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A NEAR-KIN WITHIN THE KIN

A COMPARATIVE STUDY

BY

C. W. WESTRUP

København
i kommission hos Ejnar Munksgaard
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AN INNER GROUP OF CLOSE AKINS WITHIN THE KIN (GENS)

The Hindu *sapiṇḍa*-family, the Greek ἀγχιστεῖς —and the Roman *adgnati*?

I.

1. In early law among the various Aryan-speaking peoples is no doubt to be found an inner group of blood-relations, comprising several generations closely bound together by common rights and duties, a definitely limited *Near-Kin* within the Kin (*gens*), obvious remains of a smaller group of kindred quondam living in one patriarchal household (*domus*, οἶκος) under the same *patria potestas*, a "Large Family", the so-called "*Joint Undivided Family*".[1] In the matter of inheritance ab intestato we meet with plain relics of such a Near-Kin.

At Gortyna, in the customary order of succession, according to the famous Code discovered in 1884, the third generation gave a definite limitation of the right of inheritance within the different classes of heirs. The Code, not comtemplating a Will, declares *in terminis* that on the death of a man his property (κρήματα) passes to his children if he has any, his grandchildren, or his great-grandchildren.[2] In default of direct descendants to the third degree the deceased was succeeded by his brothers, his brother's children or his brother's grandchildren, the ὁμόκαποι, as the Attic ὀργεῶνες ("cult-fellows"?) were called in Crete.[3] If the brother's stock failed, then the sisters, their children, or their grand-

[1] See my *Introduction to Early Roman Law*. The Patriarchal Joint Family. Vol. II, Part I *The House Community*, Section 2 Community of Property (1934) 5 ff. Recently Francesco de Martino, *Storia della Costituzione Romana* I (1951) 124 ff.

[2] *The Gortyna Laws*, Col. V l. 9 sqq. M. Cl. Gertz, *Nord. Tidskrift f. Filol.* Ny Rk. IX (1889-90) p. 16 f. Edit. R. Dareste, *La loi de Gortyne* (1886) l. 26. F. Bücheler u. E. Zitelmann, *Das Recht von Gortyn, Rhein. Mus.* XL, Erg. H. (1885).

[3] Col. V l. 13 sqq. Epimenides in Aristotle, *Politika* I 1,6: ὁμόκαποι, the members of the same ὄικος, i.e. those "that eat at the same table (κάπη "crib")". Liddell and Scott, *Greek-English Lexicon*, Oxford 1945. Comp. ὁμοσίπυοι. Charondas in Aristotle *l. c.* Or those "that share of the same plot of land (κῆπος, Doric κᾶπος)".—ὀργεών perhaps from ὄργια "worship". (Liddell and Scott).

children succeeded.[1] In default of direct descendants and of ὁμόκαποι, the deceased was succeeded by οἷς κ'ἐπιβάλλει ὁπῶ κ'εἶ "the proper persons (the nearest kinsman) whosoever" ("les ayants-droit quels qu'ils soient").[2] The Code does not say who were denoted by "the proper persons". The Code, however, obviously refers to an old Custom so firmly fixed at Gortyna that it was unnecessary to use any more precise expression in the Code.[3] Therefore it is not too unreasonable to suppose that the Gortyna Code on the failure of descendants to the third degree and of ὁμόκαποι, like the so-called Code of Manu and the Attic Solonic Law, as we shall see, according to the probably original common Greek Custom, called upon the descendants of the deceased's grandfather to the third degree to inherit, that is the deceased's father's brothers, his father's brother's sons (first cousins), and his father's brother's grandsons (cousin's sons), the ὁμογάλακτες.[4]

The same limitation of the right of inheritance to the third degree within the different classes of heirs, as well in the direct line as in collateral lines is no doubt found in Attic law of succession in the fourth century B.C. It is, however, generally assumed that the direct descent of the deceased,[5] and possibly also the first collateral line, i.e. the deceased's brothers and their descent, the ὀργεῶνες, succeeded *ad infinitum*.[6] But this statement is by no means sufficiently proved or only made probable by a simple reference to the texts of Isaios quoted. In early Greek law, too, and this is essential, the duty of carrying on the family cult followed the same relationship as the right of inheritance, but, as we shall see, it was merely the ancestors to the third degree,

[1] Col. V l. 17 sqq.

[2] Col. V l. 22 sqq. Dareste p. 22 f. Dareste &c., *Inscr. jurid. grecques I* (1891) 369, cf. 463[1]. Hans Kreller, *Erbrechtl. Untersuchungen* (1919) 171[16]: "welchen es zukommt, von woher das Vermögen stammt". Cf. 139 f.

[3] F. B. Jevons, "Kin and Custom", *Journal of Philology* XVI (1888) 93.

[4] Cf. Arist. *Polit.* I 1,7 speaking of the κώμη. They were called ὁμογάλακτες, because the joint libation at the tomb of the ancestors was milk (Jevons), whereas the similar Hindu group was called *Samanodacas*, because their libation was water (*udaka*). See, however, Liddell and Scott: "persons suckled with the same milk".

[5] Caillemer, *Le droit de succession légitime à Athènes* (1879) 10 ff. L. Beauchet, *Hist. du droit privé de la république athénienne* III (1897) 447 ff. I. H. Lipsius, *Attisches Recht* (1915) 541. Thus already Gans, *Das Erbrecht in weltgechichtl. Entwicklung* I (1824) 351 f. See, however, Jevons 91 following Bunsen, *De iure hereditario Athen.* (Gött. 1813) 17.

[6] Lipsius 553. Cf. Beauchet III 503.

the τριτοπάτορες, who were ritually worshipped.[1] Consequently a man only succeeded his father, his grandfather, and his great-grandfather, in other words a man was succeeded by his descendants to the third degree inclusive. It is certainly a survival of the original common Greek custom according to which the right of inheritance was generally limited to descendants in the third generation, the τριγονία, that is preserved in Isaios where, speaking of ancestor-worship, he says that the γονεῖς, our "parents", are parents, grandparents, and *their* parents, going on to say" for they are the beginning (ἀρχή) of the family (γένος, i. e. the "Joint Family") and their estate descends to their offspring (ἔκγονοι). In another place Isaios says that "you all inherit the property of your father, your grandfather, and your more remote ascendants, for you receive the property by virtue of your birth and your rights as next-of-kin (ἀγχιστεία)."[2] Within the second collateral line, the descent of the deceased's father's brothers and of the mother's brothers, the right of inheritance was no doubt limited to descendants in the third degree. According to the customary law of succession as incorporated in Solon's Law, handed down in Ps. Demosthenes[3] and certainly authentic,[4] it is expressly stated that within the paternal second collateral line the right of inheritance was limited to relatives on the father's side μέχρι ἀνεψιῶν παίδων.[5] And ἀνεψιῶν παῖδες[6] must no doubt be understood to mean the cousin's sons of the deceased[7] (*consobrinorum filii*),[8] i.e. the grandsons of his father's brother, in

[1] Cf. my *Introduction*, Vol. I, Part I *The House Community*, Section 1 *Community of Cult* (1944) 50 ff. cf. 34 ff.

[2] Isaios, *de Cir. her.* § 32. § 34. Edit. Pierre Roussel 1922. Karl Münscher, *Zeitschr. f. vergleich. Rechtswiss.* XXXVII (1920) 244. – Concerning the first collateral line: Ps. Demosth. XLIII c. *Makart.* § 51 speaks only of ἀδελφοί and παῖδες ἐξ ἀδελφῶν γνήσιοι. Cf. Isai. *de Hagn. her.* § 1. (ἀδελφιδοῖ).

[3] Ps. Demosth. c. *Makart.* § 51; *cf.* 27. Isaios, *de Hagn. her.* § 11; cf. § 2.12 *De Apollodor. her.* § 22.

[4] Buermann, *Rhein. Mus.* XXXII (1877) 353 ff. Caillemer 15. 81. Beauchet III 443.

[5] The wording of the text in Beauchet III 442. Lipsius 549[33].

[6] ἀνεψιαδῶν of the Mss. is generally corrected to ἀνεψιῶν. See the text in Isaios l. c. § 11. Cf. Beauchet III 540 f. Lipsius 557[45]. Occasionally the term ἀνεψιαδοῖ, properly meaning second cousins, is used, apparently with the same signification as ἀνεψιοί.

