SI PATER FILIUM TER VENUM DUIT

by

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There have been some divergences of opinion on the background and purpose of XII T.4,2b (taken from Gaius 1,132; Ulp. 10,1): SI PATER FILIUM TER VENUM DUIT FILIUS A PATRE LIBER ESTO. A dominant opinion envisages a background of ordinary sale, and a desire to restrict this practice. These scholars see as immediate purpose of the rule the „Bestrafung des hartherzigen und habgierigen Vaters, der seinen Sohn dreimal zu Geld macht” 1). Some earlier authors see — against the same background of sale — a different purpose altogether: in view of the importance of the son (as distinguished from the daughter and the grandson) within the family, the decemvirs are supposed to have enacted the rule in 4,2b as a „besondere Begünstigung für den bedrängten Vater, der zum Verkauf sogar seines Sohnes schreiten mußte” 2). As far as I can see, this approach has found no adherents in recent times, and I have no wish to resurrect it 3). Both views agree on two points: the background is one of sale, and the conveyances mentioned are separate and genuine.

On both items the dominant opinion has been the subject of detailed criticism by H. Lévy-Bruhl: in his view the immediate background of XII T.4,2b is not sale, generally, but conveyance for the sake of noxae deditio. Also, the triple mancipatio is to be viewed not as the sum total, the cumulation of three separate

*) The following remarks on XII T.4.2b arose out of conversations with Dr. A. M. Rabello, working on his Ph. D. thesis, on Effetti personali della patria potestas. While not wishing to anticipate his results, I considered it desirable to deal with a few points, especially such as arise from a comparison with non-Roman, Oriental sources. These are outside the sphere of Rabello’s investigation.

2) C. G. Bergman, Beiträge zum römischen Adoptionsrecht, 1912, p. 128. Bergman quotes others who have expressed the same opinion.
3) See also the negative remarks of Kaser, ZSS 67 (1950), p. 478.
occurrences, but as one act, designed as such by the decemvirs 4).
It is the aim of this brief paper to examine the objections raised by Lévy-Bruhl, as well as his assertions. This examination, it may be said at once, will lead us to reject his approach, and to reassert the dominant view, — though not without significant change, concerning the immediate aim of the legislator.

Lévy-Bruhl sets out in a fashion not open to objection. The only explanation, he asserts, „qui soit acceptable est celui qui prend les mots dans leur sens le plus naturel. La règle viserait donc une aliénation, non fictive, mais véritable ... C'est sur le terrain de la vente que se plaçaient les décemvirs ... dans les XII Tables, la règle visait non pas l'émancipation, mais la vente du fils de famille” 5). The difficulty is in establishing the purpose which the father wishes to achieve by means of the triple sale. Lévy-Bruhl examines the transfer into another family group (i.e. adoption) as a possible purpose of the transaction, but comes to negative conclusions; in these we concur.

Next, Lévy-Bruhl states the dominant opinion and embarks at once on his criticism of it. If it was the purpose of the decemviral rule to combat a malpractice, this implies necessarily that prior to the Tables the power of alienation was not restricted, and conveyance of the son, however often repeated, would not lead to the destruction of patria potestas. This is an implication I am ready to accept. But, objects Lévy-Bruhl, there is at least one type of sale („une hypothèse de vente”) — and that the one most frequent in archaic times — regarding which it is inexact: this is noxae deditio, since it has „pour fonction de désolidariser

4) Nouvelles études sur le très ancien droit romain, 1947, pp. 80—94. His views were endorsed and developed by Kaser, ZSS cit., pp. 474—483. See both also for detailed references to earlier authors. See further Lévy-Bruhl's remarks in Fest-schrift Lewald, 1953, pp. 93ff. Support for Lévy-Bruhl and Kaser came also from Th. Mayer-Maly, ZSS 75 (1958), p. 120.


5) Pp. 81—82. But one might remark, (a) that the literal meaning of the passage is straightforward and will not cause any difficulty; (b) that Lévy-Bruhl's application of it is by no means „le plus naturel".