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## Critical Remarks on Roman Law in the Prussian Correction<sup>1</sup>

*Ius terrestre nobilitatis Prussiae correctum*, commonly known as the Prussian Correction, is—as we know—a partial codification of the Prussian land law, enacted by the *Sejm* (diet) and endorsed by the king in 1598.<sup>2</sup> It was brought about after very protracted and extraordinarily inept preparatory work, if one can even apply that phrase to the repeatedly adjourned or forgone conferences and gatherings during which the reform was to be developed. The reform itself stemmed from the demands of the Prussian nobility who, under the charter issued by Kazimierz Jagiellończyk in 1476, had been governed by the law of Kulm. This was municipal law, and the nobles deplored its uncertainty and lack of precision, though most of all they were unwilling to accept

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1 Translated from: Z. Lisowski, *O prawie rzymskim w korekturze pruskiej. Uwagi krytyczne*, “Czasopismo Prawno-Historyczne” 1954, t. 6, pp. 194–220 by Szymon Nowak and proofread by Stephen Dersley. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018. This paper, being a fragment from a more comprehensive work by this author, was to have been published in the previous volume, dedicated to the 500th anniversary of incorporation of Prussia into Poland. The editors include the article in this volume, all the more readily since as a model of critique and analysis of a source text it may contribute substantially to a more profound and vigorous study of the important issue of the reception of Roman law in Poland during the age of the Nobles’ Democracy.

2 Promulgated in print several times, also in Polish and German translation.. the Correction was included in vol. VI of the Piarist edition of *Volumina Legum*, and from thence reprinted in Ohryzko’s edition, vol. VI, pp. 270–281. I have used this latter edition V. S. Kutrzeba, *Historia źródeł dawnego prawa polskiego*, vol. II, Lwów–Warszawa–Kraków 1926, p. 39 ff.

the community of property it imposed and the resulting regime of succession *ab intestato*.<sup>3</sup>

In the scholarly literature, the authorship of the Correction is attributed to two royal secretaries, Reinhold Heidenstein and Mikołaj Niewieściński. In reality, however, according to the testimony of Lengnich—who may be relied on, given his thorough knowledge of the history of Royal Prussia—things were different. At the Prussian diet in Grudziądz held on January 22 1598, both presented their drafts following the request of the Prussian estates (Heidenstein personally and Niewieściński in writing). Their projects became the object of day-long discussion<sup>4</sup>, but at the Sejm which began on March 2, 1598, only Heidenstein's draft was deliberated on and subjected to vote,<sup>5</sup> subsequently receiving royal approval.<sup>6</sup> Thus the current text of the Correction originates solely with Heidenstein.

Heidenstein had some grounding as far as codification was concerned. After a short stay in Königsberg and Wittenberg, he registered in October 1575 with the Alemanian nation of jurists in Padua where he spent over four years (until November 1579).<sup>7</sup> He therefore had enough time and sufficient opportunity to gain considerable knowledge of Roman law. Although a substantial lapse of time—19 years—divides his studies and the drafting of the Correction, the text of the statute clearly shows that at the time of writing the author was still fairly conversant with Roman law. Without such knowledge, his draft of the statute would not have defined the capacity of a minor to act by means of a formula modelled on I. 1, 21: *omnibus autem in rebus wardlus meliorem suam*

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3 A detailed account of the preparatory efforts may be found in vols. III and IV of G. Lengnich, *Geschichte der preussischen Lande königlichen Anteils*, Gdańsk 1727.

4 G. Lengnich, *op.cit.*, vol. IV, pp. 255–256.

5 In the course of deliberations of the Prussian deputies, Niewieściński went as far as making certain allegations against Heidenstein's draft. V. G. Lengnich, *op.cit.*, vol. IV, p. 262.

6 G. Lengnich, *op.cit.* Based on Lengnich, a correct account of the affair is presented in E. Nehring, *O życiu i pismach R. Heidensteina*, Poznań 1862, p. 12 ff.

7 On Heidenstein's studies in Padua see Barycz in *Pamiętnik Literacki*, XXVI, 1929, pp. 213–223.

*conditionem etiam sine tutorum auctoritate facere poterit, deteriorem non* (Title III, 18) nor conveyed the principle which sanctioned the revocation and modification of the testament using the sentence: *ut ad mortem cuiusque voluntas ambulatoria et libera sit*, which paraphrases Ulpian's statement in D. 24.1, 32.3 and 34.4; he would not have justified the institution of usucaption with *ne rerum dominia in incerto sint* (Title IV.1), taken verbatim from I. 2.6pr, which in its turn derived from somewhat differently formulated text in Gaius I.44; finally, he would not have determined *culpa latae* as *dolo proxima* had he not had guidance in that respect in three sections from Ulpian, which incidentally had all been interpolated in any case (D. 11.1, 11.11; 43.26, 8.3; 47.4, 1, 2).

That general, Roman-like wording in the Correction might have given the impression and engendered the conviction that the statute as a whole was under considerable Roman influence, which may be termed as reception. This conviction was formulated in an unpublished work by one of the students of Prof. Taubenschlag, Sygierycz, whose findings Prof. Taubenschlag included in his valuable volume on the reception of Roman law in Poland,<sup>8</sup> which otherwise relied on the latter's own comprehensive research. Mentioning the name of the author, Prof. Taubenschlag indirectly intimated that he did not intend to bear full personal responsibility for the findings that his student had arrived at. I am therefore even more encouraged to make some critical remarks regarding Sygierycz's assertions where they concern private law in the Correction, though they are not materially addressed to the scholar whose body of works comprises a fair number of publications on Polish court law in the Middle Ages.

## I

First and foremost, two misunderstandings have to be clarified. The author whose findings were communicated courtesy of Prof. Taubenschlag

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8 R. Taubenschlag, *La Storia della recezione del diritto romano in Polonia fino alla fine del secolo XVI*, in: *L'Europa e il diritto romano*, vol. I, Milan 1953, pp. 227—242.

identified, for example, influences of Roman law in the Correction's provisions concerning the testamentary inventory and the admissibility of action for inheritance (*hereditatis petitio*), not only against the possessor but also against one *qui dolo desiit possidere*. Sadly, both these assertions are completely erroneous.

As we know, *beneficium inventarii* had been introduced into the Roman legal system by Justinian, by virtue of the constitution of 531 contained in C. 6.30,22 and summarized in I. 2.19,6. Justinian's creation triumphed over the centuries, surviving until today.<sup>9</sup> It is therefore possible that it found its way into the Prussian Correction, just as it was included in the 1580 edition of the Kulm law in which, despite having been formulated in general terms, it concurred in its premises and effect with Justinian's law.<sup>10</sup> However, there is no trace of it in the Correction. Indeed, the final section of Title I is provided with the heading *de inventario*, and it is concerned with the inventory in the context of succession, but this is not the inventory of Justinian. As is known, and as follows from the designation itself, *beneficium inventarii* is a privilege or an entitlement of an heir who, having accepted the inheritance without recourse to the so-called *tempus deliberandi* and having compiled a list of all assets and liabilities in a manner and time prescribed by law (90 days in total), would be liable to the creditors only to the amount of inheritance stated in the inventory, and have to satisfy such creditors as they come forward until all assets are exhausted. In contrast, the inventory in the Prussian Correction is not a privilege but an obligation. The obliga-

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9 E.g. in chronological order: Napoleonic code: Art. 793–813, Austrian code: §§ 800–807, German code: §§ 1993–2012, Swiss code §§ 380–B92, Italian code: Art. 484–611; Polish inheritance law: Art. 34, 49 § 2. In Soviet law, the estate regulated in § 100 of the Instruction of the Ministry of Justice of the Russian Soviet Federative Socialist Republic of March 2nd, 1948, has a different foundation and purpose, given that Art. 434 of the code sets forth—rightly so in my opinion—that the heir is liable only to the amount of the assets inherited.

