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古代法

ANCIENT LAW

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(二)

《西方学术经典文库》(第一辑)

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CHAPTER VII

Ancient And Modern Ideas Respecting Wills And Successions

Although there is much in the modern European Law of Wills which is intimately connected with the oldest rules of Testamentary disposition practised among men, there are nevertheless some important differences between ancient and modern ideas on the subject of Wills and Successions. Some of the points of difference I shall endeavor to illustrate in this chapter.

At a period, removed several centuries from the era of the Twelve Tables, we find a variety of rules engrafted on the Roman Civil Law with the view of limiting the disinherison of children ; we have the jurisdiction of the Praetor very actively exerted in the same interest; and we are also presented with a new remedy, very anomalous in character and of uncertain origin, called the Querela Inofficiosi Testamenti, "the Plaint of an Unduteous Will," directed to the reinstatement of the issue in inheritances from which they had been unjustifiably excluded by a father's Testament. Comparing this condition of the law with the text of the Twelve Tables which concedes in terms the utmost liberty of Testation, several writers have been tempted to interweave a good deal of dramatic incident into their history of the Law Testamentary. They tell us of the boundless license of disinherison in which the heads of families instantly began to indulge, of the scandal and injury to public morals which the new practices engendered, and of the applause of all good men which hailed the courage of the Praetor in arresting the progress of paternal depravity. This story, which is not without some foundation for the principal fact it relates, is often so told as to disclose very serious misconceptions of the principles of legal history. The Law of the Twelve Tables is to be explained by

第七章　古今有关遗嘱与继承的各种思想

尽管现代欧洲的“遗嘱法”中的许多地方和以前人们实施的最古老的遗嘱处分有着密切的关系，但是古代和现代的思想观点在“遗嘱”和“继承”这个主题上有着重大的分歧。在本章中我将详细说明这些分歧中的部分观点。

在距离《十二铜表法》颁布时代几个世纪后的某一段时期内，我们可以发现在“罗马市民法”中增加很多目的在于限制剥夺子女继承权的规定；我们可以看到“裁判官”的审判权也在努力地执行这些规定；我们在那个时候还发现了一种新的救济方式，其性质非常反常，而且其来源也不确定，这种新的救济方法被称为“遗嘱违背道义之诉”，目的在于恢复儿子被父亲不公正的“遗命”所剥夺的继承遗产的权利。有的作者在比较这个法律规定和《十二铜表法》中承认订立“遗嘱”的绝对自由的文本时，试图把大量戏剧性的偶然事件混入他们的“遗嘱法律”史中。他们告诉我们族长可以毫无限制地任意剥夺子女的继承权，告诉我们这种新的实践会对公共道德造成的耻辱和损害，更告诉我们一切善良的人们对“裁判官”阻止父权进一步堕落的勇气进行的赞美。这些故事从其所叙述的主要事实来说并不是完全没有依据的，但是严重误解了这些故事所反映的法律史上的各项原则。《十二铜表法》

the character of the age in which it was enacted. It does not license a tendency which a later era thought itself bound to counteract, but it proceeds on the assumption that no such tendency exists, or, perhaps we should say, in ignorance of the possibility of its existence. There is no likelihood that Roman citizens began immediately to avail themselves freely of the power to disinherit. It is against all reason and sound appreciation of history to suppose that the yoke of family bondage, still patiently submitted to, as we know, where its pressure galled most cruelly, would be cast off in the very particular in which its incidence in our own day is not otherwise than welcome. The Law of the Twelve Tables permitted the execution of Testament in the only case in which it was thought possible that they could be executed, viz. : on failure of children and proximate kindred. It did not forbid the disinherison of direct descendants, inasmuch as it did not legislate against a contingency which no Roman lawgiver of that era could have contemplated. No doubt, as the offices of family affection progressively lost the aspect of primary personal duties, the disinherison of children was occasionally attempted. But the interference of the Praetor, so far from being called for by the universality of the abuse, was doubtless first prompted by the fact that such instances of Unnatural caprice were few and exceptional, and at conflict with the current morality.

