THE LAW OF SUCCESSION IN THE LATER ROMAN REPUBLIC

BY

ALAN WATSON

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FOR

REUVEN AND SHOSHANNA YARON

PREFACE

THIS book completes the series of volumes on the substantive law of the last two hundred years of the Roman Republic, and follows on the author's *The Law of Obligations in the Later Roman Republic* (Clarendon Press, 1965), *The Law of Persons in the Later Roman Republic* (Clarendon Press, 1967), and *The Law of Property in the Later Roman Republic* (Clarendon Press, 1968). The aim throughout has been the same; to examine all the texts which directly throw light on the law of the period, but to exclude from the argument texts which do nothing more than illustrate the law of an earlier or later time. In this way it is hoped it will be possible to see how much can be known of the law of the later Roman Republic, and the view of it will not be obscured by preconceptions of the course of development.

The law of succession, which is so closely connected with the family and with social custom, was of great interest at Rome to lawyer and non-lawyer alike. It occupies what seems to us a disproportionately large part of the legal sources, and questions of principle and individual problems abound in the writings of Cicero and other non-jurists. Here more clearly than anywhere else can be seen the jurists' love of fine distinction, the praetors' reforming zeal, and, at the same time, the force of tradition in law. This volume, like the preceding ones, should be of interest to the social historian as well as to the lawyer.

I am deeply in the debt of Mr. Robin Seager, who read the whole typescript with a historian's eye, Professor Reuven Yaron, Professor A. M. Honoré, and Mr. John Barton, who read much of it and discussed important problems with me, and to many others who helped with particular points or supplied books not readily available. I am most grateful, too, to the staff of the Bodleian and Codrington libraries and of the library of the University of Glasgow for unending courtesy and aid.

ALAN WATSON

Edinburgh
May 1969

ABBREVIATIONS

AG	*Archivio giuridico.*
Beseler, *Beiträge* i–v	Beseler, *Beiträge zur Kritik der römischen Rechtsquellen* i–iv (Tübingen, 1910–20), v (Leipzig, 1931).
BIDR	*Bullettino dell'Istituto di Diritto Romano.*
Biondi, *Successione*	Biondi, *Successione testamentaria e donazioni*, 2nd edit. (Milan, 1955).
Bolla, *Erbrecht*	Bolla, *Aus römischem und bürgerlichem Erbrecht* (Vienna, 1950).
Buckland, *Textbook*	Buckland, *A Textbook of Roman Law*, 3rd edit., revised by Stein (Cambridge, 1963).
Costa, *Cicerone* i	Costa, *Cicerone giureconsulto* i, 2nd edit. (reprinted, Rome, 1964).
De Sarlo, *AV*	De Sarlo, *Alfeno Varo e i suoi digesta* (Milan, 1940).
De Zulueta, *Gaius* ii	De Zulueta, *The Institutes of Gaius* part ii, *Commentary* (Oxford, 1953).
Grosso, *Legati*	Grosso, *I legati nel diritto romano*, 2nd edit. (Turin, 1962).
Index Itp.	*Index Interpolationum quae in Iustiniani Digestis inesse dicuntur* i, ii, iii, and *Supplementum* (Weimar, 1929–35).
Kaser, *RPR* i, ii	Kaser, *Das römische Privatrecht* (Munich, 1955 (i), 1959 (ii)).
Kaser, *ZPR*	Kaser, *Das römische Zivilprozessrecht* (Munich, 1966).
La Pira, *Successione ereditaria*	La Pira, *La successione ereditaria intestata e contro il testamento* (Florence, 1930).
Lenel, *EP*	Lenel, *Das Edictum perpetuum*, 3rd edit. (Leipzig, 1927).
Lenel, *Pal.* i, ii	Lenel, *Palingenesia Iuris Civilis* i, ii (Leipzig, 1889).
LQR	*Law Quarterly Review.*
Milan Digest	*Digesta Iustiniani Augusti*, edited by Bonfante, Fadda, Ferrini, Riccobono, and Scialoja (Milan, 1931).
RE	Pauly–Wissowa, *Real-Encyclopädie der classischen Altertumswissenschaft* (Stuttgart, 1873–).
RHD	*Revue historique de droit.*
RIDA	*Revue internationale des droits de l'antiquité.*

