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XVIII.22 On a civil law of the Germanic peoples

- The Spirit of Law - Book XVIII. On laws in their relationship to the nature of the terrain -

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I shall now explain how this particular part of the Salic law that is ordinarily called the Salic law relates to the institutions of a people which did not till the land, or at least very little.

When a man leaves children, the Salic law would have the males succeed to Salic land in preference to the daughters. [1]

To know what Salic lands were, you have to find out what the properties or uses of the land were among the Franks before they had emerged from Germania.

Mr. Echard has firmly proven that the word *Salic* derives from the word *sala*, which means house, and that Salic land was thus the land of the house. [2] I shall go further and examine what the house was, and the land of the house, among the Germans.

"They do not dwell in cities," says Tacitus, "and they cannot bear having their houses adjoining each other ; each man leaves a small parcel or space around his house that is enclosed and locked." [3] Tacitus spoke correctly, for several laws in the barbarian codes have different provisions against those who broke down this enclosure and those who broke into the house itself. [4]

We know from Tacitus and Cæsar that the lands which the Germans cultivated were allocated to them for only a year, after which they reverted to the public. As patrimony, they had nothing but the house and a parcel of land within the enclosure surrounding the house. [5] It was this particular patrimony which belonged to the males. Indeed, why would it have belonged to the daughters ? They moved on to some other house.

Salic land was thus this enclosure, which was a dependency of the German's house ; it was the only property he had. After the conquest, the Franks acquired new properties and continued to call them Salic lands.

When the Franks lived in Germania, their properties were slaves, herds, horses and weapons, etc. The house and the small parcel of land adjoining it were naturally left to the male children who would inhabit them. But when, after the conquest, the Franks had acquired vast lands, it was considered unfair that the daughters and their children should have no share of them. A practice came into being which allowed the father to recall his daughter and his daughter's children. The law was silenced ; and these sorts of recalls had to be common, since formulas were made of them. [6]

Among all these formulas I find one that is singular. [7] A grandfather recalls his grandchildren to succeed him along with his sons and daughters. Where then was the Salic law ? It must be that in those times it was no longer observed, or that the continual practice of recalling daughters had led to their eligibility to inherit being considered the most common situation.

The purpose of the Salic law was not a certain preference of one sex over the other, and even less the perpetuity of a family, name, or transmission of land. None of that had entered the Germans' heads : it was a purely economic law, which gave the house and its adjacent land to the males who were to live there, and for whom consequently it was the most appropriate.

We need do no more here than cite the title of the Salic law on allod lands, that famous text which so many people have talked about, and which so few have read :

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If a man dies childless, his father or mother shall succeed him.

(2) If he has neither father nor mother, his brother or sister shall succeed him.

(3) If he has neither brother nor sister, his mother's sister shall succeed him.

(4) If his mother has no sister, his father's sister shall succeed him.

(5) If his father has no sister, the closest kin on the male side shall succeed him.

(6) No portion of Salic land shall pass to females, but it shall belong to the males, which is to say that male children shall succeed their fathers. [8]

It is clear that the first five articles relate to the succession of the man who dies childless, and the sixth to the succession of the man who has children.

According to the law, when a man died childless, one of the two sexes was to have preference over the other only in certain cases. In the two first degrees of succession, the advantages of males and females were the same ; in the third and fourth, women had the preference, and the males had it in the fifth.

I find the seeds of these oddities in Tacitus : "The sisters' children," he says, "are as dear to their uncle as to their own father. There are those who find this bond closer and even more sacred ; they prefer it when they receive hostages." [9] That is why our earliest historians speak to us so often of the love of the Frankish kings for their sister and their sister's children. [10] Now if the sisters' children were treated in the house as the children themselves, it was natural for the children to treat their aunt like their own mother.

The mother's sister was given preference over the father's sister ; this can be explained by other texts in the Salic law : when a woman was a widow, she came under the guardianship of her husband's kin ; for this guardianship, the law preferred kin on the female side to kin on the male side. [11] Indeed, a woman who entered a family, joining with persons of her sex, was more closely tied to kin on the female side than on the male side. Moreover, when one man had killed another, and had no means of satisfying the fine he had incurred, the law allowed him to give up his possessions, and his family had to make up for any shortfall. [12] After the father, the mother, and the brother, it was the mother's sister who paid, as if there were something more intimate about that bond ; for the kinship that imposes burdens must also have conferred advantages.

According to the Salic law, after the father's sister, the closest kin on the male side was to have the succession ; but if he were kin beyond the fifth remove, he did not inherit. Thus, a woman of the fifth remove would have inherited in preference to a male of the sixth, and this is seen in the law of the Ripuarian Franks, [13] the faithful interpreter of the Salic law, in the title on allods, where it follows step by step the same title in the Salic law.

If the father left children, his daughters, according to the Salic law, were to be excluded from succession to Salic land, and it would belong to the male children.

I can readily prove that the Salic law does not categorically exclude daughters from Salic land, but solely in the case where brothers would exclude them. We see this in the Salic law itself, which, after stating that women would possess none of the Salic land, but only the males, interprets and restricts itself : "which is to say," it adds, "that the

son shall inherit the father's legacy."

2nd. The text of the Salic law is clarified by the law of the Ripuarian Franks, which also includes a title on allods [14] quite consistent with that of the Salic law.