The indications furnished by this part of Roman Testamentary Law are of a very different kind. It is remarkable that a Will never seems to have been regarded by the Romans as a means of *disinheriting* a Family, or of effecting the unequal distribution of a patrimony. The rules of law preventing its being turned to such a purpose, increase in number and stringency as the jurisprudence unfolds itself; and these rules correspond doubtless with the abiding sentiment of Roman society, as distinguished from occasional variations of feeling in individuals. It would rather seem as if the Testamentary Power were chiefly valued for the assistance it gave in *making provision* for a

的法律应当根据它所颁布的时代的特性来解释。它不会允许在将来会出现一种思想跳出来反对它本身，它只会根据这样一个假定继续前进，即认为这种倾向是不存在的，或者我们可以说，根本不考虑这种倾向存在的可能性。罗马公民不太可能会立即开始大量地运用这种剥夺继承权的权力。我们知道，尽管在当时人们被家族奴役的束缚的压力非常残酷地压迫着，但人们仍然很有耐心地服从于家族，在这种情况下，如果以为在那时候就能丢弃我们现在这个时代不受欢迎的某些东西，这是违背了一切理性和一切对历史的合理评价的。《十二铜表法》只在它认为遗嘱可能被执行的情况下准许执行，也就是说，只限于没有子嗣和近亲属的情况下。它没有禁止剥夺直系卑亲属的继承权，是因为当时的罗马立法者不可能预见到这种偶然事件，因此也就没有办法在立法中加以明文规定。毫无疑问，当家族友爱的职责逐渐失去了本来所具有的个人义务的一面时，就偶尔会发生剥夺子女继承权的事件。但是“裁判官”会进行干涉并不是因为这种陋习普遍发生，最初无疑是因为以下事实的推动，即这种违背自然的任性事例在当时很少发生而且是异常的，并且也和当时的道德观念相抵触。

这一部分罗马“遗嘱法”所提供的暗示在性质上是完全不同的一个种类。值得注意的是，罗马人并没有把“遗嘱”作为剥夺“家族”的继承权的一种手段，也没有把它作为不公平分配遗产的手段。随着这部分法学的逐渐发展，阻止它向这一方向发展的法律规定的数量不断增加而且也变得越来越严密；这些规定毫无疑问是和罗马社会的一贯情绪相吻合的，并不完全是源于个人情绪的偶然变更。遗嘱权的主要价值似乎在于它能够帮助一个“家

Family, and in dividing the inheritance more evenly and fairly than the Law of Intestate Succession would have divided it. 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 characterised 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. The feeling has no counterpart, or none that is easily recognisable, in the forms of opinion which exist at the present day. All men at all times will doubtless prefer chalking out the destination of their substance to having that office performed for them by the law; but the Roman passion for Testacy is distinguished from the mere desire to indulge caprice by its intensity ; and it has, of course, nothing whatever in common with that pride of family, exclusively the creation of feudalism, which accumulates one description of property in the hands of a single representative. It is probable, *à priori*, that it was something in the rules of Intestate Succession which caused this vehement preference for the distribution of property under a Testament over its distribution by law. The difficulty, however, is, that on glancing at the Roman law of Intestate Succession, in the form which it wore for many centuries before Justinian shaped it into that scheme of inheritance which has been almost universally adopted by modern lawgivers, it by no means strikes one as remarkably unreasonable or inequitable. On the contrary, the distribution it prescribes is so fair and rational, and differs so little from that with which modern society has been generally contented, that no reason suggests itself why it should have been regarded with extraordinary distaste, especially under a jurisprudence which pared down to a narrow compass the testamentary privileges of persons who had children to provide for. We should rather have expected that, as in France at this moment, the heads of families would generally save themselves the trouble of executing a Will, and allow the Law to do as it pleased with their assets. I think, however, if we look a little closely at the pre-Justinianean scale of Intestate Succession, we shall discover the key to the mystery.

