
CARVILIUS RUGA v UXOR: A FAMOUS ROMAN DIVORCE

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1 Introduction

It was the third century BC in early Rome – republican Rome. The city of Rome, which looked like a village though, was by now the largest city in Italy with more or less 100 000 inhabitants. Rome had been at warfare for several centuries and was still continuing her wars.¹ Despite Rome's continuous warfare and the rapid expansion of the territory of the Roman state, the general appearance of the city of Rome underwent little change between the end of the regal period and the third century BC (the period between 509 and 300 BC). In 386 BC the Gauls sacked Rome² and nearly destroyed the city.³ After the destruction by the Gauls, Rome was rebuilt but still looked like a village.⁴

The government of Rome was in the hands of the popular assembly, the senate and an extensive system of magistracies such as the consuls, *praetors* and censors.⁵ Although fairly simple in character, this form of government resulted in the success of the administration of the Roman state.⁶

The political success of Rome as well as the conquests on the battlefields did not correspond with the development in Rome's economy. The Romans were so occupied with their career of warfare that their economic progress was very slow. The Roman community was still mostly engaged in farming and there was little interest in foreign commerce.⁷

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1 Cary & Scullard *A History of Rome down to the Reign of Constantine* (1984) 97; Friedländer *Roman Life and Manners under the Early Roman Empire* (1909) 1-2.

2 Borkowski & Du Plessis *Textbook on Roman Law* (2005) 30. For the different dates of the invasion of Rome by the Gauls, see Cary & Scullard (n 1) 107; Westrup *Introduction to Early Roman Law* Vol 5 (1954) 9-10; Van Warmelo *Die Oorsprong en Betekenis van die Romeinse Reg* (1978) 17; Van Zyl *History and Principles of Roman Private Law* (1983) 4 n 4.

3 It is alleged that after the invasion of the Gauls in 386 BC much evidence was destroyed. Information on early Rome is therefore scarce and it is difficult to determine what is truth and what is legend from regal times to the middle of the republican period. Therefore, for a reconstruction of early Rome and all facets of early Roman life, modern scholars have to rely on incomplete evidence. By using results of archaeological research, sources by antiquarians and historians (who only date from the first century BC), literary sources, epitaphs, comparisons with other communities and intelligent suppositions or speculations, the position can sometimes be reconstructed. See Van Warmelo (n 2) 17; Cary & Scullard (n 1) 57-61; Westrup (n 2) 9-13.

4 Cary & Scullard (n 1) 107; Friedländer (n 1) 1-2.

5 Borkowski & Du Plessis (n 2) 2-5, 9-10, 32-35; Van Zyl (n 2) 5, 9-23.

6 Van Zyl (n 2) 9-10; Cary & Scullard (n 1) 97.

7 Cary & Scullard (n 1) 106.

Religion played an important role in the lives of republican Romans. In the fifth and fourth centuries BC the transformation of the Roman state religion, which started under the later kings, continued. The influence of Etruscan or Greek religion became visible. Temples with cult images replaced the primitive altars of an earlier age. The introduction of new cults occurred particularly to distract the attention of the Roman public in times of difficulty. One such an example is the introduction of the cult of Ceres in 496 BC during a devastating famine.⁸ The Romans adopted Ceres since the Sibylline books advised the adoption of her Greek equivalent Demeter, the Greek goddess of agriculture. Ceres was thus one of the foreign deities adopted by Rome. She was the Roman goddess of agriculture and fertility.⁹

However, the introduction of these foreign influences and usages into Roman state cults was carefully controlled by the high priests. Ruling families in Rome admitted foreign deities only to alleviate suffering and not to excite the emotion of the Roman people.¹⁰ It therefore appears that even in the field of religion there was little interest in the introduction of foreign customs. The ancient Italic religion of the home, fields and flocks was still practiced, untouched by the exotic influences of the Etruscan and Greek religions.¹¹

In accordance with the primitive lifestyle of early Roman society, early Roman law was rigid and primitive too. It appears to have been a mixture of customs together with moral and religious rules of the community¹² or, as Borkowski and Du Plessis put it, "the law was essentially a mixture of custom embellished by royal decree".¹³ Republican Rome, though, experienced significant legal development. By the third century BC the Twelve Tables, a piece of Roman legislation promulgated in 451-450 BC, already existed. Unfortunately, the greater part of the original Twelve Tables was destroyed during the Gallic plunder of 386 BC and for its contents researchers have to rely on later writings of historians, antiquarians and lawyers.¹⁴ Also the office of the *praetor* who was responsible for the administration of law and justice in Rome had been in place since 367 BC.¹⁵

From the short sketch above on Roman life during the third century BC, the frequent description of early Rome as a small, primitive, rural and homogenous

8 *Idem* 109.

9 Price & Kearns *The Oxford Dictionary of Classical Myth and Religion* (2003) 107-108; Adkins & Adkins *Dictionary of Roman Religion* (1996) 44-45; Barber *A Companion to World Mythology* (1979) 52. See also Cary & Scullard (n 1) 65.

10 Cary & Scullard (n 1) 109.

11 *Ibid.*

12 Kaser *Das Römische Privatrecht* Vol 1 (1971) 29; Hecker *Die Historische Entwicklung des Ehescheidungsprozessrechts* (1967) 12; Borkowski & Du Plessis (n 2) 27-29.

13 Borkowski & Du Plessis (n 2) 27.

14 Kaser (n 12) 30-31; Cary & Scullard (n 1) 57-58; Borkowski & Du Plessis (n 2) 29-31; Van Zyl (n 2) 28-29.

15 Borkowski & Du Plessis (n 2) 4; Van Zyl (n 2) 17-18.

agricultural society which attached great value to religion, customs and mores appears to be true.¹⁶

It is amidst these circumstances in Rome during the third century BC and the problem of incomplete evidence on all aspects of early Roman law and life that the divorce of Carvilius Ruga¹⁷ took place in about 230 BC.¹⁸ Few divorces received the attention of that of Carvilius Ruga. The purpose of this article is therefore to investigate the Carvilian divorce and its significance in Roman law. To achieve this purpose, it would first be appropriate to briefly discuss the legal position regarding Roman marriage, divorce and dowry from regal times to the time of Carvilius Ruga's divorce in about 230 BC.

2 Marriage, divorce and dowry in early Roman law

2.1 Marriage

As indicated, the law of early Roman society was rigid and primitive and consisted essentially of the customs and the moral and religious rules of the community. These three aspects were closely interwoven, and strict compliance with these rules was so self-evident that regulation by the state was unthinkable.¹⁹ In addition, the political importance of the *familia* (an autonomous, religious, political and legal unit which played an important role within Rome's primitive society²⁰)

16 Delpini *Divorzio e Separazione dei Coniugi nel Diritto Romano e Nella Dottrina della Chiesa Fino al Secolo V* (1956) 23; Cary & Scullard (n 1) 97; Van Zyl (n 2) 4.

