.

[108] F.DE MARTINO, *Clienti e condizioni materiali* (*supra n.107*), p.82-83.

[109] Aulus Gellius 20.1.47 *Erat autem ius interea paciscendi ac, nisi pacti forent, habebantur in uinculis dies sexaginta. Inter eos dies trinis nundinis continuis ad praetorem in comitium producebantur, quantaeque pecuniae iudicati essent, praedicabatur. Tertiis autem nundinis capite poenas dabant aut trans Tiberim peregre uenum ibant.*

[110] Gai.3.189 *Poena manifesti furti ex lege xii tabularum capitalis erat. nam liber uerberatus addicebatur ei, cui furtum fecerat; utrum autem seruus efficeretur ex addictione an adiudicati loco constitueretur, ueteres quaerebant.* See: F.SERRAO, *Diritto privato economia e società nella storia di Roma (supra n.13)*, v.1 p.204.

[111] F.DE VISSCHER, *Le régime romain de la noxalité,* Bruxelles 1947, p.33 and also F.DE VISSCHER, *Il sistema romano della nossalità*, in IVRA XI (1960), p.9.

[112] Nevertheless, De Martino denies any truth to such events and delays the emergence of slavery until the mid 4th century BC. This seems unlikely for the institution is specifically treated in the XII Tables. See: F.DE MARTINO, *Intorno all'origine della schiavitù a Roma* (*supra n.107*), p.27-57.

[113] Dion. Hal. 3.49-50; 6.19-20. G.FRANCIOSI, *Famiglia e persone in Roma antica* (*supra n.17*), p.208; F.SERRAO, *Diritto privato economia e società nella storia di Roma* (*supra n.13*), p.205.

and the Etruscan word *serve*[114], although it is not clear whether or not they have the same meaning[115].

With the rise of the city-state during the government of the Tarquin kings, economic and social conditions that implied slavery developed. Production escapes from gentile clans when the privatization of land allows a first accumulation of productive capital in individual hands. The recently developed political organization took a central role in production and transformed itself into a resource allocator through an important policy of public construction. The presence of artisans and merchants, who develop their economic activities independently from the *gentes*, finds itself increased to the point that a whole neighborhood only for them is developed, called the Etruscan district[116]. These new producers do not have –as the *gentes* did- a guaranteed subordinate labor supply to develop their own production processes. It is then that slavery –imported from Etruria- emerges as a way to apply the abundant prisoners of war to labor. The adoption of an Etruscan word to name such serfdom makes it very explicit regarding the origin of the institution and the time when it was developed in Rome's economic history. In legal vocabulary, the XII Tables always uses the word *servus* to designate slaves. For instance, in the extensively commented XIITab.8.3 on *iniuria* it says:

> *MANU FUSTIVE SI OS FREGIT LIBERO, CCC, SI SERVO, CL POENAM SUBITO*[117].

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[114] E.BENVENISTE, *Le nom de l'esclave à Rome*, in REL 10 (1932) p.429ff.; F.DE VISSCHER, *Mancipium et res mancipi* (*supra n.11*), p.246.

[115] It is very unlikely that the word *serve* intended to translate the primitive Latin word *mancipium*, as sometimes has been pointed out. See: L.CAPOGROSSI COLOGNESI, *La struttura della proprietà e la formazione dei iura praediorum nell'eta republicana* (*supra n.18*), p.236; F.DE MARTINO, *Intorno all'origine della schiavitù a Roma* (*supra n.107*), p.30.

[116] Varro L.L. 5.46

[117] The fragment comes from Paul., *Coll*., 2.5.5 ; Gai.3.223 ; Gell.20.1.32. It appears in this place and with this text in most of the main editions. This particular version is taken from C.G.BRUNS, *Fontes iuris Romani antiqui* (*supra n.36*), I, p.15-40. On the matter S.RICCOBONO, *Fontes iuris Romani antejustiniani* (*supra n.88*), p.21-75 reads: *Iniuriarum actio aut legitima est –. Legitima ex lege XII Tab. : 'qui iniuriam alteri facit, V et XX sestertiorum poenam subito', quae lex generalis fuit : fuerunt et speciales, velut illa : 'manu fustive si os fregit libero, CCC, (si) servo, CL poenam subit sestertiorum'***;** P.F.GIRARD/F.SENN, *Les lois des Romains* (*supra n.22*), p.22-73 give: *INIURIARUM ACTIO - aut legitima est aut honoraria. Legitima ex lege XII*