10 Cap. 147: *Haeres . . . sin autem, uti par est. inventarium cum scitu et consensu iudicis conscripserit, explorandi causa, quantae sint haereditatis illius facultates, et quantum ex ea creditoribus debeatur, hoc casu nulla cogitur necessitate, qua cui tum ultra vires haereditatis exsolvat.* P.J.W. Bandtkie, *Ius Culmense cum appendice privilegiorum et jurium selectorum municipalium et dissertatione historicojuridica exhibitum, cura*, Warszawa 1814.

tion rests with the one *quicumque haereditatem vel etiam usumfructum possederit*, in other words on the possessor of the testamentary estate.<sup>11</sup> Within four months from succession (*post mortem defuncti intra mensem quatuor*), such a holder should make an inventory (*inventarium facere tenebitur*), for which act they should request the presence of both suitable witnesses as well as heirs, or at least one of them (*testibus fide dignis suae conditionis adhibitis, haeredibusque aut aliquo ex illis vocatis*). Should they fail to discharge the obligation, or the inventory they have made is deemed unreliable (*quod nisi fecerit aut fides inventario habita non fuerit*), they shall be summoned to appear before land court within a peremptory time-limit<sup>12</sup>, where they would confirm under oath that they have made the inventory with due honesty and without seeking to conceal anything (*peremptorium terminum habebit atque ad primam citationem respondere tenebitur, corporaque iuramentum praestabit omnia bona fide in inventarium a se relata nihilque ex bonis defuncti a se celatum vel celari*). Thus the differences with respect to the inventory in the constitution C. 6, 30, 22 are striking: 1. there, the successor is entitled in a particular manner, here, the holder of the testamentary property is under an obligation; 2. the Justinian inventory encompasses all the active and passive components of the estate, while the inventory in the Correction specifies only the property held by the person obligated to compile the inventory; 3. the time set forth for making the inventory is different, with 90 days in the Justinian Code and 4 months in the Correction; 4. finally, the goals of the inventory differ—there the aim is to protect the heir in case of excessive debt on the estate, while here the objective is to facilitate the determination of its components for the heir. In all fairness, one remark is due regarding the last sentence. The Prussian Correction is not an exhaustive codification. Even in those domains which it regulates, numerous matters are left without

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11 Naturally, I understand that possession most generally, not in the sense of the Roman possession *ad interdicta*, which in principle the user did not have.

12 On the meaning of *termin zawity* (peremptory time-limit) v. O.M. Balzer, *Przewód sądowy polski*, Lwów 1935, p. 96.

pertinent statutory provisions. In the land law of Royal Prussia, the said affairs were no doubt governed by the law of Kulm, in accordance with the charter of 1476. It is therefore likely that the obligation to make an inventory of testamentary property which is imposed on its holder was linked to the heir's exercise of the right which they had been granted under cap. 147 of the aforesaid digest of the Kulm law, and was intended to ease the task of surveying the assets. However, detailed provisions of the 531 constitution do not mention any obligation compelling anyone to aid the inheritor in the task of making the inventory, while it remains unknown whether such obligation had existed in Roman law. It is therefore difficult—even in such a hypothetical, indirect fashion—to presume the influence of Roman law. At any rate, the discussed regulation in the Correction does not in itself reproduce the provisions of the constitution C. 6, 30, 22 and cannot therefore attest to the reception of Roman law into that statute.

Much the same is the case with the Roman legal principle of passive locus standi of the possessor or one *qui dolo desiit possidere* upon *hereditatis petitio*, which had allegedly been received into the Correction. This assertion was advanced most likely in connection with Section 6, Title II of the Correction: *de donationibus et testamentis*. However, when the provision is examined more closely, it is easy to demonstrate that it is not at all concerned with the petition of a claimant to the succession against the holder of the estate or with the dispute regarding succession. Its factual state is rather similar to what one finds in Gaius II, 167 i.f.<sup>13</sup> Namely, it is founded on the fact that the heir appointed to the succession renounces it (*si haereditati, in quam debebat succedere, quis renunciaverit, sive filius sive quicumque alius*). In consequence: 1. not having acquired the status of successor they will not be liable for the liabilities of the estate (*ad debita quidem solvenda, aut alia onera haereditatis non tenebitur*); and 2. the estate should be handed over to the creditors so

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13 *Solet praetor postulantibus hereditariis creditoribus tempus constituere, intra quod si velit (sc. heres) adeat hereditatem, si minus, ut liceat creditoribus bona defuncti vendere.*

that their claims may be satisfied (*bona autem omnia creditoribus dimittiere debet*). However, there may arise the suspicion that the inheritor withholds a portion of the estate. In such a case: *a creditore ad ludicium Terrestre vocatus, terminum peremptorium habebit, in quo corporale iuramentum praestet, nihil ex bonis deijuncti se possidere, aut dolo malo possidere desiisse, quod si praestare recusaverit ac liquidum debitum, quod petetur, fuerit, ad solvendum cogatur*. Thus it is not the successor who becomes the claimant in the dispute, but the creditor of the estate; the would-be successor, as opposed to the holder of the estate, is the respondent; the object of the action is to determine whether the respondent withheld any part of the estate rather than recover the estate and, should the respondent fail to swear that they do not possess any portion of the estate, to award it to the claimant in respect of liquid debt, obviously not exceeding the amounts possessed or the malevolently disposed components of the estate (to use the terminology of the Code of Obligations).<sup>14</sup> The reference to Roman law can only be seen in the application—with a different state of fact at hand—of the principle of liability for property possessed and malevolently disposed, which had in fact existed in Roman law in connection with inheritance claims (cf. D. 5, 30, 20, 6c and 27 pr.).<sup>15</sup> However, the Correction is in no way concerned with a claim against the estate and passive locus standi.

## II

Another untenable proposition is that the Correction's system of succession *ab intestato* derives directly from Justinian's Novels 118 from 543, supplemented in one point by Nov. 127 from 548. The former piece of legislation is known to have introduced order into the tangle of Ro-

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<sup>14</sup> The content of the respective provisions in the Correction was accurately reconstructed by P. Dąbkowski, *Prawo prywatne polskie*, vol. II, p. 39.

<sup>15</sup> I ask that Roman law scholars forgive me for not discussing the difference between the time before the contestation of suit and after, and—prior to *litis contestatio*—between the possessor in good and bad faith. The matter is irrelevant to our deliberations.

man intestate succession, since the Senate's resolutions and imperial constitutions (beginning with Sc. Tertullianum under Hadrian) disrupted the precisely delineated boundary between agnatic *ab intestato* inheritance based on the Law of the Twelve Tables and the praetorian *bonorum possession* which allowed for cognation by granting civil rights of succession to some cognatic relations before civil law successors or on a par with the latter.

Justinian's reform is founded on two principles. First, it utterly abolished any distinction between agnation and cognation and based statutory inheritance law solely on natural, cognatic kinship. The principle is conveyed already in the preface to the Novels<sup>16</sup> (*omnes simul cognationis ab intestato successiones per presentem legern clava et compendiaria distinctione definire*), and stated even more clearly and precisely in c. 4, as follows: *in omnibus successioneibus adgnatorum et cognatorum differentiam cessare... atque omnes sine ulla eiusmodi differentia secundum cognationis suae gradum ad cognatorum ab intestato successiones vocare iubemus*. The second principle, also a fundamental one, establishes complete equality of male and female persons in both the paternal and maternal lines with respect to succession law. Here, one should refer yet again to the general formulation in c. 4, which stipulates that: *nullam autem differentiam esse volumus in ulla successione aut hereditate inter eos qui ad hereditatem vocantur masculos et feminas, quos communiter ad hereditatem vocari constituimus, sive per masculum sive per feminam defuncto coniungebantur*. It may be added that the abrogation of differences between men and women in terms of succession was such an important and momentous principle to Justinian that he did not content himself with the just cited general formulation, but reiterated how it applies in each of the four classes,<sup>17</sup> into which he grouped the consecutive cognates appointed to the succession (c. 1, class I: *neve ulla differentia inducatur utrum masculi an feminae sint*; c. 2. classes

16 In view of the now fading knowledge of Greek, I provide the text of the Novels in Latin.

17 The Novels mention only three classes in any case, combining classes II and III (in c.2).



II and III: *tam masculos quam feminas, neve ulla differentia inter eas personas observetur utrum masculi an feminae sint*; c. 3. class IV: *sive masculi sive feminae*).