17 For primary sources on the divorce of Carvilius Ruga, see Dionysius of Halicarnassus *Antiquitates Romanae* 2 25 7; Plutarch *Quaestiones Romanae* 14; Plutarch *Theseus-Romulus* 35 (6) 3 4; Plutarch *Lycurgus-Numa* 25 (3) 12-13; Valerius Maximus *Facta et Dicta Memorabilia* 2 1 4; Aulus Gellius *Noctes Atticae* 4 3 1-2, 17 21 44. For secondary sources on the divorce of Carvilius Ruga, see Jonaitis & Kosaitė-Čypienė "Conception of Roman marriage: Historical experience in the context of national family policy concept" 2009 (2) *Jurisprudencija* 295-316; Martin "Earliest Roman divorces: Divergent memories or hidden agendas?": <http://cathygary.com/Classics/RomanDivorce.html> (10 Oct 2009) 1-9; D'Ambra *Roman Women* (2007); Frier & McGinn *A Casebook on Roman Family Law* (2004); Evans Grubbs *Law and Family in Late Antiquity. The Emperor Constantine's Marriage Legislation* (1999); Zablocki "The image of a Roman family in *Noctes Atticae* by Aulus Gellius" 1996 (2) *Pomoerium* 35-44; Dixon *The Roman Family* (1992); Treggiari *Roman Marriage. Iusti Coniuges from the Time of Cicero to the Time of Ulpian* (1991); Gardner *Women in Roman Law and Society* (1986); Robleda "Il divorzio in Roma prima di Costantino" in Temporini & Haase (eds) *Aufstieg und Niedergang der römischen Welt* Vol 2 (1982) 347-389; Watson *The Law of the Ancient Romans* (1975) (hereafter *Ancient Romans*); Watson *Rome of the XII Tables. Persons and Property* (1975) (hereafter *XII Tables*); MacCormack "Wine drinking and the Romulan law of divorce" 1975 *The Irish Jurist* 170-174; Humbert *Le Remariage à Rome* (1972); Watson *Roman Private Law around 200 BC* (1971) (hereafter *Roman Private Law*); Kaser (n 12) 82 nn 12, 13, 14; Williams *Tradition and Originality in Roman Poetry* (1968); Watson "The divorce of Carvilius Ruga" 1965 *Tijdschrift voor Rechtsgeschiedenis* (hereafter "Divorce") 38-50; Lee *The Elements of Roman Law* (1952); Van Oven *Leerboek van Romeinsch Privaatrecht* (1948); Carcopino *Daily Life in Ancient Rome. The People and the City at the Height of the Empire* (1967); Corbett *The Roman Law of Marriage* (1930); Marquardt *Privatleben der Römer* (1886).

18 Aulus Gellius (n 17) 4 3 1-2, 17 21 44; Dionysius of Halicarnassus (n 17) 2 25 7. See also Watson "Divorce" (n 17) 40; Van Oven (n 17) 458; Gardner (n 17) 48.

19 Hecker (n 12) 12.

20 Delpini (n 16) 23; Zablocki (n 17) 36. See also Jonaitis & Kosaitė-Čypienė (n 17) 296-300, 313.

resulted in the state being reluctant to enter into any legal relationship with individuals of the *familia*.²¹

Consequently, under early Roman law, Roman *matrimonium* (marriage) and related matters, for example *divortium* (divorce), were private matters which were regulated by customs and mores of the *familia*.²² Roman marriage was therefore not a legal relationship, but purely a "social fact" with certain legal consequences,²³ namely *patria potestas* (the power of the father or the head of the family),²⁴ *manus* (the power of the husband),²⁵ and in particular that children born from marriage were legitimate.²⁶

The Romans nevertheless regarded marriage as a solemn union with important implications.²⁷ The gravity with which the Romans treated marriage was demonstrated by certain material legal requirements for the conclusion of a valid marriage with regard to age, consent to marriage, *conubium* (the *ius civile* right to conclude marriage) as well as rules regarding prohibited marriages.²⁸ Yet, Roman law did not require a marriage ceremony with prescribed legal formalities for the conclusion of a valid marriage.²⁹ However, since marriage was such an important social institution, a tradition of customs developed with regard to the marriage ceremony.³⁰

Although Roman marriage was not a legal relationship regulated by the state, public authority did indeed take notice of marriage.³¹ Marriage was, moreover,

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- 21 Delpini (n 16) 32. See also Treggiari (n 17) 57; Spruit *Romeinsrechtelijke Romanesken* (1979) 77-78.
- 22 Kaser (n 12) 71-73, 310-312; Spruit (n 21) 77-78; Macours "Libera matrimonia esse antiquitas placuit" in Spruit & Van de Vrugt *Brocardica in Honorem GCJJ van den Bergh: 22 Studies over Oude Rechtspreuken* (1987) 56; Jonaitis & Kosaitė-Čypienė (n 17) 302. For a discussion on the nature of marriage in early Rome and the state's slow tendency to intervene in marriage-related aspects, see Dixon (n 17) 71-83.
- 23 Kaser (n 12) 71-73, 310; Borkowski & Du Plessis (n 2) 121; Spruit (n 21) 77-78; Jonaitis & Kosaitė-Čypienė (n 17) 301, 302, 313.
- 24 Gaius 1 55. See also Guarino *Diritto Privato Romano* (1992) 565; Borkowski & Du Plessis (n 2) 121; Watson *Ancient Romans* (n 17) 35; Watson *Roman Private Law* (n 17) 21.
- 25 Gaius 1 109. See also Kaser (n 12) 72; Guarino (n 24) 565; Thomas *Textbook of Roman Law* (1976) 417; Watson *Ancient Romans* (n 17) 35; Watson *Roman Private Law* (n 17) 22.
- 26 Gaius 1 55. See also Borkowski & Du Plessis (n 2) 121; Watson *Roman Private Law* (n 17) 21.
- 27 Spruit (n 21) 78; Borkowski & Du Plessis (n 2) 121; Williams (n 17) 373.
- 28 For a discussion of these formal requirements for a valid Roman marriage which developed and changed in the course of time, see Kaser (n 12) 74-75, 314-318; Watson *Roman Private Law* (n 17) 19-21; Borkowski & Du Plessis (n 2) 121, 122-125; Guarino (n 24) 570-573; Gardner (n 17) 31-44; Watson *Ancient Romans* (n 17) 33-35; Van Oven (n 17) 453-456; Thomas (n 25) 421-425; Jonaitis & Kosaitė-Čypienė (n 17) 306-310, 313-314.
- 29 Kaser (n 12) 73-74, 321-322; Lee (n 17) 68; Watson *Ancient Romans* (n 17) 32-33; Gardner (n 17) 47; Dixon (n 17) 64; Jonaitis & Kosaitė-Čypienė (n 17) 313.
- 30 Jonaitis & Kosaitė-Čypienė (n 17) 313; Van Oven (n 17) 452; Guarino (n 24) 573-574. For the customs which developed with regard to the marriage ceremony, see Treggiari (n 17) 161-170; Gardner (n 17) 44; Van Zyl (n 2) 104; Dixon (n 17) 64-65, 204 n 21. Cf Williams "Some aspects of Roman marriage ceremonies and ideals" 1958 *Journal of Roman Studies* 16-18.
- 31 Treggiari (n 17) 57-58; Jonaitis & Kosaitė-Čypienė (n 17) 312.

regarded as a distinct advantage in obtaining public office.³² But, for both the state and the community the primary object of marriage was the procreation of legitimate children.³³

Marriage with the purpose of having legitimate children was so important to the state that primary and secondary sources refer to the interesting tradition of an oath relating to marriage required from men during the Roman census which took place every five years.³⁴ In the course of reviewing the Roman citizen-body during the census, the censors' general function was to compile lists comprising of the following information of citizens³⁵ (at least those from propertied classes³⁶ or men of rank³⁷); the citizens' names, the monetary valuation of their property, the names of their fathers or patrons, their ages, and the names of their wives and children.³⁸ Roman citizens had to provide this information under oath.³⁹ It appears that it was traditional for censors, the guardians of Roman morals, to ask men, for example, "Do you have a wife?" If the answer was "no", the censor could impose a punishment.⁴⁰ If the answer was "yes", the censor would then ask "Have you married for the purpose of procreating children?" If this was indeed a man's intention, he swore to the censors that he had married a certain woman in order to procreate children. The censors then registered that marriage and thereafter also registered children of the marriage as the man's heirs.⁴¹

