Book XXVII.

1. Of the Origin and Revolutions of the Roman Laws on Successions. This affair derives its establishment from the most distant antiquity, and to penetrate to its foundation, permit me to search among the first laws of the Romans for what, I believe, nobody yet has been so happy as to discover.

We know that Romulus[1] divided the land of his little kingdom among his subjects; it seems to me that hence the laws of Rome on successions were derived.

The law of the division of lands made it necessary that the property of one family should not pass into another: hence it followed that there were but two orders of heirs established by law, the children and all the descendants that lived under the power of the father, whom they called sui hæredes, or his natural heirs; and, in their default, the nearest relatives on the male side, whom they called agnati.[2]

It followed likewise, that the relatives on the female side, whom they called cognati, ought not to succeed; they would have conveyed the estate into another family, which was not allowed.

Thence also it followed that the children ought not to succeed to the mother, nor the mother to her children; for this might carry the estate of one family into another. Thus we see them excluded by the law of the Twelve Tables:[3] it called none to the succession but the agnati, and there was no agnation between the son and the mother.

But it was indifferent whether the suus hæres, or, in default of such, the nearest by agnation, was male or female; because, as the relatives on the mother's side could not succeed, though a woman who was an heiress should happen to marry, yet the estate always returned into the family whence it came. On this account, the law of the Twelve Tables

does not distinguish, whether the person who succeeded was male or female.[4]

This was the cause that, though the grandchildren by the son succeeded to the grandfather, the grandchildren by the daughter did not succeed; for, to prevent the estate from passing into another family, the agnati were preferred to them. Hence the daughter, and not her children, succeeded to the father.[5]

Thus among the primitive Romans, the women succeeded, when this was agreeable to the law of the division of lands, and they did not succeed, when this might suffer by it.

Such were the laws of succession among the primitive Romans; and as these had a natural dependence on the constitution, and were derived from the division of lands, it is easy to perceive that they had not a foreign origin, and were not of the number of those brought into the republic by the deputies sent into the cities of Greece.

Dionysius Halicarnassus tells us[6] 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 old a greater weight. We cannot therefore doubt but that the laws we have been speaking of, made in consequence of this division, were the work of these three Roman legislators.

The order of succession having been established in consequence of a political law, no citizen was allowed to break in upon it by his private will; that is, in the first ages of Rome he had not the power of making a testament. Yet it would have been hard to deprive him, in his last moments, of the friendly commerce of kind and beneficent actions.

They therefore found a method of reconciling, in this respect; the laws with the desires of the individual. He was permitted to dispose of his

substance in an assembly of the people; and thus every testament was; in some sort; an act of the legislative power.

The law of the Twelve Tables permitted the person who made his will to choose which citizen he pleased for his heir. The reason that induced the Roman laws so strictly to restrain the number of those who might succeed ab intestato was the law of the division of lands; and the reason why they extended so widely the power of the testator was that, as the father might sell his children,[7] he might with greater reason deprive them of his substance. These were therefore different effects, since they flowed from different principles; and such is, in this respect, the spirit of the Roman laws.

The ancient laws of Athens did not suffer a citizen to make a will. Solon permitted it, with an exception to those who had children;[8] and the legislators of Rome, filled with the idea of paternal power, allowed the making a will even to the prejudice of their children. It must be confessed that the ancient laws of Athens were more consistent than those of Rome. The indefinite permission of making a will which had been granted to the Romans, ruined little by little the political regulation on the division of lands; it was the principal thing that introduced the fatal difference between riches and poverty: many shares were united in the same person; some citizens had too much, and a multitude of others had nothing. Thus the people being continually deprived of their shares were incessantly calling out for a new distribution of lands. They demanded it in an age when the frugality, the parsimony and the poverty of the Romans were their distinguishing characteristics; as well as at a time when their luxury had become still more astonishing.