Rotondi, *Leges*	Rotondi, *Leges publicae populi romani* (reprinted, Hildesheim, 1966).
SDHI	*Studia et Documenta Historiae et Iuris.*
Tijd.	*Tijdschrift voor rechtsgeschiedenis.*
TLL	*Thesaurus Linguae Latinae* (Leipzig, 1900–).
Voci, *Diritto ereditario* i, ii	Voci, *Diritto ereditario romano*, 2nd edit. (Milan, 1967 (i), 1963 (ii)).
Watson, *Obligations*	Watson, *The Law of Obligations in the Later Roman Republic* (Oxford, 1965).
Watson, *Persons*	Watson, *The Law of Persons in the Later Roman Republic* (Oxford, 1967).
Watson, *Property*	Watson, *The Law of Property in the Later Roman Republic* (Oxford, 1968).
ZSS	*Zeitschrift der Savigny-Stiftung* (Romanistische Abteilung).

CONTENTS

1

HEREDITAS

IN the last two centuries of the Roman Republic (and even considerably earlier) succession on death could be under a will or on intestacy. The primary object of the law of succession was the discovery of the heir or heirs. Indeed, the question "Who is heir?" was the sole matter relevant for intestate succession. In testate succession other questions involving, for instance, legacies or manumissions were also relevant, but the sole substantive essential of a will was the appointment of an heir. A republican definition of *hereditas* has survived and it, in fact, brings out the importance of the discovery of the heir: *Hereditas est pecunia quae morte alicuius ad quempiam pervenit iure nec ea aut legata testamento aut possessione retenta.*[1] Thus, significantly, an inheritance is defined not in terms of the whole property left by a deceased, but as the part of the deceased's property which comes to the heir.[2] In this the definition contrasts with the way the word *hereditas* is used in a number of sources.[3]

[1] Cicero, *top.* 6. 29. *Sic igitur veteres praecipiunt: cum sumpseris ea quae sint ei rei quam definire velis cum aliis communia, usque eo persequi, dum proprium efficiatur, quod nullam in aliam rem transferri possit. Ut haec: Hereditas est pecunia. Commune adhuc; multa enim genera pecuniae. Adde quod sequitur: quae morte alicuius ad quempiam pervenit. Nondum est definitio; multis enim modis sine hereditate teneri pecuniae mortuorum possunt. Unum adde verbum: iure; iam a communitate res diiuncta videbitur, ut sit explicata definitio sic: Hereditas est pecunia quae morte alicuius ad quempiam pervenit iure. Nondum est satis; adde: nec ea aut legata testamento aut possessione retenta; confectum est.* . . . No jurist is named as the author of the definition and it is not intended to enter into any discussion of ultimate authorship. On the problem of the provenance of the legal definitions, maxims, etc., in the *topica*, see most recently Crifò, 'Per una lettura giuridica dei *topica* di Cicerone', *Annali dell'Istituto Italiano per gli Studi Storici* i (1967) 113ff., and the authors he cites.

[2] This aspect of Cicero's definition seems to escape Robbe: *La 'successio' e la distinzione fra 'successio in ius' e 'successio in locum'* (Milan, 1965), pp. 2f. He does, however, properly stress the difference between Cicero's definition and that of Gaius and Julian in D. 50. 16. 24 (Gaius, 6 *ad ed. prov.*) and 50. 17. 62 (Julian, 6 *dig.*): op. cit., pp. 1ff.

[3] A clear instance of the use of *hereditas* to mean the property left by the

We have no definition of *testamentum* but we do know Servius' opinion on its etymology.

