

Inheritance in Roman law and the reputed "horror of intestacy" of the Romans

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Declarations:

I hereby declare that I am the sole author of this thesis and that it is the product of my own research.

Fanný Heiða Hjartardóttir

It is hereby certified that in my judgment, this thesis fulfills the requirements for a B.A. degree at the Department of Humanities and Social Sciences.

Prof. Francesco Milazzo

Útdráttur

Í þessari ritgerð verður reynt að skoða með hvaða lagalegum hætti erfðaröðin átti sér stað í Rómarrétti. Einnig verður skoðað hvort að Rómverjar kysu alla jafna alltaf að skilja eftir sig erfðaskrá. Eignir voru yfirleitt arfleiddar í gegnum erfðaskrár eða samkvæmt reglum sem tóku sjálfkrafa við þegar Rómverjar létust án þess að hafa gengið frá erfðaskrá. Hjá Rómverjum giltu mjög nákvæmar reglur bæði við gerð erfðaskráa og einnig þegar einstaklingar létust án þess að hafa gengið frá erfðaskrá. Hins vegar þurfti einstaklingur að hafa getu til að útbúa erfðaskrá, sem þýddi bæði að gild vitni þurftu að vera viðstödd til að votta erfðaskrána og svo þurfti auðvitað að skipa erfingja sem hafði getu til þess að erfa.

Markmiðið er að komast að því hvort að Rómverjarnir vildu frekar láta útbúa erfðaskrá í stað þess að leyfa hinum sjálfkrafa reglum að taka gildi þegar þeir létust án þess að hafa útbúið erfðaskrá. Kanna þannig hvort þeir stóðu í raun og veru frammi fyrir hið svokallaða "horror of intestacy".

Margir fræðimenn hafa fjallað um þetta efni í ritum sínum og til að komast að niðurstöðu er nauðsynlegt að kanna skoðanir þeirra á þessu máli. Staðreyndin er hins vegar sú að það regluverk sem unnið var eftir gerði eingöngu ráð fyrir ráðstöfun á eignum svo það voru mikilvægar ástæður fyrir því hvers vegna Rómverjar hefðu viljað að útbúa erfðaskrá. Með því að skilja eftir sig erfðaskrá sá Rómverjinn til þess að arfurinn hans myndi skiptast jafnt og að sjálfsögðu ákvað hann hver röðin yrði hjá erfingjum sínum. Í stað þess að leyfa hinum sjálfkrafa reglum að taka gildi þegar engin erfðaskrá var til staðar. Það er mín skoðun að ástæður Rómverja til að skilja eftir sig erfðaskrár hafi verið það miklar í samanbórið við ástæður þess að leyfa hinum sjálfkrafa reglum að gilda að þeir Rómverjar sem höfðu getu til að útbúa erfðaskrár glímdu í raun og veru við einhvers konar "horror of intestacy".

Abstract

In this thesis the ways by which juridical succession happened in Roman law will be discussed as well as the reputed horror of intestacy of the Romans. Property was normally inherited either under a will or as a result of intestacy. There were very specific rules that applied to the making of the will as well as to intestacy. However in order to make a will the individual had to have capacity to do so, meaning as well that witnesses were required and of course the heir needed capacity to succeed.

Also the rules of testation and intestacy will be explored more in depth. The goal is to try to discover if the Romans preferred always and anyway to make a will instead of letting the automatic rules of the intestate succession apply. If they did in fact have a "horror of intestacy".

Many scholars have covered this topic and in order to hopefully reach a conclusion, their opinions have to be discussed and explored. The fact however remains that the law of intestacy took care of property only so there was a very important reasons why Romans would want to make will. When making a will a Roman citizen made sure that the inheritance was divided more evenly and of course decided his order of succession. Instead of allowing the automatic rules of intestacy apply. It would seem to me that the reasons for making a will were so great comparing them to the reasons for allowing intestacy that the Romans who were capable of making a will, were in fact faced with a sense of "horror of intestacy".

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Part I - Introduction

In this thesis I intend to write about the ways by which juridical succession happened in Roman law and discuss the reputed horror of intestacy of the Romans.

Property was normally inherited either under a will or as a result of intestacy. In Roman law there were very specific rules that applied to the making of the will as well as to intestacy. These rules of course changed during the long time of Roman law (that is from the middle of the VIII century b. Chr. until Justinian's age: the beginning of the VI century a. Chr.).

The law of intestacy¹ applied when there was no operative will, which occurred if a person failed to make a will or if a person made a will, which lacked legal effect.

Under the Twelve Tables (middle of the V century b. Chr.) the order of succession to the estates of freeborn persons was (a) *sui heredes*, (b) the nearest agnate, (c) the *gentiles*. Children (adopted as well as natural) of the deceased were *sui heredes*. Each of the deceased person's child and their families formed a separate stem for the purpose of inheritance. If there were no *sui heredes*, the inheritance passed to the nearest agnate (often a brother or a sister of the intestate)². And if there were no *sui heredes*, and no nearest agnate, the estate passed to the *gentiles* (the deceased person's clan members).

Later on an alternative but parallel law of intestacy emerged alongside the *ius civile* rules as a result of the praetorian intervention. The spur of the praetorian scheme was a greater recognition of the blood tie. Claims for *bonorum possession* (as the praetorian succession was named) were made before the praetor. If a *prima facie*

¹ The jurist Gaius (III century a. Chr.) in his Roman Law handbook (*Institutiones*) informs us about this group of rules: s. Gai. 3.1-3; 3.9; 3.11; 3.17.

² Agnate were relatives through the male line, descended from a common male ancestor without any artificial break in the line of relationship (such as emancipation). Persons of either sex may be agnates, but the line could only be transmitted through males. If the common male ancestor (*paterfamilias*) was alive, the agnates were all in his *patria potestas*. Agnatic relations existed through adoption as fully as through blood.

S. William L. Carey, Esq. *Glossary of Roman Law*.

<<http://thelatinlibrary.com/law/glossary.html>> Accessed 2th April 2013

case was made out, the praetor would make the appropriate grant, entitling the claimant to seek possession of the estate. A number of enactments were made in the classical period affecting succession on intestacy. The most important were the *Senatusconsultum (S.C.) Tertullianum* and the *S.C. Orphitianum* (supporting the mother-child and child-mother successions before that of the agnates). In the later Empire further modifications were too introduced to the law of intestacy. Justinian finally introduced a new scheme of intestate succession whereby the old rules and concepts were more deeply based on a system that emphasized the so-called *cognatio* relationship, where the blood tie came first.