Of those four classes, the first encompasses descendants of all sexes without restriction as to the degree. The inheritance is divided among offspring of the same degree, essentially *in capita*. But there is no exclusion of the more remote by the more immediate one; next to sons and daughters, the issue of the deceased son or daughter is entitled to inheritance for instance; however, they jointly receive and subsequently divide between themselves only such portion of the estate that would have fallen to their parent, had they been alive (succession *in stirpes*). Should there be no inheritors of the first class, the second class succeeds. The latter comprises the ascendants and full siblings of the deceased. Among the ascendants, those of the nearest degree take precedence over those farther removed. Should there be individuals entitled on both the father's and mother's side, the inheritance is divided into two halves (*in lineas*), one of which goes to the paternal ascendants while the other to the maternal ones, who then divide it among themselves as their number requires. This applies if there are only ascendants. Where there are surviving brothers and sisters of the deceased, the estate is divided among the nearest ascendants and siblings *in capita*; also, under Nov. 127, the children of the deceased brother or sister are entitled to a share of inheritance after the deceased ancestor (*in stirpes*). Class III, the least numerous, includes step siblings of the deceased. The offspring of the deceased brother or sister, but not more distant descendants, inherit with the siblings, *in stirpes* of course. Finally, in class IV, all more remote collaterals are called to succession, without restriction as to the degree, but with the exclusion of the more distant degree in favour of the nearest of kin.

The reason why I have recalled the foundations and the system of the Justinian succession so extensively and in such a textbook fashion is to make it easier to demonstrate how vastly it differs from *ab intestato* succession in the Correction when the two systems are compared.

Namely, with respect to the fundamental elements of the system, provisions of the Correction relating to the succession of collaterals still embrace the distinction between agnatic and cognatic kinship, which Justinian had abolished, though not in the sense of kinship based on paternal power, present or past, but in the sense of kinship in the male and female line, on the spear and distaff sides. Then, most importantly and in stark contrast to the absolute equality of men and women with respect to succession rights which Justinian had so forcefully emphasized, the Correction considerably disadvantages the female sex with respect to males. Even the first sentence of Title I, *de successioneibus*, leaves no doubt in that matter. It reads as follows: *In quaecunq̄ue bona, tam mobilia, quam immobilia, si filii supersint, aequis sortibus filii tantum succedant: masculis deficientibus, filiae*. Thus, if the decedent leaves sons, daughters are entirely excluded from succession, being solely entitled to a dower. If it had not been established or paid by the parents, this should be done within a year and six months by the brothers inheriting after the deceased, with the assistance of two relatives in the paternal line and two in the maternal as well as two lay magistrates appointed by the land court (*quae — sc. dos — nisi a parentibus assignata fuerit, per fratres et duos proximos ex parte patris, et duos ex parte matris, duosque Scabinos Terrestres illius districtus, in quo habitabunt, per iudicium Terrestre electos, intra annum et sex menses assignari et constitui debent*). In this case, the nature of things—as it is with every obligation resting on a person—may give rise to two possible outcomes. The brothers may fail to discharge the obligation in the designated period of time; then and only then can the sisters come into inheritance after the deceased parent (father or mother) on a par with their brothers (*portiones suas una cum fratribus aequo iure in paternis, quam maternis bonis habebunt*). Most often however, acting in their own interest, brothers will not neglect to establish a dower for the benefit of their sisters. Consequently, the daughters will have no rights to succession, not only after parents but also all ascendants in

general (*Dote autem ita illis assignata, nullum ultra eam sibi ius haereditarium, in bonis paternis vel maternis, aliorumve ascendentium ... vindicare poterunt, licet nulla eo nomine renunciatio facta sit*). What is more, where a succession after a deceased brother is concerned, dowried sisters will neither be entitled to claim increase of the endowment, nor to succession after him, unless no brother of the decedent or none of their male offspring survive (*nec ut dos ratione decedentium fratrum sibi augeatur o fratribus petere, sed illae sortes fratrum steriliter decedentium, ad fratres solos, aut fratrum masculini sexus liberos, qui supervixerint, pleno iure devolventur*). Only when all brothers of the deceased had died before him without issue can the sisters or possibly their children inherit after him (*quod si fratres omnes steriliter decédant, sorores earumque liberi in stirpes in bonis succedent*). Finally, women's rights are also restricted in favour of other collaterals, as they can succeed together with brothers only after sisters and female kin, but have no rights of succession after agnatic relatives (*sororibus itidem amitis,<sup>18</sup> materteris, avunculis, aliisque cognatis, non tamen patruis vel patruelibus aliisque agnatis una cum fratribus sorores earumque successor es in stirpes itidem succedent*). This basic rule which handicaps women in the event of intestate succession is evinced in the Correction for all classes of successors, just as in Justinian's legislation the reverse principle of equality of both sexes applies to all classes of successors.

Four such classes are distinguished in the Correction, just as had been done in Justinian's law. The first—again, as in Justinian's law—encompasses descendants of the first or more remote degrees, with an essential division of the estate *in capita*, whereas *per stirpes* mode is employed only when next to descendants of a certain degree there are children of one of those, who may succeed as their parent had predeceased the decedent. However, unlike in Justinian's regulations, class II does not com-

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18 An evident mistake must have occurred in the statute, since *amita*, father's sister, may be female, but is not a relative on the distaff side.

prise siblings and ascendants but siblings exclusively, again with a division *per stirpes*, where next to brothers or sisters succeeding by way of exception there are the inheriting children of the deceased brother or sister. Ascendants, in accordance with the sequence of degree, are included only in class III. Given that the statute does not specifically provide in that respect, it should be surmised that in this case—in contrast to Justinian’s law—division *in capita* will invariably ensue. If the decedent also left no ascendants, more distant collaterals—other than siblings—become entitled to succession. The range of persons entitled to inheritance in this class IV is not restricted, just as Justinian would have it, but unlike in the Novels, near degree of kinship does not mean exclusion of the more remote ones: next to relatives of a certain degree the issue of a relative of the same degree who had died earlier may inherit as well; naturally, division *in stirpes* would then apply.

If one is willing to draw final conclusions from that comparison of the two systems, one will inevitably have to state that the purported influence of Justinian’s legislation on the Correction is hardly in evidence. The fundamental principles governing the entire order of succession in both systems are diametrically different (the equal rights of men and women in Justinian, the disadvantaged position of women in the Correction; solely cognation in the Justinian Code, the distinction between agnation and cognation in the Correction). In the Correction, the composition of persons entitled to succession in classes II and III differs from what had been adopted in Justinian’s law. Also, the Correction approaches the range of entitled collaterals in a different manner (the possibility of division *in stirpes*) than Justinian’s regulation had done. It is only the division of inheriting persons into four classes which may be surmised to have been derived from the Novels and modelled on it, but was any model required there at all? After all, when one grants the right to succeed to the descendants, ascendants and collaterals, whilst distinguishing the siblings in the latter group—as the nature of things dictates—the division into four classes is an inevitable outcome, is it not?