Testaments being properly a law made in the assembly of the people, those who were in the army were thereby deprived of a testamentary power. The people therefore gave the soldiers the privilege of making before their companions[9] the dispositions which should have been made before them.[10]

The great assembly of the people met but twice a year; besides, both the people and the affairs brought before them were increased; they therefore judged it convenient to permit all the citizens to make their will before some Roman citizens of ripe age, who were to represent the body of the people;[11] they took five citizens,[12] in whose presence the inheritor purchased his family, that is, his inheritance, of the testator;[13] another citizen brought a pair of scales to weigh the value; for the Romans, as yet, had no money.[14]

To all appearance these five citizens were to represent the five classes of the people; and they set no value on the sixth, as being composed of men who had no property.

We ought not to say, with Justinian, that these scales were merely imaginary; they became, indeed, imaginary in time, but were not so originally. Most of the laws, which afterwards regulated wills, were built on the reality of these scales: we find sufficient proof of this in the fragments of Ulpian.[15] The deaf, the dumb, the prodigal, could not make a will: the deaf, because he could not hear the words of the buyer of the inheritance; the dumb, because he could not pronounce the terms of nomination; the prodigal, because as he was excluded from the management of all affairs, he could not sell his inheritance. I omit any further examples.

Wills being made in the assembly of the people were rather the acts of political than of civil laws, a public rather than a private right; whence it followed that the father, while his son was under his authority, could not give him leave to make a will.

Among most nations, wills are not subject to greater formalities than ordinary contracts; because both the one and the other are only expressions of the will of him who makes the contract, and both are equally a private right. But among the Romans, where testaments were derived from the public law, they were attended with much greater

formalities than other affairs;[16] and this is still the case in those provinces of France which are governed by the Roman law.

Testaments being, as I have said, a law of the people, they ought to be made with the force of a command, and in such terms as are called direct and imperative.[17] Hence a rule was formed, that they could neither give nor transmit an inheritance without making use of the imperative words: whence it followed, that they might very justly in certain cases make a substitution;[18] and ordain, that the inheritance should pass to another heir; but that they could never make a fiduciary bequest,[19] that is, charge any one in terms of entreaty to restore an inheritance, or a part of it, to another.

When the father neither instituted his son his heir, nor disinherited him, the will was annulled; but it was valid, though he did not disinherit his daughter, nor institute her his heiress. The reason is plain: when he neither instituted nor disinherited his son, he did an injury to his grandson, who might have succeeded ab intestato to his father; but in neither instituting nor disinheriting his daughter, he did no injury to his daughter's children, who could not succeed ab intestato to their mother, because they were neither sui hæredes, nor agnati.[20]

The laws of the ancient Romans concerning successions, being formed with the same spirit which dictated the division of lands, did not sufficiently restrain the riches of women; thus a door was left open to luxury, which is always inseparable from this sort of opulence. Between the second and third Punic war, they began to perceive the evil and made the Voconian law;[21] but as they were induced to this by the most important considerations; as but few monuments have reached us that take notice of this law, and as it has hitherto been spoken of in a most confused manner, I shall endeavour to clear it up.

Cicero has preserved a fragment, which forbids the instituting a woman

an heiress, whether she was married or unmarried.[22]

The Epitome of Livy, where he speaks of this law, says no more:[23] it appears from Cicero[24] and St. Augustine[25] that the daughter, though an only child, was comprehended in the prohibition.

Cato, the elder, contributed all in his power to get this law passed.[26] Aulus Gellius cites a fragment of a speech,[27] which he made on this occasion. By preventing the succession of women, his intent was to take away the source of luxury; as by undertaking the defence of the Oppian law, he intended to put a stop to luxury itself.

In the Institutes of Justinian[28] and Theophilus,[29] mention is made of a chapter of the Voconian law which limits the power of bequeathing. In reading these authors, everybody would imagine that this chapter was made to prevent the inheritance from being so exhausted by legacies as to render it unworthy of the heir's acceptance. But this was not the spirit of the Voconian law. We have just seen that they had in view the hindering women from inheriting an estate. The article of this law, which set bounds to the power of bequeathing entered into this view: for if people had been possessed of the liberty to bequeath as much as they pleased, the women might have received as legacies what they could not receive by succession.

The Voconian law was made to hinder the women from growing too wealthy; for this end it was necessary to deprive them of large inheritances, and not of such as were incapable of supporting luxury. The law fixed a certain sum to be given to the women whom it deprived of the succession. Cicero,[30] from whom we have this particular, does not tell us what was the sum; but by Dio we are informed it was a hundred thousand sesterces.[31]

The Voconian law was made to regulate opulence, not to lay a restraint upon poverty; hence Cicero[32] informs us that it related only to those

whose names were registered in the censors' books.

