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XXVII Only chapter. On the Roman laws on successions

- The Spirit of Law - Book XXVII. On the origin and transformations of the Roman laws on successions -

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This matter stems from establishments of very remote antiquity, and to get to the bottom of it, allow me to search in the earliest laws of the Romans for what I do not know that anyone has seen until now.

We know that Romulus divided the lands of his little state among his citizens [1] ; that, it seems to me, is the origin of the laws of Rome on successions.

The law on the division of lands required that the assets of one family not pass to another family ; from this it followed from that there should be but two orders of heirs established by law [2] : the children and all the descendants who lived under father's authority, whom they called *sui hæredes* ; and in their absence, the closest relatives on the male side, who were called *agnati*.

It further followed that the relatives on the female side, who were called *cognati*, should not inherit : they would have taken the assets into another family ; and it was was established thus.

It further followed from this that children should not succeed to their mother, nor the mother to her children : that would have transferred the assets of one family to another. Thus they were excluded in the law of the Twelve Tables : it called to succession only the *agnati*, and the son and mother together were not *agnati*. [3]

But it was indifferent whether the *suus hæres* or, in his absence, the closest *agnatus*, be male or female, because, since relatives on the maternal side did not inherit, even if a female heir married, the assets still returned to the family from which they had come. That is why in the law of the Twelve Tables there is no distinction made whether the person who succeeded was male or female. [4]

As a result, although the grandchildren by the son succeeded to the grandfather, the grandchildren by the daughter did not ; for to keep the assets from passing into another family, the *agnati* took precedence over them. Thus the daughter succeeded to her father, and not her children. [5]

Thus, among the early Romans, women succeeded when that coincided with the law of the division of lands ; and they did not succeed when it could clash with it.

Such were the laws of successions among the early Romans ; and as they were naturally dependent on the constitution, and derived from the division of lands, it is clear that they did not have a foreign origin, and were not among those which the deputies sent to the Greek villages brought back with them.

Dionysius of Halicarnassus tells us that Servius Tullius, finding the laws of Romulus and Numa on the division of lands abolished, restored them, and made new ones to give the older ones new weight. [6] Thus there can be no doubt that the laws which we have just mentioned, made in function of that division, are the work of those three legislators of Rome.

The order of succession having been established in function of a political law, a citizen should not disrupt it by an act of individual will, which is to say that in the earliest times of Rome the making of a testament must not have been allowed. Nevertheless, it would have been harsh to be deprived in one's last moments of the communication of benefits.

A way was found to reconcile the laws in this respect with the will of individuals. One was allowed to dispose of one's

property in an assembly of the people, and each testament was in some sense an act of the legislative authority.

The law of the Twelve Tables allowed the person making his testament to choose as his heir any citizen he wished. The reason why the Roman laws so restricted the number of those who could succeed in the absence of a will was the law on division of lands ; and the reason why they thus extended the ability to make a will was that the father, having the right to sell his children, [7] could *a fortiori* deprive them of his property. They were thus different effects, since they flowed from separate principles : and such is the spirit of the Roman laws on this subject.

The ancient laws of Athens did not allow the citizen to make a will. Solon allowed it, except for those who had children [8] ; and the legislators of Rome, imbued with the notion of paternal authority, allowed wills even to the prejudice of the children. It must be admitted that the ancient laws of Athens were more consistent than the laws of Rome. The unlimited permission to make a will, granted by the Romans, ultimately undid the political provision on the division of lands ; it introduced, more than anything else, the ominous difference between wealth and poverty : several shares were combined in the same person ; some citizens got too much, and an infinite number of others got nothing. And so the people, continually deprived of their share, continually called for a new distribution of lands. They called for it at a time when frugality, parsimony, and poverty constituted the distinctive character of Romans, as at the times when their luxury was still more impressive.