## III

It is a prevailing notion in the scholarship that testaments were introduced into the Polish legal system from Roman law through the intermediary of the Church.<sup>19</sup> There are no grounds to suspect that Royal Prussia was any different in this respect. If one adopts that explanation of the origin of last will dispositions, then it should also involve the principle of their revocability until the death of the testators, a rule which, as I have already stated, is expressed in the Correction by means of a purely Roman, general formula. Given the unambiguous wording of the statute, one can hardly disagree that despite its origins, the content of the testament according to the Correction departs from the Roman norm, as it may only contain dispositions pertaining to chattels while clearly excluding immovable property (*testamenta, autem de bonis mobilibus quibuscunque, non autem de immobilibus . . . condere liberum erit*, Title II, 2). The contention or, to put it more cautiously, doubt may arise only when one embarks on an examination of forms of last will dispositions. Namely, it has been said that in the Correction, the three admissible forms of testator's expression of their will correspond closely with the three forms of Justinian's: *testamentum tripertitum, apud acta conditum, principi oblatum*. Let us then discuss them individually. Justinian refers (I. 2, 10, 3) to the a written private testament of his period as *testamentum tripertitum*, since in his opinion it constitutes an amalgamation of three elements: civil law, which required *uno contextu* the presence of witnesses summoned to the drafting of the will, imperial constitutions which prescribed that the testament be signed by the testator and the witnesses, and praetorian law, which stipulated that seals of the signatories need to be affixed to the testament and the number of necessary witnesses established for the document to be valid, of whom there should have been seven. A written testament in the Correction also

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19 See P. Dąbkowski, *op.cit.*, vol. II, p. 67ff., S. Kutrzeba, *Relazioni fra l'Italia e la Polonia*, Rome 1936, p. 71; from earlier authors, see P.J.W. Bandtkie, *Prawo prywatne polskie*, 1851, p. 335.

requires the signatures and seals of the testator and the witnesses, but the number of the latter is reduced to three (Title II, 33). If, therefore, one of the *partes* of that three-partite testament of Justinian's is lacking in the Correction, then both testaments can hardly be deemed identical, and the testament in the Correction be qualified as a *tripertitum*. Other than that, the remaining components of that form of testament are perfectly obvious. Namely, it is natural that the testator and the witnesses have to sign the drafted will and, in accordance with the custom at the time, affix their seals. A model for such a straightforward form does not have to be sought elsewhere.

The second form of testament defined in the Correction is a declaration of will made before a court followed by its being entered into court records (*si etiam in iure id testator facere maluerit, integrum illi erit, ad acta quaecunque authentica ultimam voluntatem suam disertis verbis profiteri atque in acta referendam curare*, Title II, 3). It cannot be denied that it is thoroughly analogous to the Roman testament *apud acta conditum* (C. 6, 23, 18; 19, 1, cf. D. 28, 4, 4). Still, having noted the analogy, it has to be remembered that the Middle Ages in Poland saw the widespread practice of recording various uni- and bilateral legal acts—testaments in particular—in court books. The custom existed both in land law and, to an even greater degree perhaps, in municipal law,<sup>20</sup> while the Prussian nobility had for over a century (since 1476) been subject to the municipal law of Kulm. It is custom rather than Roman law which should be seen as the source of that form of testament.

Finally, there is the third form, whereby the testator deposits their sealed testament—signed and with their seal affixed—with the court for safekeeping (*testamentum sua solius manu subscriptum et sigillo ob-signatum, clausum ad eadem acta offerre; cuius oblationis et traditionis actus, actis Officii inscribi debet*, Title II, 3). Undoubtedly its equivalent

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20 See S. Kutrzeba, *Historia źródeł dawnego prawa polskiego*, vol. I, Lwów–Warszawa–Kraków 1925, p. 53 ff., 140; for municipal books vol. II, p. 252 ff., regarding the testament specifically see P. Dąbkowski, *op.cit.*, vol. II, pp. 82, 407.

is the Roman testament *principi oblatum* (C. 6, 23, pr. 1). Whether the former is genetically linked to the latter may be difficult to prove in my opinion, but to argue successfully to the contrary would be just as hard.

#### IV

Roman law is also the alleged source of guardianship over women for which the Correction provides. At the same time, it is unclear whether the assertion was advanced with respect to the institution as such or its specific formulation. As for the first possibility, one should immediately counter it with a rebuttal, since lack of legal autonomy of women, that is their being hindered in legal life by virtue of subordination to a more or less extensive power of men is a phenomenon which emerged in numerous legal systems at some stage of development. Already Gaius, discussing Roman *tutela mulierum*, which he contrasted with the relationships among the peregrini, could not deny that after all *plerumque quasi in tutela sunt, ut ecce lex Bithynorum*<sup>21</sup>, *si quid mulier contrahat, maritum auctorem esse iubet aut filium eius puberem* (Gai. I, 93). In Attic law, statutory tutelage over a woman is exercised by her *κύριος*: father, husband, alternatively brother or paternal grandfather, and it is widely assumed that a similar arrangement functioned in other legal systems of ancient Greece.<sup>22</sup> *Κύριος* as a woman's guardian also exists in the law of Greco-Roman Egypt, as may be reconstructed from Greek papyri.<sup>23</sup> The fact of women being subject to custody can be determined in the law of the Sixth Dynasty (2625–2475 BCE).<sup>24</sup> The Old Germanic *mundium* over women may be mentioned as well, as an institution that is well known to historians of law.<sup>25</sup> Those several examples, cited com-

21 A country in north-western Asia Minor.

22 P. Lipsius, *Das attische Recht und Rechtsverfahren*, Leipzig 1905–1915, p. 482 ff., 520, 534 ff.; Taubenschlag, *Vormundschaftsrechtliche Studien*, 1915, p. 69 ff.

23 Taubenschlag, *The Law of Greco — Roman Egypt*, vol. I, p. 128ff. and *Archives du Droit Oriental*, vol. II, p. 293 ff.

24 Pirenne, *Histoire des institutions et du droit privé de l'ancienne Egypte*, vol. III, pp. 351–353.

25 R. Hübner, *Grundzüge des deutschen Privatrechts*, Leipzig 1930, p. 71 ff.

pletely at random, suffice to warrant the conclusion that just as tutelage over women developed without the influence of Roman law in Old Egyptian, Attic, Bithynian or Germanic law, Polish law, including the Correction, did not need to rely on a foreign model to subject women to certain restrictions in legal life.

It is therefore very likely that the purported influence of Roman law was identified in the specific framework of the tutelage of women established in the Correction. Still, the view is also seriously dubious. In order to substantiate it, one should recall—in a general outline—the pertinent norms of Roman law.<sup>26</sup> When did a woman as such need a guardian in Rome? Only upon the end of puberty and attainment of autonomous legal status, *sui iuris*. She was not *sui iuris* as long as she stood under the power (*potestas*) of the father or grandfather or when in a *cum manu* marriage—while it remained valid—she became subject to her husband's control (*manus*) in one of the ways which resulted in such a status. Thus, in no case could the power of the husband and that of a tutor (*tutela*) be simultaneously in effect with respect to one woman. Also, whilst remaining under continual tutelage for as long as it endured, a woman *sui iuris* could by no means be subject to curatorship (*cura*), even though there may have been reasons to establish such custody, such as being a spendthrift or suffering from a mental illness. Hence the power of the husband and the power of the guardian, the tutelage of the tutor and the custody of the curator were mutually exclusive terms where women were concerned. One could be appointed for guardianship based on one of the consecutively considered titles: designation in the testament of the father or husband, agnatic kinship and, from a certain period onwards, appointment by authority. In the classical period, the guardian of a woman did not manage her property; the woman administered her estate on her own, and only some of the actions required the sanction (*auctoritas*) of the tutor (Gai. I, 190, Ulp. XI, 25, 27). Already at an early stage, the guardianship of agnates proved the sole viable option,

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26 Cf. Kozubski, *Opieka nad kobietami w prawie rzymskim*, Kraków 1922.



as according to the account of Gaius (I, 192) they were the only ones who could not be compelled to grant *auctoritatis*. However, that type of tutelage is also the first to disappear. With respect to free-born women it was abolished as early as mid-first century by *lex Claudia*, which meant that henceforth they would only have guardians appointed under a testament or decree of the authorities. The significance of the latter modes of guardianship gradually diminished as well, disappearing ultimately in the Theodosian code<sup>27</sup>, not to mention Justinian's codifications, where the excerpts from legal writings collected in the Digests were meticulously purged of any mentions of them.