[7] Cf. Caillemer 109 ff. Hugh E. Seebohm, *On the Structure of Greek Tribal Society* (1895) 58. Beauchet III 537 ff. Lipsius 555 ff.

[8] The *consobrinorum filii* are *not* the *sobrini* in the sense of second cousins, i. e. grandsons of the grandfather's brother, in other words, those who are akin through a common great-grandfather, as Nehring-Schrader, *Real-lexikon der indogerm. Altertumskunde*[2] I (1917), art. "Erbschaft" p. 255, holds.

other words the descendants of his grandfather to the third degree, the ὁμογάλακτες.

In Hindu law according to the Custom as embodied in the Code of Manu, the deceased, if he were himself a House-Father, was succeeded by his descendants to the third degree, i. e. by his sons, his grandsons, or his great-grandsons. Manu says: "Not brothers nor parents, but sons are heirs to the deceased." And the Code goes on to say that "the fourth in descent (i. e. the great-grandson) is heir in default of nearer descendants".[1] Failing direct descendants to the third degree, the deceased was succeeded by his father's descendants to the third degree, i. e. by his brother, his brother's son, or his brother's grandson. Apastamba says that, "on failure of sons the nearest *sapiṇḍa* takes the inheritance", i. e. in the first instance the brother of the deceased, and then the brother's son or grandson.[2] In default of direct descendants and of brothers and their descendants, the *Sapindas* as the Greek ὀργεῶνες were called, the deceased was succeeded by the *Samanodacas*, as the Greek ὁμογάλακτες were called, the descendants of his grandfather to the third degree, that is by his father's brother, his cousin, and his cousin's son.[3]

Also the particular principle which in early law among the Greeks and the Hindus regulated the customary order of succession seems to point back to such an original concept of "Near-Kin". In Attic law the inheritance goes first to the descent of the deceased, i. e. the sons (and their descendants) and in default of sons to the "designated daughters"; next, to the descent of the deceased's father, i. e. the brothers by the same father (and their descendants) and in default of brothers to the sisters (and their descendants); and lastly, to the descent of the deceased grandfather, i. e. the father's brothers and their descendants μέχρι ἀνεψιῶν παίδων, and, in default of father's brothers, to the father's sisters (and their descendants). "If there are none on the father's side as far as cousin's sons, the relations on the mother's side in the same way shall have possession

[1] Manu IX 185 f. cf. 137. Edit. G. Bühler, *The Laws of Manu*, The Sacred Books of the East XXV. Baudh. I 11,9. J. Jolly, *Recht u. Sitte* (1896) 85.

[2] Apast. II 14,2. Cf. Manu IX 187: "to the nearest *sapiṇḍa* after him (i. e. after the deceased) in the third degree the inheritance next belongs".

[3] Manu IX 187.

(κυρίους εἶναι)."[1] Within the whole kindred entitled to succeed ab intestato, the συγγένεια, the three parenteles, on the father's and the mother's side: the parentele of the *de cujus* (i.e. *successione agitur*) himself, the parentele of the father of the *de cujus* and the parentel of the grandfather of the *de cujus*, thus formed a Near-Kin, the so-called ἀγχιστεία, "the nearest kindred" preferentially entitled to succeed.[2] The ἀγχιστεῖς were in other words: (1) the descendants; (2) the brothers and sisters by the same father; and (3) the ἀνεψιοί πρὸς πατρὸς μέχρι ἀνεψιῶν παίδων, that is the cousins (*consobrini*) and the *consobrinorum filii*. There was obviously quite a similar order of succession ab intestato at Gortyna.[3] And we find, as we have seen, essentially the same parentele system in Hindu law. The inheritance passes in the first instance to the descent of the deceased, next to the descent of the deceased's father, the *Sapindas* in the narrower sense, and lastly to the descent of the deceased's grandfather, the *Samanodacas*. Failing kinsmen in these three classes of heirs, the *Sapindas* in the wider sense, the inheritance goes to the rest of the Kin, the *sakulyas* or *sagotras*.[4] The *Sagotras* were those who bore the same family name with the deceased, i. e. members of the same γένος.[5] As opposed to the *Sapindas* and *Samanodacas*, the Near-Kin, the *Sagotras* were the Remote Kin. Whereas the *Samonodacas* were the descendants of the grandfather of the deceased, the *Sagotras* were the descendants of his great-grandfather, his great-great-grandfather and so on. Like the ἀγχιστεῖς in Greek law, the *Sapindas* in Hindu Law formed a Near-Kin preferentially entitled to succeed.

In Greek and Hindu law of succession we no doubt in the principle of the three generations regulating the inheritance ab intestato within the different classes of heirs have a survival of an original

[1] Demosth. *c. Makart.* § 51. Isai. *de Hagn. her.* § 11 cf. 2.12. Cf. Beauchet III. 548 ff.

[2] ἀγχιστεία also simply denotes "right of inheritance".—Within the συγγένεια the succession did not rest on the principle of parenteles but on the proximity of the degree: τὸν πρὸς πατρὸς ἐγγυτάτω κύριον εἶναι. Demosth. *c. Makart.* § 51. Beauchet III 563; cf. 559 ff.

[3] Col. V 9 sqq.

[4] Manu IX 187. Cf. Apast. II 14,2 with Haradatta's commentary. Cf. Gautama XIV 13 f. XVIII 6. *Baudh.* I 11,9 f.—Sanskr. *sakulya*: *kūla* "Wohnsitz", "Geschlecht". Nehring-Schrader, *Reallexikon*[2] I 252.

[5] Cf. Jevons 93 f. Cf. A. Kaegi, *Die Neunzahl bei den Ostarien* (1891) 420.

concept of a "Near-Kin" in four generations, the Greek ἀγχιστεῖς and the Hindu *Sapindas*. The circle of close akins originally united by common ancestor-worship and by community of property in one patriarchal household, the *Joint Undivided Family*, was still considered as particularly bound together, and appeared in the matter of inheritance as a definitely closed family-group or οἶκος.[1] The three parenteles of the order of succession, the descendants of the deceased, the descendants of the deceased's father and the descendants of the deceased's grandfather, are then certainly a relic of this *Near-Kin* itself.

Also in the Irish-Keltic law of succession there appears a clear distinction between a Near-Kin *fine*, and the Remote Kin, the clan. With the Irish the inheritance, *finechas*, according to the *Senchus Mór* (*Senchas Már*) goes in the first instance to the *gelfine*, "famille de la main", i. e. those who contemporaneously were under the *gel* ("hand", *manus*) of the same House-Father, the direct descendants of the deceased, i. e. his son, grandson, great-grandson and great-grandson's son;[2] next—to be divided in a certain proportion—to the three groups: *derbfine* "famille certaine", the parentele of the deceased's father, i. e. the brother, brother's son, and brother's grandson;[3] the *iarfine* "famille d'après", the parentele of the deceased's grandfather, i. e. the father's brothers and their descendants, and the *indfine* "famille de la fin", the parentele of the deceased's great-grandfather, i. e. the grand-uncles and their descendants.[4] (Failing kindred in the *indfine* with which, as indicated by the name, the Near-Kin ceased ("if the four families have become extinct"), the inheritance goes first "to the person who is next to them in the community of the people upwards (the tribe)" and then "to the person next to them in the *indfine*".)[5] This Irish Near-Kin seems

[1] See for instance Demosth. *c. Makart.* § 61. 77 sq., where the οἶκος plainly comprised not only the direct descent but also the collaterals entitled to succeed. Seebohm 90 f.; cf. 55 f. Cf. Bunsen, *De iure hereditario Athen.* 34.

[2] Henry Sumner Maine, *Lectures on the Early History of Institutions*[4] (1885) 216 ff. H. d'Arbois de Jubainville, *La famille celtique*, Étude de droit comparé (1905) I ff.

[3] The term *derb-fine*, "famille certaine", seems to express the near blood-relation between the direct descent and the first collateral line. Cf. B. W. Leist, *Alt-arisches jus civile* I (1892) 465. ("leibliche Familie").

[4] *Ancient Laws of Ireland* I 260 l. 1 ff. II 160 l. 24. 162 l. 1. IV 283 ff. 286 l. 1 ff. Cf. III 330 l. 7 ff. Dareste, *Études d'histoire du droit* 371 ss. d'Arbois de Jubainville 12 ff. 30 ff.