It looks as if Romans enjoyed very much making a will. However in order to make a will the individual had to have capacity to do so, meaning as well that witnesses were required and of course the heir needed capacity to succeed. The types and formalities of wills changed in accordance with the different times like the rules of intestacy.

The first kind of will was made before the *comitia curiata* (the oldest popular assembly). Another type of will - “will *in procinctu*” - was a wartime will open to soldiers who declared their wishes before their comrades. Besides these two wills the standard *ius civile* will was called mancipatory will and it was current until the later Empire. Other types of wills were the praetorian will and the soldiers' will.

An important aspect of the will making was that the will was considered invalid unless it contained the appointment of an heir and that appointment needed to follow the correct procedure. When an heir was appointed it was the heir's duty to step into the shoes of the testator for all legal purpose and it mattered which category the heir belonged to since there were three types of heirs. The *sui et necessarii heredes* were all those who became *sui iuris*³ on the testator's death, then there were slaves who had been voluntarily manumitted by will and appointed and they were known as *necessarii heredes*. Finally the last type was known as *extranei*, they were

³ *Sui iuris* was a person who is not in the power of another. A person is in another's power (*alieni iuris*) if he or she is *in manu*, *in mancipio*, or *in patria potestate*. All other persons are *sui iuris* and, if male, are *patres familias*. Persons *sui iuris* who were *impubes* (under age 14 for boys, 12 for girls) were subject to a *tutor*, those who were *minores* (under age 25) were subject to a *curator*. S. William L. Carey, Esq. (fn. 2)

"extraneous" in the sense that usually they were not members of the testator's household.⁴

In this thesis the rules of testation and intestacy will be explored more in depth. The goal is to try to discover if the Romans preferred always and anyway to make a will instead of letting the automatic rules of the intestate succession apply. If they did in fact have a "horror of intestacy"⁵. Many scholars have covered this topic⁶ and in order to hopefully reach a conclusion, their opinions have to be discussed and explored.

Part II - Juridical Succession

The rules of will making were complex but the law on intestacy even more. The law of intestacy applied when there was no operative will, which occurred if a person failed to make a will or made one that lacked legal effect⁷. However wills in Roman law served similar purpose as wills today, they appointed an heir or heirs who would succeed all of the assets and rights. Of course the heir also succeeded his or her obligations and became responsible for continuing the deceased's family *sacra*⁸ or

⁴ Borkowski / Du Plessis, *Textbook on Roman Law* (Oxford, 2005, 3rd edition) 208-248.

⁵ Maine, *Ancient Law. Its Connection with the early History of Society and its Relation to modern Ideas* (X ed., London, 1930) 243.

⁶ Champlin, *Creditur vulgo testamenta hominum speculum esse morum: Why the Romans made Wills*, in *Class. Philol.* 84 (1989). See especially his footnote (n. 40) 209. The first and salutary criticism of Maine's dictum came from Daube, *The Preponderance of Intestacy at Rome*, in *Tulane Law Review* 39 (1964-65): 253-61; repeated in his *Roman Law: Linguistic, Social and Philosophical Aspects* (Edinburgh, 1969) 71-75, and extended by Watson, *The Law of Succession in the Later Roman Republic* (Oxford, 1971) 175-76. Nevertheless, a convincing defense was mounted by Crook, *Intestacy in Roman Society*, in *PCPS* 19 (1973).

⁷ Borkowski / Du Plessis (Fn. 4) 210.

⁸ The domestic responsibilities of the *paterfamilias* included his priestly duties (*sacra familiae*) to his "household gods" (the *lares* and *penates*) and the ancestral gods of his own *gens*. Roman religious law defined the religious rites of *familia* as *sacra privata* (funded by the *familia* rather than the state) and "unofficial" (not a rite of state office or magistracy, though the state *pontifices* and *censor* might intervene if the observation of *sacra privata* was

religious observances. Becoming an heir was not only a good thing since the heir also became responsible for his or her debts. It was also important that the wills were valid.⁹ In the following sections a short look will be given to the different periods of Roman law in regard to succession and intestacy in order to get a deeper sense of the ways of legal succession.

2.1 Succession and Intestacy under the Twelve Tables

Wills were recognized as early as the Twelve Tables with the two oldest types being *testamentum comitiis calatis* and the *testamentum in procinctu*¹⁰. The first was made in the *comitia calata* (i. e. in the convened people's assembly), which met twice a year, on March 24th and May 24th, also for the purpose of making wills. The *testamentum in procinctu* was made when the army was drawn up in battle order after the auspices, that is the ceremony to establish whether the omens for victory were favorable, had been taken.¹¹

The rules of succession on intestacy underwent great historical changes, nearly all of these tending to give greater effect to blood relationship than to the purely civil tie which alone was recognized by the early law.¹² The persons who became *sui heredes* on the death of the deceased were all those who had been in his power, including children, remoter issue through the male line (e.g., grandchildren) and a

lax or improper). The responsibility for funding and executing *sacra privata* therefore fell to the head of the household and no other. As well as observance of common rites and festivals (including those marked by domestic rites), each family had its own unique internal religious calendar — marking the formal acceptance of infant children, coming of age, marriages, deaths and burials. In rural estates, the entire *familia* would gather to offer sacrifice(s) to the gods for the protection and fertility of fields and livestock. All such festivals and offerings were presided over by the *paterfamilias*.

S. Wikipedia - the Free Encyclopedia. 2013. *Pater Familias*.

<http://en.wikipedia.org/wiki/Pater_familias> Accessed 4th April 2013

⁹ Johnston, *Roman Law in Context* (Cambridge, 1999) 45.

¹⁰ Gai. 2.201.

¹¹ Watson, *The Law of the Ancient Romans* (Dallas, 1970) 84.

