Rights and Duties of Women in Roman Law of Succession – Analysis of D. 5. 2. 28.

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Short abstract

This paper deals with some issues concerning the position of women in Roman law of succession. It provides analysis of Paulus fragment D. 5. 2. 8. regarding a testament of a mother who under wrongful assumption of her son's death appointed other heirs; it raises a series of questions, especially since when and under what circumstances could a woman have drawn up a will, what were the inheritance claims of children based solely on cognatic kinship etc. The aim is to explore by how far the rights and duties of women differed from those of men in the examined aspects in the classical Roman law.

Key words

Roman Law of Succession, Position of Women in Roman Law, Testamentary Capacity, Cognate Kinship, Compulsory Heirs of Women, Fiduciary Coemption

1. Introduction

D. 1. 5. 9.: ***In multis iuris nostri articulis deterior est condicio feminarum quam masculorum.***[1]

Roman law was not secretive about the fact that in Roman point of view, not all humans had the same value. As for the position of women, in today's terminology they were discriminated in many ways. However, this distinction from the position of men did not lie in a general despise of their gender, it was merely the result of the opinion that women were reckless and needed to be more protected and controlled.[2]

[1] D. 1. 5. 9.: In many parts of our law the condition of women is worse than that of men.

[2] Cf. Gai. 1. 144.: *(…) veteres enim voluerunt feminas, etiamsi perfectae aetatis sint, propter animi levitatem in tutela esse.* (…) for the ancients required women, even if they were of full age, to remain under guardianship on account of the levity of their disposition.

Law of succession represented an important part of life of every Roman. The role of this particular field of law was enhanced by the Roman approach. The essence of the Roman law of succession went as opposed to modern law far beyond the matter of a property transmission. The heir succeeded into the legal position of the testator, even into the rights otherwise non-transferable; the succession had also significant religious impacts.[3] Due to this stance, it was considered a decent person's duty to draw up a will.[4] A certain proof of the importance of the law of succession can be seen in the number of preserved sources with one quarter of the 50 books of the Digest dealing with this particular branch of law.[5]

The aim of this article is to explore by how much the legal position of women differed from the position of men in some aspects of the law of succession as such a crucial part of life. The core of the paper is an interpretation of a Paulus[6] fragment D. 5. 2. 28 which deals with a specific law of succession situation in connection to which some specifics of the position of women will be depicted. The aim of this analysis is to answer the question by how far the fragment D. 1. 5. 9. can be extended to the field of the examined aspects of the law of succession.

Roman law, as well as many other states' laws, underwent a major development throughout the centuries and the position of women was changing alongside with it. In this paper, I will focus mainly on the classical period[7] of Roman law and on the prior development and its tendencies.

2. Fragment D. 5. 2. 28

Cum mater militem filium falso audisset decessisse et testamento heredes alios instituisset, divus hadrianus decrevit hereditatem ad filium pertinere ita, ut libertates et legata praestentur. hic illud

[3] SALÁK, Pavel. Zásady římského práva dědického a jejich odraz v novodobých kodifikacích. *Časopis pro právní vědu a praxi* [online]. 2012, vol. 20, no. 3, s. 232.

[4] SOMMER, Otakar. *Učebnice soukromého práva římského, 2. díl.* 2. vyd. Praha: Wolters Kluwer (ČR). 2011, s. 260.

[5] LONGCHAMPS DE BÉRIER, Franciszek. *Law of Succession. Roman Legal Framework and Comparative Law Perspective.* Warszawa: Wolters Kluwer Polska. 2011, s. 23.

[6] Iulius Paulus (2nd - 3rd century AD) was a lawyer and a writer of the late classical period of Roman law; the importance of his work is emphasised by the fact that one sixth of the Digest is derived from him.

[7] The classical period of Roman law, the time of a significant progress and a rise of Roman jurisprudence, begun shortly after the origin of the principate. Having its height at the turn of the 1st and 2nd century, it lasted until the half of 3rd century when a crisis arrived and, alongside with it, quite a decline in the quality of law.

adnotatum quod de libertatibus et legatis adicitur: nam cum inofficiosum testamentum arguitur, nihil ex eo testamento valet.[8]

In this fragment, a mother left a formally valid will in which she did not mention her son based on a false information about his death. The will was declared invalid by the decree of the emperor based on an error in inducement – based on a fact, that she would not have left him out had she known he was still alive. Following chapters will answer questions connected to this fragment – under what circumstances could a woman drew up a will, what possibilities did the son have to invalidate his mother's will, whether he would have inherited from her had there been no testament and what were his rights, if any, in the law of succession based simply on their mother-son relationship. The issue of the error of inducement will also be briefly mentioned.

3. Testamentary Capacity of Women

In order to draw up a valid will, one has to have a legal capacity to draw up a will (*testamenti factio activa*). In general, Roman citizens and Latins of full age had this capacity.[9]

To gain the testamentary capacity, women were according to Gaius at first required to undergo a coemption.[10] It was a formal procedure usually used to enter into a *cum manu* marriage, which consisted

[8] D. 5. 2. 28.: Where a mother has heard a false report that her son, who was a soldier, was dead, and appointed other heirs by her will, the Divine Hadrian decreed that the estate should belong to the son on the ground that testamentary grants of freedom and bequests should be maintained. What was added with reference to grants of freedom and bequests should carefully be noted, for where a testament is decided to be inofficious, nothing it contains is valid.

[9] HEYROVSKÝ, op. cit., s. 991. As women were of full age earlier than men, Gaius stated the position of women was more favourable. – Gai. 2. 113.