This furnished a pretence for eluding the law: it is well known that the Romans were extremely fond of set forms; and we have already taken notice that it was the spirit of the republic to follow the letter of the law. There were fathers who would not give in their names to be enrolled by the censors, because they would have it in their power to leave the succession to a daughter: and the prætors determined that this was no violation of the Voconian law since it was not contrary to the letter of it.

One Anius Asellus had appointed his daughter his sole heir and executrix. He had a right to make this disposition, says Cicero;[33] he was not restrained by the Voconian law, since he was not included in the census. Verres, during the time of his prætorship, had deprived Anius' daughter of the succession; and Cicero maintains that Verres had been bribed, otherwise he would not have annulled a disposition which all the other prætors had confirmed.

What kind of citizens then must those have been, who were not registered in the census in which all the freemen of Rome were included? According to the institution of Servius Tullius, mentioned by Dionysius of Halicarnassus,[34] every citizen not enrolled in the census became a slave; even Cicero himself observes[35] that such a man forfeited his liberty, and the same thing is affirmed by Zonaras. There must have been therefore a difference between not being in the census according to the spirit of the Voconian law, and not being in it according to the spirit of Servius Tullius' institutions.

They whose names were not registered in the first five classes,[36] in which the inhabitants ranked in proportion to their fortunes, were not comprised in the census according to the spirit of the Voconian law: they who were not enrolled in one of these six classes, or who were not ranked by the censors among such as were called ærarii, were not

included in the census according to the spirit of Servius' institutions. Such was the force of nature, that to elude the Voconian law fathers submitted to the disgrace of being confounded in the sixth class with the proletarii and capite censi, or perhaps to have their names entered in the Cærites tabulæ.[37]

We have elsewhere observed that the Roman laws did not admit of fiduciary bequests. The hopes of evading the Voconian law were the cause of their being introduced: they instituted an heir qualified by the law, and they begged he would resign the succession to a person whom the law had excluded; this new method of disposition was productive of very different effects. Some resigned the inheritance; and the conduct of Sextus Peduccus on an occasion of this nature was very remarkable.[38] A considerable succession was left him, and nobody living knew that he was desired to resign it to another, when he waited upon the widow of the testator and made over to her the whole fortune belonging to her late husband.

Others kept possession of the inheritance; and here the example of P. Sextilius Rufus is also famous, having been made use of by Cicero in his disputations against the Epicureans.[39] "In my younger days," says he, "I was desired by Sextilius to accompany him to his friends, in order to know whether he ought to restore the inheritance of Quintus Fadius Gallus to his daughter Fadia. There were several young people present, with others of more maturity and judgment; and not one of them was of opinion that he should give more to Fadia than the lady was entitled to by the Voconian law. In consequence of this, Sextilius kept possession of a fine estate, of which he would not have retained a single sestertius had he preferred justice to utility. It is possible, added he, that you would have resigned the inheritance; nay it is possible that Epicurus himself would have resigned it; but you would not have acted according to your own principles." Here I shall pause a little to reflect.

It is a misfortune inherent in humanity that legislators should be sometimes obliged to enact laws repugnant to the dictates of nature: such was the Voconian law. The reason is, the legislature considers the society rather than the citizen, and the citizen rather than the man. The law sacrificed both the citizen and the man, and directed its views to the prosperity of the republic. Suppose a person made a fiduciary bequest in favour of his daughter; the law paid no regard to the sentiments of nature in the father, nor to the filial piety of the daughter; all it had an eye to was the person to whom the bequest was made in trust, and who on such occasion found himself in a terrible dilemma. If he restored the estate, he was a bad citizen; if he kept it, he was a bad man. None but good-natured people thought of eluding the law; and they could pitch upon none but honest men to help them to elude it; for a trust of this kind requires a triumph over avarice and inordinate pleasure, which none but honest men are likely to obtain. Perhaps in this light to look upon them as bad citizens would have savoured too much of severity. It is not impossible but that the legislator carried his point in a great measure, since his law was of such a nature as obliged none but honest men to elude it.