¹² Buckland, *A Manual of Roman Private Law* (Cambridge, 1953, 3rd printing) 227.

wife in a *manus* marriage¹³. All *sui heredes* who were children whether male or female of the deceased, and his wife (*in manu*) took equal shares. *Sui* were remoter descendants, i.e. persons whose father had predeceased the *paterfamilias* or had been emancipated, took equally the share which would have come to their immediate ancestor if he had survived. Women and a man's illegitimate children could not have been *sui heredes*. An unborn child could become *sui heredes* as well as adopted ones. In cases where parents could not inherit their parents because they had passed away the grandchildren became representatives. The grandchildren would therefore take the share their parents would have gotten.¹⁴ If there was no *sui heres* the inheritance went to the nearest agnate, and no distinction was made between male and female agnates.¹⁵

Although the inheritance was passed to the nearest agnate it did not mean that, if that person died or refused the inheritance, that the right would go to the next agnate. In such cases the inheritance went to the *gentiles*.¹⁶ The agnate would often be a brother or a sister of the intestate and if there were more than one agnate they would take equal shares of the inheritance.¹⁷

¹³ Borkowski / Du Plessis (Fn. 4) 210. *Manus* was when a woman entered marriage either *in manu*, the most common outcome of marriage before the I century b. Chr. but rare thereafter, or *sine manu*, a modern term for the alternative marital status which became the norm from the end of the I century b. Chr. *Manus* defined a married woman before the law as separated from the *patria potestas* of her *paterfamilias* (as well as all rights of inheritance from him), but subject to the legal control of her husband (if he was *sui iuris*). Her position before the law was similar to that of their children in respect to inheritance from her husband. If her husband was not independent (*sui iuris*), then she was legally subject, together with her husband, to his *paterfamilias*. Marriage *sine manu* was advantageous to the bride's natal family in that her property, including her dowry, after her marriage remained legally the possession of her *paterfamilias*; this arrangement left her husband the use only of her dowry as long as the marriage endured and his wife remained alive.

S. Ann R. Raia. 2012. *Under Construction, Matrimonium*

<<http://www2.cnr.edu/home/araia/matrimonium.html>> Accessed 3th April 2013

¹⁴ Borkowski / Du Plessis (Fn. 4) 211.

¹⁵ Watson (Fn. 6) 98.

¹⁶ *Ibid.* 98 f.

¹⁷ Borkowski / Du Plessis (Fn. 4) 211.

As I said already, if there were no agnate the *gens* was next in line. The *gens* was a group, the members of which bore a common *nomen gentilicium* and consisting in fact of a number of agnatic groups, all supposed to be related.¹⁸ Succession by the *gens* lends some support to the view that the concept of community of property was known to early Rome; but it is not clear how the rule operated in practice.¹⁹

2.2 The Praetorian Intervention

Because of the praetorian intervention a practice of a will, known as the *testamentum per aes et libram*, was given a great boost. Making of this will required a *mancipatio*, i.e. a complicated procedure based on five witnesses, a scale-holder and at first a person to whom the estate was transferred known as the *familiae emptor*. In The classical law though, the testator simply remained the owner of his property until his death. Also the will required a written document (*tabulae ceratae*, i. e. wax writing tablets) with the wishes of the testator that was then sealed (usually done with a ring) before the five witnesses. Besides this document, the testator had to pronounce a formal statement confirming (but not openly declaring) the content of the document itself. This solemn statement, called *nuncupatio*, was formerly the will itself since the testator, by the *nuncupatio*, declared the content of his will. Actually, in later times, obvious reasons of discretion had suggested not to reveal the will before its author died. This written document served great purpose in disputes over wills, since the praetor would in those cases give the person named heir the possession of the property. In the late Roman law a will known as the tripartite became the ordinary type of will in Roman law and had to be made in one operation, before seven witnesses, the witnesses had to seal and the testator had to sign.²⁰

Much like the Twelve Tables there was an order of succession so those in subsequent classes were excluded if there existed a member of a prior class. Those who belonged to the top of the classes were the children of the deceased. Those next in line were a class that had a claim under the Twelve Tables. This class, known as the heirs-at-law (*legitimi*), could of course not be the children claiming as *liberi*. In cases where there were neither children nor heirs-at-law to inherit the inheritance

¹⁸ Buckland (Fn. 12) 228.

¹⁹ Borkowski / Du Plessis (Fn. 4) 211.

²⁰ Watson (Fn. 11) 84.

would be passed along to the cognates. Cognates are believed to have been "a large class, consisting of blood relations within the sixth degree of relationship"²¹. Last but not least came the surviving spouse who was entitled to *bonorum possessio*.²²

If disputes arose regarding the heir, the deserving claimant could be allowed to have *bonorum possessio* ("possession of property") of the whole or of a part of the estate. This *bonorum possessio* was very useful since the praetor was always obliged to declare the heir to be the person entitled under the *ius civile*.²³ The *bonorum possessio* had three principal forms: *secundum tabulas* (in accordance with the will), *contra tabulas* (despite the will) and *ab intestato* (on intestacy).²⁴ This remedy was characterized by a preference of blood instead of the civil relationship, which had been ongoing in the civil law. Whether the successful grantee of *bonorum possessio* eventually prevailed depended on the type of grant.²⁵

2.3 Classical Period

A number of enactments were made in the classical period affecting succession on intestacy. One of them was thought to be the first resolution of the Senate (*senatusconsultum* or shortly *S. C.*) to be formally recognized as having direct, binding legal force. This enactment was the *S.C. Tertullianum*. The main purpose of this enactment was to improve the positions of mothers as regards the intestate estates of their children. Until this enactment, as seen under the Twelve Tables, a mother could only succeed her children if she was in a *manus* marriage. However the change was made so that mothers who had given birth to three children or more had the right to intestate succession of their children. Another enactment was also very important and focused on the rights of children to succeed on their mother's intestacy and was known as the *S.C. Orphitianum*. With this act the nearest agnate would no longer succeed the mother's estate but the children (legitimate or illegitimate).²⁶

²¹ Borkowski / Du Plessis (Fn. 4) 213.

²² *Ibid.* 212.

²³ *Ibid.* 214.

²⁴ Thomas, *Textbook of Roman Law* (Amsterdam, New York, Oxford, 1976) 519 f.

²⁵ Borkowski / Du Plessis (Fn. 4) 214.

²⁶ *Ibid.* 214 f.