[10] Gai. 1. 115a.: *Olim etiam testamenti faciendi gratia fiduciaria fiebat coemptio: Tunc enim non aliter feminae testamenti faciendi ius habebant, exceptis quibusdam personis, quam si coemptionem fecissent remancipataeque et manumissae fuissent; sed hanc necessitatem coemptionis faciendae ex auctoritate divi Hadriani senatus remisit.* Formerly a fiduciary coemption took place for the purpose of acquiring power to make a will, for women, with some exceptions, did not then have testamentary capacity unless they had made a *coemptio* [transl. altered by the author], and after having been resold, were manumitted; but the Senate, at the suggestion of the Divine Hadrian, abolished this necessity of making a fictitious sale. Cf. BONFANTE, op. cit., s. 630; KASER, op. cit., s. 683; ROBY, Henry John. *Roman Private Law in the Times of Cicero and of the Antonines, Book 1* [online]. Reprint. New Jersey: The Lawbook Exchange. 2000, s. 73.

in being mancipated (sold fictitiously) to a man. Later, at the end of the republican era,[11] fiduciary coemption was developed. Contrary to the "general" coemption, in case of fiduciary coemption the *manus* was merely a formality;[12] after the fictitious sale, the woman was manumitted (freed). Therefore, this institute called *coemptio fiduciaria testamenti faciendi gratia* enabled women to get the testamentary capacity without having to get married (*cum manu*) and divorced first; it also reflects nicely on the fact that at this time, *cum manu* marriages were becoming obsolete (see below). The necessary formality to undergo the coemption in the first place was later abolished on Hadrian's command.

The reasoning behind the need of undergoing a coemption lies within the approach to agnate relationships, since as agnates were considered former family members as well (those who used to be "properly" agnate related but then they ceased to be due to a death of their *pater familias*).[13] Therefore, these agnates had the right to inherit even from a woman *sui iuris* in the inheritance order *proximus agnatus* (see below). After the coemption, however, the agnate ties were cut,[14] and women could thus decide freely about their estate.[15]

It is unclear how wide the exception to the coemption rule mentioned in Gai. 1. 115a is. The obvious exception were the Vestal virgins.[16] Apart from them, given the probable reasoning of the coemption, it

[11] BONFANTE, op. cit., s. 630; HEYROVSKÝ, op. cit., s. 844; BUCKLAND, William Warwick. *Elementary Principles of the Roman Private Law* [online]. Reprint. Cambridge: Cambridge University Press. 2013, s. 33.

[12] HEYROVSKÝ, op. cit., s. 844.

[13] BONFANTE, op. cit., s. 167; cf. D. 50. 16. 195 (2) *in fine* (taken from HEYROVSKÝ, op. cit., s. 155).

[14] Cf. Gai. 1. 136.

[15] GAIUS; POSTE, Edward (translation and commentary); WHITTUCK, E. A. (revision and enlargement); GREENIDGE, A. H. J.; LITT, D. *Gai Institutiones, or, Institutes of Roman law* [online]. 4. vyd. Oxford: Clarendon Press. 1904, commentary to 1. 115a.; cf. also CROOK, John Anthony. Women in Roman Succession. In: RAWSON, Beryl. *The Family in Ancient Rome: New Perspectives* [online]. New York: Cornell University Press, 1987, s. 64.

[16] BONFANTE, op. cit., s. 630; cf. Gell. 1. 12. 9.: *Virgo autem Vestalis, simul est capta atque in atrium Vestae deducta et pontificibus tradita est, eo statim tempore sine emancipatione ac sine capitis minutione e patris potestate exit et ius testamenti faciundi adipiscitur.* Now, as soon as the Vestal virgin is chosen, escorted to the House of Vesta and delivered to the pontiffs, she immediately passes from the control of her father without the ceremony of emancipation or loss of civil rights, and acquires the right to make a will. (taken from KASER, op. cit., s. 683). This advantage of the Vestal virgins was balanced by the fact that intestate succession from them was not possible – their property transferred to the state after their death. Also, they were not able to be intestate heiresses. – HEYROVSKÝ, Leopold. *Dějiny a system soukromého práva římského*. 4. vyd. Praha: J. Otto. 1910, s. 1036.

can be assumed the exception might also have included women who did not have any agnatic bonds such as freedwomen[17] or women who were emancipated from the paternal power.[18]

Some authors seem to be of the opinion, that prior to the development of *coemptio fiduciaria testamenti faciendi gratia* (in the 1st century BC) it was not possible for women in general to draw up wills.[19] Nevertheless, the oldest known testament that was drawn up by a woman comes from 186 BC as reported by Titus Livius in *Ab Urbe Condita*.[20] From other sources we can also derive that women have been drawing up wills quite commonly already in the 2nd century BC.[21] If *coemptio fiduciaria testament faciendi gratia* were the only coemption that resulted in the acquirement of the testamentary capacity, it would have to come to existence sooner.

Cicero mentions the necessity of *capitis deminutio* in order for a woman's will to have a full legal impact.[22] We can only guess what the discrepancy between Cicero's and Gaius's terminology means. Given the above-mentioned possible reasoning of the coemption rule, it seems that *capitis deminutio* achieved by other means would suffice; for example after undergoing a divorce through *diffareatio*, a woman would be also free of any remaining agnate bonds. The reason why Gaius mentions coemption only might lie simply within the fact that by his time, vast majority of women did not go through any

[17] Gaius mentions that according to the old law, freedwomen needed at first the consent of their patron to draw up a will. Later after 9 AD when *Lex Papia et Poppaea* was issued, freedwomen were relieved from this rule by *ius liberorum*. – Gai. 3. 43.; 3. 44.; Ulp. Ep. 29. 3.

[18] Cf. Gai. 3. 21.; 1. 162.

[19] BONFANTE, Pietro. *Instituce římského práva.* 9. vyd. Brno: ČS. A. S. Právník v Brně. 1932, s. 630. Cf. KASER, Max. *Das Römische Privatrecht. Erster Abschnitt. Das Altrömische, das vorklassische und klassische Recht.* 2. Aufl. München: Verlag C. H. Beck. 1971, s. 683.