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- 32 See Watson *Roman Private Law* (n 17) 22 where he reminds researchers that, according to Gaius 1 112, to become a *flamen* of Jupiter, Mars and Romulus or the *rex sacrorum*, one's parents had to be married by *confarreatio* and oneself too.
- 33 For *liberorum quaerendorum causa uxorem ducere*, see Aulus Gellius (n 17) 1 6 6, 4 3 1-2, 17 21 44; Plautus *Captivi* 889; Plautus *Aulularia* 148. For *liberorum procreandorum animo et voto uxores ducunt*, see *D* 50 16 220 3; Dionysius of Halicarnassus (n 17) 2 25 7. Cf further Guarino (n 24) 565; Treggiari (n 17) 57-58; Borkowski & Du Plessis (n 2) 121; Dixon (n 17) 62, 67; Jonaitis & Kosaitė-Čypienė (n 17) 312, 314.
- 34 Aulus Gellius (n 17) 4 3 2, 4 20 3-5, 17 21 44. See Williams (n 17) 372-373; Treggiari (n 17) 58; Gardner (n 17) 48-49; Lee (n 17) 64-65; Zablocki (n 17) 42; Jonaitis & Kosaitė-Čypienė (n 17) 312. See Van Oven (n 17) 471 who regards it as a legend. Cf Gardner (n 17) 48-49 who argues that census could be avoided and evidence for such an oath is scanty. She is of the opinion that the oath mentioned refers to the truth and good faith of the declaration.
- 35 Van Warmelo (n 2) 35; Williams (n 17) 372-373; Treggiari (n 17) 58; Gardner (n 17) 49.
- 36 Williams (n 17) 372.
- 37 Dixon (n 17) 67.
- 38 Besides this information required from Roman citizens, censors might even have investigated citizens' conduct. If a citizen did not live up to the standards set for a Roman citizen, the citizen faced judicial proceedings and possibly a *nota censoria* (a mark of disgrace) against his name on the list of Roman citizens. Serious consequences could follow. See in this regard Van Warmelo (n 2) 35-36; Borkowski & Du Plessis (n 2) 4-5, 107-108.
- 39 Dionysius of Halicarnassus (n 17) 2 25 7; Aulus Gellius (n 17) 4 3 2, 4 20 3-5, 17 21 44. See Williams (n 17) 372-373; Watson "Divorce" (n 17) 46; Watson *Ancient Romans* (n 17) 35. See again Gardner (n 17) 49 who is of the opinion that the oath mentioned refers only to the truth and good faith of the declaration.
- 40 Valerius Maximus (n 17) 2 1 4, 2 9 1; Plutarch *Camillus* 2 2; Cicero *Philosophica de Legibus* 3 3 7. See also Watson *Roman Private Law* (n 17) 22 and also n 2; Treggiari (n 17) 58 and also n 85. See further Jonaitis & Kosaitė-Čypienė (n 17) 312 for the imposition of special taxes on citizens who remained bachelors until their old age.
- 41 Williams (n 17) 373.

This ancient phrase or formula "Have you married for the purpose of procreating children?" was used in a solemn public ceremony performed every five years during the Roman census.⁴² It recurs, with slight variations in wording, in literature and other texts,⁴³ as well as in the comic plays of Plautus (205 BC - 184 BC) during the second century BC.⁴⁴ It also appears in written marriage agreements or the so-called Latin marriage contracts (known as *tabulae matrimoniales*, *tabulae nuptiales* or *tabulae dotales*) of the Augustan period from the first century AD,⁴⁵ as well as in marriage contracts (*tabulae matrimoniales*) referred to by one of the church fathers, Augustine (354-430 AD), in late antiquity.⁴⁶

Since Roman law did not require any formal requirements during the marriage ceremony, scarcely anything is known about what was said at Roman marriage ceremonies. Therefore, Williams believes that the phrase whether a man had married his wife for procreating children, may indeed have formed part of an oath or declaration made by the husband in the course of the wedding ceremony in some forms of marriage. He further believes that it seems likely that the use of the ancient phrase in a verbal declaration made by the husband in the presence of witnesses could have been replaced by a phrase with more or less the same meaning in the written marriage agreements, namely that the purpose of marriage was to produce children.⁴⁷ Evans Grubbs confirms that papyrus fragments of Latin marriage contracts prove that the contracts did indeed contain the phrase *liberorum procreandorum causa*, possibly a modernisation of the ancient formula.⁴⁸ By referring to written agreements in the time of Augustine using the

42 *Ibid*; Jonaitis & Kosaitė-Čyprienė (n 17) 312.

43 For *liberorum quaerendorum causa uxorem ducere*, see Aulus Gellius (n 17) 1 6 6, 4 3 2, 17 21 44, 4 20 3-5; Valerius Maximus (n 17) 7 7 4; Suetonius *Caesar* 52 3; Livius *Epistulae* 59. For *liberorum procreandorum animo et voto uxores ducunt*, see *D* 50 16 220 3. For a list of several references with variations of the ancient phrase see Treggiari (n 17) 8 n 37. Cf also Guarino (n 24) 565; Kaser (n 12) 73 n 8, 312; Treggiari (n 17) 58; Dixon (n 17) 67-68; Williams (n 17) 370-373.

44 Plautus *Captivi* 889; Plautus *Aulularia* 148. See also D'Ambra (n 17) 186.

45 From the Augustan period in the first century AD, the fact of and agreement to marriage were often put in writing. These written marriage contracts were an important, though not essential, legal component of Roman marriages during this period. It appears that these contracts had a financial character and was primarily concerned with dotal and property arrangements at the end of marriage. Some scholars believe that the contracts also stated that the purpose of marriage is to have children. For different views on the nature and role of these written marriage contracts, see Williams (n 17) 373; Gardner (n 17) 49-50; Treggiari (n 17) 165; Dixon (n 17) 66-67. These sources refer to PSI 730 and FIRA 3 17 for papyrus fragments of these Latin contracts. For a more detailed discussion on the fragments of the Latin marriage contracts and a translation of one of the fragments, see Evans Grubbs *Women and the Law in the Roman Empire. A Sourcebook on Marriage, Divorce and Widowhood* (2002) 126-127. See also Hunter "Marrying and the *tabulae nuptiales* in Roman North Africa from Tertullian to Augustine" in Reynolds & Witte *To Have and to Hold: Marrying and its Documentation in Western Christendom, 400-1600* (2007) 104.

46 *Liberorum procreandorum causa*, a possible modernisation of the ancient formula, is also mentioned twice by Augustine as being characteristic of the *tabulae matrimoniales*. See Augustine's *Sermones* 51 22, 278 9. Cf Sanders "A Latin marriage contract" 1938 (69) *Transactions and Proceedings of the American Philological Association* 104-116, esp 104.

47 Williams (n 17) 373.

48 Evans Grubbs (n 45) 126-127, 294-295 n 99. See also Hunter (n 45) 104.

same phrase, Hunter also comes to the conclusion that these agreements stated that the purpose of marriage was to procreate.⁴⁹

The questions on marriage served the purpose of obtaining and registering information on a number of issues, such as to determine whether the relationship was indeed a *matrimonium* (marriage) and not a *concubinatus* (cohabitation relationship); to register the marriage; to correctly identify and register the names of the husband, wife and children; and to register the children of the marriage as the husband's real heirs.⁵⁰

During the third century BC the only marriage that the Romans knew, was the *cum manu* marriage or marriage with power.⁵¹ The formal *cum manu* marriage scarcely affected the status of the husband. But, in view of the oath relating to marriage and the procreation of children required from men during the Roman census, bachelorhood and failure to procreate children were frowned upon, especially by the censors.⁵² The wife's status, however, was affected and she became a member of her husband's family.⁵³ She was under the *manus* of her husband (or his father, if he had one)⁵⁴ and, after marriage, any property she owned, belonged to her husband.⁵⁵

2.2 Divorce

In early Roman law, when *manus* marriage was prevalent, little direct evidence exists for divorce in *manus* marriage.⁵⁶ Since morality played such an important role in Rome's small agricultural community with a primitive law mainly found in custom and religion, divorce was, like marriage, a private matter.⁵⁷ Although

49 Hunter (n 45) 104; Sanders (n 46) 104.

50 Williams (n 17) 373. Cf Gardner (n 17) 49.

51 Kaser (n 12) 72, 73-74, 76-81, 321-325; Buckland *A Textbook of Roman Law from Augustus to Justinian* (1963) 118; Thomas (n 25) 446; Treggiari (n 17) 442; Borkowski & Du Plessis (n 2) 125. See Watson *Roman Private Law* (n 17) 17 where he points out that the marriage *sine manu* was common by the late third century BC, but that it is likely that the marriage *cum manu* was much more usual. Further Corbett (n 17) 90-91; Watson *The Law of Persons in the Later Republic* (1967) 19-23.

52 Valerius Maximus (n 17) 2 1 4; Watson *Roman Private Law* (n 17) 22; Treggiari (n 17) 58; Jonaitis & Kosaitė-Cyprienė (n 17) 312.