Aulus Gellius, *N.A.* 7. 12. 1. Servius Sulpicius iureconsultus, vir aetatis suae doctissimus, in libro de sacris detestandis secundo qua ratione adductus 'testamentum' verbum esse duplex scripserit, non reperio; 2. nam compositum esse dixit a mentis contestatione. 3. Quid igitur 'calciamentum', quid 'paludamentum', quid 'pavimentum', quid 'vestimentum', quid alia mille per huiuscemodi formam producta, etiamne ista omnia composita dicemus? 4. Obrepsisse autem videtur Servio, vel si quis est, qui id prior dixit, falsa quidem, sed non abhorrens neque inconcinna quasi mentis quaedam in hoc vocabulo significatio, sicut hercle C. quoque Trebatio eadem concinnitas obrepsit. 5. Nam in libro de religionibus secundo: 'sacellum' est inquit locus parvus deo sacratus cum ara. Deinde addit verba haec: 'Sacellum' ex duobus verbis arbitror compositum 'sacri' et 'cellae', quasi 'sacra cella'. 6. Hoc quidem scripsit Trebatius; sed quis ignorat 'sacellum' et simplex verbum esse et non ex 'sacro' et 'cella' copulatum, sed ex 'sacro' deminutum?

Thus, Servius wrongly derived *testamentum* from *mentis contestatio*, 'a proving of intention by witnesses'. In reality, the word seems to derive from *testor*,[1] the ending *-mentum* here signifying a tool or means.[2] But Servius' etymology, *non abhorrens neque inconcinna*, is valuable in showing the jurist's attitude to wills. Juristic attitude to etymology is not totally lacking in mystical significance. There is a widespread tendency to think that the knowledge of a name, or knowledge of the origins of a word, gives power or control over, or understanding of, its subject-matter. In the present case the alleged derivation of *testamentum* is indicative of the predominance of the testator's intention and of its proof. Within the limits of the law,[3] the testator's intention as expressed in the will was paramount, no matter how unreasonable this might be or how inconsistent with his other behaviour. Valerius Maximus tells us[4] of a Quintus Caecilius

deceased, not what comes to the heir, is to be found in the wording of the *lex Falcidia*: cf. D. 35. 2. 1 pr. (Paul, *lib. sing. ad legem Falcidiam*); G. 2. 227.

[1] Cf. Ernout and Meillet, *Dictionnaire étymologique de la langue latine*, 4th edit. (Paris, 1959), p. 689.

[2] Cf. Kühner-Holzweissig, *Ausführliche Grammatik der lateinischen Sprache*, i, 2nd edit. (Hanover, 1912), p. 966.

[3] e.g. a peregrine could not be appointed heir; *infra*, pp. 26 f.; certain close relatives passed over without justification had a *querella inofficiosi testamenti*; *infra*, pp. 62 ff.

[4] 7. 8. 5.

whose position in life and large fortune were due to the efforts of his friend, Lucius Lucullus. Caecilius had always declared that Lucullus would be his sole heir, and even on his death bed he gave Lucullus his rings—a traditional gift to the heir.[1] But in the will he adopted[2] and instituted as heir to all his property Cicero's friend, Pomponius Atticus. The Roman populace was so incensed that it dragged the body with a rope round its neck through the streets. The account ends: *itaque nefarius homo filium quidem et heredem habuit quem voluit, funus autem et exequias quales meruit.* The institution in the will was valid and effective though the testator had always said he would institute another and had given that person his rings. Likewise, Valerius Maximus recounts[3] that Lucius Valerius Heptachordus, who is probably the L. Valerius Flaccus, praetor in 63 B.C. who died shortly after 54 B.C.,[4] perversely instituted as sole heir his enemy, Cornelius Balbus, who had even instigated capital criminal proceedings against him.[5]