Testaments being properly a law made in the assembly of the people, men who were away with the army found themselves deprived of the ability to make a will. The people gave soldiers the power [9] to make in the presence of some of their companions the dispositions they would have made before them. [10]

The great assemblies of the people were held but twice a year ; besides, the people had grown and its business as well : they judged it appropriate to allow all citizens to make their will before a few adult Roman citizens, who could represent the body of the people [11] ; five citizens [12] were chosen before whom the heir [13] purchased his family, which is to say his inheritance, from the testator ; another citizen brought a balance to weigh its value, for the Romans as yet had no coinage. [14]

To all appearances, those five citizens represented the five classes of the people, and the sixth, composed of persons who had nothing, was not counted.

We should not say with Justinian that these sales were imaginary : they became so, but at the beginning they were not. Most of the laws that subsequently regulated wills originate in the reality of these sales ; the proof of this is indeed to be found in Ulpian's fragments. [15] The deaf, the dumb, and the prodigal could not make a will : the deaf, because he could not hear the words of the purchaser of the family ; the dumb, because he could not pronounce the terms of nomination ; the prodigal, because, being banned from all management of business, he could not sell his family. I omit the other examples.

Wills being made in the assembly of the people, they were rather acts of political law than of civil law, of public law rather than private law : whence it followed that the father could not allow his son who was under his authority to make a will.

Among most peoples, wills are not subjected to greater formalities than ordinary contracts, because the ones and the others are no more than expressions of the will of the person who contracts, which belong equally to private law. But among the Romans, where wills derived from public law, there were greater formalities than for other acts [16] ; and that still subsists today in the regions of France that are governed by Roman law.

Wills being, as I have said, a law of the people, they were supposed to be made with the force of command, and by

words that were called *direct and imperative*. From this a rule was formed that a person could neither give nor transmit his inheritance except by words of command [17] : whence it followed that one could well, in certain cases, make a substitution, [18] and order that the inheritance pass on to another heir, but that one could never make a trust, [19] in other words enjoin someone, in the form of a request, to remit the inheritance, or a part of it, to another heir.

When the father neither designated nor disinherited his son, the will was abrogated ; but it was valid even if he neither disinherited nor designated his daughter. I see the reason for this. When he neither designated nor disinherited his son, he was harming his grandson, who would have succeeded *ab intestato* to his father, but by neither designating nor disinheriting his daughter, he did no harm to his daughter's children, who would not have succeeded *ab intestato* to their mother, [20] because they were neither *sui hæredes* nor *agnati*.

As the laws of the early Romans on successions had in mind only to follow the spirit of the division of lands, they did not sufficiently restrain the wealth of women, and thereby left a door open to luxury, which is always inseparable from wealth. Between the second and third Punic Wars, they began to sense the evil : they made the Voconian law [21] ; and as very great considerations made them do it, as few records of it remain to us, and as it has up to now been spoken of only very confusedly, I shall now clarify it.

Cicero has preserved a fragment for us which forbids designating a woman as heir, [22] whether or not she was married.

The *Epitome* of Livy, where this law is mentioned, says nothing more about it [23] ; it seems from Cicero [24] and St. Augustine [25] that the daughter, and even the only daughter, were included in the prohibition.

Cato the Elder contributed with all his power to getting this law accepted. [26] Aulus Gellius quotes a fragment of the speech he delivered on that occasion. [27] By preventing the succession of women, he wanted to avoid the causes of luxury, as in undertaking the defense of the Oppian law he wanted to check luxury itself.

Mention is made in the *Institutes* of Justinian and Theophilus of a chapter of the Voconian law that restricted the ability to bequeath. [28] Reading these writers, there is no one who does not think this chapter was made to avoid the succession's being so exhausted by legacies that the heir might refuse to accept it. But the spirit of the Voconian law was not that. We have just seen that its purpose was to prevent women from receiving any succession. The chapter of that law that put limits on the ability to bequeath entered into this purpose : for if one had been able to bequeath as much as one would have wished, women could have received as legacy what they could not obtain as a succession.