族”做好准备，并且使得继承财产的分配比按照“无遗嘱继承法”分配更加公平不偏不倚。如果当时在这一点上普通大众的情绪的确是这样的话，它在某种程度上说明了一种罗马人始终具有的特点，即对“无遗嘱”死亡怀有的特殊的恐惧。比之失去遗嘱特权，没有哪种不幸是更沉重的天罚；没有哪种诅咒比说一个敌人会无“遗嘱”而死更加残酷的了。在我们今天所存在的各种形式的意见中，没有这种相似的情感，或者是很不容易找到这种情感。所有时代的所有人毫无疑问都更加希望他们能计划好其财产的归宿，并且由政府机关按照法律为他们完成这个任务；但是罗马人对于留有遗嘱的热情，从其强烈的程度来讲，并不像是仅仅出于放任随便的愿望；当然，它和家族的骄傲更加没有共通之处，因为家族的骄傲纯粹是封建制度的产物，它将财产积聚在一个单独的代表人手中。也许是因为“无遗嘱继承”中的某些规定，而先天地造成了这种强烈想用“遗嘱”分配财产而不是根据法律而分配的偏好。但是，困难在于，我们看到的罗马的“无遗嘱继承”的法律，是在查士丁尼将它改为现代几乎普遍采用的继承顺序的前几个世纪中一直具有的那种形式，这种形式的法律完全没有给人以明显不合理或者不公平的感觉。正相反，它规定的分配方法非常公平合理，而且和现代社会普遍满意的分配方法没有多少不同之处，因此，我们实在没有理由来说明它为什么会这样不受欢迎，特别在这样一种将有子女要抚养的人的遗嘱权限范围削减得非常狭小的法律中。我们可以预料，就像在当时的法兰西那样，族长一般都不会愿意自找麻烦去执行一份“遗嘱”，他宁可让“法律”来处理他的财产。但是，我以为如果我们可以较为仔细地观察一下查士丁尼以前的“无遗嘱继承”的亲等，我们就能发现秘密的关

The texture of the law consists of two distinct parts. One department of rules comes from the Jus Civile, the Common Law of Rome; the other from the Edict of the Praetor . The Civil Law, as I have already stated for another purpose, calls to the inheritance only three orders of successors in their turn; the unemancipated children, the nearest class of Agnatic kindred, and the Gentiles. Between these three orders, the Praetor interpolates various classes of relatives, of whom the Civil Law took no notice whatever. Ultimately, the combination of the Edict and of the Civil Law forms a table of succession not materially different from that which has descended to the generality of modern codes.

The point for recollection is, that there must anciently have been a time at which the rules of the Civil Law determined the scheme of Intestate Succession exclusively, and at which the arrangements of the Edict were non-existent, or not consistently carried out. We cannot doubt that, in its infancy, the Praetorian jurisprudence had to contend with formidable obstructions, and it is more than probable that, long after popular sentiment and legal opinion had acquiesced in it, the modifications which it periodically introduced were governed by no certain principles, and fluctuated with the varying bias of successive magistrates. The rules of Intestate Succession, which the Romans must at this period have practised, account, I think—and more than account—for that vehement distaste for an Intestacy to which Roman society during so many ages remained constant. The order of succession was this : on the death of a citizen, having no will or no valid will, his Unemancipated children became his Heirs. His *emancipated* sons had no share in the inheritance. If he left no direct descendants living at his death, the nearest grade of the Agnatic kindred succeeded, but no part of the inheritance was given to any relative united (however closely) with the dead man through female descents. All the other branches of the family were excluded, and the inheritance escheated to the *Gentiles*, or entire body of Roman citizens bearing the same name with the deceased. So that on failing to execute an operative Testament, a Roman of the era under examination left his emancipated children absolutely without provision, while, on the

键。这个法律的结构由两个不同的部分组成。一部分规定来源于“市民法”,即罗马的“普通法”;另一部分来源于“裁判官的告令”。我在其他场合已经提到,“市民法”规定的有继承权的继承人按照继承顺序只有以下三类人:未解放的孩子,宗亲中亲等最近的人,以及“同族人”。在这三种顺序中,“裁判官”添加了各种不同亲等的亲族,这些亲族“市民法”是完全不理会的。最后,“告令”和“市民法”结合形成了一张继承顺序表,这张顺序表在实质上和传下来的大部分现代法典中的规定没有太大区别。