[5] *Ancient Laws of Ireland* IV 293. Cf. Leist I 471 ff.

to have corresponded to Greek ἀγχιστεῖς and the Hindu *Sapindas*. The limitation of the right of inheritance within the various parenteles indeed in theory was not as in Greek and Hindu law the third but the fourth generation. The *gelfine*—including the *de cujus* himself—comprised five generations, and the following parenteles four generations. But this divergence from Greek and Hindu law is only apparent. In the remoter parenteles the four-generation limit is due merely to the fact that the common ancestor himself is included. The five generations in the *gelfine* is probably due only to a play on words by the Irish jurists. The metaphor of *gelfine* "the hand family", was the human hand. And the hand has five fingers. The *gelfine* group must therefore, theoretically, consist of five members (generations).[1] In contrast with the Greek ἀγχιστεῖς and the Hindu *Sapindas*, the Irish-Keltic Near-Kin preferentially entitled to succeed, included also the deceased's great-grandfather's parentele *(indfine)*. But this divergence from the "South-Aryan" order of succession may in like manner rest on a juridical construction of a later particular legal development. Indeed, among the Gauls we meet with the same three-generation limit as among the "South-Aryans". With the deceased's great-grandson the kindred entitled to succeed, the Gaulish *gwely* ("lit", "famille") ceased.[2] "The ancestors of a person are his father and his grandfather and his great-grandfather."[3]

In the field of Germanic law we find some slight traces of an original definitely limited inner group of kindred within the whole Kin entitled to inherit ("Magschaft"). About the early Germanic peoples we have merely the statement in Tacitus that "every man has heirs and successors (*heredes successoresque*) in his own children (*liberi*, i. e. sons)—and certainly their sons and grandsons. If there be no children, the brothers and the father's brothers (*patrui*)—and certainly their sons and grandsons—shall

[1] *Ancient Laws of Ireland* IV 283. 286 l. 1 f. "As they represented the roots of the spreading branches of the family, they were called *cuic mera na Fine* or the five fingers of the Fine." The authors of the Brehon law in MAINE 220. D'ARBOIS DE JUBAINVILLE 24 f.

[2] D'ARBOIS DE JUBAINVILLE 27 ff. *Ancient Laws and Institutions of Wales* 1841 in folio p. 788. Cf. recently *Studies in Early Irish Law* by R. THURNEYSEN, etc., published by the Royal Irish Academy, Dublin 1936, VIII p. 133 ff.

[3] *Ancient Laws of Wales* II 427. JEVONS 98 f.—In the ancient laws of Wales the immediate family ceased with the great-grandsons. SEEBOHM 49.

have the property as the relatives in the nearest degree (*proximus gradus in possessione*)."[1] In historical times, the inheritance goes first as "breast inheritance", Old Swedish *brystarf*, to the descendants; next as "back inheritance", Old Swedish *bakarf*, to the parents, then to the brothers and sisters; and lastly to the remoter ascendants. However, we meet here with various modifications.[2] These two (or three) classes of nearest relations, the *sex honda* ("6 hands" i. e. son, daughter, father, mother, brother, sister) in Frisian law, the *framarvæ* ("foreheirs") in Danish, the *tǫlumenn* in Norwegian and the *er talðir heita til arfs i lǫgum* ("im Gesetz einzeln aufgezählten Erben") in Old Norse law, constituted the circle of persons who, living in one household (family), were or have been subject to the same *munt* (*manus*).[3] Failing this Near-Kin, the inheritance went as *unwēna lāwa* ("unexpected inheritance") in Frisian, as *gangu arf* ("going inheritance") in Danish, as *frænderfð* ("kinsman inheritance") in Old Norse law, according to the proximity of relationship, to the wider group of heirs, the "cousins", the *nipiar* in Gothlandic law, the "Magen" in the proper sense of the term. The Near-Kin of the Germanic law, however, differs essentially from that of South-Aryan-Keltic law both by its extent and by the limitation of the right of inheritance. It included only the descent of the deceased and the descent of the deceased's father. And within the two parenteles the right of succession was probably carried on *ad infinitum*.[4] A linguistic rudiment of a Near-Kin in four generations, however, is perhaps to be found in Germanic law in Old Norse *ætt*, O. H. G. *ahta* ("Achtzahl"), which obviously originally denoted the group of Kin that was specially connected by the twice-four common great-grandparents.[5]

[1] Tac., *Germania* 20. The fact that Tacitus mentions *avunculi* (mother's brothers) after *patrui* is no doubt due to a misunderstanding on his part. Cf. my *Introduction* vol. I (1944) 233 f.

[2] See for instance Fr. Brandt, *Den norske Retshistorie* I (1880) 145 ff.

[3] Just all the relations for which Indo-European has simplex-words.

[4] Cf. Otto Brunner, *Deutsche Rechtsgeschichte* I[2] (1906) 114 ff. S. Rietschel, Hoops, *Reallexikon der germ. Altertumskunde* I (1911-13) 616 ff. and the lit. quoted there.

[5] v. Amira, *Grundriss des germ. Rechts* (1897) 106. Jacob Grimm, *Deutsche Rechtsaltert.* I[3] 644. Brunner I 114. On a possible connexion between O.H.G. *ahta* and Old Norse *ætt*, see Falk u. Torp, *Norwegisch-dänisches etymol. Wörterb.* (Heidelberg 1910) 1415. Cf. further *Westmannal.* II *Aerf.* 12: "Es hat jeder freie Mensch in seinem Geschlecht vier Viertel und acht Achtel".

2. Remnants of a Near-Kin within the whole Kin (*gens*) are to be found also outside the law of succession. In early law among the various Aryan-speaking peoples we meet with a close connexion between the right of inheritance and the obligation to take charge of the customary rites at the tombs of the dead. The duty of offering the *sacra*, and the inheritance of the estate went together.[1] In Hindu law, according to the Code of Manu, he who inherits the estate, has to make the sacrifices to the dead. "He who inherits property," it says in Viṣṇu, "also offers the funeral cake, *piṇḍa*."[2] Conversely, he who offers *piṇḍa* is generally regarded as the "heir". The terms *dāyāda* "heir" and *sapiṇḍa* "he who takes part in offering the funeral cake" are frequently used synonymously.[3] The same particular correlation between common rights of inheritance and common debts towards the departed "fathers" of the family is to be found at Athens and Rome, as we plainly learn from Isaios and Cicero. The duty of performing libations and sacrifices at the tombs of the family, it says in Isaios, would follow the same relationship as the right to participate in the inheritance.[4] And Cicero declares that religion prescribes that the *pecunia* and the *sacra* of the family *pontificum auctoritate* are inseparable and that the charge of the sacrifices is always incumbent on those who inherit the property (*ad quos pecunia venerit*). *Nulla hereditas sine sacris* is an old Roman *proverbium*. And Gaius says that the ancient lawyers (*veteres*) wished inheritances to be accepted promptly, in order that there should be persons to carry on the family cult, to which the greatest importance was attached in those days.[5] In Germanic law, too, we have a linguistic rudiment of an original close connexion between the right of inheritance and ancestor worship in the term *erfa*, which signifies both "to inherit" (*erfð* "inheritance") and "to honour with a funeral feast" (*erfða-öldr* ["beer"], "a funeral feast").[6]

[1] Fundamental: Fustel de Coulanges, *La Cité antique*[8] (1919) 76 ff.

[2] Manu IX 186. Viṣṇu XV 40.

[3] Cf. Jolly 84 f.

[4] Isai. *de Philoct. her.* § 51: εἶναι κληρονόμον καὶ ἐπὶ τὰ μνήματα ἰέναι χεόμενον καὶ ἐναγιοῦντα. Cf. *Nicostrat. her.* § 19. Demosth. c. *Makart* § 65. Plato, *Laws* V 740 designates the heir as διάδοχος θεῶν. Beauchet III 442. 636 f.

[5] Cic. *de leg.* II 20,50.21, 52; cf. 19,47.—Fest. v[is] *everriator, sine sacris hereditas.*—Gai. II 55: *hereditates adire, ut essent qui sacra facerent.* Edit. F. de Zulueta 1946.

[6] Johan Fritzner, *Ordbog over det gamle norske Sprog*[2] I 348 f.