[20] See Liv. 39. 9. *in fine*. However, there are many unanswered questions concerning this fragment as there is only an information that a freedwoman drew up a will and nothing else about it. In Liv. 39. 19., there is also an information she had gained all sorts of privileges from the assembly one of which being the right of alienating her property (probably without a tutor's consent). Drawing up a will, although not mentioned, could have been one of those privileges; cf. CROOK, op. cit., s. 70. Crook mentions without further arguments that although not mentioned by Titus Livius, the coemption must have already in 186 BC taken place in order to draw up a will, however, as explained above, it must have not been a requirement given that she was a freedwoman and therefore had no prior agnate ties.

[21] See note 98.

[22] Cic. Top. 4. 18.: *Ab adiunctis: Si ea mulier testamentum fecit quae se capite nunquam deminuit, non videtur ex edicto praetoris secundum eas tabulas possessio dari (…).* An argument is derived from adjuncts, thus: "If woman who had never undergone *capitisdeminutio* has made a will, it does not appear that possession ought to be given by the edict of the praetor under that will (…)" [transl. altered by the author].

capitis deminutio whilst entering into a marriage (most marriages had already been *sine manu*) and therefore women had until Hadrian's time only one suitable option to gain their testamentary capacity – through the fiduciary coemption.

Women were probably excluded from the possibility to draw up the oldest two types of testaments[23] (*testamentum calatis comitiis*[24] and *testamentum in procinctu*[25]). Women were not allowed to participate on assemblies; therefore, they could not have had their testaments authorized by one. Women were also not allowed to be soldiers thus it was not possible for them to draw up a will designated for soldiers only.[26] The first testament which could have been made by a woman was therefore *testamentum per aes et libram*.[27]

According to Bonfante, the reason why there were at first these restrictions for women was that given the original aim of making a testament, it should have been a privilege of *pater familias*.[28] The aim of testament was logically always to appoint an heir; the so called *heredis institutio* was a crucial requirement of every testament in all stages of its development.[29] Originally, the succession had merely a character of a sovereignty transfer rather than a property one. The heir gained via the death of the testator the power over the wide agnate family[30] and consequentially, he obtained also the property.[31] Later on, as the property relations were coming to the foreground, it started to made more sense that

[23] HEYROVSKÝ, op. cit., s. 992.

[24] Testament authorized by the *comitia calata,* assembly held for this purpose twice a year. – HEYROVSKÝ, op. cit., s. 994; cf. Gai. 2. 101. Women were not only excluded from making this type of will, it was also not possible to appoint them as heir in it. – CROOK, op. cit., s. 63.

[25] Testament that had basically no formal requirements other than that it had to be made by a soldier right before a battle. – HEYROVSKÝ, op. cit., s. 994.

[26] LONGCHAMPS DE BÉRIER, op. cit., s. 43.

[27] This type of testament was derived by the jurisprudence from *Lex duodecim tabularum*. – HEYROVSKÝ, op. cit., s. 994. The two earlier types went later out of use; cf. Gai 2. 103.

[28] BONFANTE, op. cit., s. 630.

[29] BONFANTE, op. cit., s. 641.

[30] In the oldest times, the agnate family was not divided into smaller families after the death of *pater familias*, instead, the family simply gained new *pater familias* (the heir). – BONFANTE, op. cit., s. 582.

[31] BONFANTE, op. cit., s. 582.

women should also be able to decide about their estate. Even in a very patriarchal society as Rome was,[32] women could still have accumulated wealth.[33]

Looking at the examined fragment, the question whether the woman must have undergone the coemption remains unanswered; both this case and both the abolition of the coemption rule happened during the rule of emperor Hadrian. The form of the testament was probably written (*testamentum per scripturam factum*[34]) as it was the most common testament at the time.[35]

4. General Limitations with Impact on Women's Ability to Draw Up Wills

4.1. Tutela mulierum

Other limitation concerning women was that they only could perform certain legal transactions[36] *tutore auctore* (with a consent of their tutor) .[37] Vestal virgins were free from this duty.[38] Women could have

[32] Cf. SALLER, Richard. P. *Patriarchy, property and death in the Roman family*. Cambridge: Cambridge University Press. 1994, s. 2.

[33] CROOK, op. cit., s. 79; DODDS, Julie. The Impact of the Roman Law of Succession and Marriage in Women's Property and Independence. *Melbourne University Law Review* [online]. 1992, vol. 18, no. 4, s.901-902; cf. Liv. 34.1.-3. In these fragments, Titus Livius reports about Cato opposing to the derogation of *Lex Oppia* (215 BC) which considerably limited the possible wealth of women. According to these fragments, women were "demonstrating" against this law; in 195 BC, the law was repealed. Therefore, this is a rare case of women possibly influencing the public life with some public actions.

[34] This testament was concluded in writing in front of seven witnesses. The advantage of this form was the fact that the content could have remained hidden until the death of the testator. – BARTOŠEK, Milan. *Škola právnického myšlení*. Praha: Karolinum. 1993, s. 152.

[35] BARTOŠEK, op. cit., s. 151.

[36] E. g. drawing up a will, entering into a marriage *cum manu*, seting up a dowry or manumitting a slave. Since the tutor did not administrate her entire property but did only authorise some of her legal actions, no *actio tutelae* was applicable. – HEYROVSKÝ, op. cit., s. 965.

[37] It was so called *tutela mulierum*; tutor was either established by a testament or by law (*tutela legitima*); in this case a tutor of a woman *sui iuris* was either her former agnate relative who manumitted her (*parens manumissor*) or her patron. Cf. Gai. 1. 175. (and Gai. 1. 157. about the abolition of agnatic *tutela*). If neither of these applied, the tutor was appointed to her by a magistrate. – HEYROVSKÝ, op. cit., s. 965-967.