The Voconian law was made to prevent the excessive wealth of women ; it was therefore of large successions that they had to be deprived, and not of those that could not support luxury. [29]Thus do we find in Cicero [30] that women were excluded only from the succession of those whose assets were in the *cens*. [31]

The civil wars caused the loss of an infinite number of citizens. Rome under Augustus was almost empty ; it had to be repopulated. The Papian laws were made, in which nothing was omitted that could encourage citizens to marry and have children. [32] One of the principal means was to raise the hopes of succession for those who lent themselves to the intentions of the law, and to lower them for those who would not comply ; and as the Voconian law had made women ineligible to inherit, the Papian law in certain cases put an end to this prohibition.

Women, especially those who had children, were made eligible to receive by virtue of their husbands' wills [33] ; they could, when they had children, receive by virtue of outsiders' wills : all this against the provision of the Voconian law ; and it is notable that the spirit of that law was not entirely abandoned. For example, the Papian law [34] allowed a

man who had a child [35] to receive the entire inheritance from the will of an outsider ; it made the same concession to a woman only when she had three children. [36]

It must be noted that the Papian law enabled women who had three children to succeed only by virtue of outsiders' wills, and that with respect to the succession of relatives it left the ancient laws and the Voconian law in full force. [37] But that did not last.

Rome, subverted by the wealth of all nations, had changed its ways ; there was no longer any question of checking women's luxury. Aulus Gellius, who lived under Adrian, tells us that in his time the Voconian law was almost obliterated ; it was covered by the opulence of the republic. [38] Thus we find in the *Sententiæ* of Paulus, [39] who lived under Niger, and in the *Fragments* of Ulpian, [40] who was in the time of Alexander Severus, that sisters on the father's side could succeed, and that only relatives further removed fell under the prohibition of the Voconian law.

We see from the procedures of Verres that the prætors extended or shrank the Voconian law at will. [41] The ancient laws of Rome had begun to seem harsh. Only reasons of equity, moderation, or decency were able to move the prætors ; they undermined all those laws. For laws often do much well-hidden good, and little but very perceptible harm.

We have seen that, by the ancient laws of Rome, mothers had no share in their children's succession. The Voconian law was another reason for excluding them. But the emperor Claudius granted the mother the succession of her children as a consolation for their loss. The Tertullian senatus consultum issued under Adrian [42] granted it to them when they had three children if they were freeborn, or four if they were freed. It is clear that this senatus consultum was merely an extension of the Papian law, which in the same case had granted to women the successions conferred on them by non-relatives. Finally, Justinian granted them the succession irrespective of the number of their children. [43]

The same causes that led to narrowing the law preventing women from succeeding led to the gradual overturning of the one that had hindered the succession of relatives on the side of women. Those laws were quite consistent with the spirit of a good republic, where the sex should be prevented from taking advantage of its wealth or of its expectations of wealth for luxury. With the luxury of a monarchy, on the contrary, making marriage onerous and costly, one must be urged to it, both by the wealth that women can offer, and by the expectation of the successions which they can obtain. Thus, when the monarchy was established in Rome, the whole system of successions was changed. In the absence of relatives through the male line, prætors called relatives on the women's side, whereas by the ancient laws relatives on the women's side were never called. The Orphitian senatus consultum called children to their mother's succession, and the emperors Valentinian, Theodosius, and Arcadius called their grandchildren by their daughter to the succession of the grandfather. [44] Finally, emperor Justinian removed the last vestige of the ancient law on successions : he established three orders of heirs : descendants, ascendants, and collaterals, with no distinction at all between males and females, between relatives on the female or the male side, and abrogated all those that remained in this regard ; he believed he was following nature itself by leaving behind what he called the tangles of the old jurisprudence. [45]

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[1] Dionysius of Halicarnassus, book II, ch. iii ; Plutarch, in his comparison of Numa and Lycurgus.

[2] *Ast si intestato moritur, cui suus hæres nec extabit, agnatus proximus familiam habeto* ['If he has no heir and dies intestate, let the nearest agnate have the inheritance' - transl. Weston]. Fragment of law of the Twelve Tables in Ulpian, last title.

