CHAPTER TWENTY-ONE

NOXAE DEDITIO

1. Gai., 4.79: TEXT AND CONTROVERSY

Cum autem filius familias ex noxali causa mancipio datur, diversae scho-
lae auctores putant ter eum mancipio dari debere, quia lege XII tabu-
larum cautum sit, <ne aliter filius de potestate patris> exeat, quam si ter
fuerit mancipatus; Sabinus et Cassius ceterique nostrae scholae auctores
sufficere unam mancipationem crediderunt, et illas tres legis XII tabu-
larum ad voluntarias mancipationes pertinere.

Now, when a filius familias is given in mancipium on account of an
actio noxalis, the authorities of the other school think that he must be
given in mancipium three times, because the Law of the Twelve Tables
provides that a son passes out of his father’s potestas only if he has been
mancipated three times. Sabinus and Cassius and the other authori-
ties of our school believed that a single mancipatio suffices and that
the three laid down in the Law of the Twelve Tables apply to voluntary
mancipationes.

Just like the text discussed in the previous chapter (Gai., 4.78) this
text is included in the part about actiones noxales (Gai., 4.75–81). If a
person in potestate or a slave committed an offence, the injured party
could bring an actio noxalis against the offender’s pater familias or
against his master, respectively. This kind of action left the defendant
the option to either pay the damage as if he had committed the delict
himself or to surrender the offender to the injured party. Such a sur-
render was called noxae deditio.

This text concerns the noxae deditio of a filius familias and discusses
the way in which it had to be carried out. According to Gaius (4.79),
the surrender of a son took place by way of a mancipatio.1 However, the

1 See also Gai., 1.140–141. Mancipatio did not only serve to transfer property of
res mancipi; it also served to transfer power over persons. If a person in potestate was
mancipated by his father, he passed into the mancipium of the receiver. This situation,
which is called ‘in mancipio esse’, strongly resembled slavery (Gai., 1.123: ‘servorum
loco’). Nonetheless, the person in mancipio maintained his status of free citizen and
could, therefore, have legitimate children. The subjection of a person in mancipio was
lifelong, unless it was ended by a manumissio (vindicta, censu, or testamento) or by
opinions differed on the number of mancipationes that were required. The following legal question gave rise to a controversy between the Sabinians and the Proculians:2 ‘If a father intended to surrender his son to the injured party on account of an actio noxalis, did a single mancipatio suffice or was he compelled to mancipate his son three times?’ Whereas the Proculians (‘diversae scholae auctores’) insisted on a triple mancipatio, the Sabinians (‘Sabinus et Cassius ceterique nostrae scholae’) required only one. It is remarkable that, in this text, Gaius first discussed the opinion of the Proculians whereas, thus far, he had mentioned the opinion of his own school first.3

Gaius mentioned both the argument in support of the Proculian view and that in support of the Sabinian view. The Proculians required a triple mancipatio for the noxae deditio of a filius familias, because it was stated in the Law of the Twelve Tables that a son only left the paternal potestas if he had been mancipated three times (Gai., 4.79: ‘Quia lege XII tabularum cautum sit, <ne aliter filius de potestate patris> exeat, quam si ter fuerit mancipatus’). It must be taken into account that part of the Proculian argumentation is lacking in the original text of Gaius and that it has been completed in the text edition.4 The rule from the

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3 Only in one other case, i.e., Gai., 3.133, he first mentioned the opinion of the Proculians and then that of the Sabinians.

4 According to G. Studemund, Gaii Institutionum. Commentariae Quattuor, Osnabrück 1874 (repr. 1965), p. 218, the words ‘ne aliter filius de potestate patris’ were not included in the manuscript. As a consequence, the text, as written down by Gaius, is grammatically incorrect. It may be assumed that Gaius made a mistake here.