How does the above compare with the norms contained in the Correction (Title III, 20) which are alleged to have had Roman provenance? It sets forth that women are always subject to another's power, but that power combines *tutela* and *cura* (*mulieres in aliena tutela et cura semper sint*). The statute further draws a distinction between unmarried women, referred to as *filiae familias*, and married ones. That peculiarly called authority over unmarried women is to be exercised by fathers, and upon their death by adult brothers; where there are no such brothers, the power should be assumed by agnates, and in their absence by the nearest cognates (*et filiae familias quidem in parentum aut fratrum, si adulti sint, tutorumve agnatorum, vel iis non existentibus cognatorum*). However, the statute does not specify what the *tutela* and *cura* of an unmarried woman consists in, nor does it determine the scope of rights of the guardian. Only through *argumento a contrario* applied to the sentence discussed below can one infer that unmarried women were completely deprived of the right to dispose of their property, as the latter was entrusted solely to the person who held the custody of the woman. The position of married women is regulated even more perfunctorily. It is with only one single sentence that the statute grants women the capacity to dispose of their property with the consent of the husband and

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<sup>27</sup> With the probable exception of Constantine's constitution C. Th. 3, 17, 2, discussed by Taubenschlag, *Vorm. Studien*, p. 84.

with the guardian in attendance (*uxores cum maritorum consensu, tutore adhibito, liberam desponendi habeant facultatem*). As for the question which immediately arises here, namely of whether the guardianship of married women involved the same persons who held it with respect to *filiae familias*—within the meaning of the Correction—the statute does not provide an answer. It merely follows that a married woman who personally disposes of her property must have two supervisors while doing so: the husband and the guardian.

There is no need for a detailed recapitulation of that comparison between Roman norms and the norms in the Correction to warrant the conclusion that the latter differ utterly from the former. Although provisions of the Correction do contain certain Roman notions and terms, they are curiously mixed and peculiarly employed. *Filia familias* is not a daughter remaining under her father's authority, but an unmarried woman; the power of the father over his daughter is not *potestas* but *tutela et cura*; the same terms, mutually exclusive in Roman law, serve to define the rights of the guardian; relatives appointed to guardianship also include kin in the female line, the cognates; the validity of decisions relating to the property of a married woman require the consent of the husband and the participation of the guardian. Finally, the Correction refers to only one of the three types of guardianship distinguished by the mode of appointment, which was also the first to disappear in Rome. Thus one can hardly speak of the provisions of Roman law on guardianship of women having been adopted in the Correction.

At this point, another observation suggests itself. Today, direct information concerning the guardianship of women in Rome is derived chiefly from Gaius' Institutes and the so-called *Regulae* of Ulpian's. As is known, the Veronese manuscript of the Institutes was discovered in 1816. Previously, one had only known the Visigothic synopsis of the Institutes, where guardianship of women is not mentioned at all. Admittedly, Ulpian's *Regulae* were published in 1549 by du Tillet from a manuscript which went missing and was later rediscovered only by

Savigny.<sup>28</sup> It was used by Cuajcius, Heidenstein's contemporary (1522–1590), who took advantage of it as a source in his disquisition concerning the guardianship of women.<sup>29</sup> On the other hand, Cujacius's frequent adversary—Donellus (1527–1591), who paid less attention to the historical development of Roman law to focus on its systematics instead, never mentioned that guardianship in his writings. And Heidenstein was not Cujacius, after all. With all due respect for his studies in Padua, one cannot overlook the fact that the knowledge of private Roman law among average students of Bologna or Padua was based primarily on Justinian's collections which provided a basis for the scholarly work of glossators and, often indirectly through glosses, commentators as well. Also, we must not forget that the time when the Correction was drafted was the heyday of humanism, when the speeches and writings of Cicero and Livy's History were part of the usual reading of an educated person. It has to be admitted that even before the discovery of Gaius and the possibility of perusing Ulpian's *Regulae* one had been able to read—in general terms—about the legal dependence of women and their being subject to guardianship both in Cicero (pro Murena 27: *mulieris omnis propter infirmitatem consilii maiores in tutoris potestate esse voluerunt*),<sup>30</sup> and in Livy (in Cato's speech of 195 in defence of *legis Oppiae: maiores nostri nullam ne privatavi quidem rem agere feminas sine tutore auctore voluerunt, in manu esse parentium, fratrum, vivorum*, 34, 2).<sup>31</sup> Without doubt, it was Cicero that the contemporaries

28 P.F. Girard, F. Senn, *Textes de droit romain*, 1937, p. 401 f.

29 See e.g. in the Neapolitan edition from 1722 *Observationum et emendationum*, liber VII, cap. XI (vol. III, col. 172/3), liber XXII, cap. XX (vol. III, col. 648); *In libros 9 responsorum Julii Pauli*, vol. VI, col. 555/6.

30 The tutelage of women, *auctoritas tutoris* in particular, is mentioned by Cicero in several other speeches; *pro Caecina* 25, 72: *quod mulier sine tutore auctore promiserit, teneri* (ironically, referring to the legally impossible state of fact); *pro Fiacco* 34, 84: *nihil enim potest de tutela légitima nisi omnium tutorum auctoritate deminui*; 35, 86: *quaecunque sine hoc auctore est dicta dos, nulla est*; as well as in one of the letters to Atticus: *id mirabamur te ignorare de tutela légitima in qua dicitur esse puella, nihil usu capi posse*, *Ad Att.* 1, 5, 6.

31 Livy's story about Hispala Fecenia is in fact an indirect reference to the tutelage of women; the Senate granted her the right to choose her guardian (*tutoris optio*) in reward for her help in exposing the Bacchanalian Conspiracy.

relied on when developing their Latin style; it was from him that they learned eloquence and gained knowledge of the systemic instruments of Rome, but in the work of codification, when one sought to formulate legal norms whilst availing themselves of the Roman model, they would certainly not have looked for it in the monumental pieces of antique rhetoric or history, but in the body of Roman law which was expressed in Justinian's codification. The latter, however, says nothing about the guardianship of women.

## V

With respect to the tutelage of minors, the influence of Roman law was detected in a whole range of elements. These include grounds for appointment to guardianship, the need of permission for the alienation of property of the ward, the distinction between *tutores gerentes* and *honorarii*, *accusatio suspecti tutoris*, statutory lien on the estate of the guardian in respect of claims of the former ward arising from the exercise of guardianship, and finally the liability of the guardian for *dolus* and *culpa lata*. On top of those, one should also add the inventory made by the guardian, which for incomprehensible reasons is not listed in Prof. Taubenschlag's treatise, although it may have offered a major, albeit only ostensible argument in support of the reception of Roman law into the Correction.

Before the respective provisions of the Correction are compared with the pertinent norms of Roman guardianship law, it must be stated that here the author demonstrates an erudition in Roman law which surpasses any other section in the Correction. It is here that we find the aforesaid (p. 1), purely Roman description of the scope of the ward's own capacity for action (title III,18), as well as the rationale for the guardian's liability for *culpa*, which arises from the fact that it constitutes *dolo proxima*. Besides, the title *de tutelis* (III) is replete with Roman designations and terms in any case. However, given the results of

our analysis so far, it would be legitimate to ask whether those expressions and terminology are not merely a facade, but indeed harbour and must harbour equally Roman substance.

The question arises immediately with the first issue: the appointment of the guardian. Just as Roman law had done, the Correction discerns a hierarchy of three grounds for appointment and describes them using Roman terms: *tutores testamentarii*, *legitimi* and *dati* (Title III, 6). But even the first does not quite correspond to the actual state of affairs. While in Rome testamentary guardianship was indeed founded on the will of the potestate expressed in the testament, the Correction permits *omnibus liberos impuberes habentibus* to appoint guardians for minors, but they may do so either by means of testament or a request registered with a court (Title III, 1).<sup>32</sup> Thus, despite the Roman name used in the Correction, the second type of tutelage will not be a testamentary one, although it will be based on the will of the potestate. The second category of guardians, appointed where there are no tutors appointed by the potestate, are the so-called statutory guardians or consanguineous guardians, as they are referred to in Polish law.<sup>33</sup> In Rome, agnates used to become such guardians for a number of centuries, and it was only Justinian who, having based statutory succession exclusively on cognation, extended his reform to include guardianship as well, and enacted appointment of cognatic relatives (Nov. 118 c.5). In Rome, therefore, cognates historically succeeded agnates in terms of eligibility for appointment. The Correction approaches the matter differently, with a distinct sequence of appointment where cognates follow agnates, as *tutores legitimi* are in the first place *proximi agnati, qui nimirum masculino sexu wardlis coniuncti sunt*, and in the absence of those *proximi cognati, qui per feminam wardlos cognatione attingunt* (Title III, 2). Again—a Roman name, but not strictly Roman substance. If a minor had no relatives

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<sup>32</sup> The matter is therefore regulated in the same way as in Polish Crown law, see P. Dąbkowski, *op.cit.*, vol. I, p. 490.