3rd. The laws of these barbarian peoples, all of which emanate from Germania, are mutually interpretative, especially since they all embody more or less the same spirit. In the law of the Saxons, the father and mother leave their legacy to their son and not to their daughter ; but if there are only daughters, they are to have the entire legacy. [15]

4th. We have two ancient formulas that raise the case where, according to the Salic law, daughters are excluded by the males : that is when they are rivalling their brother. [16]

5th. Another formula proves that the daughter succeeded in preference to the grandson ; she was therefore excluded only by the son. [17]

6th. If daughters had generally been excluded by the Salic law from succession to lands, it would be impossible to explain the histories, formulas, and charters which speak constantly of the lands and properties of women in the first dynasty.

We have been wrong to claim that the Salic lands were fiefs. [18] 1st. This title is labelled *On allods*. 2nd. In the beginning fiefs were not hereditary. 3rd. If the Salic lands had been fiefs, how could Malculfe have called impious the custom that excluded women from succeeding to them, since even the males did not succeed to fiefs ? 4th. The charters which people cite to prove that the Salic lands were fiefs prove only that they were freeholds. 5th. Fiefs were established only after the conquest, and the Salic practices existed before the Franks had left Germania. 6th. It was not the Salic law which by limiting the succession of women constituted the establishment of fiefs ; but it was the establishment of fiefs that put limits on the succession of women and the provisions of the Salic law.

After what we have just said, one would not think that the personal succession of males to the French crown could have come from the Salic law. Yet it is beyond doubt that it does. I can prove it with the various codes of the barbarian peoples. The Salic law [19] and the law of the Burgundians [20] did not give daughters the right to inherit land with their brothers, neither did they inherit the crown ; the law of the Visigoths, [21] on the contrary, [22] allowed daughters to inherit lands with their brothers ; women were able to succeed to the crown. Among these peoples the provision of civil law forced the political law.

This was not the only case where the political law among the Franks yielded to the civil law. By provision of the Salic law, all brothers equally inherited the land, and that was also the provision of the law of the Burgundians. And in the Frankish monarchy as well as the Burgundian, all brothers succeeded to the crown, if we except a few acts of violence, murders, and usurpations among the Burgundians.

[1] Tit. 72.

[2] [Johann Georg von Eckhart published numerous linguistic and philological works, among them *Commentarii de rebus Franciæ Orientalis et episcopatus Wirceburgensis* (1729).]

[3] *Nullas Germanorum populis urbes habitari satis notum est, ne pati quidem inter se junctas sedes ; colunt discreti, ut nemus placuit. Vicos*

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locant, non in nostrum morem connexis et coherentibus ædificiis, suam quisque domum spatio circumdat. [It is well known that the nations of Germany have no cities, and that they do not even tolerate closely contiguous dwellings. They live scattered and apart, just as a spring or a wood has attracted them. Their villages they do not arrange in our fashion, with the buildings connected and joined together, but every person surrounds his dwelling with an open space.' â€” trans.[Thomas Gordon](#)] (*De moribus Germanorum* [chapter xvi].)

[4] *Leges Alamannorum*, ch. x, and *Leges Baiwariorum*, tit. 10, §1 and 2.

[5] This enclosure is called *cortis* in the charters.

[6] See Marculfus, book II form. 10 and 12, *Appendice de Marculfus*, formula 49, and the ancient formulas called *Sirmondi*, formula 22.

[7] Form. 55 in the Lindenbroch compendium.

[8] *De terra vero Salica in mulierem nulla portio hereditatis transit, sed hoc virilis sexus acquirit, hoc est filii in ipsa hereditate succedunt*, tit. 62, §6.

[9] *Sorum filiis idem apud avunculum quam apud patrem honor. Quidam sanctiorem arctioremque hunc nexum sanguinis arbitrantur, et in accipiendis obsidibus magis exigunt, tanquam ii et animum firmiùs et domum latius teneant.* [Sister's sons are held in as much esteem by their uncles as by their fathers ; indeed, some regard the relation as even more sacred and binding, and prefer it in receiving hostages, thinking thus to secure a stronger hold on the affections and a wider bond for the family.] (*De moribus Germanorum* [ch. xx].)

[10] See Gregory of Tours, book VIII, ch. xviii and xx ; book IX, ch. xvi and xx, the furies of Guntram over the ill treatment received by his niece Ingunda at the hands of Lenvigilda, and how Childebert her brother waged war to avenge her.

[11] Salic law, tit. 47.

[12] *Ibid.*, tit. 61, §1.

[13] *Et deinceps usque ad quintum genuculum qui proximus fuerit in hereditatem succedat* (title 56, §36).

[14] Tit. 56.

[15] Tit. 7, §1. *Pater aut mater defuncti, filio non filiæ hereditatem relinquunt ; §4, qui defunctus, non filios, sed filias reliquerit, ad eas omnis hereditas pertineat.*

[16] In Marculfus, book II, formula 12, and in Marculfus appendix, formula 49.

[17] In the Lindenbroch compendium, formula 55.

[18] Ducange, Pithou, etc.

[19] Title 62.

[20] Tit. 1, §3, tit. 14, §1, and tit. 51.

[21] Book IV, tit. 2, §1.

[22] The Germanic nations, says Tacitus, had common practices ; they also had some particular ones.