53 Kaser (n 12) 79; Thomas (n 25) 446; Treggiari (n 17) 324; Watson *Ancient Romans* (n 17) 32.

54 The *manus* of the husband was not automatically established upon conclusion of the marriage. A specific legal act, namely the *conventio in manu*, was required to establish the *manus* of the husband over the wife. There were three such legal acts in which the marriage *cum manu* could be created. All three these ways, namely *confarreatio*, *coemptio* and *usus*, were fully established by the time of the Twelve Tables. For a discussion of the three different kinds of marriage *cum manu*, see Kaser (n 12) 76-81, 321-325; Borkowski & Du Plessis (n 2) 125-126; Buckland (n 51) 118-121; Thomas (n 25) 446-447; Watson *Roman Private Law* (n 17) 17-19; Watson *Ancient Romans* (n 17) 32-33; Jonaitis & Kosaitė-Cyprienė (n 17) 304-306, 313.

55 Buckland (n 51) 118; Thomas (n 25) 446. See Watson *Roman Private Law* (n 17) 22 who argues that in practice the wife in *manu* was not necessarily very subordinate to her husband. She might even have control of her dowry, especially if her family was powerful.

56 Gardner (n 17) 83; Martin (n 17) 1.

57 Kaser (n 12) 71-73, 310-312; Borkowski & Du Plessis (n 2) 128; Spruit (n 21) 77-78; Macours (n 22) 56.

divorce was legally possible in early Roman law, scholars argue that it was a rare practice.⁵⁸ From the restricted sources left, it appears that the institution of divorce did indeed exist and probably dates back from as early as the regal period.⁵⁹ Plutarch, the famous Greek philosopher and biographer (born 46 BC, died after 119 AD),⁶⁰ was one of the first to refer to the topic of divorce in his biography of Romulus, the first king of Rome. He states in *Romulus* 22 3 that Romulus enacted the following rigorous law:

He [Romulus] instituted also certain laws, one of which is somewhat severe, which suffers not a wife to leave her husband, but grants a husband power to turn off his wife, either upon poisoning her children; or counterfeiting his keys, or for adultery; but if the husband upon any other occasion put her away, he ordered one moiety of his estate to be given to the wife, the other fall to the goddess Ceres; and whoever cast off his wife, to make an atonement by the sacrifice to the gods of the dead.⁶¹

In terms of this severe law, Romulus allowed a husband to divorce his wife, but a wife had no right to divorce her husband. He did not only prescribe the husband's grounds of divorce, but also the husband's punishment, if he should divorce for any other reason. The husband's grounds for divorce were restricted to a few specific grounds which related to offences by the wife. Unfortunately, the original absence of punctuation in classical texts makes the text of *Romulus* 22 3 uncertain.⁶² Consequently, the different interpretations of the text have not only resulted in several varying grounds of divorce but also in confusing meanings of the Romulan grounds of divorce.⁶³

For purposes of this discussion, the interpretation of Watson is followed. Although he argues that the meanings of the grounds were obscure, he accepts that the statutory offences by the wife were "adultery", "poisoning of children", and

58 Treggiari "Divorce Roman style: How easy and how frequent was it?" in Rawson (ed) *Marriage, Divorce and Children in Ancient Rome* (1991) 31-46; Borkowski & Du Plessis (n 2) 128; Watson *XII Tables* (n 17) 32; Lee (n 17) 65.

59 Evans Grubbs (n 17) 226; Dixon (n 17) 205 n 33; Corbett (n 17) 219, 221.

60 D'Ambra (n 17) 187.

61 As translated by Martin (n 17) 3.

62 MacCormack (n 17) 170; Gardner (n 17) 83; Watson "Divorce" (n 17) 44-45.

63 By referring to several scholars, MacCormack (n 17) 170 points out the different interpretations of Plutarch's *Romulus* 22 3: One interpretation of the text gives three grounds for divorce, namely poisoning of children, substitution of keys and adultery. Another interpretation identifies four grounds, namely poisoning, substitution of children, substitution of keys and adultery. A third interpretation deletes the reference to keys altogether and accepts poisoning, substitution of children and adultery as the three Romulan grounds of divorce. According to Borkowski & Du Plessis (n 2) 128 the grounds included "poisoning of children, theft of keys and the imbibing of wine – conduct thought to be unbecoming in the responsible wife of the early Republic." Gardner (n 17) 83 interprets it to read as "poisoning of children, substitution (or theft) of keys, wine-drinking" or "poisoning, substituting of children or keys, wine-drinking ... the last two items show a concern for the safety of the household property and, perhaps, for the sexual restraint of the woman." Treggiari (n 17) 441 regards the Romulan grounds of divorce as "adultery, poisoning children (including abortion?) and substituting keys (failure in their duty to be good *custodes*)". Evans Grubbs (n 17) 226 refers to the grounds of divorce as "adultery, administering poison or drugs to the children (*pharmakeia*, perhaps referred to procured abortion) and 'counterfeiting the keys' (criminal mismanagement of the household)". D'Ambra (n 17) 47 mentions that divorce was only permitted "if the wife committed adultery, poisoned children, or substituted the keys". Wine-drinking by women was a serious offence and regarded as a stimulus to adultery. See Watson *XII Tables* (n 17) 34-38; MacCormack (n 17) 170-174; Evans Grubbs (n 17) 226.

"substitution of keys".⁶⁴ In his opinion the meaning of "adultery" is clear enough, "poisoning of children" may refer to abortion, but "substitution of keys" remains a mystery.⁶⁵

Amidst all this confusion, it is perhaps wise, once again, to follow Watson's opinion on Plutarch's *Romulus* 22 3: He suggests that instead of attempting to establish the original or authentic text and the meaning of the grounds, it should be accepted that the meanings of the Romulan grounds of divorce are obscure. He further advises that some weight, not too much though, should be afforded to the grounds of divorce Plutarch attributed to Romulus. In fact, Watson believes that *Romulus* 22 3 should merely hint to the practice of divorce in early Rome.⁶⁶

Although scholars are hesitant to give too much weight to Plutarch's passage, they do agree that the passage evidences that before the time of the Twelve Tables a husband was allowed to divorce his wife on grounds of certain specified statutory offences. As indicated above, Romulus did not only prescribe the husband's grounds for divorce, but also the husband's punishment if he should divorce for reasons other than the three permitted grounds. If a husband divorced his wife for one of the specified offences, the husband incurred no loss of property. The wife, however, forfeited her dowry. And if the husband divorced his wife for any other reason than one of the specified ones, he was punished severely. He had to forfeit his property. He was compelled to give half of his property to his divorced wife and the other half to Ceres, the goddess of agriculture and fertility.⁶⁷

This seems still to have been the position in the fifth century BC since there is no indication that the first piece of Roman legislation, the Twelve Tables promulgated in 450 BC, had altered the grounds for divorce.⁶⁸ But then, what did the Twelve Tables rule about divorce? Very little, it appears.

64 Watson *XII Tables* (n 17) 31-32.

65 For "substitution of keys" the following phrases are also used: "theft of keys", "counterfeiting keys" or "tampering with keys". Scholars provide several suggestions for a possible meaning of this ground. These suggestions include the following: the wife's acquisition of a fresh set of house keys to facilitate her adultery, the wife's acquisition of keys to the wine cupboard or cellar so that she might secretly drink, the wife's criminal mismanagement of the household, or that wives were pilfering household supplies or were drinking wine on the sly. See Watson *XII Tables* (n 17) 33 n 11; Evans Grubbs (n 17) 226; Gardner (n 17) 83; Watson *Ancient Romans* (n 17) 35; Corbett (n 17) 219; D'Ambra (n 17) 47.