We are then, I think, justified in concluding that the circle of near-akins appearing among the various Aryan-speaking peoples in early customary order of succession as a closed Near-Kin preferentially entitled to inherit, also constituted a definitely limited community bound in duty to carry on the family *sacra*. That this was the case with the Hindu *Sapindas* is now beyond all doubt. Manu expressly says "for three ancestors is the funeral cake ordained". "Through a son one conquers Worlds (of the beyond), through a son's son one attains endlessness, and through the son's son of a son one attains the world of the Sun."[1] And Isaios declares: "The law commands that we nourish (τρέφειν) our forefathers (γονεῖς). These are parents, grandparents, and their parents, if they are still alive. For they are the beginning (ἀρχή) of the family (γένος)", i. e. for the family (γένος) goes back to these.[2] In the Solonic law of succession, transmitted in Ps. Demosthenes in the speech against Makartatos, ἀγχιστεία is not only designated as ὁσίων, but also as ἱερῶν.[3] Further it is not improbable that the Greek τριτοπάτορες, the early term for those "fathers" who were ritually worshipped,[4] entirely corresponded to the three *Sapinda*-fathers: father, grandfather and great-grandfather, beyond whom the line of ancestors was not carried on.[5] (The *Sapindas*, indeed, were those persons of the male sex who offer the funeral cake to their common ancestors at the tomb.) These "forefathers" in three generations, the ἀγχιστεῖς, who have a common father, grandfather, and great-grandfather, the pater familias had often known personally. With them he had lived in one patriarchal household.[6] It was only to them, therefore, that the House-Father was bound to devote a special cult.[7]

[1] Manu IX 186.—IX 137.

[2] Isai. *de Cir. her.* § 32. Roussell, *Isée* (1922) 153: "l'ascendance remonte jusqu'à eux."

[3] Ps. Demosth. *c. Makart.* § 51. Cf. Isai. *de Philoct. her.* § 47.

[4] τριτοπάτορες means τρίτοι πατέρες "the ancestors in the third degree", i. e. πρόπαπποι, then in general "ancestors" (οἱ προπάτορες of Hesychios, Arist. in Pollux III 17. Bekker, *Anecdota* I 307,16. Rohde, *Psyche*[7] (1921) 247[4]. Cf. above Isai. *de Cir. her.* § 32.

[5] A. Kaegi, *Die Neunzahl bei den Ostariern* (1891) 5 f.

[6] Isai. *de Cir. her.* § 32: ἐὰν ἔτι ζῶσιν. Roussell, *Isée* (1922): "s'ils vivent encore." Cf. *De Menecl. her.* § 46.

[7] See my *Introduction to Early Roman Law* I, Part. I. *The House Community.* Section 1, *Community of Cult* 50 ff. cf. 30 ff.

3. Early Greek tradition affords nothing in support of the supposition[1] that at all times there existed in Greece a close correlation between the right of inheritance and the right of—and the obligation to—blood-vengeance.

In the Homeric poems the duty of revenging bloodshed was certainly in the first place incumbent on the members of the οἶκος, the "house",[2] that is to say sons, grandsons, father, brothers,[3] next on the Remote Kin in the collateral line,[4] and lastly on the obscure kinsmen called ἔται.[5] But without doubt the father could not inherit.[6] And the collaterals receive in Homeric times ipso jure the inheritance in default of sons,[7] but they seem to have pursued the blood-feud without regard to the question whether the murdered man left sons.[8] It is even doubtful whether agnatic relationship was a prerequisite of blood-vengeance at all.[9] The obligation to pursue the blood-feud, which no doubt rested originally upon the whole kindred of the murdered as a joint obligation, was immediately incumbent on the blood-relationship.[10]

However, a law of Draco about murder (φόνος), dating from the year 621 B.C., handed down in Ps. Demosthenes[11] and the genuineness of which is proved by an inscription on marble found at Athens in 1843 and belonging to the year 409 B.C.,

[1] B. W. Leist, *Graeco-italische Rechtsgeschichte* (1884) 42 f. 718 ff. Cf. Beauchet I 15 f.

[2] *Odyssey* XXIV 188: φίλοι κατὰ δῶμαϑ' ἑκάστου.—On the Homeric οἶκος, the primitive "family", the "Large Family", the House-Community, see my *Introduction to Early Roman Law* II (1934) 8 ff.

[3] *Od.* I 29 ff. 299 f. III 307 cf. 198 ff. (Orestes). Cf. III 196 f.—*Iliad.* II 662 (grandsons). *Od.* XXIV 422 ff. 470: Eupeithes prepares to revenge his son Antinoos.—*Od.* XXIV 433 ff. cf. 482 ff.: παῖδές τε κασίγνητοί τε. *Il.* IX 632 f: κασίγνητοι; παῖδες.

[4] *Il.* XVI 573: ἀνεψιός "cousin". ἀνεψιός in *Il.* XV 554 cf. XX 238 does not mean "cousin" but "brother's son".

[5] *Od.* XV 273: πολλοὶ δὲ κασίγνητοί τε ἔται τε. Cf. *Il.* IX 464: ἔται καὶ ἀνεψιοί.—See further Gustave Glotz, *De la solidarité de la famille en Grèce* (1904) 76 ff.

[6] Beauchet III 494 ff. cf. 473 ff. Glotz 79. Lipsius 550 f.

[7] *Il.* V 158.

[8] "La vengeance du sang n'est pas un héritage moral à titre onéreux; elle est un acte de la solidarité familiale, qui s'accomplit selon des règles antérieurs au principe même de la succession individuelle." Glotz 79; cf. Beauchet I 15 f.

[9] Glotz 79 f.

[10] Blood-vengeance was sacrally, too, a sacred duty. *Introduction* I 63 ff.

[11] Ps. Demosth. c. *Makart.* § 57. Lipsius 556^{44}. 600^{1}. Blass' reading adopted by Köhler, Hermes II 27 ff. C.I.A I n. 61. Dareste, *Playdoyers civils de Démosthène* I 2 p. 56.

says that the right "to make proclamation against the murderer in the Agora (προειπεῖν τῷ κτείναντι ἐν ἀγορᾷ)," which is undoubtedly a relic of the ancient institution of blood-vengeance shall rest upon the kindred of the murdered man ἐντὸς ἀνεψιότητος καὶ ἀνεψιοῦ, that is "within [his?] cousinship and (the degree) of a first cousin". The law prescribes further that "the prosecution shall be made jointly (συνδιώκειν) by cousins (ἀνεψιοί) and cousins' sons (ἀνεψιῶν παῖδες), and descendants of cousins (ἀνεψιαδοῖ)".[1] And in another place—which seems generally to have escaped the scholars, unfortunately for the interpretation of the law—Ps. Demosthenes thus refers to the action of this law: "The law commands the relations to go forth and prosecute (ἐπεξιέναι) as far as descendants of cousins (μέχρι ἀνεψιαδῶν)."[2]

The obligation to pursue the blood-feud thus according to the law of Draco was limited to relations within the same degrees as the right of inheritance, i. e. μέχρι ἀνεψιῶν παίδων (*consobrinorum filii*).[3]

The liability for pursuing a bloodshed, the duty of offering the *sacra* and the inheritance of the estate certainly went together. Also in respect of the performance of the kin's blood-vengeance, the ἀγχιστεία, the smaller family-group or οἶκος, at Athens in the fourth century B. C., constituted a definitely close Near-Kin within the whole Kin, γένος. All within the ἀγχιστεία were liable.

We shall now return to the Homeric locution κασίγνητοί τε ἔται τε, in order to attempt an approximative understanding of the term ἔται.[4] In Homer κασίγνητοι does not exclusively mean brothers but no doubt generally the collaterals up to cousins' sons inclusive.[5] And ἔται (ἕται), whose meaning is extremely doubtful,[6] seems to have denoted the members of

[1] Seebohm. 76 f.

[2] Ps. Demosth. c. *Euerg.* § 72. Cf. Pollux VIII 118 (obviously quoting this passage).

[3] See above Ps. Demosth. c. *Makart.* § 51.

[4] Cf. above *Od.* XV 273.

