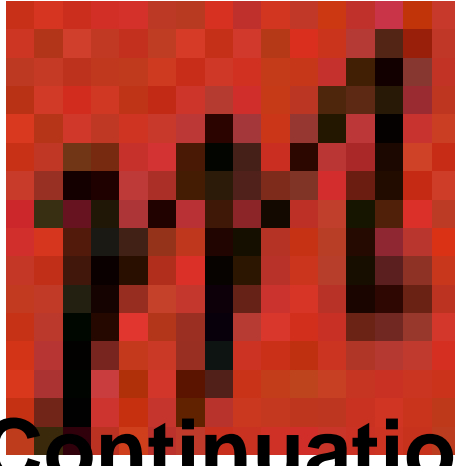


<http://montesquieu.ens-lyon.fr/spip.php?article2904>



XIX.24 Continuation of the same subject

- The Spirit of Law - Book XIX. On the laws in the relation they have to the principles that constitute the general spirit, the ethos, and the manners of a nation -

Date de mise en ligne : jeudi 6 septembre 2018

Copyright © Montesquieu - Tous droits réservés

XIX.24 Continuation of the same subject

Laws that give guardianship to the mother prioritize the preservation of the ward's person ; those that give it to the closest heir prioritize the preservation of property. Among peoples whose ethos is corrupt, it is better to award guardianship to the mother. Where the laws must show confidence in the citizens' ethos, guardianship is given to the inheritor of the property, or to the mother, and sometimes to both.

If we reflect on Roman laws, we will find that their spirit is consistent with what I am saying. At the time when the law of the Twelve Tables was made, the ethos in Rome was admirable. Guardianship was conferred on the ward's closest relative, thinking that the person who could benefit from the succession ought to have the responsibility of guardianship. The life of the ward was not thought to be in danger, although it was placed in the hands of the person whom the child's death was to benefit. But when the ethos in Rome changed, the legislators also changed their way of thinking. If the testator, in the substitution of the child's guardian, say Caius [1] and Justinian, [2] fears lest the guardian create traps for the ward, he can leave open the vulgar substitution [3] and place the child's guardianship in a part of the will that can be opened only after a certain time. These are fears and precautions unknown to the early Romans.

[1] *Institutes*, book II, tit. 6, §2, Ozel compilation, Leyden, 1658

[2] *Institutes*, book II, *De pupillari substitutione*, §3.

[3] The vulgar substitution is : If so-and-so does not choose an heir, I substitute for him, etc. ; the pupillary substitution is : If so-and-so dies before puberty, I substitute for him, etc.