<sup>33</sup> P. Dąbkowski, *op.cit.*, vol. I, p. 493.

in the male and female line, or if such relatives refused guardianship for statutory reasons (*si legitimis causis a tutela se excusent*), the land court would, at anyone's solicitation (*a quocunque eo nomine appellatum*), appoint two or three appropriate guardians (*idoneos et sufficienter ibidem possessionatos*, Title III, 4). Concerning the successive bodies of authority which were tasked with appointing guardians in Roman law, see I. 1, 20.

Drafting the inventory of the ward's estate as a basis for accounting for the custody after it ceased is a fundamental duty of the guardian, in Roman law and in the Correction alike, and the concurrence of pertinent norms in both legal systems is exceptionally substantial. According to the Correction, it is the first action of each guardian (*sive testamentarii fuerint, sive legitimi, sive dati*), which they should undertake within a month from assuming guardianship (*tutela suae administrationem a confectioe inventarii ordiantur*, Title III, 6). In Justinian's law, prior to making the inventory the guardian may only engage in actions of the most urgent concern (*nihil itaque gerere ante inventarium factum eum oportet, nisi id quod dilationem nec modicam exspectare possit* D. 27, 7, 7 pr. i. f. and C. 5, 51, 13). Pursuant to the imperial rescript, the inventory must be made with a representative of the authority in attendance (*sub praesentia publicarum personarum*, C. 5, 37, 24 pr.), whereas the Correction sets forth that at the request of guardians, competent land judge will dispatch two lay magistrates to the estate of the ward, who, having made the inventory, will sign it and affix their seals (*Iudex Terrestris loci illius a tutoribus requisitus, duos Scabinos in bona wardlorum delegabit, qui confectum inventarium manibus suis subscribant, et sigillis muniant*). In the Correction, failure to discharge the obligation on the part of the guardian will entail dire consequences, because when their custody expires, they may be liable to recompense loss to the amount which will be determined, within the limits decreed by the court, by the oath of former wards or their inheritors (*quod si a tutoribus prometer mis sum, fuerit, quanti a wardlis aut haeredibus eo-*

*rum, moderatione iudicis praecedente, in litem iurabitur, tantum damni nomine praestare illis tenebuntur*). The rule in Roman law is no different: the guardian who deliberately (*dolo*) fails to make the inventory: *in ea conditione est, ut teneatur in id quod wardli interest, quod ex iureiurando in litem aestimabitur* (D. cit.). On the judge's determination of the maximum amount to which one may swear, see D. 12, 3, 5, 1.

Furthermore, the Correction echoes Roman law in its restriction of the guardian's powers to dispose of the ward's estate. Nonetheless, they agree only as to the principle of limitation, whose core idea—to maintain the most important components of the estate intact for the benefit of the ward—is so natural that it is also found in Kulm law (c. 166) and in Polish Crown law.<sup>34</sup> Also, there are substantial differences between the systems as far as the scope of restrictions is concerned. In Roman law, the first limitation was introduced by the resolution of the Senate of 195, passed on the initiative of Septimius Severus (*Oratio Severi* D. 27, 9, 1 pr. — § 2). It was concerned only with rural and suburban land (*praedia rustica et suburbana*) and permitted the guardian to alienate it only in two cases: 1. necessarily, when sale was directed in a testament or codicil; 2. when approved by competent authority (praetor or province governor), if sale or hypothecation proved necessary to satisfy the debts which could not be paid from other portions of the ward's estate. Constantine went much farther in the constitution of 326 (C. 5, 37, 22), where the prohibition was extended to include all major component of the ward's estate, such as urban property and more valuable chattels (*aurum, argentum, gemmas, vestes, ceteraque mobilia praetiosa, urbana etiam mancipia*), making an exception for used pieces of attire and superfluous animals (§§ 6, 7). Disposal which violated this prohibition, i.e. occurred without the consent of authority, was invalid (*venditio tutoris nulla sit sine interpositione decreti*, § 6). The Correction approaches the issue differently. The limitation imposed on the guardians in Section 9, Title III, pertains only to immovable property, while the exception as-

<sup>34</sup> See P. Dąbkowski, op.cit., vol. I, p. 508 f.

sociated with the request of the father, provided for in *Oratio Severi*, is not taken into account at all. Alienation or a pledge always require authorization from the land court, which is granted provided that admissible grounds are stated (*immobilia bona non nisi ex sequentibus causis, et decreto Iudicii Terrestris causa aliqua earum in ludido Terrestri prius probata*). These reasons, exhaustively enumerated, include: 1) payment of dowry (*dotis solvendae*); 2) upkeep of the ward, if there are no other means to cover it (*alimentorum wardlis, si aliter ea expediri non possunt, constituendorum*); 3) avoidance of losses which may arise from failure to satisfy a lien or pay usurious interest rates (*damna ex obligationibus aliquibus, aut usuris, si ea non explicarentur, provenientia*); and 4) payment of liquid debts (*liquidorum debitorum solutio*). If alienation took place without such reasons in evidence and without a court decree, it would be invalid as in Roman law, and the ward would not lose their property (*dominium non transferetur, recteque postea a wardlis vindicari poterunt*).

If one guardian seems to have been a rule in Roman law, though undoubtedly there may have been several as well, the Correction gives preference to multiple guardians, both statutory and those appointed by court. Thus, if there is a greater number of relatives in one degree who solicit guardianship, the court *tres ex ipsis, si tot sint, deligat* (Title II, 3), and where there are no relatives, the court is to appoint the guardian *tutores duos aut tres dare tenebitur* (Title II, 4). Naturally, the father was also entitled to appoint more numerous guardians. Nevertheless, in such cases the paucity of the ward's estate or the purposefulness of its administration may have required that it be placed in the hands of one, or possibly a couple of guardians. The others, whom the Correction does not name as *tutores honorarii* as it had been observed in such circumstances in Rome (see e.g. D. 26, 7, 3, 2; 23, 2, 62), will be obliged to supervise that guardians adequately discharge their custodial duties since, as in Roman law, those inactive guardians will be jointly responsible for the care over a ward or its inheritors (*wardlis tarnen hae-*



*redibusve eorum omnes coniunctim . . . in solidum*, Title III, 10). Also, it does not follow from the text of the statute whether the liability should only be a subsidiary one, as under D. 26, 7, 3, 2 (*excussis prius facultatibus eius qui gesserit conveniri oportere*).<sup>35</sup> Meanwhile, reimbursement of losses incurred as a result of poor administration on the part of the guardian or guardians may be sought by the ward or their inheritors after guardianship expires, through an action analogous to the Roman *actio tutelae*, with a period of limitation of three years and three months (Title III, 19). However, that is as far as the analogy goes. In spite of what has been claimed, the extent of liability of the guardian differs between the Correction and Justinian's law. According to the Correction, the guardian is liable for malevolent intent and gross negligence (*nihil praeter dolum et culpam latam, quae dolo próxima est, tutor praestare debet*, Title III, 17), while Justinian's law obliges them to exercise the same due diligence in the affairs of their ward as they would in their own (so-called *culpa levis in concreto* D. 27, 3, 1 pr). The analogy returns in the provisions related to securing claims of the ward against the guardian in respect of the tutelage. As in Roman law following Constantine's constitution of 314 (C. 5, 37, 20), the pupil is entitled in the Correction to a general pledge on the entire estate of the former guardian (*et ipsi et bona eorum in solidum obligata erunt*, Title III, 10).<sup>36</sup>

This is how matters will stand once the tutelage ceases, but still while it lasts it may turn out that the guardian is not up to the task; in such a case they may be removed from the guardianship (*decreto iudicii a tutela removeatur*, Title III, 11). This *remotio tutoris* does indeed resemble the analogous Roman institution that usually ensued the so-called *accusatio suspecti tutoris*.<sup>37</sup> The latter originates from the Twelve Tables, but it seems to have been limited at the time to testamentary tu-

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<sup>35</sup> The responsibility of guardians who are not involved in administration is also a subsidiary one in the Kulm law, cap. 172.