必须注意的一点是,在古代一定有一段时间“无遗嘱继承”的顺序完全是由“市民法”决定的,不存在“告令”的安排,或者说“告令”的执行不是持续的。我们相信“裁判官”法学在它的幼年时代不得不和强大的阻力相抗争,而且更有可能的是,在大众情绪和法律观点默认了它很久之后,它周期性引进的各种修改并不是根据某种确定的原则,而是因为续任的地方法官的不同成见而摇摆不定。我以为,在这个时期中罗马人施行的“无遗嘱继承”的规则,可以说明——而且不仅仅是说明——为什么罗马社会长期以来保持着对“无遗嘱死亡”的激烈嫌恶。当时的继承顺序是:当一个公民死亡时,如果没有遗嘱或者遗嘱无效,那么他“没有解放”的儿子将成为他的继承人。他已经解放的儿子不能分享继承权。假如在他死亡时没有直系卑亲属,就由亲等最近的宗亲来继承,但是通过女性后裔和死者产生亲戚关系的亲族(不管血缘多近)不能享有继承权。家族的其他支脉全部被排除在继承之外,因此继承权就归于同族人、也就是和死者继承了同一姓氏的所有罗马公民所有。因此在我们观察的这个时代,如果没有一个有效的“遗命”,罗马人的已经解放的儿子就完全丧失权利,与此同时,

assumption that he died childless, there was imminent risk that his possessions would escape from the family altogether, and devolve on a number of persons with whom he was merely connected by the sacerdotal fiction that assumed all members of the same *gens* to be descended from a common ancestor. The prospect of such an issue is in itself a nearly sufficient explanation of the popular sentiment; but, in point of fact, we shall only half understand it, if we forget that the state of things I have been describing is likely to have existed at the very moment when Roman society was in the first stage of its transition from its primitive organisation in detached families. The empire of the father had indeed received one of the earliest blows directed at it through the recognition of Emancipation as a legitimate usage, but the law, still considering the Patria Potestas to be the root of family connection, persevered in looking on the emancipated children as strangers to the rights of Kinship and aliens from the blood. We cannot, however, for a moment suppose that the limitations of the family imposed by legal pedantry had their counterpart in the natural affection of parents. Family attachments must still have retained that nearly inconceivable sanctity and intensity which belonged to them under the Patriarchal system; and so little are they likely to have been extinguished by the act of emancipation, that the probabilities are altogether the other way. It may be unhesitatingly taken for granted that enfranchisement from the father's power was a demonstration, rather than a severance, of affection—a mark of grace and favour accorded to the best-beloved and most esteemed of the children. If sons thus honoured above the rest were absolutely deprived of their heritage by an Intestacy, the reluctance to incur it requires no farther explanation. We might have assumed *à priori* that the passion for Testacy, was generated by some moral injustice entailed by the rules of Intestate succession; and here we find them at variance with the very instinct by which early society was cemented together. It is possible to put all that has been urged in a very succinct form. Every dominant sentiment of the primitive Romans was entwined with the relations of the family. But what was the Family ? The Law defined it one way—natural affection another. In the conflict between the two, the feeling

假定他在死亡时没有儿子，那么他的家族就有完全失去其财产而将这些财产转移给其他一群人的迫切危险，这些人只是因为祭司的拟制而假定为因为同族所以和他来自同一个祖先。这种情况本身就几乎可以说明上述的大众情绪为什么会产生了；但是事实上，如果我们忘记了我描述的情况很有可能发生这样一个时期，即罗马社会正处于其家族分离的原始组织过渡的第一个阶段，那么我们仅仅只理解了一半。承认“解放”是合法的惯例是对父权王国的最早打击，但是虽然法律仍旧认定“家长权”是家族关系的根本，被解放的儿子却始终被视为“亲属关系”权利之外的陌生人和血缘之外的外人。但是我们不能因此就认为法律上的迂腐规定会像对家族的种种限制一样对家长的自然情感有影响。家族依恋一定仍然保持着“宗法”制度下那种近乎难以想象的神圣和强烈；而且家族依恋很少可能因为解放行为而消失，可能性正好完全相反。我们可以毫不犹豫理所当然地认为，从父权下得到解放不仅不是情感上的断绝，相反更是情感的体现——这是对最深爱和最尊重的子嗣给予的一种仁慈和宠爱的标志。如果在所有子嗣中这么受到宠爱的儿子会因为“无遗嘱死亡”而被绝对剥夺继承权，那么他的不情愿不用多解释就可以明白。我们也许可以先天地假定，人们“立遗嘱”的热情来自于“无遗嘱”继承的规定所导致的某种道德上的不公平；在这里我们可以发现，这种“无遗嘱”的继承规定和古代社会借以团结在一起的天性是不一致的。我们可以把上述的一切用一种简洁的形式表现。原始罗马人每一种处于支配地位的情绪，都和家族的各种关系缠绕在一起。但是“家族”是什么？法律对它进行了定义——自然情感上却有另一种定义。这两者的冲突产生了我们将要分析的这种情感，它用