2.4 Justinian's Time

In the later Empire Justinian introduced a new scheme of intestate succession by *Novellae*²⁷ enacted in AD 543 and 548 whereby the old rules and concepts were replaced by a system that emphasized the cognatic relationship.²⁸ This new system had hardly any trace of the old notions and was an extremely modern looking system that has influenced nearly all-modern systems.²⁹

The first in the order of this new scheme were the descendants, meaning children and remoter issue, without distinction of sex. Descendants were determined purely by blood, except the adopted children who were also included. Second came the ascendants and full brothers and sisters who would all share equally in cases where more than one ascendant/full brother and sister remained to inherit. If no ascendant survived, the property went exclusively to any brothers and sisters of the whole blood. Also the nearest ascendant would exclude the more remote. Third there were the brothers and sisters of half-blood and fourth the nearest other collaterals, i.e. the next of kin and finally the surviving spouse.³⁰

In regarding with succession of freedman Justinian substituted a simpler system than the ones before. His order was: first came *liberi* of the freedman other than adoptive children. Then the patron or patroness (other than adoptive) and finally cognates of the patron to the fifth degree; surviving spouse.³¹

2.5 The Making of Valid Wills

Will was not just a way to make sure that one's family was taken care of but a will could also be used to list one's achievements. Wills often contained gifts to important citizens, politicians and generals as well as being a sort of final "judgment"

²⁷ The *Novels* (*Novellae Constitutiones*) were a collection of Justinian's constitutions that hadn't been included in his *Corpus Iuris Civilis*. They didn't constitute an official (that is a publicly recognized) collection and therefore we know them only by private collections that have come down to us from the VI century a. Chr.: the *Epitome Iuliani* (with only a summary of 122 Novels) and the *Authenticum* (with the full text of 134 Novels).

²⁸ Borkowski / Du Plessis (Fn. 4) 215.

²⁹ Buckland (Fn. 12) 232.

³⁰ Borkowski / Du Plessis (Fn. 4) 216.

³¹ Thomas (Fn. 24) 526.

made by the testator. With his will the testator had a last opportunity to cast judgments on his friends, family and enemies. The application of the law of intestacy might on the other hand have led to such curious results that a desire to avoid intestacy was in fact very understandable.³² By the will its author was certain to master everything he considered as the best plan once he died.

In order for the wills to be considered valid certain rules applied. A will could only be made by a sane Roman citizen above the age of puberty who was not in *patriapotestas*. Another very important rule regarding will making was the appointment of heirs. The heirs had to be properly appointed and properly qualified and accept the inheritance.³³ Also the appointment had to be made with certain words, e.g. "Let Titus be my heir", where the name of the heir was sufficiently identified. The number of heirs did however not matter, as they would simply share the inheritance equally unless of course the will specified otherwise.³⁴

Different legal positions applied to the heirs with the difference being based on which category the heir belonged to. There were three categories, *sui et necessarii heredes*, *necessarii heredes* and *extranei heredes*. The first group could not refuse the inheritance if they were appointed and became *sui iuris* on the testator's death. The next were slaves who had been voluntarily manumitted by will and appointed as heirs. Finally the third was simply a category that applied to all those who were not *sui* or *necessarii* and normally they did not belong to the testator's household. Also this group was allowed to decline the inheritance unlike the others.³⁵

Despite of what one might have thought, the same rules did not apply for making a will as to witnessing it. Slaves could not witness a will or the family of the testator. However heirs could witness wills as long as they were not related to the testator. Later Justinian banned the practice of allowing heirs to witness the wills they had been appointed to. Witnesses were not obliged to understand or even know the contents of the will. They only had to understand that they were witnessing a will.³⁶

³² Borkowski / Du Plessis (Fn. 4) 209.

³³ Watson (Fn. 11) 85.

³⁴ Thomas (Fn. 24) 223 f.

³⁵ Borkowski / Du Plessis (Fn. 4) 227 f.

³⁶ *Ibid.* 218.

As has already been mentioned, the heir became responsible for the testator's debts. If there were two or more heirs they had to pay in proportion with their share. But of course, if the testator stated otherwise, then that would be the way of the will. Sometimes there were difficulties with debts and in those cases the Romans had two devices to assist them. The devices were *separatio bonorum* and *beneficium inventarii*. The first one was to assist the creditors to get the debt of the testator paid. The creditor could apply for *separatio bonorum* if the praetor allowed and in which case the testator's estate and the heir's estate would be kept separate until the debt had been paid. If the creditor did not apply for this the two estates would merge and, if the heir was already having difficulties with payment before the merging, it could become very difficult with the creditor to collect his payment. Later, Justinian introduced the *beneficium inventarii* and its purpose was to improve the position of the heir. The way it worked was that the heir had to make a formal inventory of the deceased's estate before witnesses. Within the first month of the appointment of the heir and no later than three months after, the inventory had to be drawn up. By making the inventory an heir's liability for the deceased's debts was confined to the assets of the inheritance.³⁷

Even though the appointment of an heir was vital for the function of a Roman will, it is said that the heart of the will lay in the legacies granted by the testator.³⁸ A legacy was a gift left by will which was payable by the heir alone and took many forms depending on which period applied.³⁹ However the most important were legacies *per vindicationem* and those *per damnationem*. To obtain property from the person in possession one would need to bring a *vindicatio* hence these *legacies* were called *per vindicationem*. This was only possible in circumstances where the heir entered on the inheritance and it seemed that the ownership of the legacy had passed directly from the testator to the legatee without vesting in the heir. The other important legacy and perhaps the most common form of legacy were legacies *per damnationem*. These legacies applied when the testator gave an instruction to the heir to give the legacy to the legatee - the heir was charged with making a gift. It was different from *per vindicationem* because the testator only obliged the heir to give to

³⁷ Borkowski / Du Plessis (Fn. 4) 229 f.

³⁸ *Ibid.* 230.

³⁹ Watson (Fn. 11) 87.

the legatee instead of giving it directly himself. The testator could pass on almost everything even property belonging to the heir. However the heir was not obliged to give the property away, he could simply pay the value of the property and give that away instead.⁴⁰

It is clear that *extraneus* would be much more likely to accept the inheritance if there was a chance of becoming richer by it. Because of this situation it could have happened that the testator was too generous in his legacies to others and as a result the *extraneus* might have refused the inheritance resulting in intestacy.⁴¹

In order to restrict the size of the legacies an effective statute called *lex Falcidia* was passed in 40 b. Chr. The function of the *lex Falcidia* was to insure the heir despite the legacies a quarter of the remaining inheritance (net estate) after the payment of funeral expenses and debts had been paid. However if there were nothing remaining after the expenses, then the heir would take nothing. Slaves were not included in the calculation of the net estate. The result of the *lex Falcidia* was that if the legacies exceeded three quarters of the net estate then they would be reduced proportionately. In cases where there were two or more heirs they would share at least a quarter. The use of Falcidian reduction was not always known to have been necessary when the accurate valuation of the net estate was not clear. Situations where the accurate valuation was unclear often lasted some time after the testator's death. Instead of delaying the legatee from benefiting he was allowed to take the whole gift with the promise of repaying whatever proved to be excessive. This rule became the practice in the previous mentioned cases. *Lex Falcidia* existed until the late Empire but was improved by Justinian and by his rules of inventory.⁴²

The legacy also had sub-rules that applied for its different categories. The five most important were: a) *Legacy of an option*, b) *legacy of a thing of a kind*, c) *legacy of part of the inheritance* and d) *legacy of a debt*.

a) *Legacy of an option (legatum optionis)*: This was a legacy whereby the legatee was expressly given the right to choose from two or more things. Also he was free to choose whatever he wanted.