66 Watson *XII Tables* (n 17) 31-33; Watson "Divorce" (n 17) 44-45, 49-50.

67 Plutarch *Romulus* 22 3; Treggiari (n 17) 441; Gardner (n 17) 83; Watson "Divorce" (n 17) 44-45.

68 Watson *XII Tables* (n 17) 33-34.

It can safely be argued that the Twelve Tables contained a provision on divorce.⁶⁹ This clause deals with a husband taking away keys from his wife on divorce.⁷⁰ For purposes of this article, the question of procedure or form of divorce is not relevant,⁷¹ but rather the proof that the Twelve Tables contained a provision on divorce and that it was permitted in the fifth century BC.⁷²

Valerius Maximus, an antiquarian in the early first century BC,⁷³ provides evidence of another divorce in early Roman law: a divorce which took place more than a century later than the one referred to in the Twelve Tables above. He tells about a certain Lucius Annius who was expelled from senate by the censors in 307 or 306 BC for divorcing his wife without taking the advice of his relatives and friends.⁷⁴ Unfortunately, after the divorce of Lucius Annius there is no evidence of any divorces reported until the notorious divorce of Carvilius Ruga in about 230 BC.⁷⁵ Aulus Gellius, a Roman author who lived in the second century AD and focused his interests on ancient times, provides most of our information about this.⁷⁶

Thus, even in the legendary days of old Rome, marriage had never been indissoluble. In the marriage *cum manu* of the first centuries of Rome, the husband's right to divorce his wife was inherent in the absolute power which he possessed over her, while the wife, placed under the authority of her husband, had no right to divorce him.⁷⁷

69 Cicero *Philippicae* 2 28 69; Gaius *D* 48 5 44. See also Yaaron "Minutiae on Roman divorce" 1960 *Tijdschrift voor Rechtsgeschiedenis* 1-8.

70 The clause in the XII Tables presumably read: "He ordered that lady of his to take her things for herself, in accordance with the Twelve Tables he took the keys from her, he drove her out." See Watson *XII Tables* (n 17) 33-34; Carcopino (n 17) 109.

71 There is little evidence when it comes to the legal form or procedure of divorce in the case of *manus* marriage. In the period when *manus* marriage was common, a divorcing husband would generally want to exclude his wife from all legal connection with his household. Since the wife was part of the husband's family, certain steps had to be taken to exclude her from his family. It appears that these steps do not relate to a specific procedure of divorce but merely the termination of the husband's *manus* (power) over the wife and a retransfer of the wife to the *potestas* (authority) of her father or remaining family. The termination of the husband's *manus* occurred through an equal opposite formality of the legal act by means of which the *manus* was originally established. See Borkowski & Du Plessis (n 2) 128; Corbett (n 17) 222-224; Gardner (n 17) 83.

72 Corbett (n 17) 218-219; Watson "Divorce" (n 17) 38, 41.

73 D'Ambra (n 17) 187.

74 Valerius Maximus (n 17) 2 9 2. See Watson "Divorce" (n 17) 40 n 8 who points out that with the help of Livius 9 43 25 the divorce of Lucius Annius could be dated to 307-306 BC. See also Borkowski & Du Plessis (n 2) 128; Treggiari (n 17) 442; Gardner (n 17) 94 n 10; Kaser (n 12) 82 n 2; Humbert (n 17) 132; Carcopino (n 17) 109-110; Corbett (n 17) 227.

75 Dionysius of Halicarnassus (n 17) 25 7; Aulus Gellius (n 17) 4 3 1-2, 17 21 44. Further Treggiari (n 17) 442.

76 Zablocki (n 17) 35; D'Ambra (n 17) 185.

77 Carcopino (n 17) 109.

2.3 Dowry

Dos (dowry) was an ancient institution.⁷⁸ In its essential character and purpose, dowry was a contribution from the wife's family to the necessary expenses involved in marriage, especially expenses of the household of the family and the upbringing and education of children.⁷⁹

Since dowry has always been associated with the establishment of the family, it is probably as old as the civilised forms of marriage. Evidence of dowry is found, for example, in the Code of Hammurabi, the Old Testament, the Law of Gortyn and in Athenian legislation.⁸⁰ In view of these very early precedents of dowry, it can scarcely be doubted that early Rome had some form of dowry. Scholars believe that dowry already existed in fifth-century BC Rome⁸¹ and that it was usually linked with the marriage *cum manu*.⁸²

It is generally accepted that although dowry in early Rome was not a recognised legal institution, it was indeed an accepted social institution. As such, there was a moral rather than a legal duty on the bride's family to provide a dowry. It was thus customary, though not compulsory, that the bride's father, grandfather or other relative gave her future husband some money, land or any form of property as dowry.⁸³

The first textual evidence of early Roman dowry is found in the time of the kings. Dionysius of Halicarnassus, rhetor and historian from Rome during the first century BC,⁸⁴ tells about the rule that clients were to assist in providing a dowry for the marriage of patrons' daughters.⁸⁵

Unfortunately, there is no mention of dowry in the Twelve Tables. The Code does not mention any specific legal rules on dowry. No evidence is found of either provision for dowry or an action for the return of dowry on death or divorce of a spouse. The lack of reference in the imperfect reconstruction of the Twelve Tables is no proof that the institution did not exist in early Roman law. It is important to

78 Martin (n 17) 1; Corbett (n 17) 147. For discussions on the development of *dos* and the three kinds of *dos*, see Kaser (n 12) 80-81, 329-341; Thomas (n 25) 428-431; Watson *Ancient Romans* (n 17) 37; Watson *Roman Private Law* (n 17) 24-27; Watson (n 51) 57-76; Corbett (n 17) 147-204; Gardner (n 17) 97-114; Borkowski & Du Plessis (n 2) 131-134; Van Oven (n 17) 457-470; Van Zyl (n 2) 106-109; Buckland (n 51) 107-110; Frier & McGinn (n 17) 91-92.

79 Corbett (n 17) 147; Thomas (n 25) 428; Gardner (n 17) 97; Borkowski & Du Plessis (n 2) 131; Dixon (n 17) 51; Buckland (n 51) 107; Van Zyl (n 2) 106-107.

80 Martin (n 17) 1, 8; Corbett (n 17) 147.

81 Corbett (n 17) 147-148; Watson *XII Tables* (n 17) 38 n 35; Dixon (n 17) 50-51.

82 Buckland (n 51) 107; Thomas (n 25) 428; Van Zyl (n 2) 106 n 126.

83 Watson *XII Tables* (n 17) 38; Watson *Roman Private Law* (n 17) 24; Gardner (n 17) 97, 102; Corbett (n 17) 152; Van Oven (n 17) 457; Buckland (n 51) 107; Dixon (n 17) 64; Van Zyl (n 2) 106-107; Borkowski & Du Plessis (n 2) 131; Thomas (n 25) 428.

84 (n 17) 2 10 2.

85 Watson *XII Tables* (n 17) 38 n 35; Van Zyl (n 2) 84 n 25.

bear in mind that the Code was brief and mainly dealt with procedural and administrative aspects.⁸⁶

The silence of the surviving fragments of the Twelve Tables on dowry upon marriage may be explained by the fact that in early Rome, when marriage with *manus* was still the norm, the dowry became the exclusive property of the husband (or his father) since the wife *in manu* was incapable of owning property. In early Rome, as in all other periods in Roman history, the dowry formed part of the husband's general assets and was not distinguished from his other property. Since the wife *in manu* could not have an estate of her own and the dowry simply merged with the husband's estate, no special rules were necessary to regulate the dowry during marriage.⁸⁷

But what happened to the dowry on divorce in early Roman law? It appears that originally the dowry itself was irrecoverable. Dionysius of Halicarnassus⁸⁸ expressly states that Romulus made no provision for the return or recovery of the dowry.⁸⁹ Thus, if a husband divorced his wife for one of the specified grounds of divorce, neither she nor anyone else could demand return of any part of the dowry. However, some kind of protection was given to the wife by the following provision mentioned above: If a husband divorced his wife for any other cause than one of the three specified grounds of divorce, he had to pay one half of his property to her, irrespective of whether or not he had received a dowry it seems, and the other half to Ceres.⁹⁰

3 The divorce case of *Carvilius Ruga v Uxor*

3.1 Introduction

As indicated several Greek and Roman authors refer to the divorce of Carvilius Ruga. Dionysius of Halicarnassus, Plutarch, Valerius Maximus and Aulus Gellius all write about this divorce,⁹¹ widely diverging as to its date though.⁹² However,

86 Corbett (n 17) 147-148; Watson *XII Tables* (n 17) 38-39; Dixon (n 17) 50-51.

87 Gardner (n 17) 97-98; Watson *XII Tables* (n 17) 39; Corbett (n 17) 148; Van Oven (n 17) 458; Thomas (n 25) 428; Borkowski & Du Plessis (n 2) 126, 131; Buckland (n 51) 108-109.