At the time when the Voconian law was passed, the Romans still preserved some remains of their ancient purity of manners. Their conscience was sometimes engaged in favour of the law; and they were made to swear they would observe it:[40] so that honesty in some measure was set in opposition against itself. But latterly their morals were corrupted to such a degree that the fiduciary bequests must have had less efficacy to elude the Voconian law, than that very legislator had to enforce its observance.

The civil wars were the destruction of an infinite number of citizens. Under Augustus, Rome was almost deserted; it was necessary to re-people it. They made the Papian laws, which omitted nothing that could encourage the citizens to marry and procreate children.[41] One of the principal means was to increase, in favour of those who gave in to the

views of the law, the hopes of being heirs, and to diminish the expectations of those who refused; and as the Voconian law had rendered women incapable of succeeding, the Papian law, in certain cases, dispensed with this prohibition.[42]

Women,[43] especially those who had children, were rendered capable of receiving in virtue of the will of their husbands; they even might, when they had children, receive in virtue of the will of strangers. All this was in direct opposition to the regulations of the Voconian law: and yet it is remarkable that the spirit of this law was not entirely abandoned. For example, the Papian law, which permitted a man who had one child[44] to receive an entire inheritance by the will of a stranger, granted the same favour to the wife only when she had three children.[45]

It must be remarked that the Papian law did not render the women who had three children capable of succeeding except in virtue of the will of strangers; and that with respect to the succession of relatives, it left the ancient laws, and particularly the Voconian, in all their force.[46] But this did not long subsist.

Rome, corrupted by the riches of every nation, had changed her manners; the putting a stop to the luxury of women was no longer minded. Aulus Gellius, who lived under Adrian,[47] tells us, that in his time the Voconian law was almost abolished; it was buried under the opulence of the city. Thus we find in the sentences of Paulus,[48] who lived under Niger, and in the fragments of Ulpian,[49] who was in the time of Alexander Severus, that the sisters on the father's side might succeed, and that none but the relatives of a more distant degree were in the case of those prohibited by the Voconian law.

The ancient laws of Rome began to be thought severe. The prætors were no longer moved except by reasons of equity, moderation, and decorum.

We have seen, that by the ancient laws of Rome mothers had no share in

the inheritance of their children. The Voconian law afforded a new reason for their exclusion. But the Emperor Claudius gave the mother the succession of her children as a consolation for her loss. The Tertullian senatus consultum, made under Adrian,[50] gave it them when they had three children if free women, or four if they were freedwomen. It is evident, that this decree of the senate was only an extension of the Papian law, which in the same case had granted to women the inheritance left them by strangers. At length Justinian favoured them with the succession independently of the number of their children.[51]

The same causes which had debilitated the law against the succession of women subverted that, by degrees, which had limited the succession of the relatives on the woman's side.

These laws were extremely conformable to the spirit of a good republic, where they ought to have such an influence as to prevent this sex from rendering either the possession, or the expectation of wealth, an instrument of luxury. On the contrary, the luxury of a monarchy rendering marriage expensive and costly, it ought to be there encouraged, both by the riches which women may bestow, and by the hope of the inheritances it is in their power to procure. Thus when monarchy was established at Rome, the whole system of successions was changed. The prætors called the relatives of the woman's side in default of those of the male side; though by the ancient laws, the relatives on the woman's side were never called. The Orphitian senatus consultum called children to the succession of their mother; and the Emperors Valentinian, Theodosius, and Arcadius called the grandchildren by the daughter to the succession of the grandfather.[52] In short, the Emperor Justinian[53] left not the least vestige of the ancient right of successions: he established three orders of heirs, the descendants, the ascendants, and the collaterals, without any distinction between the males and females; between the relatives on the woman's side, and those on the male side; and abrogated all laws of this kind, which were still in force: he believed that he followed nature, even in deviating from

what he called the embarrassments of the ancient jurisprudence.

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1. Dionysius Halicarnassus, ii. 3. Plutarch's comparison between Numa and Lycurgus.

2. Ast si intestato moritur cui suus hæres nec exhabit, agnatus proximus familiam habeto. Fragment of the law of the Twelve Tables in Ulpian, the last title.