[5] *Il.* XV 545 cf. 546. 526 f. XX 237 f.: the term κασίγνητοι includes ἀνεψιός. *Etymologicum Magnum* (Oxf. 1848) 493[14]. *Suidas* v° κασίγνητοι. *Od.* XVI 115 ff. cf. 97.115: Telemachos regards as his κασίγνητοι not merely the sons of his father Ulysses, his brothers, but also the descendants of his grandfather Laertes, his cousins, and even the descendants of his great-grandfather Arkeisios, his second cousins. See further the locution ἔται καὶ ἀνεψιοί. *Il.* IX 464. Cf. Glotz 85 ff. ("Toute le cousinage").

[6] The ἔται identical with the ἑταῖροι ? G. Curtius, *Grundzüge der griech. Etymologie*[5] (1879) 251 n° 505. Cf. Glotz 87 f.

the more remote social group of kinsmen, the φρήτρη.[1] The locution κασίγνητοί τε ἔται τε then possibly expressed just the contrast between the ἀγχιστεία and the φρήτρη. We may have an indication of this in the ninth book of the Iliad, where Nestor says that merely the man who is ἀφρήτωρ "without φρήτρη" and ἀνέστιος "without ἑστία (i.e. οἶκος)" can be fond of the feud citizen against citizen (πόλεμος ἐπιδήμιος).[2] And it is then not too bold to hazard the conjecture that the juxtaposition ἀνέστιος—ἀφρήτωρ corresponds to the contrast κασίγνητοι—ἔται, i.e. the members of the οἶκος and the φρήτρη. The ancient Greek "Large Family", the οἶκος, where several generations were living in one patriarchal household, united by the common hearth, ἑστία, comprised also the κασίγνητοι.

The Hindu sources furnish no clear information as to how the performance of blood-vengeance was ordained within the Kin in the Vedic time. From the tradition it appears merely that the blood-price, the *weregild*, went to the kindred of the murdered man.[3] In the field of Germanic law, on the other hand, we have the statement in Tacitus: *recipit satisfactionem universa domus.*[4] And *universa domus* must certainly, in spite of Grimm,[5] be understood to denote the whole "House", the "household".[6] The responsibility for revenging a murder committed on a member of the Kin ("Sippe") no doubt fell upon the whole Kin of the murdered man, but within the Kin the duty of blood-vengeance rested in the first instance upon the group of nearest kindred, the "House" (*domus*, οἶκος), above all on the sons.[7] It seems to appear from a text in the ancient Thuringian

[1] Cp. φράτορες in Ps. Demosth c. *Makart.* § 57.—Nehring-Schrader, *Reallexikon*[2] II (1929), art. "Sippe" p. 401. Cf. Glotz 90 f. Botsford, *Pol. Science Quarterly* XIII (1907) 687.

[2] *Il.* IX 63 f.: ἀφρήτωρ, ἀθέμιστος ("outlaw"), ἀνέστιός ἐστιν ἐκεῖνος, ὅς πολέμου ἔραται ἐπιδημίου ὀκρυόεντος.

[3] R. v. Roth, *Das Wergeld im Veda*, Zeitschr. der Deutsch. Morgenländ. Gesellschaft XLI (1887) 672 ff. G. Bühler u. L. v. Schröder in Festgruss an R. v. Roth (1893) 44 ff. Cf. Leist, *Alt-arisches jus gentium* (1889) 204 ff. Jolly 131 f.

[4] Tac. *Germ.* XXI.

[5] J. Grimm, *Deutsche Rechtsaltertümer* (1828) 663. 4. Aufl. besorgt von A. Heusler und R. Hübner (1899): "das ganze Geschlecht". Nehring-Schrader, *Reallexikon*[2] I (1917), art. "Blutrache" p. 153: "Domus ist Sippe".

[6] Cf. J. L. Burnouf: "la maison toute entière". Carl Ludwig Roth: "die ganze Familie". H. Brunner I[2] 120: "der ganze Kreis der fehdeberechtigten Magen".

[7] In Njál's Saga Njáll chooses death when he is unable to take vengeance for the slaying of his sons. Njáls Saga c. 129 § 16.

Law[1] that in Germanic law, too, there was a close correlation between the right of inheritance and the obligation to blood-vengeance. In Iceland the *vīgsakar aðili*, he who alone was entitled to proclaim the murder action, was the *heir*.[2] Concerning Keltic law, the *Senchus Mor* states that the Irish *fine* with its four groups of closely related: *gelfine*, *derbfine*, *iarfine*, and *indfine*, constituted the basis of the apportionment of the *weregild*.[3]

II.

In *Rome* in olden times, as long as the *Joint Undivided Family*, comprising several generations, living in one patriarchal household and sharing in common work, persisted unimpaired, the sons and grandsons together with the *paterfamilias* had, as we have shown elsewhere,[4] a certain actual joint right of property, with equal notional shares, to the joint house property, a right which limited and was limited by the co-ordinate rights of the other co-owners. If one of the co-owners in turn died without leaving male issue, only the following change in this *co-existent* co-ownership occurred that the material right of the other sons by virtue of a principle of *accretion* consequent upon the co-ownership, acquired a corresponding extension. There was no separate property and consequently no material succession.

In the *successive* co-ownership between father and sons later appearing—by the division of the Joint Undivided Family—in the single separate family, where the sons were regarded as having a latent joint right of ownership which became effective (actual) upon the death of the *paterfamilias*, materially likewise only an extension occurred of the share in the joint house property (*fa-*

[1] *Lex Angl. et Werin.* 31: *ad quemcumque hereditas terrae pervenerit, ad illum ultio proximi et solutio leudis* ("wergild") *debet pertinere.*

[2] Cf. RIETSCHEL, in HOOPS' *Reallexikon der germ. Altertumskunde* I (1911) 295 ff. and the lit. quoted there.

[3] H. D'ARBOIS DE JUBAINVILLE, 1 s.s.—In the ancient Laws of Wales, where the blood-fine takes a very important position, the group upon which the responsibility for murder falls, is twice as in Athens and includes fifth cousins, or the great-grandchildren of great-grandchildren of a common ancestor. H. E. SEEBOHM, *On the Structure of Greek Tribal Society* (1895) 78 f. Cf. F. WALTHER, *Das alte Wales* (1889) 131 ff. See further F. KRAUSS, *Sitte u. Brauch der Südslaven* (1885) 39 f. MIKLOSICH, *Die Blutrache bei den Slaven*, Denkschr. d. k.Akad. der Wiss. zu Wien. Phil.-hist. Kl. XXXVI (1888) 127 ff.

[4] Cf. my *Introduction to Early Roman Law* Vol. II (1934) 78 ff. Cf. Vol. III, Part II *Patria Potestas*, (1939) 233 ff.

milia) assigned to the other sons (the brothers, *fratres consortes*), if one of the sons died without leaving any son. If the *paterfamilias* died without male issue, *sui heredes*, so that the house became *desolate*, the family estate no doubt originally reverted to the economic community from which it had come, the people or more probably—as in Germanic law—the "Kin", that is to say the individual *gentiles*. A fundamental change in this occurred—it would seem—in the time before the Laws of the XII Tables. Created by the social and economic evolution, the concept of "*adgnatus proximus*" originated as a concept of the law of succession and denoted the (agnatic) relative (*agnatus*) who was "nearest heir (*proximus*)" after the "sons of the house", the *sui heredes*.

Nothing is known with certainty about the original legal sense of the term *agnatus*. Nor do literary texts afford any considerable information. On the basis of historical reflexions taken in conjunction with logical conclusions and probably *Comparative Law*, it is only possible to form certain conjectures.

"*Agnati*", says Gaius, "are those akin to each other through persons of the male sex, being, as it were, cognates on the father's side (*per uirilis sexus personas cognatione iuncti*). And the *agnati* are, for instance one's brother by the same father, his son and his grandson by that son, or again one's paternal uncle, his son, and his grandson by that son."[1] This, however, probably did not exhaust the concept of *agnati* known in Gaius' time.[2] As a term of family law it no doubt, originally at any rate, also included the direct male descendants who were termed *sui heredes* in the law of succession. And Pomponius in his commentary on Q. Mucius Scaevola does, in fact, says that the son was the father's *adgnatus proximus*.[3] Ulpian further states that the term *familia* besides denoting an aggregation of property (*res*), was also used about a certain group of persons (*quoddam corpus*), and that there it occurred in a more restricted and in a wider sense. *Familia* in the narrower sense (*iure*

[1] Gai. I 156. Edit Zulueta, Oxford 1946. *Inst.* I 15,1. Cf. Gai. III 10.

[2] Cf. *ueluti* "for instance" in Gai. I 156.