88 (n 17) 2 25 1. See also Martin (n 17) 2, 8 n 2.

89 In Part 3 2 *infra* reference will be made to Aulus Gellius who in his *Noctes Atticae* 4 3 1-2 specifically quotes Cicero's contemporary, the famous jurist Servius Sulpicius Rufus, in this regard. In his book titled *On Dowries*, Sulpicius wrote that the divorce of Carvilius Ruga showed that there was no remedy or action which protected the wife's dowry. Security for a wife's dowry seemed to have become necessary for the first time when Carvilius divorced his wife. There were no *cautiones* or *actiones rei uxoriae*, methods of protection of the dowry, until late in the third century BC. See also Corbett (n 17) 148; Van Oven (n 17) 471; Watson *XII Tables* (n 17) 38-39.

90 Watson *XII Tables* (n 17) 39; Gardner (n 17) 98; Watson "Divorce" (n 17) 44-45.

91 Dionysius of Halicarnassus (n 17) 2 25 7; Plutarch *Quaestiones Romanae* 14; Plutarch *Theseus-Romulus* 35 (6) 3 4; Plutarch *Lycurgus-Numa* 25 (3) 12 13; Valerius Maximus (n 17) 2 1 4; Aulus Gellius (n 17) 4 3 1-2, 17 21 44. In 4 3 2 it appears that Gellius took the story from the well-known late republican jurist Servius Sulpicius' work *On Dowries*. See also Watson "Divorce" (n 17) 38-40; Watson *XII Tables* (n 17) 31 n 3; Corbett (n 17) 218; Dixon (n 17) 68; Martin (n 17) 1-9.

both Dionysius of Halicarnassus and Aulus Gellius place this divorce around 230 BC⁹³ – a date which modern scholars regard to be correct.⁹⁴

There is a strong Roman tradition that the divorce of Carvilius Ruga around 230 BC was the first divorce of Roman times.⁹⁵ But the Carvilian divorce was not the first Roman divorce as mistakenly asserted by Dionysius of Halicarnassus, Plutarch, Valerius Maximus and Aulus Gellius.⁹⁶ The concurrence in this tradition is remarkable since there is enough evidence of divorce in Rome before that time and even before the Twelve Tables. And then there is considerable evidence of the divorce of Lucius Annius in Rome in 307-306 BC.⁹⁷

Even though the perception that Carvilius Ruga's divorce was the first Roman divorce is clearly wrong, it was nevertheless regarded as significant enough to have elicited abundant reaction in the literary and legal sources.⁹⁸ In order to determine the significance and importance of the divorce case of *Carvilius Ruga v Uxor*, the following aspects have to be discussed: The facts of the case, the two legal questions that resulted from the facts, the reaction to the divorce of Carvilius Ruga, the precedents created by the divorce of Carvilius Ruga and finally the significance of the divorce of Carvilius Ruga in Roman law.

3 2 The facts of the case

In his *Noctes Atticae* 4 3 1-2 Aulus Gellius writes, in more detail than the other Greek and Roman authors mentioned, the following about the divorce of Carvilius Ruga:

It is on record that for nearly five hundred years after the founding of Rome there were no lawsuits and no warranties in connection with a wife's dowry in the city of Rome or in Latium, since of course nothing of that kind was called for, inasmuch as no marriages were annulled during that period. Servius Sulpicius too, in the book which he compiled *On Dowries*, wrote that security for a wife's dower seemed to have become necessary for the first time when Spurius Carvilius, who was

92 The date of the divorce of Carvilius Ruga is estimated differently in the texts of Dionysius of Halicarnassus (n 17) 2 25 7; Plutarch *Quaestiones Romanae* 14; Plutarch *Theseus-Romulus* 35 (6) 3 4; Plutarch *Lycurgus-Numa* 25 (3) 12 13; Valerius Maximus (n 17) 2 1 4; Aulus Gellius (n 17) 4 3 1-2. For different interpretations and arguments by modern scholars, see Corbett (n 17) 218, 227-228; Watson "Divorce" (n 17) 38-44; Robleda (n 17) 355-356; Martin (n 17) 1-9.

93 Dionysius of Halicarnassus (n 17) 2 25 7; Aulus Gellius (n 17) 4 3 1. See also Ziegler, Zontheimer & Gärtner *Der Kleine Pauly. Lexikon der Antike* Vol 1 (1979) 1065; Corbett (n 17) 218; Watson "Divorce" (n 17) 40; Watson *XII Tables* (n 17) 32; Humbert (n 17) 132; Treggiari (n 17) 442; Martin (n 17) 5.

94 Watson "Divorce" (n 17) 40; Watson *XII Tables* (n 17) 32; Watson (n 51) 55; Gardner (n 17) 48; Van Oven (n 17) 458; Humbert (n 17) 132; Corbett (n 17) 218. For different arguments surrounding the date of the first divorce, estimated differently in the texts, see Corbett (n 17) 227-228; Watson "Divorce" (n 17) 38-42; Robleda (n 17) 356; Martin (n 17) 1-9.

95 So told also by Aulus Gellius (n 17) 4 3 1-2, 17 21 44; Valerius Maximus (n 17) 2 1 4; Dionysius of Halicarnassus (n 17) 2 25 7; Plutarch *Theseus-Romulus* 35 (6) 3 4; Plutarch *Lycurgus-Numa* 25 (3) 12 13. See further Watson *XII Tables* (n 17) 32; Corbett (n 17) 218; Martin (n 17) 5.

96 Watson "Divorce" (n 17) 40, 41; Gardner (n 17) 48; Corbett (n 17) 218; Robleda (n 17) 356-358.

97 See the discussion above in Part 2 2.

98 Watson "Divorce" (n 17) 41-42.

surrounded Ruga, a man of rank, put away his wife because, owing to some physical defect, no children were born from her; and this happened in the five hundred and twenty-third year after the founding of the city, in the consulship of Marcus Atilius and Publius Valerius. And it is reported that this Carvilius dearly loved the wife whom he divorced, and held her in strong affection because of her character, but that above his devotion and his love he set his regard for the oath which the censors compelled him to take, that he would marry a wife for the purpose of begetting children.⁹⁹

Spurius Carvilius Maximus Ruga, a man of noble birth, was consul in 234 BC and again in 228 BC¹⁰⁰ and augur in 211 BC.¹⁰¹ It is not known exactly when he married, but sources agree that Carvilius Ruga married his wife because he truly and dearly loved her.¹⁰² Being a consul, he was obliged to take the traditional oath during the Roman census which censors required from men of rank, such as consuls. This oath entailed a solemn undertaking to marry a wife for the purpose of having children.¹⁰³

Very little is said about his wife. According to Aulus Gellius she suffered from a physical defect and consequently could not bear children. He further refers to Ruga's high opinion about her good character and moral values.¹⁰⁴ Nothing more is said about her. None of the sources consulted even mentions her name.¹⁰⁵ Then Carvilius Ruga decided to divorce his wife. Since the divorce took place around 230 BC, when the marriage with *manus* was still common, it may be assumed that the couple's marriage was with *manus*.¹⁰⁶ If his father-in-law provided Carvilius with a dowry, this dowry according to early Roman law belonged to Carvilius and formed part of his estate.¹⁰⁷

His decision to divorce his wife because she was infertile and could not have children resulted in a crisis. He wished to divorce a beloved and virtuous wife who was not at fault. She had not committed one of the three statutory offences which would justify a divorce in early Roman law. Infertility was not one of the statutory grounds for divorce.¹⁰⁸

But Carvilius was also not at fault. He was neither guilty nor behaving improperly.¹⁰⁹ Carvilius argued that he deeply loved his wife, but that he