[38] Gai. 1. 145.

changed their tutor by fiduciary coemption with the consent of both tutors (the present one and the future one – *tutor fiduciarius*).[39] The exchange of tutors was of course possible without the consent in serious cases, for example when a tutor was missing[40] or when he was not of sound mind.[41]

Since *Lex Julia et Papia Poppaea* (9 AD) women who gave birth to three children (four children in case of freedwomen) gained so called *ius liberorum* and thus were no longer required to make legal transactions with tutor's cooperation only.[42]

Already in the republican era, the consent of the tutor could have been forced by a magistrate,[43] except for *tutores legitimi* whose cooperation could not have been enforced even in the classical period.[44] This was an exception to the general weakening of the importance of *tutela mulierum*. By the second century AD, it has been by some already considered an outdated formality;[45] it was for example criticized by Gaius.[46] The legal duty to have a tutor's consent went out of practice around two hundred years before Justinian, it was therefore not included in the Digest. Last mention of this institute is said to be in 294 AD.[47]

4.2. Full Legal Capacity

Another matter which considerably influenced and reduced the possibility of women to draw up a will was a matter of the concept of ownership and agnate family relations itself. Only a person *sui iuris* was

[39] Gai. 1. 115.

[40] Gai. 1. 173.

[41] Gai. 1. 180.

[42] Gai. 1. 145.; HEYROVSKÝ, op. cit., s. 968.

[43] HEYROVSKÝ, op. cit., s. 967.

[44] Gai. 1. 192.

[45] HEYROVSKÝ, op. cit., s. 967.

[46] Gai. 1. 190.: *Feminas uero perfectae aetatis in tutela esse fere nulla pretiosa ratio suasisse uidetur; (...); mulieres enim, quae perfectae aetatis sunt, ipsae sibi negotia tractant et in quibusdam causis dicis gratia tutor interponit auctoritatem suam (...).* But why women of full age should continue in wardship there appears to be no valid reason, (…), for women of full age administer their own property, and it is a mere formality that in some transactions their guardian interposes his sanction, (…).

[47] ROBY, op. cit., s. 102.

capable to own property and subsequently to conclude legal relations regarding said property. The only person in an agnate family endowed with a full legal capacity (the person *sui iuris*) was *pater familias*.[48]

There were multiple ways how could a woman become person *sui iuris* one of them being the death of *pater familias* to whom she was directly subordinated.[49] Other than death, *capitis deminutio maxima*[50] and *media*[51] of *pater familias* also resulted in a loss of his *manus*[52] and paternal power.[53] Women also became *sui iuris* right after being admitted among the Vestal virgins.[54] Another way how to be freed from the agnate bond was to be emancipated.[55]

Earlier, the common form of marriage was *matrimonium cum manu* in which it was not possible for a woman to maintain *sui iuris* status.[56] This was on the contrary possible in marriage *sine manu*[57] which started to prevail at the end of the republican era.[58] Women who were under *manus* were in the position of daughters (*filiae loco*). *Manus* could therefore be eliminated by re*mancipatio*.[59] Bonfante mentions

[48] SOMMER, Otakar. Učebnice soukromého práva římského, 1. díl. Praha: Wolters Kluwer (ČR). 2011, s. 157.

[49] Gai. 1. 127.

[50] Loss of freedom. – SOMMER, I., op. cit., s. 182.

[51] Loss of citizenship. – Ibid.; cf. Gai. 1. 128.

[52] Power of men over women; traditionally connected to matrimonium *cum manu* but Roman jurisprudence developed another use (such as fiduciary coemption) for this legal instrument as well. – HEYROVSKÝ, op. cit., s. 833.

[53] BONFANTE, op. cit., s. 165. Of course, *ius postliminii* applied here also. – Gai. 1. 129.

[54] Gai. 1. 130.

[55] Emancipation of women consisted of a fictitious sale of her to another person who then set her free. Therefore, emancipation of women (and men other than sons) was easier than the one of sons because sons had to be mancipated three times in order to get emancipated. Cf. Gai. 1. 132. Due to numerous advantages of the manumittor, the manumitted person was often remancipated back to *pater familias* (who then set her/him free). – HEYROVSKÝ, op. cit., s. 923.

[56] Woman who entered into this type of marriage transferred from the family of her father to the family of her husband maintaining still the *alieni iuris* status. Had she been *sui iuris* before the marriage, she became *alieni iuris* anyway. – SOMMER, I., op. cit., s. 163-164.

[57] Woman in this type of marriage did not become a part of the agnate family of her husband. She either stayed in her former family as a person *alieni iuris* or stayed *sui iuris*. – Ibid.

[58] By the time of Justinian, the *cum manu* marriage went definitely out of use. – HEYROVSKÝ, op. cit., s. 832.

[59] Gai. 1. 137; cf. also Gai. 1. 137a.

that *remancipatio* could have been conducted in a way that the woman was fictitiously sold to herself,[60] therefore she did not have to wait for further actions of the mancipee. Divorce (and subsequently dissolution of *manus*) could have also been executed by *diffareatio*.[61]

The independence of women was of course always relative – there could have been at the same time on one hand a woman *sui iuris* with a compliant tutor who could basically have freely decided about her private life; and on the other hand a woman in *cum manu* marriage not being able to own anything with a despotic husband.[62] According to some calculations, 57%[63] of women were *sui iuris* at the time of emperor Augustus which was among other factors caused by the prevalence of marriages *sine manu*.[64]

The mother in the examined fragment must have been a person *sui iuris* as this particular rule never lost its importance. At the time, she must have still handled with a tutor's consent in case she did not gain *ius liberorum.*

5. Contesting a Testament

In the examined fragment, the will was invalidated via the decree of the emperor because he assumed the mother would have appointed his son as her heir (more on that below).[65] *Decretum principis* represented a type of an emperor constitution, it was a binding decision of an emperor based on a court session and the advices of his consultative body. The proceedings started when a party turned itself to the emperor with a request to solve a dispute (*preces*).[66] No overruling of the *decretum* was possible. Decrees had on

[60] BONFANTE, op. cit., s. 165.

[61] Formal procedure opposed to *confarreatio* – formal way of entering into a marriage. – BONFANTE, op. cit., s. 165. About *confarreatio* see Gai. 1. 112.

[62] DODDS, op. cit., s. 900.