In view of the stress on the intention of the testator it is perhaps surprising to find that the heir was not always regarded as morally bound to any marked extent to carry out the wishes of the testator. Certain provisions of a will, such as *fideicommissa* in the Republic,[6] were not legally binding, and a testator would be wise to exact a promise from his future heir. This promise, too, would not be legally binding, but would be morally. Thus, Quintus Fadius Gallus instituted Publius Sextilius Rufus as his heir, and in the will was written that Fadius had requested Sextilius to allow the inheritance to pass to his daughter. Sextilius held a consultation with his friends at which he denied the arrangement and declared that since he had sworn to maintain the *lex Voconia*[7] he would not break his oath except on his friends' advice. Sextilius kept the *hereditas*.[8] The story makes it plain that no great moral obloquy

[1] Cf., e.g., Valerius Maximus, 7. 8. 8; 7. 8. 9.

[2] Whether this was a true adoption or merely institution coupled with a direction to take the testator's name cannot be determined.

[3] 7. 8. 7.

[4] Cf. Münzer, *RE* viiiA. 41.

[5] Another case where the person who deserved to be, and was treated as, heir was passed over in the will is in Valerius Maximus, 7. 8. 9, but it is not known whether the episode is Republican: cf. Münzer, *RE* xviii. 727.

[6] Cf. *infra*, pp. 35 ff.

[7] Cf. *infra*, pp. 29 ff.

[8] Cicero, *de fin.* 2. 17. 55; 2. 18. 58.

would fall upon Sextilius for refusing to carry out the testator's instructions while keeping the *hereditas*, but he was concerned to deny that he had made any arrangement with the testator.[1]

In the nature of things, intestate succession presents far fewer legal problems and is much less complex than the law of testate succession. So in a legal discussion of both, the weight is inevitably on testate succession. But it should be emphasized that modern scholarship seriously underestimates just how common and important intestacy was in Rome.[2]

One of the most striking features of succession in the late Republic was that the heir—with certain qualifications to be noted shortly—was liable to perform the *sacra privata* of the deceased. It may have been that in early law these duties passed to the members of the deceased's family whether or not they were also the heirs.[3] But long before the beginning of our period it was established that the person primarily liable was the heir, whether or not he was a member of the family.

Cicero tells us *sacra cum pecunia pontificum auctoritate, nulla lege coniuncta sunt.*[4] And he describes two rather different sets of pontifical rules on the subject, one earlier, one rather later. These rules seem to derive from pontifical decisions in individual cases, not from pontifical enactments.[5] Linked with one aspect of the later set of rules is the name of Tiberius Coruncanius who was *pontifex maximus* in 254 B.C.,[6] and so it is reasonable to suppose that what Cicero lists as the earlier set of rules is, as a whole, older than the middle of the third century B.C. Of this set, Cicero, *de leg.* 2. 20. 49, says:

> tribus modis sacris adstringitur: *aut* hereditate, aut si maiorem partem pecuniae capiat, aut si maior pars pecuniae legata est, si inde quippiam ceperit.

[1] Cf., in general, Genzmer, 'La genèse du fidéicommis comme institution juridique', *RHD* xl (1962), 319 ff., especially at pp. 329 ff.

[2] Cf. *infra*, pp. 175 ff.

[3] Cf., e.g., Wieacker, 'Hausgenossenschaft und Erbeinsetzung', *Festschrift Siber* (Leipziger rechtswissenschaftliche Studien 124, 1940), p. 8; Kaser, *Das altrömische Ius* (Göttingen, 1949), p. 339.

[4] *de leg.* 2. 21. 52.

[5] On this very disputed point see, above all, Franciosi, *Usucapio pro herede* (Naples, 1965), pp. 133 ff., and the authors he cites; cf. Watson, *Property*, p. 33.

[6] Cf. Kunkel, *Herkunft und soziale Stellung der römischen Juristen*, 2nd edit. (Graz, Vienna, Cologne, 1967), p. 7.