99 Rolfe *Loeb Classical Library: Translations of Greek and Latin Texts Vol 1* (1927) 323. Aulus Gellius *Noctes Atticae* 17 21 44 states that Spurius Carvilius Ruga divorced his wife because of her infertility. He furthermore states that he did so upon the advice given by his friends.
 100 Aulus Gellius (n 17) 4 3 2. Ziegler, Zontheimer & Gärtner (n 93) 1065; Watson "Divorce" (n 17) 40.
 101 Livius 26 23 7. Cf Ziegler, Zontheimer & Gärtner (n 93) 1065.
 102 Aulus Gellius (n 17) 4 3 2. See Van Oven (n 17) 471; Watson "Divorce" (n 17) 46; Watson *Ancient Romans* (n 17) 35; Dixon (n 17) 68; Treggiari (n 17) 58; D'Ambra (n 17) 47.
 103 Watson "Divorce" (n 17) 40.
 104 Aulus Gellius (n 17) 4 3 2; Zablocki (n 17) 42; Watson *Ancient Romans* (n 17) 35.
 105 Therefore it was decided to simply refer to her as "*uxor*" (wife) in the title and the discussion of the article.
 106 Frier & McGinn (n 17) 91.
 107 See the discussion in Part 2 3 *supra*.
 108 Watson "Divorce" (n 17) 45-46; Watson *Ancient Romans* (n 17) 35.
 109 Watson "Divorce" (n 17) 45-46; Watson *Ancient Romans* (n 17) 35.

considered the traditional oath that he had given during the census that he would marry and have a wife for the sake of having children, to be more important than the continued existence of his marriage. In view of his wife's infertility, he further argued that he could not with a clear conscience say that he was married to have children. He even went as far as to argue that the state, through the question which the censors as guardians of Roman morality asked him, compelled him to divorce.¹¹⁰ He felt obliged to leave his wife because she could not have children. It appears that Carvilius Ruga's argument hinged on his claim that he had sworn to the censors that he would marry his wife for the purpose of having children and because he could not fulfil the oath, he wanted to divorce her.¹¹¹ Thus arguing, Carvilius used the oath as a ground for divorce and not one of the three statutory offences.¹¹²

Technically, in terms of early Roman law, Carvilius ought to have faced severe punishment since his wife had not been at fault. He would have had to pay half of his property to his divorced wife and the other half to Ceres.¹¹³ But since Carvilius argued that he was also not at fault, a problem occurred for which early Roman law had no solution.¹¹⁴

3 3 The legal questions that resulted from the facts of the case

Two rather difficult legal questions resulted from the facts of this case. The first was whether Carvilius Ruga was in fact liable to lose part of his property to his wife when the cause of the divorce was not one of the specified statutory offences by the wife but the oath which the husband was compelled to give by the censors. The second was whether the divorced wife or her father had some means or action to recover the dowry. As far as could be determined, the answers to both these questions would seem to be "No".¹¹⁵

110 Aulus Gellius (n 17) 4 3 2. See also Treggiari (n 17) 325; Watson "Divorce" (n 17) 46. Cf Watson "Divorce" (n 17) 46 n 29 who is not convinced that the censors would have compelled the divorce.

111 Dixon (n 17) 68.

112 Watson "Divorce" (n 17) 46. See also Gardner (n 17) 48-49 where she interprets the texts of Gellius and Dionysius with regard to the taking of the oath. She argues that Gellius writes that Carvilius took the oath before or during the marriage and since he could not fulfil the oath, he used the oath as a ground of divorce. Dionysius, however, describes the oath *after* the divorce. Dionysius's account could mean that the censors accused Ruga of divorcing his wife for a ground other than the acceptable grounds of divorce in early Roman law, and the oath was part of his self-exculpation before the censors, rather than a regular part of the census conducted by them.

113 Watson *Ancient Romans* (n 17) 35-36; Watson "Divorce" (n 17) 44-45.

114 Watson "Divorce" (n 17) 46.

115 Watson "Divorce" (n 17) 46; Watson *Ancient Romans* (n 17) 35-36; Treggiari (n 17) 324-325. See Aulus Gellius (n 17) 4 3 2 for a reference to the work of Servius Sulpicius' *On Dowries* in which it is clear that no action existed for the recovery of the dowry but that the necessity of security for a wife's dower became necessary after Carvilius Ruga's divorce.

One cannot but agree with Watson's remark that a new and unforeseen situation had developed in early Roman law.¹¹⁶ A husband could divorce his innocent wife for a reason other than the three existing reasons for which she lost her dowry as stated by the old law. He could then also plead successfully against surrendering any property to his wife.¹¹⁷ It appears that the penalty required by old law was consequently not exacted and no legal action was available to the wife or her father for the recovery of the dowry.¹¹⁸

3 4 The reaction to the divorce of Carvilius Ruga

The divorce did not escape reaction by the Roman people. It appears that divorce by a husband for any reason but the most serious misconduct prescribed by old law was open to criticism, especially in early Rome. The notoriety surrounding Carvilius Ruga's divorce suggests that in the third century BC divorce because of a wife's infertility was met with strong popular disapproval.¹¹⁹ It was probably hotly disputed whether Ruga's excuse was really acceptable.¹²⁰

Antiquarians tell that Carvilius indeed scandalised his colleagues by leaving his wife with whom he could find no fault but that she had given him no children. Dionysius of Halicarnassus writes that although Ruga's action was based on necessity, he was ever afterwards hated by the people.¹²¹ Valerius Maximus relates that he appreciates Ruga's motive as honourable but adds that his action was censured by his contemporaries and did not lack reproach, since a desire for children should never be placed above conjugal loyalty.¹²²

Even in the first century BC the divorce of Carvilius Ruga was referred to by a husband who commemorated his infertile but beloved wife in a very long funeral eulogy on conjugal faith, the well-known *Laudatio Turiae*. In this eulogy the husband tells how shocked he was at his wife's suggestion that they should divorce so that he could marry another woman who could give him children. He proudly relates that he refused to take up her offer and exclaimed that (unlike Carvilius Ruga) he would never put the desire for children above their marital bond.¹²³

116 Watson "Divorce" (n 17) 46.

117 Treggiari (n 17) 325; Gardner (n 17) 84; Watson "Divorce" (n 17) 46; Watson *Ancient Romans* (n 17) 35-36; Frier & McGinn (n 17) 91.

118 Watson *Ancient Romans* (n 17) 36; Watson "Divorce" (n 17) 46.

119 Evans Grubbs (n 17) 227-228; Watson *Ancient Romans* (n 17) 36.

120 Frier & McGinn (n 17) 91.

121 Dionysius of Halicarnassus (n 17) 2 25 7. Cf Watson "Divorce" (n 17) 46; Martin (n 17) 3.

122 Valerius Maximus (n 17) 214. See Evans Grubbs (n 17) 228 at n 96. Cf Treggiari (n 17) 237.

123 See Wistrand *The So-called Laudatio Turiae* (1976) for *Laudatio Turiae* 2 45. Cf also Evans Grubbs (n 17) 228; Treggiari (n 17) 237-238; Dixon (n 17) 85.

3 5 Precedents created by the divorce of Carvilius Ruga

Carvilius Ruga's divorce was perhaps not the first divorce of early Roman times, but was indeed one of the first few reported divorce cases in early Roman law and the first which created some precedents. Modern scholars accept that this was the first Roman divorce in the old law where a wife was not guilty of one of the three statutory offences and where the husband did not misbehave either.¹²⁴

The fact that Ruga successfully ended his marriage on a new ground, namely childlessness, must then be regarded as the first precedent.¹²⁵

In addition, it set the precedent for the divorce of a barren but blameless wife without penalising the husband.¹²⁶ Carvilius seems to have succeeded in retaining his wife's dowry although she was not at fault. He was not even compelled to pay his wife the portion of his property demanded under old law. He suffered no financial penalty.¹²⁷ This further confirms that in *manus* marriages the dowry belonged to the husband, unless the giver (the wife's family) had received a specific promise of its return.¹²⁸ But existing law did not provide for such an agreement. There was therefore no action available to the wife or her family for reclaiming the dowry.¹²⁹

It is important that inability to abide by the censor's oath was elevated to a ground for divorce. Carvilius may have been the first husband to honour the censors' oath that he was married or would marry and have a wife for the sake of having children. His strict sense of devoutness induced him to reject his wife who could not have children.¹³⁰

124 Marquardt (n 17) 69 n 2; Humbert (n 17) 132; Treggiari (n 17) 442; Watson (n 51) 55; Watson *XII Tables* (n 17) 32. In Watson "Divorce" (n 17) 42, however, Watson has a different view. In this article he points out that he is not completely convinced that the Carvilian divorce was the first without fault of the wife. For him it is hard to believe that during the long period between the XII Tables (450 BC) and 230 BC some wives were divorced for some prescribed matrimonial offence, but that no husband, who misbehaved badly, divorced a wife who has not misbehaved. He suggests that even if there were extremely severe penalties for unjustified divorce, one would expect it to occur: The prospect of a very large dowry or the love of another woman could be good enough a reason for a man to behave improperly. Cf Corbett (n 17) 227-228.