[3] See Ulpian, *Fragmenta,* §8, tit. 26 ; *Institutes*, tit. 3, *in proemio ad Senatus consulto Tertulliano*.

[4] Paul the Jurist, book IV *De sententiarum*, tit. 8, §3.

[5] *Institutes*, book III, §15.

[6] Book IV, p. 276.

[7] Dionysius of Halicarnassus proves by the law of Numa that the law allowing a father to sell his son three times was a law of Romulus, not of the decemvirs (book II).

[8] See Plutarch, *Life of Solon*.

[9] This will, called *in procinctu*, was different from the one called military, which was only established by the constitutions of the emperors (Law 1 following *De militari testamento*) : it was one of their mollifications of the soldiers.

[10] This will was unwritten, and devoid of formalities, *sine libra et tabulis*, as Cicero says (book I of *De oratore*).

[11] *Institutes*, book II, tit. 10, §1 ; Aulus Gellius, book XV, ch. xxvii. They called this form of will *per æs et libram*.

[12] Ulpian, tit. 10, §2.

[13] Theophilos, *Institutes*, book II, tit. 10.

[14] Livy (book IV, *nondum argentum signatum erat*) ; he speaks of the time of the siege of Veii.

[15] Tit. 20, §13.

[16] *Institutes*, book II, tit. 10, §1.

[17] Let Titius be my heir.

[18] Vulgar, pupillary, and exemplary.

[19] Augustus, for particular reasons, began to authorize trustees. *Institutes*, book II, tit. 23 *in proemio*.

[20] *Ad liberos matris intestatæ hæreditas* ['On the inheretance of an intestate mother'], book XII. The law *non pertinebat quia fæminæ suos hæredes non habent*, ['did not apply because women have no proper heirs'] (Ulpian, Fragmenta, tit. 26, §7).

[21] Quintus Voconius, tribune of the people, proposed it. See Cicero, second oration against Verres, in Livy, *Epitome*, book XLI ; read Voconius instead of Volumnius.

[22] *Sanxit.... ne quis hæredem virginem neve mulierem faceret* ; Cicero, second oration against Verres.

[23] *Legem tulit, ne quis hæredem mulierem institueret*, book XLI.

[24] Second oration against Verres.

[25] Book III of *The City of God*.

[26] Livy, *Epitome*, book XLI.

[27] Book XVII, ch. vi.

[28] *Institutes*, book III, tit. 22.

[29] [From here to the paragraph begining "Les guerres civiles," the edition of 1758 inserts the text of Annex 21.]

[30] Second oration against Verres.

[31] *Qui census esset* ; which Dio, in book LVI, explains about him who had a hundred thousand, that is, him who had the first *cens*, as we can see in Livy, book I, and Dionysius of Halicarnassus.

[32] See what I have said about it in book XXIII, ch. xxi.

[33] On this see Ulpian's *Fragmenta*, tit. 15, §16.

[34] The same difference is found in several provisions of the Papian law. See Ulpian's *Fragmenta*, §4-5, last title, and the same at the same title, §6.

[35] *Quod tibi filiolus, vel filia, nascitur ex me, ¶Jura parentis habes ; propter me scriberis hæres*. Juvenal, *Sat*. 9.

[36] See law 9 of Codex Theodosianus, *De bonis proscriptorum seu damnatorum* ; and Dio, book LV. See Ulpian's *Fragmenta*, last tit., §6, and tit. 29, §3.

[37] Book XX, ch. i.

[38] Book XX, ch. i.

[39] [*Pauli sententiæ*,] Book IV, tit. 8, §3.

[40] Tit. 26, §6.

[41] Cicero, second oration against Verres.

[42] In other words, emperor Pius, who took the name of Adrian by adoption.

[43] Book II, Codex, *De jure liberorum*, *Institutes*, tit. 3, §4 of senatus consulta, and book II, Codex, *De senatus consulto Tertulliano*.

[44] L. IX. Codex, *De suis et legitimis liberis ex filia nepotibus ab instetato venientibus*.

[45] L. XIV. Codex, *ibid*. and *Novellas* 118 and 127.