we would analyse grew up, taking the form of an enthusiasm for the institution by which the dictates of affection were permitted to determine the fortunes of its objects.

I regard, therefore, the Roman horror of Intesracy as a monument of a very early conflict between ancient law and slowly changing ancient sentiment on the subject of the Family. Some passages in the Roman Statute-Law, and one statute in particular which limited the capacity for inheritance possessed by women, must have contributed to keep alive the feeling; and it is the general belief that the system of creating Fidei-Commissa, or bequests in trust, was devised to evade the disabilities imposed by those statutes. But the feeling itself, in its remarkable intensity, seems to point back to some deeper antagonism between law and opinion; nor is it at all wonderful that the improvements of jurisprudence by the Praetor should not have extinguished it. Everybody conversant with the philosophy of opinion is aware that a sentiment by no means dies out, of necessity, with the passing away of the circumstances which produced it. It may long survive them; nay, it may afterwards attain to a pitch and climax of intensity which it never attained during their actual continuance.

The view of a Will which regards it as conferring the power of diverting property from the Family, or of distributing it in such uneven proportions as the fancy or good sense of the Testator may dictate, is not older than that later portion of the Middle Ages in which Feudalism had completely consolidated itself. When modern jurisprudence flist shows itself in the rough, Wills are rarely allowed to dispose with absolute freedom of a dead man's assets. Wherever at this period the descent of property was regulated by Will—and over the greater part of Europe moveable or personal property was the subject of Testamentary disposition —the exercise of the Testamentary power was seldom allowed to interfere with the right of the widow to a definite share, and of the children to certain fixed proportions, of the devolving inheritance. The shares of the children, as their amount shows, were determined by the authority of Roman law. The provision for the widow was attributable to the exertions of the Church, which never relaxed its solicitude for the interest of wives surviving their husbands—winning, perhaps one of the most arduous of its triumphs when, after exacting for two or three centuries an express promise from the husband at

其热情的形式欢迎一种制度，这种制度允许人们根据感情的指令来决定对象的命运。

因此在我看来，罗马人对于“无遗嘱死亡”的恐惧，说明了在和“家族”有关的主题上，古代法律和古代情感的缓慢改变两者之间很早就发生了冲突。在罗马“制定法”中的一些规定，特别是有关限制女性继承能力的那个条款，必定是这种情感存在的重要原因；大众一般都相信，“信托遗赠”制度就是为了规避这些规定强加的无能力而创设的。但是这种情感本身令人瞩目的强烈程度，似乎已经说明了在法律和人们的观念中存在的某种更深的对抗；而“裁判官”对法学的修正没有办法消灭这种情感，也是毫不稀奇的。熟悉观念哲学的人都知道，一种情绪必定不会因为产生它的环境消失了而必然消亡。它可能会比环境存活得更加长久；不，它也可能达到一个在环境存续期间从来没有达到过的激烈的顶峰和高潮。