[3] Pomp. *libro trigesimo ad Quintum Mucium*, *Dig.* XXXVIII 16 *de suis et legitimis heredibus* § 12: *filius patri adgnatus proximus est*. Cf. De Visscher, *Mélanges Cornil* (1926) II 587.—In the XII Tables V 4 *agnatus proximus* is opposed to *suus heres*, i.e. the "nearest agnate" after the "sons of the house".

proprio) denoted that circle of persons who *natura* or *iure* were at the same time subject to the authority of the same *paterfamilias*. *Familia* in the wider sense (*communi iure*) denoted *omnes agnati*. And the expression *omnes agnati* is then explained in more detail. Upon the death of the *paterfamilias* the sons became indeed *sui iuris* and started new houses of their own, single separate families (*singulas familias incipiunt habere*). But all those who had once been united under the *potestas* of the same paterfamilias (*omnes qui sub unius potestate fuerunt*) were still, since they had issued from the same *house* (*ex eadem domo proditi*), rightly called members of the same family.[1] In this wider sense of *familia*, according to which, in other words, *agnati* denoted all those who were or might have been under the same *patria potestas* if they had lived together—at the same time—in the same house (*eadem domus*),[2] it is not improbable that we have a reminiscence of the basic sense of *agnati*. Originally *agnati*, as a term of family law for a circle of near relations, then probably denoted the whole group of kindred living in one patriarchal household (*domus*), and united by common ownership of property,[3] the whole "agnatic" family of the ancient House Community subject to the same *patria potestas*.[4]

In early Roman law of succession, in the certainly authentic fragments or the Laws of the Twelve Tables, no three-genera-

[1] Ulp. *Dig.* L 16 *de verb. signif.* l. 195 § 2. Cf. Paul. *Dig.* XXXVIII 10 l. 10 § 2: *sed hi* (i. e. *agnati*) *sunt per patrem cognati ex eadem familia.*

[2] Cf. the distinction between *gens* and *agnatio* in *Cic. de leg.* I 7,23 i. f.

[3] Also the House-Father for the time being(?).—In the clause of the XII Tables concerning *cura furiosi*: *Si furiosus escit, ast ei custos nec escit* (i. e. *paterfamilias* or *tutor*), *adgnatûm... potestas esto. Cic. de invent.* II 50, 148. *Rhet. ad Her.* I 13,23. *Leges* XII *tab.* V 7[a]. *Fontes* I 24) *agnati* do not seem to include the House-Father.—*Agnati* were originally *domestici* in the proper sense. In contrast to *agnati*, *familia* also comprised the slaves.

[4] The etymology of *agnatus* and *agnatio* also seems to agree with this. The fundamental sense is uncertain. It is not improbable, however, that *adgnatus* from *ad-gnascor* (of the same stem *gen* (*gna*), which as γνη appears in Gr. γνήσιος) "be born into" (cf. Georges, *Lat.-Deutsches Handwörterb.* I 239 f.), at first simply meant the person by whose birth the family (the *domus*) according to the ancient Roman notions had been *augmented*, and *adgnatio* the "accretion" of the family (the "Kin"), i. e. all the progenitor's (*de cujus*) male descendants, the entire successive agnatic family. Cp. the use of *agnati* about the herd. Ulp. *Dig.* VII 1 *de usu fructu* l. 68 § 2. See further *Inst.* I 11 § 7: *ne ei invito suus heres adgnascatur* and the expression *agnatio postumi* ("the subsequent agnation"). Gai. II 131. Cf. Ulp. *Reg.* XXII 18. Tac. *Germ.* 19 and *Hist.* V 5: *augendae tamen multitudini consulitur; nam et necare quemquam ex agnatis nefas.*—*Thesaurus Linguae Latinae* I *vis agnascor, agnatus.*

tion limit of the right of inheritance is found. From the texts there appears nothing to show that within the two classes of heirs: the *sui heredes*, "the sons of the house", and the *agnati*, a definite limitation for succession was made. And in the law fragments that have been preserved, there is nothing directly indicating that early Roman law knew a *Near-Kin* preferentially entitled to succeed, corresponding to the Hindu *Sapindas* and the Greek ἀγχιστεῖς. The inheritance goes first to the direct descendants of the deceased (*sui heredes*), next to the *adgnati*. If there be no *adgnatus*, the XII Tables call the *gentiles* to the inheritance.[1] Further we have no direct conclusive information as to whether there was in early Rome a definitely closed circle of the "nearest" akins on whom it was preferentially incumbent to take care of the *sacra privata*[2] and to perform the Kin's blood-vengeance. Only a single linguistic rudiment of such a Near-Kin of four generations is possibly found in the definition of *parens* in Festus. In early juridical parlance, it is said in Festus, *parentes* signified not merely parents (*pater aut mater*), but also grandparents and great-grandparents.[3] It is, indeed, further probably a relic of such an ancient peculiar notion of Kin that survived in historical Rome in the custom of requiring for an officially complete designation of a citizen not merely his father's, but also his grandfather's and his great-grandfather's name.[4]

As a starting-point for an investigation of early Roman law we have only the term *agnati* itself in the connexion in which it occurs in the old sacral precept handed down by Servius and attributed to Numa, respecting expiation for manslaughter, inadvertent homicide, of a Roman citizen (*homo*, i. e. *homo liber*), and the clauses of the XII Tables relating to intestate succession and *tutela* and *cura*.

[1] Gai. III 1. 9.17. *Leges* XII *tab.* V 4.5. Girard, *Textes de droit romain*, ed. 5 (1923) 14. C. G. Bruns, *Fontes iuris romani antiqui*, ed. 7. O. Gradenwitz (1909) I 23.

[2] Referring to C.I.L. IV 1679: *habeas propitios deos tuos tres* (i. e. paterfamilias' *genius* and "two dead forefathers"?) Fr. Pfister, "Die Religion der Griechen und Römer", *Jahresber. für Altertumswiss.* CCXXIX, Suppl. Bd. (1930) 139 surmises that among the Romans, too, the ancestral cult was limited to three generations.

[3] Festus v° *parens*. Ed. W. M. Lindsay 1913. *Fontes* II 21. Cf. Gaius. *Dig.* L 16 *de verb* signif. l. 51. Cp. above Isai. *de Cic. her.* § 32.

[4] Marquardt-Mau, *Das Privatleben der Römer* I[2] (1886) 8: *M. Tullius M.f. M.n.M. pr(onepos)... Cicero.*

In Servius[1] it is said that the slayer *pro capite occisi* had *in contione*[2] to bring a ram to the *agnati* of the *victim*.[3] The interpretation of this provision of the so-called *leges regiae* as well as its closer dating is uncertain.[4] But undoubtedly it dates back to a time when the blood-vengeance still rested on the Kin and when within the whole Kin this duty was principally incumbent on a certain definitely limited circle of near relations, the *agnati*. And it is then justifiable to suppose that the narrower group of akins which in the Servius fragment, not expressly mentioning the direct descent, is designated *adgnati*, were the ancient Roman House Community, closely bound together by common cult, *the Joint Undivided Family*, comprising several generations. In other words, *agnati* must here no doubt be interpreted as all those who, in the ancient Roman sense, belonged to the "house" (*domus*) of the victim, and of course primarily the sons.

In the clauses of the XII Tables respecting intestate succession, *agnati* in the combination *adgnatus proximus* has certainly also preserved the original sense of the word denoting the whole "agnatic" family of the ancient Roman patriarchal household. But here *adgnati* appears in a special relation. *Adgnatus proximus* has become a term and a concept of the law of succession created by the economic development, and denotes the "neighbouring"[5] brothers separated from the paternal house at the division of the Joint Undivided Family, who in the sonless, i. e. the "desolate", house of a deceased brother—that is to say, *cui suus heres non escit*—are called upon by the law to take the property he has left (*familiam habere*). *Adgnatus proximus* was "nearest agnatic heir" after the *suus*.

By the introduction of *a° familiae erciscundae* in the Laws of the XII Tables a right had been given to the "sons of the house", *sui here-*

[1] Servius, *In Vergilii ecl.* IV 43. Cf. *In Bucolica* IV 43. *In Georgica* III 387. (*arietis damnum*). *Textes* 8. *Fontes* I 10. II 78 sq.—Cato in *Prisc. Gramm.* VI 13,69: *talione proximus cognatus ulciscitur postumi. Fontes* I 29[2]. Cf. *Leges* XII *tab.* VIII 24[a]. *Fontes* I 34. See my *Introduction to Early Roman Law* IV. *Sources and Methods* (1950) Book I, *Primary Sources* II ch. 3, *Leges regiae* 63 ff. II (1934) 81.