⁴⁰ Borkowski / Du Plessis (Fn. 4) 230 f.

⁴¹ *Ibid.* 233.

⁴² *Ibid.* 233 f.

b) *Legacy of a thing of a kind (legatum generis)*: This was a legacy where the legatee did not have a free choice. In fact the choice often lay with the heir but he could not pick the worst for the legatee. The same applied to the legatee if the choice was his, that is to say he could not choose the best. The thing of a kind was not something specifically identified so a good example of this would be: "I give Balbus a horse".

c) *Legacy of part of the inheritance (legatum partitionis)*: Like the name implies, this legacy provided the legatee a share of the inheritance. However the legatee did not become an heir because he was simply allowed to share a part, e.g. "Let my heir, Balbus, share the inheritance with Milo". So what would usually happen is that the heir and the legatee would make some kind of an agreement together specifying the shares.

d) *Legacy of a debt (legatum debiti)*: If the creditor was given a legacy consisting of the debt owed by the testator the legacy became invalid. But if on the other hand the creditor received something of worth like receiving a payment of debt earlier than was to be expected the legacy was valid.⁴³

2.6 Rules for the Testators

Being a testator did not mean doing whatever one pleased with his will. There were not many restrictions but they were specific. The most important ones were *exheredatio* and the *querela*. In order to explain the rules on disinheritance (*exheredatio*) it is necessary to distinguish between the *ius civile* rules and the praetorian system. The reason for this is because the rules were extremely complicated.

The reason why the rules on disinheritance emerged was because *sui heredes* needed protection. In the sense that *sui* could not be excluded from benefiting under a will except by express provision to that effect. However if the testator wanted to disinherit the *sui* he could if he but followed a correct form. Since this was a possibility a rule was established insuring that the *sui* would either be appointed heir or disinherited. Trying to avoid the rule by not mentioning which one of the two choices applied to the *sui* could lead to an invalid will. It was common for the Romans to disinherit persons for it did not always mean that there was some kind of bad blood between the testator and the person being disinherited. The situation was

⁴³ *Ibid.* 234 f.

often that the disinherited person received legacies instead. These strict rules created some complications in cases where children, who claimed a position as *sui heredes*, were born after the will had already been made. Since the children were born after the will had been made they were considered to be "unascertained persons" and thus incapable of being appointed heirs. But on the other hand, as they were *sui heredes* of the testator when he died, they should have been either appointed or disinherited in the will according to the rule of disinheritance. So the testator could only choose between two options when faced with circumstances like these. He could either delay the will making until the possible future *sui heredes* had been born or make a new will on the birth of any *sui*. However seeing how this position was not good at all for the testators, it was improved in the late Republic. The improvement involved allowing the testators to appoint or disinherit any future *sui heredes* in their will by adding clauses such as: "whatever children may be born to my wife".⁴⁴

During the time of the praetors new set of rules in regards to *exheredatio* were made. The goal of the rules was to consist with their scheme of intestacy. This meant that if a will did not satisfy specific requirements such as all male *sui* being appointed or disinherited by name then the omitted *sui* could seek *bonorum possessio contra tabulas* ("possession of the estate contrary to the tablets") from the praetor.⁴⁵

Finally Justinian simplified the whole thing with the rule that, if a testator was to disinherit someone (women or men), then he had to do so by writing the name of that person in his will.⁴⁶

If a testator disinherited his family in his will without a good reason he was considered to be failing his moral duty. In the late Republic this moral duty was developed into a legal remedy to give the disinherited family or family members a chance to take legal actions against the will. This procedure was known as the *querela inofficiosi testamenti* - "the complaint concerning of the undutiful will". The court of the *centumviri* normally heard the complaint. Such cases often attracted considerable public interest.⁴⁷

⁴⁴ *Ibid.* 236.

⁴⁵ *Ibid.* 236 f.

⁴⁶ *Ibid.* 237.

⁴⁷ *Ibid.* 235.

Part III - Horror of Intestacy

There has been and there still is a lively debate on whether Romans detested dying intestate or not. As a consequence of this the frequency of will making has been debated.⁴⁸ For a better understanding of what horror of intestacy meant it is necessary to have a look at what scholars have written about this topic. In this section I intend to explore the different opinions from Maine, who believed that when people did not make a will they were part of an exception⁴⁹, to Daube, who believed the exact opposite.⁵⁰

I have already discussed the main will making process and the complex rules that applied in case of intestacy and it is clear that there were important reasons why a Roman citizen would wish to make a will. The obvious one is that he would want to choose his heir. But also other reasons mattered, for example it was expected of the *paterfamilias* to be responsible and good role models and making a will was an example of just that.⁵¹ However, as stated earlier, one must explore all sides of this topic.

3.1 Historical Reality or a Scholarship's Story?

Henry James Sumner Maine, a Scottish jurist⁵², argued that the Romans did not regard the wills as a means of disinheriting a family, or of affecting the unequal

⁴⁸ *Ibid.* 208.

⁴⁹ Maine (Fn. 5) 243.

⁵⁰ Daube (Fn. 6) 71-73.

⁵¹ Borkowski / Du Plessis (Fn. 4) 209. See also Champlin, *Final Judgments. Duty and Emotion in Roman Wills 200 b. C. – a. D. 250* (Berkeley, Los Angeles, Oxford, 1991) 21: The law of intestacy took care of property only. The making of a proper will was an actual duty, designed to honor or rebuke family, friends and servants as they deserved. If this *officium* was properly fulfilled, the testator was praised. S. also Buckland / Stein, *A Text-Book of Roman Law from Augustus to Justinian* (Cambridge, 1975) 365. "It may be that, as has been said, the feeling is at bottom religious: a *heres ab intestato* could, by *cessio hereditatis*, shift the *sacra* to the care of another, uninterested person, a *heres ex testamento* could not".