Thus, at this stage, according to the text, those liable were the heir, or anyone who took[1] a greater share of the *pecunia*, or, if a greater share of the *pecunia* was left by way of legacy, anyone who took a part.[2]

The second set of rules—which alone comes within the historical scope of this volume—existed in Cicero's own day and he learnt the rules from Quintus Mucius Scaevola.[3]

de leg. 2. 19. 48 Quaeruntur enim qui adstringantur sacris. Heredum causa iustissima est: nulla est enim persona quae ad vicem eius qui e vita emigrarit propius accedat. Deinde qui morte testamentove eius tantundem capiat quantum omnes heredes: id quoque ordine; est enim, ad id quod propositum est, adcommodatum. Tertio loco, si nemo sit heres, is qui de bonis, quae eius fuerint, quom moritur, usu ceperit plurimum possidendo. Quarto, si [qui] nemo sit qui ullam rem ceperit, de creditoribus eius *qui* plurimum servet. 49. Extrema illa persona est ut, si is qui ei, qui mortuus sit, pecuniam debuerit neminique eam solverit, proinde habeatur quasi eam pecuniam ceperit.

First, the heirs, then anyone who by the death or will took as much as all the heirs; thirdly, if there was no heir, the person who usucapted the greatest share of the deceased's property; fourthly, if no one usucapted any of it, that creditor who recovered most;[4] finally, a debtor of the deceased, who paid the debt to no one.

The performance of the *sacra familiaria* was under the supervision of the *pontifices*,[5] and it obviously had to be taken seriously. It was onerous and was frequently regarded as troublesome. Thus, two Plautine texts treat the taking of the *hereditas* without responsibility for the *sacra* as supreme joy.

Captivi, 775: sine sacris hereditatem sum aptus ecfertissumam.

The parasite, Ergasilus, has come into possession of some news

[1] Most likely by *usucapio*.

[2] No significance should be attached to the order of the second and third rules. Indeed, there is doubt as to the originality of the third rule: see now Watson, *Property*, p. 36 n. 2, and the authorities cited.

[3] *de leg.* 2. 19. 47 ff.

[4] Cf. most recently, with full citation of literature, Franciosi, 'I creditori e l'obbligo dei *sacra*', *Synteleia Arangio-Ruiz* ii (Naples, 1964), pp. 643 ff.

[5] Cf., e.g., Wissowa, *Religion und Kultus der Römer*, 2nd edit. (Munich, 1912), p. 400.

which, he hopes, will make his fortune. He declares he has acquired a *hereditas*—stuffed fit to burst—*sine sacris.*

Trinummus, 484: cena hac annona est sine sacris hereditas.

The slave, Stasimus, says that prices being what they are, a dinner is a *sine sacris hereditas.* We also know from Festus that *hereditas sine sacris* was proverbial.

⟨*SINE SACRIS HEREDITAS*⟩ in proverbio dici solet, . . . sine ulla incommodi appendice: quod olim sacra non solum publica curiosissime administrabant, sed etiam privata; relictusque heres sic⟨ut⟩ pecuniae, etiam sacrorum erat; ut ea diligentissime administrare esset necessarium.

In the circumstances it was inevitable that jurists would devise ways for individuals to avoid the *sacra.* One way was for the testator to order the heir to share the estate with another, i.e. create a *legatum partitionis*,[1] but under the deduction of a small sum from the division. Thus, the legatee would take less than the heir and not be liable for the *sacra.*

Cicero, *de leg.* 2. 21. 53. Habeo ius pontificium. Quid huc accessit ex iure civili? Partitionis caput scriptum caute, ut centum nummi deducerentur: inventa est ratio, cur pecunia sacrorum molestia liberaretur. Quid, si hoc qui testamentum faciebat cavere noluisset? admonet iuris consult*us* hic quidem ipse Mucius, pontifex idem, ut minus capiat quam omnibus heredibus relinquatur. Superi*ores* dicebant, quicquid cepisset, adstringi: rursus sacris liberatur. Hoc vero nihil ad pontificium ius sed e medio est iure civili, ut per aes et libram heredem testamenti solvant et eodem loco res sit, quasi ea pecunia legata non esset, si is, cui legatum est, stipulatus est id ipsum, quo*d* legatu*m* est, ut ea pecunia ex stipulatione debeatur sitque ea non *e testamento sibi numerata.*