[2] Huschke's reading: *agnatis eius in contione* instead of: *et natis eius in cautione*. (M.S.)

[3] See for the present my *Introduktion til Romerretsstudiet* (1920) 28.36. Cf. my paper "Alcune osservazioni circa le fonti e i metodi nell'investigazione del primo diritto Romano", in *Rev. intern. di Filosofia del Diritto* XVII (1937) 398 ff.

[4] Cf. my *Introduction* IV 61 ff. (*Leges regiae*).

[5] Cf. V. Kalb, *Das Juristenlatein*[9] 56 f.

des, to demand partitions of the inheritance (*familia*) upon the death of the *paterfamilias* and thus the dissolution of the joint ownership (*consortium, societas*),[1] and consequently of the House Community. By this partition of the family estate the sons (the brothers, *fratres consortes*)[2] had each received his equal share in the *heredium*, besides presumably a right of accretion, that is to say, a subsidiary right of co-ownership to the shares assigned to the other sons (brothers). If one of the "separated" brothers died without leaving a *suus heres*, then this subsidiary "latent" joint right of ownership became effective and appeared as a right of inheritance: The other brothers were called upon to *inherit* the property left by him.[3] Since the brothers who started single separate families (*singulae familiae*) lived in their own "house" (*domus*), in order to take over the property of the deceased father (*familiam habere*), in contrast to the *sui heredes* living in the paternal house, they had to "go and take" the inheritance, *adire hereditatem*.[4] The family property in the "sonless house", as by a kind of resumption of the partition of the estate previously carried out, reverted to the other brothers. Their right of inheritance was in its essence a reversion ("droit de retour").[5]

This material right of inheritance for *agnati* to the house property of the sonless *paterfamilias*, probably first inserted in the Laws of the XII Tables between *sui heredes* and *gentiles*, between *domus* and *gens*, as I have shown elsewhere, may originally have been limited to the deceased's agnates of the first degree, the paternal brothers (*consanguinei*).[6] This view may be favoured by the following consideration: The brothers (and their sons) had previously lived with the deceased brother, the

[1] Gai. *libro septimo ad ed. provinciale. Dig.* X 2,1 *pr. Leges* XII *tab.* V 10. *Textes* 15. *Fontes* I 24. Cf. the new Gaius fragm. IV 17[a]. Edit. De *Zulueta*. Oxford 1946. Cf. my *Introduction* II (1934) 64 ff. cf. 61 ff. 82 ff.

[2] In the law of succession called *sui heredes* "the sons of the house".

[3] A curious parallel would seem to be found in Hindu law: The property of the "separated" (and not "reunited") brothers deceased without male issue goes to the brothers. Haradatta's commentary on Gautama XXVIII 27 cf. 28. Leist, *Alt-arisches jus gentium* 418[4]. Cf. Jolly 89.

[4] This is certainly the fundamental sense of the technical term of historical law: *adire hereditatem* "to enter on the inheritance", applied to the *extranei heredes* "not being subject to the *potestas* of the *de cujus*". Gai. II 162 cf. 161.

[5] Paul., *Dig.* XXXVIII 10, l. 10 pr.: *quia legibus hereditates et tutelae ad proximum agnatum redire consuerunt.* Cf. Terence, *Andria* IV 5,4 (*lege redierunt*). Edit. U. Moricca, Florence 1921.

[6] Gai. III 23 says that "female agnates more remote than sisters by the same father (*consanguineae*)", that is agnates of the first degree, "have no right (of inheritance) *ex lege* (i.e. XII *tabularum*)". From this statement we may logically conclude, following A. Giffard, *Nouv. rev. hist* 1932 p. 385 ff., that only the paternal brothers (*consanguinei*) of the deceased were called to succeed as agnates. Cf. Ed. Cuq, *Manuel des inst. jurid. des Romains* (1928) 718 f.

de cujus, in their common father's *house*, and before the dissolution of the joint ownership (*consortium*) and the partition of the family estate upon the death of the *paterfamilias*, by their work contributed to increase the house property. In order to avoid a further split of the family property the *whole* inheritance (*familia*) possibly originally fell to "the nearest agnatic relation" after "the sons of the house", *sui heredes*, as seems to appear from the singular form *adgnatus proximus* in contrast to the plural form *gentiles*.[1] If he who, "at the moment when it is established that there is an intestacy", was appointed *agnatus proximus*, "abstains from the inheritance or dies before having entered upon the inheritance, the next nearest agnates have no right *ex lege* (*i. e.* XII *tabularum*)", but the *familia* falls to the *gentiles*. A *successio graduum* was not known.[2]

In the Laws of the XII Tables the *adgnati* were further entitled—and bound—to undertake *tutela mulieris* and *impuberis*[3] as well as *cura furiosi*[4] and *cura prodigi*.[5] And here *adgnati* appear distinctly as a Near-Kin in contrast with the Remote Kin, *gens*.[6]

We have no doubt in the definition in early Roman law of *tutela* and *cura* (*agnatorum*) as *potestates* a further indication that the *agnati* in olden times constituted a definitely limited circle of Near-Kin closely bound together by common economic interests, by common property, and identical with the ancient

[1] The other brothers must then have been kept indemnified in other ways. If these conjectures are correct, the statement in Gai. III 16, that the inheritance is to be divided by individuals (*in capita dividendam esse hereditatem*) would seem to be based on a later development of the law.

[2] Cf. Gai. III 12: *Nec in eo iure* ("in this title by agnation") *successio est.* Cf. 11: *non tamen omnibus simul agnatis dat lex* XII *tabularum hereditatem, sed his qui tum, cum certum est aliquem intestatum decessisse, proximo gradu sunt.* Cf. 22.28, Paul. *Sent.* IV 8,21: *in hereditate legitima successioni locus non est.* Ulp. *Reg.* XXVI 5. *Inst.* III 2,6 cf. 1 *i. f.* Cf. Lenel, *Zeitschr. der Sav.-Stift.* XXXVII (1916) 119 f. Girard, *Manuel de droit romain*[8] (1928) 938[2] maintains that there was no *successio ordinum* either. But the texts of Gaius seem only to exclude a *successio graduum*.

[3] *Leges* XII *tab.* V 6. Cf. V 2. Gai. I 155. Cf. 157. II 47. Ulp. *Reg.* XI 3. *Textes* 14. *Fontes* I 23.

[4] *Leges* XII *tab.* V 7[a]. *Cic. de invent.* II 50, 148 = *Rhet. ad Her.* I 13, 23. *Tuscul.* III 5,11. Gai. II 64. *Textes* 14. *Fontes* I 23.

[5] *Leges* XII *tab.* V 7[b]. Ulp. XII 2. *Textes 14. Fontes* I 24. Cf. my *Introduction* II 97 ff. 101 f.

[6] *Leges* XII *tab.* V 7[a]: *Si furiosus escit, adgnatùm gentiliumque...potestas esto.* Cf. Paul. *Dig.* L 16 *de verb. signif.* l. 53 pr.: *nam cum dicitur apud veteres "adgnatorum gentiliumque", pro separatione accipitur (que = ve)...* Kübler, *Zeitschr.-d. Sav. Stift.* XXV 269.—Cf. further Varro, *de re rust.* I 2,8: *mente est captus atque ad agnatos et gentiles deducendus.* Cic. *de leg.* I 7,23.