3. See Ulpian, Fragment., § 8, tit. 26. Institutes, tit. 3, In præmio ad S.C. Tertullianum.

4. Paul, Sentences, tit. 8, § 3.

5. Institutes, iii, tit. 1, § 15.

6. Book iv, p. 276.

7. Dionysius Halicarnassus proves, by a law of Numa, that the law which permitted a father to sell his son three times was made by Romulus, and not by the Decemvirs. -- Book ii.

8. See Plutarch, Solon.

9. This testament, called in procinctu, was different from that which they styled military, which was established only by the constitutions of the emperors. Leg. 1, ff. de militari testamento. This was one of the artifices by which they cajoled the soldiers.

10. This testament was not in writing, and it was without formality, sine librâ et tabulis, as Cicero says, De Orat., i.

11. Institutes, ii, tit. 10, § 1. Aulus Gellius, xv. 27. They called this form of testament per æs et libram.

12. Ulpian, tit. 10, § 2.

13. Theophilus, Institutes, ii, tit. 10.

14. Livy, iv, Nondum argentum signatum erat. He speaks of the time of the siege of Veii.

15. Tit. 20, § 13.

16. Institutes, ii, tit. 10, § 1.

17. Let Titus be my heir.

18. Vulgar, pupillary, and exemplary.

19. Augustus, for particular reasons, first began to authorise the fiduciary bequest, which, in the Roman law, was called fidei commissum. Institutes, ii, tit. 23, § 1.

20. Ad liberos matris intestatæ hæredit as, leg. 12 Tab., non pertinebat, quia, fæminæ suos hæredes non habent. Ulpian, Fragment., tit. 26, § 7.

21. It was proposed by Quintus Voconius, tribune of the people, in the year 585 of Rome, 169 B.C. See Cicero, Second Oration against Verres. In the Epitome of Livy, xli we should read Voconius, instead of Voluminus.

22. Sanxit . . . . . ne quis hæredem virginern neve mulierem faceret. -- Cicero, Second Oration against Verres, 107.

23. Legem tulit, ne quis hæredem mulierem institueret -- Book xli.

24. Second Oration against Verres.

25. City of God, iii. 21.

26. Epitome of Livy, xli.

27. Book xvii, 6.

28. Institutes, ii, tit. 22

29. Ibid.

30. Nemo censuit plus Fadiæ dandum, quam posset ad cam lege Voconia pervenire. De Finib. boni et mali, ii. 55.

31. Cum lege Voconia mulieribus prohiberetur, ne qua majorem centum millibus nummum hæreditatem posset adire. Book lvi.

32. Qui census esset. Second Oration against Verres.

33. Census non erat. Ibid.

34. Book iv.

35. Oratio pro Cæcinna.

36. These five classes were so considerable, that authors sometimes mention no more than five.

37. In Cæritum tabulas referri; ærarius fieri.

38. Cicero, De Finib. boni et mali, ii. 58.

39. Ibid.

40. Sextilius said he had sworn to observe it. -- Cicero, De Finib. boni et mali, ii. 55.

41. See what has been said in xxiii. 21.

42. The same difference occurs in several regulations of the Papian law. See Ulpian, Fragment. tit. ult., §§ 4, 5, 6.

43. See Ulpian, Fragment., tit. 15, § 16.

44. Quod tibi filiolus, vel filia nascitur ex me, Jura Parentis habes; propter me scriberis hæres. -- Juvenal, Sat. ix. 5, 83, 87.

45. See Leg. 9, Cod. Theod. De bonis proscriptorum, and Dio, lv. See Ulpian, Fragment., tit. ult., § 6, and tit. 29, § 3.

46. Ulpian, Fragment., tit. 16, § 1. Sozomenus, i. 29.

47. Book xx. 1.

48. Book iv, tit. 8, § 3.

49. Tit. 26, § 6.

50. That is, the Emperor Pius who changed his name to that of Adrian by adoption.

51. Leg. 2, Cod. de jure liberorum. Institutes, tit. 3, § 4, de senatus consult. Tertul.

52. Leg. 9, Cod. de suis et legitimis liberis.

53. Leg. 12, ibid., and Nov. 118, 127.