[63] The number is based on an assumption that at the time, there were no *cum manu* marriages anymore. – HIN, Saskia. *The Demography of Roman Italy: Population Dynamics in an Ancient Conquest Society 201 BCE-14 CE* [online]. Cambridge: Cambridge University Press. 2013, s. 290. This is however not likely since Gaius (2nd century lawyer) was working with *cum manu* marriage as with a living instrument. – Gai. 1. 112, 1. 113. The percentage was therefore probably a little lower at the time.

[64] HIN, op. cit., s. 289.

[65] There are more examples when wills were nullified by the emperor; already Augustus invalidated a will in which a woman left over her two sons. Augustus gave the inheritance to them as he probably considered their omission unjust. – Val. Max. 7. 7. 4. (taken from CROOK, op. cit., s. 75).

[66] HEYROVSKÝ, op. cit., s. 18.

one hand the function of a judicial decision; on the other hand, they were also law-making[67] which in our case applies mainly to the last sentence of the fragment.

The son in the fragment had another option how to invalidate the will. He could have used *querella inofficiosi testamenti*,[68] an action which was mostly used to protect compulsory heirs (see below). The term "*inofficious*" described that someone was "*undeservedly and therefore improperly passed over*"[69] and the party harmed had to prove that "*the testator does not appear to have been of sound mind when he executed an unjust will*".[70] As a result, the will would have been invalidated as a whole and he would not have to fulfil grants of freedom and bequests (because before the decree mentioned in the examined fragment which developed this rule, it would not have been legally enforceable). Nevertheless, stating and proving that the testator (in this case his mother) was insane (*color insaniae*), which was necessary for this claim,[71] would not be considered appropriate with regard to her commemoration, moreover, it would have been hard to prove.[72] However, this form of contesting a testament was used anyway.[73]

Had the will in the examined fragment been invalidated through *querella*, intestate succession would have stepped in since there was no prior will (that we know of); her son would therefore have inherited her estate according to the praetor's third inheritance order[74] (*unde cognati*) in case there would not have been persons with stronger inheritance claims.[75] This might have also been the reason why he decided to

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[67] HEYROVSKÝ, op. cit., s. 19.

[68] Ulpian D. 5. 2. 27. (4.): *De testamento matris, quae existimans perisse filium alium heredem instituit, de inofficioso queri potest.* A complaint can be filed on the ground of inofficiousness in the case of the will of a mother who, thinking that her son was dead, had appointed another heir.

[69] D. 5. 2. 5.

[70] Ibid.

[71] *Querella inofficiosi testamenti* was a so called *actio vindictam spirans*; it was used for personal vengeance. – BONFANTE, op. cit., s. 681; cf. also HEYROVSKÝ, op. cit., s. 1056; BARTOŠEK, op. cit., s. 153; cf. D. 5. 2. 2.

[72] BARTOŠEK, op. cit., s. 153.

[73] SOMMER, II., op. cit., s. 310; *querella* was for example used by a son who felt unjustly disinherited by his mother. – Pliny's (1st century AD) Ep. 5. 1. (taken from CROOK, op. cit., s. 75).

[74] Gai. 3. 30.: *Eodem gradu (tertio gradu* N. B. author*) vocantur etiam ae personae, quae per femini sexus personas copulatae sunt.* Those are also called in the same degree (third degree N. B. author) who are related through persons of the female sex.

[75] There were four praetor's inheritance orders. In the first one (*unde liberi*), there inherited children of the testator (*sui* and *emancipati*); the relations were still agnate based. The second order (*unde legitimi*) contained the heirs of the civil inheritance order (see note 77). The third one (*unde*

appeal to the emperor instead – this way through the error in inducement the inheritance was given directly to him.

6. Mother-child Relationship in the Intestate Succession

Similarly to the situation of an invalidated will, had the mother in the examined fragment not left a will at all, her son might have inherited from her as her cognate according to the praetorian inheritance order. In general, *ius civile* also enabled inheritance from a woman, although not in the first civil inheritance order[76] because women could not have had *heredes sui* as there was no such thing as *matria potestas*. In the order *proximus agnatus* it was possible to inherit from a woman, although not from a mother because a woman *sui iuris* could not have any agnate related children.[77] Of course, women *sui iuris* were *stricto sensu* not a part of any agnate family, they represented isolated subjects of law.[78] However, as it was mentioned above, former family members were still viewed as agnates and it was thus possible to inherit from a woman *sui iuris* as from a proximate agnate.

In 178, around 50 years after the case in the fragment occurred, *senatusconsultum Orphitianum* was issued.[79] In accordance with it, legitimate as well as illegitimate children were prioritised even above agnate heirs.[80]

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cognati) acknowledged cognate relationships and enabled the succession of blood relatives. The fourth one (*vir et uxor*) was designated for the spouse. – BONFANTE, op. cit., s. 666.

[76] In *ius civile*, there were three inheritance orders. In the first one, there were *heredes sui* (heirs directly subordinated to the paternal power who became *sui iuris* after the death of the testator). In the second one inherited *proximus agnatus* (the closest agnate). In the third one, there were gentiles – members of a clan; it was basically a wider approach to agnate relationships. – BONFANTE, op. cit., s. 663-664. The importance of *genus* lowered through the years and even in the law of succession, it lost its importance at the end of the republican era. – HEYROVSKÝ, op. cit., s. 157.

[77] Exception to this rule may have been the case when the husband *cum manu* and *pater familias* in one man died. Then, between the mother (who became *sui iuris*) and her children remained the agnate bond and had she then died intestate, her children would have probably inherited from her in the praetorian order *Unde liberi* or in the civil one, *proximus agnatus*. Cf. Gai. 3. 24.

[78] BONFANTE, op. cit., s. 168.