⁵² Henry James Sumner Maine was born in 1822 in Kelso. He was a comparative jurist and historian. He is famous for the thesis outlined in his *Ancient Law* that law and society developed "from status to contract". According to the thesis, in the ancient world individuals

distribution of a patrimony. Contrary to this he believed that the Law of Intestacy divided the inheritance unfairly whereas the testamentary power made provisions for families and helped in dividing the inheritance more evenly.⁵³ Horror of intestacy came out as the *ius civile* rules, that were in former times the foundation of the intestate succession without a proper balancing by the praetorian law, “persevered in looking on the emancipated children as strangers to the rights of kinship and aliens from the blood”⁵⁴ so that these children on one hand had profited by the emancipation but on the other “were absolutely deprived of their heritage by an Intestacy”⁵⁵. This result explains beyond any reasonable doubt the “vehement distaste for intestacy” and makes it easy to understand why in a very old time – as the recognition of the emancipation conflicted with the *patriapotestas* as chief support of any familiar relationship – the not yet healed “competition” between the legal and the affective idea of family made easy the enthusiastic flourishing of testacy where “the dictates of affection were permitted to determine the fortunes of its objects”⁵⁶. Since the Testamentary power divided the inheritance more evenly than the law of intestate

were tightly bound by status to traditional groups, while in the modern one, in which individuals are viewed as autonomous agents, they are free to make contracts and form associations with whomever they choose. Because of this thesis, Maine can be seen as one of the forefathers of modern sociology of law. Maine contributed to the *Cambridge Essays* an essay on Roman law and legal education. Lectures delivered by Maine for the Inns of Court were the groundwork of *Ancient Law* (1st Edition: 1861), the book by which his reputation was made at one stroke. Its object, as stated in the preface, was "to indicate some of the earliest ideas of mankind, as they are reflected in ancient law, and to point out the relation of those ideas to modern thought." He published the substance of his Oxford lectures: *Village Communities in the East and the West* (1871); *Early History of Institutions* (1875); *Early Law and Custom* (1883). In all these works, the phenomena of societies in an archaic stage are brought into line to illustrate the process of development in legal and political ideas.

S.Wikipedia - the free Encyclopedia. 2013. *Henry James Sumner Maine*.

<http://en.wikipedia.org/wiki/Henry_James_Sumner_Maine> Accessed 2th April 2013

⁵³ Maine (Fn. 5) 243.

⁵⁴ *Ibid.* 247.

⁵⁵ *Ibid.* 247.

⁵⁶ *Ibid.* 248.

succession, Maine suggested a "singular horror of Intestacy"⁵⁷. If a Roman citizen would die without a will he would leave his children without provision. In cases where there were no children the Roman citizen would risk that his possessions would escape from the family altogether.⁵⁸

Against Maine Daube concluded that intestacy was in fact the rule and testacy the exception. The Latin word *in-testatus* is a negative one used for persons who did not leave a will. *Intestatus* for the time of its initial appearance indicates that intestacy was the norm because "*testari* designating an extraordinary action, *testatus* its doer, *intestatus* the abstainer. If nature of the term is to serve as an argument at all, it points to testacy as the exception, intestacy as the norm"⁵⁹. The Twelve Tables also treat testacy before intestacy, which might have suggested that testacy was more common.⁶⁰ But according to Daube this conclusion is not decisive since it is not possible to know whether the ancient Roman lawgivers always started with the regular and appended the less frequent. The point being that the order of the provisions does not furnish evidence for testacy being the norm.⁶¹

⁵⁷ *Ibid.* 243. "If this be the true reading of the general sentiment on the point, it explains to some extent the singular horror of Intestacy which always characterized the Roman. No evil seems to have been considered a heavier visitation than the forfeiture of Testamentary privileges; no curse appears to have been bitterer than that which imprecated on an enemy that he might die without a Will".

⁵⁸ *Ibid.* 246. *See also* Watson (Fn. 11) 88 f.: When there was no will - or no effective will - the property was divided according to certain rules. The system of the Twelve Tables rested completely on agnation, that is, relationship through males. This was gradually altered, at first by the praetor's Edict and then by imperial legislation from the time of Hadrian. After Justinian's legislation in his *Novels* the old civil law rules based on blood relationship. It is, though, of particular significance that at no time was the eldest born given greater rights than other *sui* in the same degree of relationship. Males and females were likewise treated alike until the *lex Voconia* in the Republic, when it was held that no woman except a sister could succeed on intestacy as an agnate.

⁵⁹ Daube (Fn. 6) 255.

⁶⁰ *Ibid.* 255. Daube quotes Digest 38.6.1 pr. (Ulpian 44 *ad edictum*): *Posteaquam praetor locutus est de bonorum possessione eius qui testatus est, transitum fecit ad intestatos, eum ordinem secutus quem et lex duodecim tabularum secuta est.*

⁶¹ *Ibid.* 256-258. Daube furthermore states that is in fact neutral whether testacy was treated first or intestacy but "if a bias must be discovered, it is in favour of intestacy".

Next is the famous quote made by the elder Cato in Plutarch (495) where he says that, among the things he regrets in his life is living one day without having a will. And in Plautus' *Curculio* (622) a man is cursed with the words *intestatus vivito* translated into "mayest thou live without having made a will".⁶²

On the anti-Maine side Watson⁶³ points to seven cases in Cicero of even propertied people who died intestate, and two further cases of people who evidently went for a long time in the will-less state that Cato is supposed to have deplored. However Daube declares that *adiathetos* does not mean "without a will" at all but that it in fact means "without serious, planned work". Crook however argues that Daube does not give satisfying explanation for his conclusion.⁶⁴

Daube also gives thought to the poor chaps who slept under the bridges of Tiber and why they would ever make a will. Since they neither had anything to leave a will about nor did they possess finance to hire the cheapest lawyer to draw it up. Therefore the wills in legal writings represented only a tiny fraction of the Roman population. No Roman will ever existed containing only the shirt and shoes of the testator. The most modern wills included at least a house or something of comparable value.⁶⁵ However, as Crook points out, there is no way of knowing for sure what proportion of Romans made wills. And so Daube's statement that only a few Romans made wills is misleading. Also there are two examples of wills where there is no

⁶² *Ibid.* 258-260.

⁶³ Watson (Fn. 6) 175 f. Much more significant is the fact in Cicero's writings alone we meet as many as seven separate factual instances where a Roman citizen who had property died without a will. Moreover, in *pro Cluentio* 15.45 Cicero tells us that his client had made no will before the trial of Oppianicus who had tried to murder him; and *Rhetorica ad Herennium* 1.13.23 involves a situation where a citizen had no will until he made one while under the sentence of death for killing his mother.