<sup>36</sup> A lien of that kind had already existed in the Kulm law, cap. 171.

<sup>37</sup> Regarding this procedure see R. Taubenschlag, *Vormundschaftsrechtliche Studien*, Leipzig 1915, p. 30 ff.

tors and guardians appointed by the authority, while under Justinian's law it could be applied to all guardians (D. 26, 10, 15 = I. 1, 26, 2). A guardian could be denounced before a praetor or province governor (I, 1, 26, 1) or—in the Correction—before a land court by anyone, for as Ulpian states in D. h. t. 1, 6, *sciendum est quasi publicam esse hanc actionem, hoc est omnibus patere*. Similarly, the Correction sanctioned summoning (*vocare*) of the guardian by anyone, close persons and strangers alike, if they were concerned about the care over the ward (*vel propinquo, vel etiam alieno, qui cura pupilli tangatur*, Title III, 11). The grounds for removal also appear to be similar, but there is a significant and, from the standpoint of our deliberations, characteristic difference. In Roman law, *tutor suspectus* is a general notion<sup>38</sup> (*genus*) which may encompass various states of fact (*species*). Therefore, considering the casuistic nature of Roman jurisprudence, jurists elaborate on the causes which could justify finding a guardian *suspectus* and lead to their removal from guardianship. Consequently, a suspected guardian is wasteful with the ward's estate, administers it negligently or to the detriment of the ward (*si forte grassatus in tutela est aut sordide agit vel perniciose pupillo*, D. 26, 10, 3, 5); furthermore, they have misappropriated something belonging to the estate (*aliquid interceptit ex rebus pupularibus*, *ib.*); failed to provide means for the upkeep of the ward (*qui ad alimenta praestanda copiam sui non faciat*, D. h. t. 3, 14); or have disposed of things whose disposal is prohibited without a decree of a competent authority (*qui res vetitas sine decreto distraxerit*, D. h. t. 3, 13) etc. Among those examples, many more of which could be cited from the Digests, the first one is the most important for us. It suggests that to the Romans, careless administration of the ward's estate was only one of the possible manifestations of the suspected character of the guardian. Things are altogether different in the Correction, as suspected character of the guardian and their poor administration are deemed equal notions there. The statute specifies two causes which sanction calling the guardian to account: the suspected character of the guardian and their deficient manage-

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<sup>38</sup> This follows both from Gai. I, 182 and above all from I. 1, 26, pr. § 1.

ment (*si tutor tutoresve suspecti sint vel bona pupilli male administrent*, Title III, 11). Moreover, this is not random, imprecise wording which occurs only once, because again the Correction states two causes which may justify the decree to remove the guardian: if the guardian is suspected in the light of the revenue account or certain other circumstantial evidence, or if it turns out that they have administered the estate poorly (*si ex rationibus proventuum vel certis aliis indiciis suspectus fuerit, aut tutelam male administrare reperietur*). One may well ask whether those are indeed two causes for removal. After all, if the first cause is reflected in the revenue account, this means that the books demonstrate poor administration. The first cause is identical with the second, while the whole notion of *suspecti tutoris* is left hanging in the air. What does this prove? It proves that the author of the Correction remembered that under Roman law it had been possible to remove the guardian as *suspectus*, but failed to appreciate the crucial, generic significance of the notion and did not realize that he merely introduced the Roman term into the statute and used it to denote content he expressed in other words.

This is how the Correction stands with respect to Roman law in the domain of guardianship over minors, the part of the statute which echoes Roman law the most. In the above analysis of particular institutions, I have deliberately cited source texts quite extensively, so that an impartial reader may determine for themselves where the truth lies. Still, in that detailed disquisition the essential threads of the issue might have been lost. Therefore, though not wanting to incur the accusation of repeating myself needlessly, I may perhaps be allowed to go over the similarities and differences between the examined systems once again, to conclude that here as well as in other sections of the Correction certain Roman notions and terms do occur, but either they do not appear in the pure Roman form, or do not bear significantly on the institutions to which they were applied. Thus—successively recapitulating particular issues—the will of the father may appoint a guardian for his children, but it may be conveyed not only in a testament, as in Rome,

but also in a request registered with a court. Statutorily, relatives are appointed to tutelage, but unlike in Justinian's Novels, a distinction is made between kin in the male and female line, whereby the former takes precedence. Guardians are restricted in their disposal of the estate of their ward, but the objective scope of the limitations and the reasons for which alienation or encumbrance are admissible differ from what is set forth in Roman law. The guardian may be removed from their position either because they administer the estate of their ward poorly, or because they are *suspectus*, whereas in Roman law the notion of *tutoris suspecti* is a *genus* which may manifest in various actions of the guardian, including negligent administration. Guardians who are not involved in the management are equally liable to the ward or their inheritors in equal measure as the administrators but, in contrast to Roman law, their responsibility is not a subsidiary one. The two systems adopt a different measure of diligence whose inadequate exercise will incur liability on the part of the guardian. It is only with respect to the obligation and manner of making the inventory and consequences of failure to discharge it, the essential possibility of removing the guardian while the guardianship lasts and the securing of claims to which the ward is entitled in respect of the guardianship through general pledge on the estate of the guardian that Roman law and the Correction show significant correspondences. But here, perhaps with the exception of the latter point, actual reception cannot be easily argued, if reception is taken to mean the adoption of an institution from a foreign legal system with its foundations and specific form. Because even obliging the guardian to inventory the estate whose administration they assume with a view to handing it over later to the estate's proper owner seems so natural that the introduction of the obligation into the statute did not require drawing on the Roman model.<sup>39</sup> Relating to this subject, *iusiurandum in litem* is undoubtedly a purely Roman term, but it should be remembered that

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<sup>39</sup> The obligation exists in the Kulm law (cap. 167) and in Crown land law, see P. Dąbkowski, *op.cit.*, vol. I, p. 502 f.

the oath of a party was a standard mode of demonstrating the extent of loss in a Crown lawsuit as well<sup>40</sup>, and it is thence that it could have been adopted into the Correction. The removal of a guardian while they still hold guardianship is not much different. After all, the guardianship can sometimes last very long, as according to the Correction one comes of age at 18 (Title III, 13). The guardian may prove to be an inept or a dishonest administrator. It is true that after guardianship ceases they will be held accountable for all their misdeeds to the ward or their inheritors, but would it not be more reasonable to have them removed from administration immediately when their ineptness or dishonesty have been determined? Did one really need to look to Roman law for such a straightforward concept? *Post hoc* does not always have to be *propter hoc*. Obviously, this observation does not preclude that certain details in what is most likely a naturally developed institution<sup>41</sup> may have been based on the Roman model (e.g. the catalogue of persons entitled to report their suspicion and the resulting “popular” aspect of the procedure).

## VI

In the area of substantive law, it has been claimed that Roman law has influenced the institution of usucaption, in particular the inadmissibility of usucaption on property acquired *vi et clam*. I admit that I find the assertion made with regard to the latter incomprehensible. The grounds for acquisitive prescription in Justinian’s law are conveyed in the following, well-known medieval hexameter: *res habilis, titulus, fides, possessio, tempus*. In the Correction, prescriptive acquisition of ownership to immovables (because this is not the only element at stake here) will ensue if someone *per triginta annos non vi, non clam, non alieno sed suo nomine, et titulo bonaque fide, pacifice sine ulla uiusquam interpellatione*

40 See O.M. Balzer, *op.cit.*, p. 157 f.

41 It should be recalled yet again that the removal of the guardian *qui malo more gessit* is provided for in the Kulm law (cap. 162) and in Crown law, see P. Dąbkowski, *op.cit.*, vol. I, p. 520 ff.