[79] Cf. C. 6. 57. 1.: *Si intestatae mulieris consanguinei existant et mater et filia, ad solam filiam ex senatus consulto orfitiano hereditas pertinet.* When a woman dies intestate, leaving brothers or sisters, as well as a mother and daughter, her estate shall, by virtue of the Orphitian Decree of the Senate, belong to her daughter alone. (taken from HEYROVSKÝ, op. cit., 1045).

[80] BARTOŠEK, op. cit., s. 152.

The development of the praetor's inheritance order (especially the order *Unde cognati*), *SC Orphitianum* alongside with for example *SC Tertulianum*[81] were signs of a continual development towards higher importance of cognate relations contrary to the agnate ones.[82] Therefore, the mother-child relationship was protected in the law of succession no matter what sort of relationship it was. This progress was concluded with Justinian's inheritance order which have taken only cognate relations into consideration.[83]

7. Women and Their Compulsive Heirs

The preference of cognate relations found its way also to the issue of the compulsive heirs. In earlier times, only *heredes suis* could have been considered compulsive heirs (and therefore women could not have such heirs – see above). Due to the praetorian law, other descendants[84] could have also belonged into this protected group.[85] Furthermore, the rights of compulsive heirs had a formal character.[86] They could not have been passed over in a testament, however, when they were mentioned and left with nothing (*exheredatio*), they did not have the right to contest. The position of women at this era was further

[81] This *senatusconsultum* from Hadrian's times privileged a mother in the succession from her children (cognates). – BONFANTE, op. cit., s. 668.

[82] Crook argues that testamentary succession always had merely a cognatic character as it was moral to establish family members as heirs. It was the intestate succession that was stuck in the agnatic kinship and took a long time to overcome it – *Unde cognati* was developed first in the late republic. – CROOK, op. cit., s. 79.

[83] BONFANTE, op. cit., s. 670.

[84] The approach to the term descendants did not mean that women also had compulsive heirs because it was just like the order *Unde liberi* based on agnate bonds even though the term contained even the emancipated. – SOMMER, II., op. cit., s. 307.

[85] KINCL, Jaromír; URFUS Valentin; SKŘEJPEK, Michal. *Římské právo*. Praha: Nakladatelství C. H. Beck. 1995, s. 290.

[86] Valerius Maximus reported on a case similar to the examined one approximately one hundred years before (around 30 AD); a father appointed other heirs believing his son-soldier was dead. In this case, in a subsequent centumviral court ruling the inheritance was also given to the son. As Valerius Maximus was probably a rhetorician, unfortunately not much legal aspects were preserved in the fragment (Val. Max. 7. 7. 1.). Still, the case differed from the examined one by an existing agnate bond between the father and the son and as he was a passed over *heres suus*, it is not at all surprising the will was invalidated.

aggravated by the fact that they could have been disinherited *inter ceteros* (among others), there was no need to name each individual woman.[87]

At the end of the first century BC this formal approach started to change. The time of the examined fragment (second century AD) was the time when the character of the institute of compulsive heirs finished changing and when it developed its main principles.[88]

The rights of compulsive heirs were newly viewed in material way. Not only did they have to be mentioned, they had the right to a certain part of the inheritance (*portio debita* – compulsory share). Earlier, the tendency had a character of moral obligation. The willingness to leave some estate for the children should have come from *pietas*, the natural family affection, and was not yet enforceable by law.[89] In Heyrovský's opinion, the transition from a moral rule to a legal one might have already happened at the end of the republican era.[90]

Alongside with the material rights, there was a visible tendency to widen the sphere of compulsive heirs. The term newly contained not only descendants, but ascendants and siblings as well. It applied to agnates as well as cognates and was therefore a big step forward in favouring blood relations.[91] Furthermore, disinheritance had to be conclusively reasoned.[92]

[87] SOMMER, II., op. cit., s. 308; Gai. 2. 128. Passed over women had the right to demand a possession of the inheritance (*bonorum possessio contra tabulas*). In the 2nd century AD, Antonius Pius laid down a rule that women were only able to obtain as much inheritance as their share according to ius civile would have been (which was only half of the inheritance in case there were some *heredes extranei* (all other heirs who were not *heredes sui* or *heredes neccesarii* (for instance slaves or descendants who did not become *sui iuris* after testator's death). – KINCL, Jaromír; URFUS Valentin; SKŘEJPEK, Michal, op. cit., s. 293-294. Cf. Gai. 2. 124.; 2. 125; 2. 126.

[88] SOMMER, II., op. cit., s. 309.

[89] KINCL, Jaromír; URFUS Valentin; SKŘEJPEK, Michal, op. cit., s. 291.

[90] HEYROVSKÝ, op. cit., s. 1056 with reference to Valerius Maximus 7. 7. 1. (see note 87).

[91] HEYROVSKÝ, op. cit., s. 1064; KINCL, Jaromír; URFUS Valentin; SKŘEJPEK, Michal, op. cit., s. 291.

[92] SOMMER, II., op. cit., s. 309-310.

However, even after the change of perception, after admitting the rights of cognate children, women were not obliged to mention them in testaments.[93] Technically, this meant that women had no compulsive heirs. Still, it was possible for their children to contest a testament on the grounds that it was "*inofficious*"[94] – that it did not respect the *officium pietatis.*

Multiple authors[95] agree upon the fact that the will in the fragment was invalidated due to the error in inducement and not because of the violation of the *pietas*. There was no deliberate violation, the mother simply did not know her son was still alive. Since one of the most important principles of the Roman law of succession says that the will of the testator should be fulfilled as much as possible,[96] the grants of freedom and bequests remained in this case in force as opposed to the general rule (applicable when the will is invalidated as "*inofficious*").[97]

Regarding the examined fragment, the development of the importance of cognate relationships might have also influenced the decision of the emperor. He came to the conclusion that the mother would have wanted her son to inherit her property had she known he was alive. Therefore, it had been already considered just that the mother-child relationship should have its impact and protection in the law of succession.[98] It is unknown who were the other appointed heirs in the fragment, but they were

[93] Gaius 3. 71.; HEYROVSKÝ, op. cit., s. 1061; later in I. 2. 13. 7.: *Mater vel avus maternus necesse non habent liberos suos aut heredes instituere aut exheredare, sed possunt eos omittere. nam silentium matris aut avi materni ceterorumque per matrem ascendentium tantum facit quantum exheredatio patris. (...).* A mother, or a maternal grandfather, is not required to either appoint children heirs or disinherit them, but may simply omit mentioning them, for the silence of a mother, a maternal grandfather, or other ascendants on the mother's side has the same effect as disinheritance by a father. (…)."