⁶⁴ Crook (Fn. 6) 38 - 40. "For this assertion he (Daube) gives no warrant, but in the *Tulane Law Review*, though still without any footnote, he gives some clue to the origin of the idea remarking: "I incline to that (*sc.* interpretation of the passage) which held exclusive sway prior to the first half of the last century and even after that found defenders until not very long ago", namely that it means that Cato regretted having been for so much as a day "not purposefully engaged".

⁶⁵ Daube (Fn. 6) 71-75.

mentioning of houses or property unlike what Daube suggested.⁶⁶ So there might in fact have existed in the Roman world plenty of people who were neither vastly rich nor grindingly poor but had a bit of this and that to leave. Crook calls them the "little people" that also made wills. In this argument he does of course not include the "poor chaps who slept under the bridges of the Tiber".⁶⁷

Crook also brings an argument regarding the *lex Voconia*. That statute was passed in 169 b. Chr., on a wave of disapproval of the ostentation and excessive wealth of women; it was to effect that people listed in the census in the top property class were forbidden to institute women as their heirs. It did however not apply to legacies, for it was concerned with instituting women as heirs; but above all it did not apply to intestacy. In Cicero it is possible to find the ways that people tried to use in order to escape the toils of the *lex Voconia*.⁶⁸ But the question raised by Crook is: why do we never hear of the desired result being achieved by simple intestacy? True, a widow without *manus* would not be able to succeed her husband on intestacy, nor a daughter or mother. But an only daughter, unless emancipated or married with *manus*, would succeed to her father if he simply made no will and let himself die intestate.⁶⁹

But the fact remains that large parts of the citizen body was unable to make or was seriously restricted in making a will under Roman law. Technically, most people

⁶⁶ Crook (Fn. 6) 39. "The well-known *testamentum per aes et libram* of Antonius Silvanus, a cavalry trooper, does not actually contain a house." The other will was published after Daube's work and did a freedman make this will. It contained no specific property.

⁶⁷ *Ibid.* 39. The reason why Crook does not include the poorest Romans in his argument is because of this comparison that he gives: "If you say that Englishmen are very fond of gardening you do not feel yourself refuted by being reminded that many Englishmen do not possess a garden. (In fact, the man without a garden may quite likely share the sentiment, even though deprived of the opportunity for its practical exercise)"

⁶⁸ *Ibid.* 43. "If a woman - your daughter, for example, or your widow - was not the only person your wanted to benefit, then you could make the other person your heir and charge him with *legatum paritionis*, legacy of share, to the woman; and that was perfectly respectable. But if it was an only daughter and you wanted her to have your all, that device was not available. We hear of a man with an only daughter who simply left himself off the census, and of a wealthy woman with an only daughter who did the same."

⁶⁹ *Ibid.* 43 f. However Crook also states that "the *lex Voconia* ignores so obvious a loophole." Nonetheless his thoughts are on this subject are of great interest.

died "intestate" as far as Roman law was concerned. Champlin therefore wonders how one can claim that the Romans had a "horror of intestacy?". According to him intestacy covers most of humanity, embracing not merely those unable to leave a legal will, but also the citizen masses who could make a will but who had nothing to leave, or so little to leave that they and their heirs took a little interest in the workings of the law as the law took in them. The question regarding the frequency of intestacy should be made much more narrowly. It should be as follows: "how frequently did people who had the capacity to make will, and who had something to leave, nevertheless die without a will?"⁷⁰

Another fact that Champlin shares is that intestacy was very rarely documented. In the jurists surveyed, some 15 instances appear, against 687 wills. However it is not possible to conclude anything from these numbers since the rules of intestate succession, involving as they do questions not of human behavior but of personal status, afford little room for debate and few points of interest for the jurist, beyond questions of their fundamental validity.⁷¹ But how far down in Roman society are we likely to find wills? The obvious fact is of course that a very rich person of the senatorial or equestrian order, educated, literate, and urban, could confidently be expected to leave a will. Whereas the impoverished peasant or indigent laborer, the ignorant and perhaps non-Roman provincial, could not. The problem remains to figure out how many of the middle class of Romans left a will. It would seem from the sources we have that in the very lowest reckoning most of the testator owned or could have owned a land.⁷² Also the collection of Roman wills on Egyptian papyri give little hint of testators who were not landowners and people of some substances, and there is no evidence for "little people".⁷³ Since there is very little hint of the

⁷⁰ Champlin (Fn. 50) 41-43.

⁷¹ *Ibid.* 44.

⁷² *Ibid.* 54.

⁷³ *Ibid.* 55. See especially the footnote where Champlin gives reason for his conclusion: "Figures are simply unavailable, since the size of properties is almost never given (usually just "my wheatfield near.."), and the quality never. *PSI* 1325 and *BGU* 326, both of second century, list respectively at least 45 arouras distributed and a single legacy of 6 1/4 arouras; taking Duncan-Jones's median average (*Economy*, 366) for Egyptian land prices, the use of which is dubious on several grounds, these might indicate values of very roughly 9000 drachmas and 1250 drachmas. The smallest estate known to have been left by a Roman will,

ordinary man or woman leaving a will, his conclusion remains that testation in Roman society was even less common than might be surprised.⁷⁴

Cherry argued that much of the non-legal writing refers to wills and intestacy in anecdotal nature, and almost all of it describes only habits of the elite (mainly senators). It is therefore of little consequence that Cicero identifies six propertied Roman citizens who died intestate.⁷⁵ But Cicero mentions however 60 wills, so should the ratio of testacy to intestacy be considered to be at roughly 9:1?⁷⁶

Then there is the previous mentioned story of a man in Plautus' *Curculio* (622) who is cursed with the expression "may you live intestate" (*intestatus vivito*). Cherry does not think that this expression can imply a general "horror of intestacy", since, as Daube remarked, the phrase puns playfully on the use of *intestatus* to mean "without testes", because *intestatus* carries with it also another meaning, such as "without the power to bear witness", and because we have no way of knowing whether Plautus' audience either understood or shared in the notion that living intestate was a curse (if this is in fact what Plautus intended). As for Cato the Elder regrets of spending an entire day intestate (*adiathetos*), Cherry does not share Daube's opinion that the story can be dismissed on the grounds that it was recorded probably only because it describes one of Cato's eccentricities. However Cato's sentiments reveal nothing about the practice of "tailors or carpenters".⁷⁷ Regarding the Roman sources altogether he makes the statement that they document an apparently deeply rooted sentiment

the 800 drachmas of a freedman in the early third century (*P. Oxy.* 3103), could by that standard easily have included a bit of land."