125 Aulus Gellius (n 17) 4 3 2. See Kaser (n 12) 82; Watson "Divorce" (n 17) 42; Gardner (n 17) 84; Evans Grubbs (n 17) 226.

126 Aulus Gellius (n 17) 4 3 2. See Evans Grubbs (n 17) 226, 228; Treggiari (n 17) 442; Watson "Divorce" (n 17) 46; Watson *XII Tables* (n 17) 32.

127 Treggiari (n 17) 442; Watson *Ancient Romans* (n 17) 36; Evans Grubbs (n 17) 226; Humbert (n 17) 132-133; Frier & McGinn (n 17) 91-92.

128 Frier & McGinn (n 17) 91-92.

129 Aulus Gellius (n 17) 4 3 2. See Van Oven (n 17) 458; Watson "Divorce" (n 17) 41.

130 Aulus Gellius (n 17) 4 3 2. Cf Watson "Divorce" (n 17) 45-46; Treggiari (n 17) 443; Dixon (n 17) 68.

3 6 The significance of the divorce of Carvilius Ruga

The divorce case of Carvilius Ruga was a milestone in the history of Roman law of divorce. The legal significance of this case was consequently noted by the Romans.¹³¹

In the first place, after Ruga's divorce, a husband had the right to divorce his innocent wife, without penalty, for reasons other than those laid down by the old regal statutes. This led to a widening of the grounds for divorce – perhaps even a system of no fixed grounds and far less stringent financial penalties for divorce, if any at all. This famous divorce which scandalised the people of Rome not only introduced the lax system of freedom of divorce but may further be regarded as a step in the development of the *sine manu* marriage (a marriage where the wife did not come under the power of the husband or free marriage).¹³²

In the second place it may, furthermore, have initiated the attitude of freedom of marriage and divorce, the idea known as *liberum matrimonium et divortium*, which is peculiar to the end of the Republic and the early Empire.¹³³ Although Carvilius may have offended the morals of some of his colleagues, he nevertheless paved the way for men to divorce wives (not guilty of one of the three offences) without risking the contempt of the Roman people. In following generations, husbands could divorce their wives on any pretext without incurring odium. Even the most trivial excuse was enough to justify a divorce. The husband, though, had to show some reason for his divorce – no matter how mean or petty. He was not allowed to divorce his wife without any grounds. Likewise, a wife could divorce her husband just as easily unless she was in his *manus*.¹³⁴

In the third place, the divorce emphasised the lack of rules regulating dowry upon divorce¹³⁵ and resulted in the precedent that women could be divorced without receiving any financial compensation.¹³⁶ In this regard Aulus Gellius in *Noctes Atticae* 4 3 1-2 makes special reference to the work of the famous jurist Servius Sulpicius Rufus, a contemporary of Cicero. In his book titled *On Dowries* Sulpicius wrote that the divorce of Carvilius Ruga showed that security for a wife's dowry seemed to have become necessary for the first time when Carvilius divorced his

131 Gardner (n 17) 48; Watson *Ancient Romans* (n 17) 36; Watson "Divorce" (n 17) 46.

132 Watson *Ancient Romans* (n 17) 36; Watson (n 51) 55; Watson "Divorce" (n 17) 50; Gardner (n 17) 84.

133 Alexander Severus *Codex* 8 38 2 (223 AD). Macours (n 22) 56; Spruit (n 21) 78; Kaser (n 12) 326.

134 Valerius Maximus (n 17) 5 3 10-12. See also Watson *Ancient Romans* (n 17) 36; Carcopino (n 17) 110.

135 Aulus Gellius (n 17) 4 3 2. Cf Watson "Divorce" (n 17) 41, 46-48; Van Oven (n 17) 458.

136 Gardner (n 17) 84; Watson "Divorce" (n 17) 46-48; Evans Grubbs (n 17) 226; Watson *Ancient Romans* (n 17) 36.

wife. Modern scholars accept Sulpicius' authority on this point.¹³⁷ It has to be borne in mind that there were no *cautiones* or *actiones rei uxoriae* until late in the third century BC.¹³⁸

This leads to the belief that it introduced the development of pre-marital agreements with regard to dowry, the so-called *cautiones rei uxoriae*.¹³⁹ In these an express agreement through *stipulatio* (stipulation/promise) was made about the fate of the dowry at the end of the marriage. The action for the dowry's recovery was presumably a *condictio* on the stipulation.¹⁴⁰

It is also believed that it led to the introduction of a legal process for recovery of dowry on divorce (and later even on the death of the husband), if no special arrangement as to its return had been made. This legal process was an action independent of agreements and was known as the *actio rei uxoriae*. It was an action for the restoration of the wife's property, which, until the divorce, had been the dowry and belonged to the husband.¹⁴¹ Although the early history of the action is obscure, it is evident that it came into existence after the divorce of Carvilius Ruga and was in operation by the second century BC.¹⁴² The *actio re uxoriae* was originally granted as a penal proceeding and viewed as compensation for a personal wrong. It was inflicted as punishment on an unjust husband who divorced his wife who was without fault. Under the action the divorced wife could recover whatever the judge thought was a fair share of the dowry in the circumstances. However, the judge did allow the husband to make reasonable deductions. This happened if the husband had incurred reasonable expenses in connection with the dowry.¹⁴³ During the different periods of Roman legal history elaborate rules of regulating dowry developed.¹⁴⁴

Thus, it appears that the heavy financial penalties of the old regal laws for being the guilty party or for divorcing without justification, disappeared with the introduction of the *actio rei uxoriae*. A trend towards less stringent financial penalties for divorce started at the end of the Republic. And later it appears that the aim of the *actio rei uxoriae* was to prevent the husband from forfeiting all his property and the wife from forfeiting her entire dowry.

137 Watson "Divorce" (n 17) 47; Treggiari (n 17) 442; Dixon (n 17) 68; Frier & McGinn (n 17) 91-92; Corbett (n 17) 218; Gardner (n 17) 48, 84; Watson *XII Tables* (n 17) 32.

138 Aulus Gellius (n 17) 4 3 1-2; Corbett (n 17) 148; Van Oven (n 17) 471; Watson *XII Tables* 38-39.

139 Gardner (n 17) 84; Watson "Divorce" (n 17) 47.

140 Watson (n 51) 66.

141 Watson "Divorce" (n 17) 47; Watson (n 51) 67.

142 Gardner (17) 48; Corbett (n 17) 150; Watson *Ancient Romans* (n 17) 37; Borkowski & Du Plessis (n 2) 132.

143 Borkowski & Du Plessis (n 2) 132; Corbett (n 17) 182-183.

144 See n 78 *supra*.

4 Conclusion

The restricted grounds for divorce and severe penalties of early Roman law came to an end with the notorious divorce of Spurius Carvilius Maximus Ruga, a man of rank and distinction. It is not surprising that this divorce figures so prominently in the primary sources and is today still regarded as a seminal case on Roman law of divorce. It was the first recorded divorce where neither of the parties was at fault. Carvilius Ruga divorced his wife, whom he loved dearly, on what he regarded as moral grounds – he had sworn an oath and he was adamant to honour it.

Nevertheless, the Roman people disapproved of his conduct, regarding it as a failure in loyalty: not an oath, not even a desire for children or sterility should take precedence over marital faith.

Significantly, the divorce of Carvilius Ruga changed the course of Roman legal history in this regard in spite of the fact that a system of judicial precedent was not officially adhered to at the time. Grounds for divorce were extended and new equitable measures regulating proprietary consequences eventually developed which worked in favour of both parties.