2. 20. 50. Atque etiam hoc docent Scaevolae, quom est partitio, ut si in testamento deducta scripta non sit, ipsique minus ceperint quam omnibus heredibus relinquatur, sacris ne alligentur.

Where the testator had not wished to take this precaution, Publius Mucius[2] advised the legatee simply to take less than all the heirs. This would also achieve the object. Cicero is scornful that the Scaevolae, who believed that no one could be a good pontiff unless

[1] Cf. *infra*, pp. 128 ff.

[2] In § 53 *ipse Mucius* must refer to Publius Mucius, who is the last mentioned of the two in § 52. In § 50 the device is ascribed simply to the Scaevolae.

he knew the civil law,[1] should, because of their knowledge of civil law, give advice on avoiding the *sacra*.

§ 53 also shows another way for a legatee to be freed from the burden of the *sacra*. The legatee releases the heir *per aes et libram*, and so it is as if there was no legacy. The legatee then takes a stipulation from the heir for the amount of the legacy, and this sum is then due under the contract, not under the will, and the promisor is not liable for the *sacra*.[2] Cicero characterizes this technique as having nothing to do with pontifical law and as drawn completely from the *ius civile*.[3]

Sometimes there might be complications.

Cicero, *de leg.* 2. 20. 51. Veluti si quis minus cepisset, ne sacris alligaretur, *et* post de eius heredibus aliquis exegisset pro sua parte, id quod ab eo, quo*i* ipse heres esset, praetermissum fuisset eaque pecunia non minor esset facta cum superiore exactione quam heredibus omnibus esset relicta, qui eam pecuniam exegisset, solum *sine* coheredibus sacris alligari.

Thus, if someone, in order to avoid liability for the *sacra*, takes less than his share, and he in his turn dies and one of his own heirs exacts for his share that part of the first *hereditas* which was not taken by the second testator, then this heir will himself become bound for the *sacra* of the first testator, but his *coheredes* will not be so liable.[4]

[1] *de leg.* 2. 19. 47: . . . *Saepe, inquit Publi filius, ex patre audivi, pontificem bonum neminem esse, nisi qui ius civile cognosset.* Cf. Bruck, *Über römisches Recht im Rahmen der Kulturgeschichte* (Berlin, Göttingen, Heidelberg, 1954), pp. 24ff. especially at pp. 29ff.

[2] For an explanation why *novatio* is not used see Watson, *Obligations*, pp. 215f.

[3] An incomplete account of the technique is found in Cicero, *de leg.* 2. 20. 51: *Quin etiam cavent ut, cui plus legatum sit quam sine religione capere liceat, is per aes et libram heredes testamenti solvat, propterea quod eo loco res est ita soluta hereditate, quasi ea pecunia legata non esset.*

[4] Also on *privata sacra* in the Republic, see G. 2. 55; Valerius Maximus, 7. 7. 2.

2

FORMS OF WILLS

IT appears that from early times there were three forms of wills: that made *calatis comitiis*, that *in procinctu*, and the *testamentum per aes et libram*.

The first form was made in the *comitia calata* which were held twice each year (on 24 March and 24 May)[1] for the purpose of making wills.[2] It fell into desuetude[3] and there is no evidence that it survived into the later Republic. Indeed, it seems to have been so limited by its form[4] that it is unlikely to have long survived the development of the *testamentum per aes et libram* as a will in which an heir could be appointed as well as legacies ordained.