Roman House Community (*domus*). In the classical jurisconsults *tutela* is included among the *munera personalia* that are ordained exclusively for the protection and in the interest of the ward (*ad tuendum eum, qui se defendere nequit*).[1] As early as the latest period of the Republic this view seems to have been common.[2] However, in early law *tutela* appears as a purely unilateral family-*potestas*.[3] As late as in the definition of Servius Sulpicius, which perhaps marks the turning-point, *tutela* is defined as a *vis* (M. S. *ius*) *ac potestas*.[4] In the fragment of the XII Tables certainly preserved in its original wording in Cicero, *cura furiosi* is likewise designated as *potestas*.[5] In Livy *tutela mulieris* is placed with *manus*.[6] In the capacity of *tutores* and *curatores* the *agnati*, we may then assume, originally exercised their authority as a *vis ac potestas* in their own interest—i. e. in the common economic interest of the house (*domus*)—in the continued existence of the family estate.[7] This also agrees with Gaius' statement that it was a general principle in early law that *tutela* and *hereditas* were closely connected. Those who were entitled to inheritance *ab intestato* were also entitled to *tutela legitima*. In other words, the guardianship rested upon the *agnati* as presumptive heirs. "The early lawyers (*veteres*)", says Gaius, "inferred that the intention of the statute was that *tutela* and *hereditas* should go to the same persons, seeing that it had ordained that agnates whom it called to succession should also be tutors."[8] Originally it was probably only the *paterfamilias*

[1] *Dig.* L 4 *de muneribus* l. 1 § 4. *Inst.* I 25 *de excus. pr.* cf. l. 2. *Inst.* I 17 *de leg. patr. tut.* l. 1 (*onus tutelae*). Cf. Paul. *Dig.* XXVI 1 *de tutel.* l. 1 *pr. Inst.* I 13 *de tutel.* l. 1: *Est autem tutela, ut Servius definivit (definit), vis* (Ms. *ius) ac potestas in capite libero ad tuendum eum, qui propter aetatem suam* (i. e. *eum eamve qui propter aetatem vel sexum) sua sponte se defendere nequit.* Cf. below Ulp. *Dig.* XXVI 4 *de leg. tut.* l. 1 pr.

[2] Cf. above Servius Sulpicius, *Inst.* I 13 l. 1: *ad tuendum.*

[3] *Cic. pro Murena* XII 27: *propter infirmitatem consilii.*

[4] Servius Sulpicius *l. c.* — Gai. II 47 (*auctoritas*). Cf. I 192 cf. 189 sq. I 144.

[5] Cf. above *Cic. de invent.* II 50, 148. *Leges* XII *tab.* V 7[a].

[6] *Liv.* XXXIV 2,11.

[7] Cp. Greek law Beauchet II 381 ff.

[8] Gai. I 165: *crediderunt ueteres uoluisse legem etiam tutelas ad eos pertinere, quia et agnatos, quos ad hereditatem uocavit, eosdem et tutores esse iusserat.* Cf. I 164. *Inst.* I 17: *ubi successionis est emolumentum, ibi et tutelae onus esse debet.* Cf. Ulp. *libro quarto decimo ad Sabinum, Dig.* XXVI 4 *de leg. tut.* l. 1 *pr.*: *hoc summa providentia, ut qui sperarent hanc successionem, iidem tuerentur bona, ne dilapidarentur.* Quintus Mucius Scaevola: *libro singulari* ὅρων, *Dig.* L. 17 *de divers. reg. iuris antiqui* l. 73 *pr: Quo tutela redit, eo et hereditas pervenit.*

who *nequitia* and *ad egestatem liberorum* dissipated the family estate, which he as *suus heres sive domesticus* in his time had received *ab intestato* from his father and grandfather (*bona paterna avitaque*), who was subjected to *cura prodigi*.[1]

Next, as appears from a recently found fragment of Livy, we have evidence that early Roman law knew a definitely closed Near-Kin with certain particular rights and obligations, for which *agnati* was obviously the technical term, in the old Roman prohibition (*vetus mos*) of inter-marriage between collaterals up to the sixth degree inclusive (*sobrino tenus*).[2] *Sobrini* in the sense of second cousins could not inter-marry. Such a rule, which no doubt was originally due to mainly economic reasons, seems a priori to be best understood as a Roman relic of an ancient Roman House-Community, which certainly often may have comprised not merely brothers and sisters and first cousins (*consobrini*) but also second cousins (*sobrini*), the grandsons of the grandfather's brother. The prohibition was, indeed, first abrogated at the end of the Second Punic War,[3] that is to say, at the point of time when the "Single Family" under the changed economic conditions probably had definitely developed from the "Large Family", the *Joint Undivided Family*, and the old divine Law, *fas*, was about losing its authority. And the assumption that the relationship *sobrino tenus* as a bar to marriage was a rudiment of an original House Community *sobrino tenus*, seems

[1] Paul. *Sent.* III 4[a] § 7: *moribus per praetorem bonis interdicitur hoc modo: "Quando tibi bona paterna avitaque nequitia tua disperdis liberosque tuos ad egestatem perducis . . ."* Cf. Cic. *de senectute* VII 22: *quemadmodum nostro modo male rem gerentibus patriis (patribus?) bonis interdici solet. Introduction* II 99 ff. cf. 97 ff.

[2] The fragment of Livy XX discovered by P. Krüger and reproduced in *Hermes* IV 372: *P. Celius* (i.e. *Cloelius*) *patricius primus adversus veterem morem intra septimum cognationis gradum duxit uxorem.*

As the Romans counted the proximity of relationship according to the number of births (*quot generationes tot gradus*) *consobrini* (first cousins) were relatives in the fourth degree and *sobrini* (second cousins) in the sixth degree. The terms *consobrini* and *sobrini* themselves, derived from *soror*, obviously date only from a time when *cognatio* had obtained a legal sense.

[3] Half a century after the Second Punic War we find instances of intermarriage between first cousins (*consobrini*). Liv. XLII 34: *Pater mihi uxorem fratris sui filiam dedit.*—Tac. *Ann.* XII 5 sq: Claudius married Agrippina, his brother's daughter. Suet. *Claudius* 26. Cf. Gai. I 62. See further P. E. Corbett, *The Roman Law of Marriage* (Oxford 1930) 48 f.

also to be confirmed by the term *adfinitas*, provided it may be justified in holding that this expression, which was later the general Roman term for affinity, i. e. the "persons related to the family by marriage", originally signified the persons who dwelt *beyond* the bounds of the family estate (*in agris vicini*).[1] For the cultivation of the common land of the *family* it may in olden times have been of practical importance at the contraction of marriage, too, to procure alien working-power for the household: The sons of the family therefore must have taken their wives *outside* the House Community, the *domus*, among the *in agris vicini*—among the *adfines*.[2] If now this probably fundamental meaning of *adfinitas* is held together with the positive old Roman prohibition of intermarriage, it may be readily surmised that the relationship *sobrino tenus*, which still in historical times was a bar to marriage, and *adfinitas*, which probably originally was a condition of marriage simply, supplemented each other within the old Roman village-community (*vicus*). Provided this conjecture is correct, we have here an indication that the peculiar group of kindred *sobrino tenus* was a survival of an ancient Roman "House Community", originally comprising several generations, a Near-Kin essentially corresponding to the Hindu *sapiṇḍa*-family and the Greek ἀγχιστεῖς.

The constitutive factor in the old Roman concept of "family" was the House Community closely bound together by common rights and duties, by common ownership of property and common cult, the inner group of kindred (*domus*, οἶκος) which as a Near-Kin survived to comparatively late days in joint right of inheritance, joint duty of offering the *sacra* and solidary mutual obligation to pursue the blood-feud. From a legal point of view, it was common subjection to the power (*potestas*) of the same *paterfamilias*, according to the old manner, that created and held together the patriarchal House Community. And the family law designation of the smaller family-group of all the free

[1] Fest. v° *adfines*: *adfines in agri vicini, sive consanguinitate coniuncti.* Cf. my paper *Studier over det primitive romerske Kongedømme*, Studier fra Sprog- og Oldtidsforskning (1947) 42 f.

[2] "Marriage outside (*exo*)" "the Joint Undivided Family", exogamy? Plut. *Quaestiones romanae* 6. 108 (?). Paul Huvelin, *Droit romain*, publié par les soins de Raymond Monier. 1927 p. 249 ff.

persons quondam living in one household (*in eadem domo*) under the same *patria potestas*, was in all probability the old Roman *adgnati*.[1]

Scattered scraps they are, but still parts of the completed pattern of the mosaic.

June 1952.

[1] In contrast to *agnati*, the term *familia*, the fundamental sense of which merely related to property, no doubt originally denoted the "heritable" family property (*heredium*), the paternal estate (*patrimonium*) constituting the basis for the continued material existence of the family (*domus*). Only subsequently *familia* became the common term for the genealogical concept "family", the free household. See my *Introduction* II 16 ff. 57 ff. 60 ff.

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