[94] The protection of the children contrary to the rule is perceptible from the fragment I. 2. 13. 7 *in fine* where it is probably referred to I. 2. 18. which deals with *inofficious* testaments.

[95] HEYROVSKÝ, op. cit., s. 1005; KASER, op. cit., s. 241 and s. 711 n. 17; SOMMER, II., op. cit., s. 294; Bartošek calles it *error probabilis* and says that the son had technically been the heir „*ex tacita voluntate matris*". – BARTOŠEK, op. cit., s. 152. Arndts says that this is an *error* without which the will would had not been made this way. – ARNDTS, Carl Ludwig. *Učební kniha pandekt. III. díl.* Ed. Jiří Spáčil. Praha: Wolters Kluwer ČR. 2010, s. 146.

[96] KASER, op. cit., s. 239-240; cf. D. 50. 17. 12.

[97] When a will was not in force due to *bonorum possessio contra tabulas,* the only bequests that had to be fulfilled were the ones to descendants and ascendants. – HEYROVSKÝ, op. cit., s. 1062-3; cf. D. 37. 5. 1. (1), D. 37. 5. 3. (2).

[98] According to Saller, from Polybius's work (2nd century BC), it is clear that wealthy women have already in his time been expected to draw up wills and to honour the rights of their children in them. – SALLER, op. cit., s. 166; in Cicero's work, there is also implied that a child should have the right to inherit from a mother (Cf. *De re publica* 3. 17.). – CROOK, op. cit., s. 71-72; Valerius Maximus states about a mother who passed over her two sons in a testament that she had handled

probably not her sons otherwise it would make more sense had it been decided they shall share the inheritance.

8. Error in Inducement and Interpretation of the Testator's Intention Concerning Women

As it was already mentioned above, the fragment contains a rather rare case of inducement having a relevance in legal transactions.[99] The term error in inducement means a mistake regarding wider scale of expectations and motives according to which a person makes a certain legal transaction. In vast majority of various legal relations, this has no legal impact whatsoever[100] because it would make legal transactions of a party much less trustworthy and one could not really rely on contracts and other legal transactions to stay in force. Only when the inducement becomes part of the expressed intention, it can have some legal relevance.

However, in Roman law of succession, the true intention of the testator was above almost everything else. It can be said that it was emphasised even more that in modern day; the interpretation of the will had a different character – the real intention rather than the words of the testator was interpreted.[101] Sometimes it meant that a lot was based on assumptions (a case was decided according to what the magistrates were convinced was the intention of the testator).[102] Therefore, law of succession is contrary to other fields of law somehow more suited for considering inducements.

contrary to the normal order of succession. – Val. Max. 7. 7. 4. (taken from CROOK, op. cit., s. 75).

[99] Under the term inducement can also be understood forcing someone to do something through violence and fear (*vis ac metus*) or through fraud (*dolus*). These situations have of course their impact regarding the testament, but they will not be a subject of further examination in this paper.

[100] HEYROVSKÝ, op. cit., 197.

[101] LONGCHAMPS DE BÉRIER, op. cit., s. 237.

[102] LONGCHAMPS DE BÉRIER, op. cit., s. 241. This approach was connected to the notion of a good housefather standard (*bonus pater familias*) – the magistrates tried to interpret the will according to reason; to give the actions of the testator a reasonable explanation. – LONGCHAMPS DE BÉRIER, op. cit., s. 247. To the last point cf. Seneca's Ep. 64. 7.: *Sed agamus bonum patrem familiae; faciamus ampliora, quae accepimus. Maior ista hereditas a me ad posteros transeat*. Let us act as the *bonus pater familias*. Let us increase what we received. Let that inheritance pass enlarged from me to my descendants. – SALLER, op. cit., s. 155.

On the other hand, there is also the principle *falsa causa non nocet.*[103] However, this principle doesn't apply in some cases; namely in those, where it would be in contradiction to the true intention of the testator as to the higher principle.[104] The idea was that when a testator had made a mistake, it should not have made the will invalid if the mistake was not serious enough that it contravened his real intentions.

One of the situations when *falsa causa non nocet* did not apply, was exactly the case when an heir was appointed under the false assumption of other probable heir's death.[105] Inducement had its relevance also for example in case the testator appointed as his heir someone of whom he had believed was his son[106] or when it made the will immoral, e. g. appointing an heir provided that he will appoint a certain designated person as his heir.[107]

Apart from the above mentioned Valerius Maximus case (7. 7. 1.),[108] there is another one very similar to the examined one. Paulus reported on it in the fragment D. 28. 5. 92.[109] In this fragment, a woman was appointed as heir by a man. Later, after hearing rumours of her death, he instituted other heirs instead. Nevertheless, to the new will, he added: "*Let Novius Rufus be my heir, for the reason that I have not been able to retain those heirs whom I desired to have*."[110] The woman turned to the emperor and it was decided she shall become the heir "*as this was in compliance with the wishes of the testator*".[111] However, this case differs from the examined one; the inducement of the testator was expressly stated which made

[103] If the testator acted according to "*untrue reason, motives or grounds*", it had no impact on the validity of the disposition. – LONGCHAMPS DE BÉRIER, op. cit. s. 233; cf. Ulp. Ep. 24. 19. concerning bequests (taken from ibid.).

[104] LONGCHAMPS DE BÉRIER, op. cit. s. 234.