The same is valid regarding XIITab.8.14:

Ex ceteris – manifestis furibus liberos verberari addicique iusserunt (Xviri) ei, cui furtum factum esset – ; servos – verberibus affici et e saxo praecipitari ; sed pueros impuberes praetoris arbitratu verberari voluerunt noxiamque – sarciri[118]

And also in XIITab.10.6a:

Haec praeterea sunt in legibus – : 'servilis unctura tollitur omnisque circumpotatio'. – : 'Ne sumptuosa respersio, ne longae coronae, ne acerrae'[119]

Tab. : 'qui iniuriam alteri facit, V et XX sesterciorum poenam subit<o>. Quae lex generalis fuit ; fuerunt et speciales velut illa : — ' MANU FUSTIVE SI <<MANIFEST>>OS FREGIT <COLLISITUE> LIBERO CCC, (SI) SERVO, CL POENA<<M>> <SUNTO> SUBIT<<O>> SE[S]TERTIORUM. Finally, M.CRAWFORD in *Roman Statutes* (*supra n.36*), p.555-721, n.40 introduces a small change in the position of the norm and puts it in T.1.14, although its text is substantially the same: *si os fregit libero, CCC, <si> seruo, CL poena<e> su<n>to*

[118] Although the text might not be a literal quotation. Our source is, again, C.G.BRUNS, *Fontes iuris Romani antiqui* (*supra n.36*), p.15-40. There is no variation in the text offered by S.RICCOBONO, *Fontes iuris Romani antejustiniani* (*supra n.88*), v.I, p.21-75. Nevertheless P.F.GIRARD/F.SENN, *Les lois des Romains* (*supra n.22*), p.22-73 take it as a textual quotation, especially to the word "servos": *— EX CETERIS — autem — MANIFESTIS FURIBUS LIBEROS VERBERARI ADDICIQUE — iusserunt (sc. Xviri) — EI CUI FURTUM FACTUM EST, SI MODO ID LUCI FECISSENT NEQUE SE TELO DEFENDISSENT ; SERVOS — item — FURTI MANIFESTI PRENSOS VERBERIBUS ADFICI ET E SAXO PRAECIPITARI ; — sed — PUEROS IMPUBERES — praetoris — ARBITRATU VERBERARI — voluerunt — NOXIAMQUE AB HIS FACTAM SARCIRI*; M.CRAWFORD, *Roman Statutes* (*supra n.36*), v.II, p.555-721, n.40, also believes that "*servos*" is part of a literal quotation and moves the norm to T.1.19: *<<<si furtum manifestum est, ni pacit, uerberato>>> transque dato. <<<si seruus, uerberato deque saxo deicito. si impubes, uerberato noxiamque sarcito.>>>*

[119] C.G.BRUNS, *Fontes iuris Romani antiqui* (*supra n.36*), v. I, p.15-40. On the matter, S.RICCOBONO, *Fontes iuris Romani antejustiniani* (*supra n.88*), v.I, p.21-75 reads: *Haec praeterea sunt in legibus : [de unctura quae] : 'servilis unctura tollitur omnisque circumpotatio'. – 'Ne sumptuosa respersio, ne longae coronae, ne acerrae praetereantur'*; P.F.GIRARD/F.SENN, *Les lois des Romains* (*supra n.22*), p.22-73 take the text as a literal quotation, specially the word "*servilis*": *Haec praeterea sunt in legibus de unctura ... — SERVILIS UNCTURA TOLLITUR OMNISQUE CIRCUMPO<<R>>TATIO — ; quae et recte tolluntur neque tollerentur nisi fuissent — NE<C> SUMPTUOSA <VINI> RESPERSIO <SIT> ...* Finally M.CRAWFORD, *Roman Statutes* (*supra n.36*), v.II, p.555-721, n.40 gives a slightly different version: *<homini mortuo murratam potionem ne indato.> (*prohibición de *«* circumpotatio. *») <rogum ??? uino ne plus respargito.>*

And in XIITab.12.2a:

SI SERVUS FURTUM FAXIT NOXIAMVE NO[X]IT[120]

As we can see, the XII Tables are very consistent in calling the slave *servus*, especially considering the literal quotations we have. However, we cannot quote one disposition of the decemviral code that calls the slave *mancipium*. If *mancipium* was a noun that originally meant slave, it would be expected to find the word used in this sense at least once in the XII Tables, but this does not occur. So the following question arises: How can one explain a relatively frequent and early use of the word *mancipium* as meaning slave in literary works? We will propose a hypothesis consistent with the data that we have collected so far.