*possederit* (Title IV). Let us leave aside the stipulation of the Correction that the usucaptor must possess the thing in their own name, otherwise they would be no proprietor, as well as the condition that the possession cannot be interrupted (*interpellatio*), because obviously if a hiatus in usucaption takes place, then according to general rules the entire past period of possession is void, meaning that only new usucaption can begin where suitable circumstance occur. If, however, we omit those two elements and compare the catalogue of conditions in the hexameter and the Correction, then we will be compelled to state that the statute sets forth too many or too few. There are too many in the sense that if the proprietor is to have a title, i.e. such a legal event which usually, were it not for the absence of rights of the predecessor, would lead them to acquisition of ownership, then obviously he could not have acquired the things either *vi* or *clam*. Conversely, there are too few in the sense that the catalogue of the Correction does not mention the condition listed in the first place in the hexameter, in other words it does not require that the thing be suitable for usucaption, a *res habilis*. However, perhaps the omission is only apparent, a conjecture one can arrive at by way of the following reasoning. *Res habilis* in Roman law has not been stolen or taken by violence, because if it is encumbered with such a *vitium*, then not only the thief or the violent individual but also no one else—up to a certain moment (so-called *reversio ad dominum*)—will be able to acquire its ownership by prescription (I. 2, 6, 2, ff.). Theft after all is perpetrated clandestinely (*clam*) or using violence (*vi*). The same applies to unlawful takeover of somebody else's land. Therefore, by introducing the requirement that the usucaptured thing be acquired *non vi non clam*, the author of the Correction may have wanted to exclude things acquired by violence or clandestinely from usucaption. However, he did not realize that by formulating the condition using words cited above he changed the objective qualification of the usucaptured property into the subjective qualification of the owner. He would have done better to have adhered to the Kulm law he sought to correct, which in the

edition of 1580 concurs with Roman law by laying down the principle that a thing *furto vel rapina oblata... furto vel rapinae ma neat obnoxia, quantumvis diu possederit* (cap. 109) and such a thing, though it may have been acquired in good faith, cannot be subject to usucaption.

If we approach the Correction by making allowances based on the above reasoning, then it has to be admitted that conditions of usucaption in that statute are indeed copied from Roman law. Such an assortment cannot be found in the Kulm compilation of 1580, which for usucaption to take place requires only *bona fide sine contradictione iudiciali* (cap. 108) nor in Polish Crown law which, setting out from the so-called prescriptive loss of right, did not in consequence require either title or good faith for the acquisition of ownership.<sup>42</sup>

However, the influence of Roman law on the conditions of usucaption we have determined here does not include the period of time it requires to ensue. The periods of ordinary prescription in the Correction are different than in Justinian's law. Unlike the latter, which requires 3 years for movable property, 10 or 20 (depending on whether usucaption occurs *inter praesentes* or *absentes*) for immovables (C. 7, 31, un.), the Correction posits 3 years and 3 days for chattels, and 30 years for realty, as in Justinian's extraordinary usucaption with good faith but without a title (C. 7, 39. 8, 1).

We have thus reached the end of our deliberations. Their findings may be summarized in several sentences. The Correction cannot demonstrate the influence of Roman law on provisions relating to estate inventory and passive locus standi in an action for succession, because the Correction is not concerned with either of those institutions. There is no trace of influence of Roman law on succession *ab intestato*, which in the Correction is founded on principles which are contradictory to Justinian's legislation, or on the guardianship of women, which despite using Roman terms in respective provisions is utterly at odds with its Roman counterpart. No indication of influence can be found in the ex-

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42 P. Dąbkowski, *op.cit.*, vol. I, p. 298 ff.

tent of liability of the guardian, which the Correction determines differently than Justinian's law. It is unlikely that Roman law had influenced restrictions of the powers of the guardian by prohibiting alienation of certain components of the ward's estate, in view of the natural basis of the institution and the scope of limitations adopted in the Correction, which differs from the Roman regulations. However, the influence of that law is probable in the case of the origins of testament and the set of conditions posited for usucaption of immovables. Also, some influence may have possibly been exerted on the procedural details relating to the guardian's inventory of estate and removal from guardianship, although both institutions are likely to have been based on domestic solutions. Perhaps the influence is also reflected in the provisions on securing claims of the ward against the guardian by means of general pledge on the estate of the latter, and the form of the testament deposited with the court for safekeeping. With the exception of the origin of testament and the conditions for usucaption, these are all matters of secondary importance and even if one conclusively proved that the provisions in question do draw on Roman law, its broader reception into the Correction could hardly be acknowledged as true. It might have been suggested by the Roman formulations of certain legal rules which the author had included in the statute and the Roman terms he had employed. But the terms—as I have attempted to demonstrate—were often not used in their erstwhile Roman sense (*filia familias*, *tutela et cura*), and at times the author failed to comprehend their actual meaning (*tutor suspectus*). They only prove that the creator of the statute had become acquainted with Roman law and remembered some of it, but they do not warrant the conclusion that the author sought to introduce Roman institutions into the statute he had conceived. Instead of reception, it would probably be more accurate to speak of reminiscences of Roman law in the Correction. The use of Roman terminology was in any case also due to the fact that the author drafted the Correction in Latin, therefore he was compelled to refer to Roman legal nomenclature order to



describe domestic institutions. As for the substance of the provisions, that external linguistic form cannot be any indication.

While I define the relationships between Roman law and the Correction in the above manner I still have to admit that Royal Prussia—except for the areas where the Second and Third Statutes of Lithuania were in force<sup>43</sup>—was the part of the Polish state whose land law offered the most discernible threads linking that legal system, if only in terminology, with Justinian's great achievement. In the land law of the Crown, the connections with Roman law were always fairly loose and expired with the Statute of Warka of 1423. It is true that when in the early sixteenth century a need for codification emerged to address the uncertainty and particularity of domestic law, the inclinations to take the principles of Roman law into account were by no means meagre. Some went as far as Śliwnicki who, having been called upon to codify municipal law wanted to Romanize it completely (around 1524), and to endow the transformed municipal law with an ancillary function to land law.<sup>44</sup> However, his draft did not become a statute. Also, no later codification relied on the work by Przyłuski (1553), who did not have so far-reaching designs as Śliwnicki, but wished that Roman law may at least serve to explain and systematize land law.<sup>45</sup> Little or no heed was given to Roy-sius, who counselled supplementing the rules of domestic law with the more refined Roman norms.<sup>46</sup> The appeals were in vain due to essential reluctance towards any foreign law on the part of the nobility, whose champion in that matter was such an emblematic representative of that estate as Orzechowski.<sup>47</sup> Besides, attempts at the codification of sub-

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43 Cf. R. Taubenschlag, *Wpływy rzymsko-bizantyńskie w II Statucie litewskim*, Lwów 1953; and *La Storia della recezione...*, op.cit., p. 239 f.

44 P. Kutrzeba, op.cit., vol. II, s. 266 ff.; P. Estreicher, *Polska kultura prawnicza XVI wieku*, in: *Kultura staropolska*, 1933, p. 57. It may be noted that Śliwnicki made unsuccessful efforts to convince the Prussian council to his draft at the congress held in Grudziądz, in October 1524, see article by J. Dworzaczkowa in this journal, vol. VI, 1 p. 178 ff.

45 P. Kutrzeba, op.cit., vol. I, p. 252 ff.; P. Estreicher, op.cit., pp. 57–58.

46 P. Dąbkowski, op.cit., vol. I, p. 25.

47 P. Estreicher, op.cit., p. 58 f.

stantive law, both those undertaken in the seventeenth century as well as later, in the eighteenth century, were ineffectual<sup>48</sup> and Crown land law remained legislation based on medieval foundations until the end of the Commonwealth.<sup>49</sup>

In contrast, what Śliwnicki wanted to achieve through legislative process happened of itself, in a sense, in Prussia. As I have previously emphasized, the Correction was a partial codification. It regulated substantive law to a minor extent, and left out obligations completely. In those domains, the nobility had to rely on the applicable Kulm law which, as an offshoot of the Magdeburg law, did avail itself of the norms of Roman law when it had to be supplemented, just as its parent body of laws had done. This did not provoke opposition from the Prussian nobility who, being more involved in trade than in other provinces, understood that for the sake of their own interest it is better to have those relationships governed by international Roman law rather than particular domestic law.

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48 P. Kutrzeba, op.cit., vol. I, p. 221 f.

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