[105] HEYROVSKÝ, op. cit., 1005; This exception found its application also with regard to *testamentum militis*. The general rule that if someone was omitted in the military testament, he was automatically disinherited, did not apply in the situation when the testator-soldier omitted someone of whom he incorrectly presumed was dead. Cf. C. 6. 21. 10. (taken from ARNDTS, op. cit., s. 146).

[106] Cf. C. 6. 24. 4. and C. 6. 23. 5. (taken from ARNDTS, op. cit., s. 146).

[107] Cf. D. 28. 5. 70; HEYROVSKÝ, op. cit., 1006.

[108] See note 87.

[109] Taken from ARNDTS, op. cit., s. 146.

[110] D. 28. 5. 92. (…) „*quia heredes, quos volui habere mihi contingere non potui, novius rufus heres esto*" (…).

[111] Ibid.

the proving much easier. Had there not been this added note, the woman would probably not be able to prove he wanted her to be the heiress because they were not related by any means.[112]

The legal position of daughters passed over due to wrongful assumption of their death was probably not worse than that of sons. Although Ulpian states that sons were in this case able to complain against the will of a mother,[113] there is nothing that prohibits daughters from doing the same thing, or for that matter, to complain against a will of a father on the same grounds.[114] Illegitimate children were also protected.[115] Given the casuistic nature of Roman law, Ulpian's fragment cannot be interpreted literally and *a contrario* conclusions cannot be drawn out of it.

As for interpreting objects of testaments, the idea of the generic masculine was already known in the classical Roman law. When a testator bequeathed male mules but only had female mules, the female mules were bequeathed. "*Hence it comes that the male sex always includes the female*."[116] The same applied to male/female slaves.[117] Needless to say, Roman law distinguished only two genders – male and female.[118]

9. Conclusion

Roman law of succession represented among other things a way how property could have been passed over from generation to generation. As women *sui iuris* were able to accumulate a great deal of wealth,

[112] As a non-relative, she could not have been successful with *querella* which was designated for close relatives – D. 5. 2. 1. She would have to use *hereditas petitio* and claim that the will was invalid due to *error* in inducement.

[113] See note 69.

[114] Cf. Eg. D. 5. 2. 1.; 5. 2. 3.; 5. 2. 4.; these fragments (derived from works of lawyers of the classical period) are gender neutral and provide protection to children and both parents. However, the impact of *querella* differed; when a son was passed over, the whole testament was rendered void; when the same happened to a daughter or another compulsive heir, she/he became a co-heir to the appointed one. – BONFANTE, op. cit., s. 676; cf. D. 5. 2. 19. (2.); cf. note 88.

[115] D. 5. 2. 29. (1.).

[116] D. 32. 1. 62. – taken from LONGCHAMPS DE BÉRIER, op. cit. s. 235.

[117] D. 32. 1. 81. pr.

[118] HEYROVSKÝ, op. cit., s. 167; D. 1. 5. 10.: *Quaeritur: hermaphroditum cui comparamus? et magis puto eius sexus aestimandum, qui in eo praevalet.* The question has been raised to which sex shall we assign an hermaphrodite? And I am of the opinion that its sex should be determined from that which predominates in it.

reason dictates that they should have been given the possibility to dispose with it in testaments. The answer to the question since when it was possible for a woman to do so, remains however somewhat blurry. It is clear that in the oldest times, women could not have drawn up wills which was partly given by the character of these oldest types of wills. From Gaius's work it is also without a doubt that before Hadrian, even women *sui iuris* did not gain the testamentary capacity sooner than before going through a coemption which cut the remains of their bonds with their agnatic kinship.

Later on, at the end of the Republic, fiduciary coemption was developed by Roman jurisprudence, as a way of enabling women to gain testamentary capacity without having to subject themselves to *manus*. The timing of this new legal instrument is quite logical – it was the time when *sine manu* marriages had already prevailed drastically and therefore it made no sense to force women to go through *cum manu* marriage just to gain testamentary capacity afterwards.

Besides limitations rooted it the law of succession, women were limited by general legal rules. The rule that the testatrix had to be *sui iuris* logically never disappeared, after all, the same rule applied with some minor exceptions also to men. There was also the fact that women needed the cooperation of their tutors which could have been by the classical period in most cases enforced.

It is without a doubt that in the classical period, it was common for women to draw up wills. After the abolition of the coemption rule and subsequent extinction of *tutela mulierum*, they were not bound by any formalities anymore and the testamentary capacity of women became equivalent to that of men. And as there were basically no *cum manu* marriages anymore, the number of *sui iuris* women disposing freely of their property was not to be underrated.

Similarly to men, women were also limited in their disposition as they could not have disinherited their children without a just cause; otherwise they risked their testament would not have the intended impact regarding the distribution of their wealth. The fact that they were not required to disinherit the children expressly changes nothing on the fact that children were protected, at first only by moral rules, later around the beginning of the classical period also through legal ones.

Children and a woman *sui iuris* were most of the times related only through blood which was especially in the old times a kinship not worthy enough to be legally protected when it came to intestate succession. As time passed, cognate relationships were also recognized by law as the *Unde cognati* order was developed; later, through the legislation in the 2nd century AD, the cognate relations even exceeded the agnate ones.

The preference of the cognate kinship found its way to interpreting wills of testators. As it was even in older times considered normal and fair that property should be passed on to the descendants, had there been a tacit disinheritance of a child who came back from the death, it was considered safe to presume

the intention of the testator had been different; multiple fragments show that the passed over child under these circumstances got the inheritance.

It was not intended in this paper to cover all angles of the position of women in Roman law of succession. Therefore, it would be inconclusive to draw a conclusion as for the topic in general. Nevertheless, it is safe to say that over time women's autonomy and the potential for their independence in the field of testamentary succession grew until it reached a level comparable to the position of men. As for the intestate succession from women, some gender discrepancy was reduced by the dissolution of the superiority of the agnate kinship as it was built strictly on the power of men. This process was concluded by Justinian, whose inheritance order did not take agnate relationship into account at all.

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