Before the Etruscan kingship Rome was a group of clans of a tribal character which kept control of their own territory. These clans are known to us with the word *gentes*[121]. These clans had different strategies to recruit subordinate labor, among which we can find the *mancipium*. This would be a libral act through which a free man or his descendants could be acquired in order to give their *opera* to the *gens*. The use of *mancipatio* for such acquirement has sense, considering

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[120] Sic in C.G.BRUNS, *Fontes iuris Romani antiqui* (*supra n.36*), v.I, p.15-40, and also S.RICCOBONO, *Fontes iuris Romani antejustiniani* (*supra n.88*), v.I, p.21-75. P.F.GIRARD/F.SENN, *Les lois des Romains* (*supra n.22*), p.22-73 give two different dispositions that would both contain the word *servos*: XIITab.12.2a: *Celsus tamen differentiam facit inter legem Aquiliam et legem XII tab. Nam in lege antiqua, si servus — SCIENTO DOMINO — furtum fecit vel aliam noxam commissit — SERVI NOMINE ACTIO EST NOXALIS — nec dominus non suo nomine tenetur. at in lege Aquilia, inquit, dominus suo nomine tenetur, non serui. Utriusque legis reddit rationem, duodecim tabularum, quasi voluerit servos dominis in hac re non obtemperare. Aquiliae, quasi ignoverit servo, qui domino parvit, periturus si non fecisset. Sed si placeat, quod Iulianus scribit — 'SI SERVUS FURTUM FAX<<S>>IT NOXIAMVE NO[X]<<V>>IT, etiam ad posteriores leges pertinere, poterit dici, etiam servi nomine cum domino agi posse noxali iudicio (Ulp., 8 ad ed., D., 9, 4, 2, 1)*. And XIITab.12.2b: – *EX MALEFICIIS FILIORUM FAMILIAS SERVORUMQUE ... NOXALES ACTIONES PRODITAE SUNT, UT LICERET PATRI DOMINOVE AUT LITIS AESTIMATIONEM SUFFERE, AUT NOXAE DEDERE...* Finally M.CRAWFORD, *Roman Statutes* (*supra n.36*), v.II, p.555-721, n.40: *si seruus furtum faxit noxiamue no<x>it, <<<noxiae datus esto.>>>* The sources of the disposition are: Ulp., 8 *ad ed*., D.9.4.2.1 ; Fest., *Noxia* ; D.47.6.5; D.50.16.283.3; *Paul. Sent*., 2.31.7

[121] This has been extensively discussed by scholars. For an extended explanation of our position on the matter see: C.F.AMUNÁTEGUI PERELLÓ, *Roma, confederación de gentes*, in Studi in onore di Antonino Metro, Milano 2009, p.11-23.

that primitive *mancipatio* probably was used to obtain the *gens*' common assets – as already Bonfante[122] putted forward and we recently defended[123]. Therefore, in the same way that things acquired through *mancipatio* (or *mancipium* in earlier vocabulary) came to be known as *res mancipi*, the free labor under the *gens*' control came also to be known as *mancipii*, for they too were acquired through *mancipium* (=*mancipatio*). In this sense, *liber in causa mancipi* would not mean a free man in the condition of a slave, but a free man acquired through *mancipium*, as already Franciosi speculated[124]. With the arrival of Etruscan kings and the latter division and privatization of the productive assets once controlled by the *gentes*[125], the slave, a new type of reified worker, was introduced in Roman world. He is even designated with a different word, *servus*, of Etruscan origin, which would distinguish him from the *mancipii*, who kept their citizenship and military obligations.