⁷⁴ *Ibid.* 55.

⁷⁵ Cherry, *Intestacy and the Roman Poor*, in *TR* 64 (1996) 159: "Valeria (*Flacc.* 84), wife of Sextilius Andro, probably an ex-slave's daughter, and a woman of moderate wealth (*Flacc.* 89: *non amplissimis patrimonii copiis*); Vibius Cappadox (*Cluent.* 165), a friend of the senator L. Plaetoris (his estate was awarded, under the terms of the praetor's Edict, to Numerius Cluentius, son of Aulus Cluentius' sister); a Minucius (*Verr.* 2.1.115) who died without a kin; an ex-slave's son (*De Orat.* 1.183) whose estate was claimed by the Marcelli and Claudii; a Spaniard (*De Orat.* 1.183) who married at Rome, having left behind a wife and child in Spain; and a wealthy man named Pompeius Phrygio (*De Orat.* 2.283)."

⁷⁶ *Ibid.* 159. However it should be mentioned that the observation is in fact Champlin's (*Final Judgments* (n. 1), 43).

⁷⁷ *Ibid.* 159 f.

among the elite that intestacy was to be avoided, and that they tell us almost nothing about the attitudes or habits of the poor, or even about the practice of the wealthy.⁷⁸

If the Roman sources do not tell the whole story regarding testacy and intestacy, it is helpful to explore the reasons why the Romans would leave a will. Most Romans who made wills named all or some of their children as heirs or legatees, and many of the legal historians who subscribe the notion of a Roman "horror of intestacy" have looked for an explanation in the rules that governed children's rights of succession on intestacy. It might be suggested that because the law of intestacy provided for equal division of property among surviving children, then there would have been a reason for a Roman to leave a will if he wanted to leave more to one child than another.⁷⁹ But it is not clear if Romans with children were more likely to leave a will and, of the 14 Romans (real or imagined) in the Digest who died without a will and whose kin are identified, only five appear to have been unmarried and childless.⁸⁰

Cherry therefore gives another explanation for a more likely reason for the cause of Roman testacy and that is the virtual exclusion of wives on intestacy (those married with *manus* claimed as *liberi*, but in the classical period of law most women married without *manus*). The fact remains that of the 14 intestate Romans in the Digest whose kin are identified, not one was survived solely by a spouse.⁸¹ Champlin

⁷⁸ *Ibid.* 160.

⁷⁹ *Ibid.* 164 f. "However it cannot be shown that the practice (or even the sentiment) was widespread. And there is some reason to believe that the principle of equal shares for children on intestacy was not contrary to popular sentiment: it was upheld over a very long period during which the law was several times reformed."

⁸⁰ *Ibid.* 165. See Cherry's footnote (59): "A veteran was survived by kin who are not identified (S. 29,1,36,3, Papinian.). The unmarried and childless: D. 31,77,29 (Papinian), a woman survived by a female cousin; 38,8,8 (Modestinus), a woman with grandchildren; 38,8,10 (Scaevola), a woman survived by her mother and half-sister; 38,12,2 (Papinian), a soldier without a kin; 41,1,14 (Scaevola), a woman survived by her two brothers. Cf. Champlin, *Final Judgements* (above, n. 1), (Fn. 50) 44-5, who understands that "two perhaps three" were unmarried and childless, and that two more "apparently left underage children". None of the five passages mentions children."

⁸¹ *Ibid.* 165. "Five of the 14 appear to have been unmarried and childless: see above, n. 74. Three left spouses and children: D. 29,2,92 (Paul), a woman survived by her husband (*a filiusfamilias*) and adult children; 36,1,80*pr.* (Scaevola), a man survived by his wife and

has also pointed out that testators who had already provided for children and spouses sometimes looked next to friends and ex-slaves, who had no place in the rules governing intestate succession.⁸² But what about those who had a little of this and that? Of 35 Roman wills preserved on Egyptian papyri, 17 are sufficiently complete to give some indication of the size or value of the estate. Fully 13 of the 17 estates included rural or urban land property. Cherry's conclusion remains the same as Daube's; that the wealthy of the Roman world are likely to have made wills, and that the poor generally died intestate.⁸³

PART IV - Conclusion

Having now explored first the complex rules of testacy and intestacy succession and then secondly various opinions regarding if the Romans did in fact have a "horror of intestacy", I can now discuss with more awareness my conclusion.

It is clear, I think, that, when discussing the frequency of will making, it is not necessary to include those who did not have the capacity to make a will, nor those who were not allowed to make a will. Simply because the "horror of intestacy" could not have faced those who did not have the option to make a will in the first place. As for the middle-class it would seem from the Roman sources we have that almost all of the wills included something of considerable wealth.⁸⁴ Implying that those belonging to the middle-class were not actually a real middle-class but a kind of upper middle-class. It would therefore seem that anyone who left a will had something of value to make a will about. This view is of course of no surprise since it can easily be said that the very same view exists today.

minor emancipated daughter (*pupilla*). Six others were survived only by their children (widows/widowers): D.10,2,39,1 (Scaevola), a man with a son and daughter; 31,34,2 (Modestinus), a woman survived by her sons; 31,77,26 (Papinian), a woman survived by her son; 36,1,76,1 (Paul), a woman with a son and daughter; 37,6,9 (Papinian), a man survived by his emancipated son; 41,9,3 (Scaevola), a man with two daughters."

⁸² *Ibid.* 166. See also Champlin (Fn. 50) 126.

⁸³ *Ibid.* 169 f.

⁸⁴ Champlin (Fn. 50) 51.

The fact however remains that the law of intestacy took care of property only⁸⁵ so there was a very important reasons why Romans would want to make will. When making a will a Roman citizen made sure that the inheritance was divided more evenly⁸⁶ and of course decided his order of succession. Instead of allowing the automatic rules of intestacy apply. It would seem to me that the reasons for making a will were so great comparing them to the reasons for allowing intestacy that the Romans who were capable of making a will, were in fact faced with a sense of "horror of intestacy".

⁸⁵ *Ibid.* 21.

⁸⁶ Maine, *Ancient Law* (Fn. 5) 243.

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