将一份“遗嘱”看成是授予把财产从家族中转出来的权力，或是把财产根据“遗嘱人”的偏好或机智而分成许多不平均的部分，这种观点在封建制度已完全巩固的中世纪的后半期出现。当现代法学最初以简陋的形式出现时，很少会允许用遗嘱来绝对自由处分一个死亡者的财产。在这段时期内无论在什么样的情况下，财产的遗传由“遗嘱”控制——在大部分欧洲，遗嘱处分的主体是动产或个人财产——遗嘱权力的行使不能妨碍寡妇获得一定份额的遗产的权利，同样不能妨碍子嗣取得固定比例份额的权利。子嗣获得的份额根据罗马法的规定用数量表示出来。关于寡妇的规定应当归功于教会的努力，它始终不放松对失去丈夫的妻子的利益的关怀——经过两到三世纪的坚决要求之后，才赢得

marriage to endow his wife, it at length succeeded in engrafting the principle of Dower on the Customary Law of all Western Europe. Curiously enough, the dower of lands proved a more stable institution than the analogous and more ancient reservation of certain shares of the personal property to the widow and children. A few local customs in France maintained the right down to the Revolution, and there are traces of similar usages in England; but on the whole the doctrine prevailed that moveables might be freely disposed of by Will, and, even when the claims of the widow continued to be respected, the privileges of the children were obliterated from jurisprudence. We need not hesitate to attribute the change to the influence of Primogeniture. As the Feudal law of land practically disinherited all the children in favour of one, the equal distribution even of those sorts of property which might have been equally divided ceased to be viewed as a duty. Testaments were the principal instruments employed in producing inequality, and in this condition of things originated the shade of difference which shows itself between the ancient and modern conception of a Will. But, though the liberty of bequest, enjoyed through Testaments, was thus an accidental fruit of Feudalism, there is no broader distinction than that which exists between a system of free Testamentary disposition and a system, like that of the Feudal land-law, under which property descends compulsorily in prescribed lines of devolution. This truth appears to have been lost sight of by the authors of the French Codes. In the social fabric which they determined to destroy, they saw Primogeniture resting chiefly on Family settlements, but they also perceived that Testaments were frequently employed to give the eldest son precisely the same preference which was reserved to him under the strictest of entails. In order, therefore, to make sure of their work, they not only rendered it impossible to prefer the eldest son to the rest in marriage-arrangements, but they almost expelled Testamentary succession from the law, lest it should be used to defeat their fundamental principle of an equal distribution of property among children at the parent's death. The result is that they have established a system of small perpetual entails, which is infinitely nearer akin to the

了也许是所有的胜利中最艰难的一个胜利，即丈夫在结婚时就明确地保证赡养他的妻子，到最后成功地把“亡夫遗产”的原则列入了全西欧的“习惯法”中。很奇怪的是，以土地作为扶养寡妇的财产的制度，比起类似的和更古老的为寡妇和子嗣保留的固定分额动产的制度，被证明为更加稳定。这种权利在法兰西有些地方风俗中，一直保持到了“革命”时代，在英国也有类似习惯的痕迹；但是基本上，根据盛行的学理，动产可以由“遗嘱”自由处分，而且，尽管寡妇的要求得到继续尊重，但子嗣的特权则被从法学中删除了。我们可以毫不犹豫地将这种变化归结于“长子继承制”的影响。封建的土地法为了一个子嗣几乎剥夺了其他所有儿子的继承权，甚至不再将平均地分配那些可以平均分配的财产视为一种义务。“遗命”是造成不平等的主要手段，而在这种情况下产生了古代人和现代人对于“遗嘱”的不同的概念。然而尽管使用“遗命”的手段而享有的遗赠的自由权是封建主义的偶然产物，但是在自由“遗嘱”处分制度和像封建土地法制度那样的其他制度之间，存在着相当巨大的区别，因为在封建土地法制度之下，财产必须按照规定好的遗传顺序而移转。“法兰西法典”的著者似乎忽略了这个事实。在他们决定要破坏的社会组织中，可以看到“长子继承制”主要是建筑在“家族”财产的授予的基础之上，但同时他们也察觉到，“遗命”也常常为长子保留了和在最严格的限定继承下完全一样的优先权。因此，为了确定他们的工作，他们不仅使长子在婚姻协议中不能优先于其他几个儿子，而且把“遗嘱继承”排除在法律之外，防止它的适用会使他们的基本原则，即在父亲死亡时财产应当由诸子平均分配的原则无法成立。其结果就是他们建立了一个小范围的永久限定继承制度，这种制度非常接近于