The *potestas* was the power exercised over the *servus*. Its primary characteristic was that it provided its holder with the power to give and take away life, which *patres* had over their descendants[126]. Therefore, in the formula of the *adrogatio* – an ancient survival of archaic legal system – the expression *vitae necique* is used to mean the position that the adopted son acquired, as a synonym of *patria potestas*:

> Cic., *De domo sua*, 77.10.
> *tamen te esse interrogatum auctorne esses, ut in te P. Fonteius vitae necisque potestatem haberet, ut in filio*

> Gell., 5.19.9
> *Eius rogationis uerba haec sunt: 'Velitis, iubeatis, uti L. Valerius L. Titio tam iure legeque filius siet, quam si ex eo patre matreque familias*

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[122] P.BONFANTE, *Corso di diritto romano, La proprietà* (*supra n.12*), p.253.
[123] See: C.F.AMUNÁTEGUI PERELLÓ, *Origen y función de la mancipatio* (supra n.102), p.37-63.
[124] G.FRANCIOSI, *Famiglia e persone in Roma antica* (*supra n.17*), p.52.
[125] Regarding land, see with detail: C.F.AMUNÁTEGUI PERELLÓ, *The Collective ownership and heredium*, RIDA 57 (2010) p.53-74. On *res mancipi* in general, see: C.F.AMUNÁTEGUI PERELLÓ, *Origen y función de la mancipatio* (supra n.102), p.37-63
[126] According to latter texts, the leges regiae expressly provided this faculty: Coll.4.8.1 *Cum patri lex regia dederit in filium vitae necisque potestatem*... This idea also appears in Dionisius of Halicarnassus: *Ant. Rom.* 2.26.

eius natus esset, utique ei uitae necisque in eum potestas siet, uti patri endo filio est. Haec ita, uti dixi, ita uos, Quirites, rogo.[1]

When the *patria potestas* is acquired over someone, the *vitae necisque potestas* is consubstantial to this *potestas*. Who is *adrogatus*, by definition, is also under the *vitae necisque potestas* of his new father, which symbolizes his new position as a son. *Potestas* is *ius vitae necisque* and it is not a coincidence that *imperium*, another absolute power of Etruscan origins that implies the *vitae necisque*, at least outside the city, was also assimilated to *potestas*. The slave came to be under the *potestas* of his master for the absolute character which provided its holder the *vitae necique potestas*, while in older ways he acquired labor through *mancipatio,* remained a different status – method that was still in use during several centuries. During the time of the XII Tables the difference between the *mancipii* and the *servi* was still sharp, and lexically the uses of the words *mancipii* and *servi* in the remaining dispositions of the decemviral text is cogent with two very different institutions. In the XII Tables the situation of the *mancipii* is regulated by stressing the value of the *nuncupationes* made during the *mancipatio* - and possibly this was the original sense of XIITab.1.5 and XIITab.6.1, as has been argued before- and by limiting the number of times the father could sell his son.

Finally, the *mancipium* as a mechanism to acquire labor decays, as a consequence of both the *lex Poetelia Papiria* and the massive expansion of slavery in Roman economy during the expansion of Rome through Italy. In fact, the *mancipatio* of the descendants is its only expression which survives after the *lex Poetelia Papiria*, probably for the creative uses the pontifical jurisprudence elaborated around it, but not as an effective way to acquire and control labor. It is in this period that the slaves came to be known colloquially as *mancipia*, for they were also labor under submission, once the real *mancipii*, the free men that work for their acquirer after being subject to a *mancipatio*, ceased to exist in Roman economy. Somehow, it is the *servi* who are *loco mancipiorum* and not the other way around, as appears in the later sources, for the free men that gave their *opera* correspond to an earlier economical situation than that of the slaves.

In consequence, the tripartition of *potestas manus mancipioque* should belong to a very early stage in Roman legal thought. On one hand, it probably belonged to a period where slavery had penetrated

into Roman economy, but *mancipium* was still an effective way to acquire labor. Maybe the most suitable period is the first century of the Republic, a time in which the productive conditions are still cogent with both institutions. We believe the syntagma should have emerged probably immediately after the XII Tables, as a consequence of pontifical interpretation of the powers of the *paterfamilias* that, by then, were clearly different one from the other.