The second form, *testamentum in procinctu*, was a military will made when the army was drawn up in battle array after the commander had taken the auspices.[5] It was a will which needed no formalities,[6] and it was obsolete in the time of Cicero.

de nat. deor. 2. 3. 9. An Atti Navii lituus ille, quo ad investigandum suem regiones vineae terminavit, contemnendus est? Crederem, nisi eius augurio rex Hostilius maxima bella gessisset, sed neglegentia

[1] Cf., e.g., Mommsen, *Römisches Staatsrecht* ii. 1, 3rd edit. (Leipzig, 1887), p. 38 n. 2; Kübler, *RE* VA. 986.

[2] G. 2. 101; *Epit. Ulp.* 20. 2; Aulus Gellius, *N.A.* 15. 27. 1, 2, 3; J. 2. 10. 1; Theophilus, *Paraph.* 2. 10. 1.

[3] G. 2. 103. Paoli sees a reminiscence in the will of Julius Caesar: 'Le testament *calatis comitiis* et l'adrogation d'Octave', *Studi Betti*, iii (Milan, 1962), pp. 527 ff. at, e.g., p. 551.

[4] For the will *calatis comitiis* in general see now Kaser, *RPR* i, pp. 58f. and the references he gives.

[5] Appears from Cicero, *de nat. deor.* 2. 3. 9; *infra*, pp. 8f. The suggestion of Scherillo that the *testamentum in procinctu* was made in the *comitia centuriata* is unconvincing: 'Appunti sul testamento *in procinctu* nel diritto romano', *Scritti Giuffrè*, i (Milan, 1967), pp. 781ff. Aulus Gellius, *N.A.* 15. 27, on which Scherillo relies, shows primarily that in the first book of Laelius Felix *ad Quintum Mucium* the Roman assemblies were described in general, not particularly with reference to the making of wills.

[6] Appears from Cicero, *de orat.* 1. 53. 228: cf. *infra*, pp. 9f. See also G. 2. 101, 102, 103; Aulus Gellius, *N.A.* 15. 27. 3; J. 2. 10. 1; Theophilus, *Paraph.* 2. 10. 1.

nobilitatis, augurii disciplina omissa veritas auspiciorum spreta est, species tantum retenta. Itaque maximae rei publicae partes, in his bella, quibus rei publicae salus continetur, nullis auspiciis administrantur; nulla peremnia servantur, nulla ex acuminibus, nulla, *cum* viri vocantur, ex quo in procinctu testamenta perierunt. Tum enim bella gerere nostri duces incipiunt, cum auspicia posuerunt.

Thus, we are told that *testamenta in procinctu* could no longer be made since the generals began to wage war only after they had laid down their *auspicia*.[1,2] But such wills were still in existence in the middle of the second century B.C.

Velleius Paterculus, *Hist. Rom.* 2. 5. 2. Et ante eum paucis annis tam severum illius Q. Macedonici in his gentibus imperium fuit, ut, cum urbem Contrebiam nomine in Hispania oppugnaret, pulsas praecipiti loco quinque cohortes legionarias eodem protinus subire iuberet, (3) facientibusque omnibus in procinctu testamenta, velut ad certam mortem eundum foret, non deterritus proposito, quem moriturum miserat militem victorem recepit: tantum effecit mixtus timori pudor spesque desperatione quaesita. Hic virtute ac severitate facti, at Fabius Aemilianus Pauli exemplo disciplina in Hispania fuit clarissimus.

The events described took place in 142 B.C.[3] We can be reasonably certain that Paterculus is here using *in procinctu* technically with reference to *testamenta* and not non-technically, 'ready for battle', since the word *procinctus* does not appear elsewhere in his writings despite his numerous accounts of battles. Since this form of will had been obsolete so long when Paterculus was writing, it is plausible to hold that he found the reference to it in his sources.[4] Cicero, *de orat.* 1. 53. 228, provides some confirmation that the *testamentum in procinctu* was still used in the middle of the second century B.C.

Reprehendebat igitur Galbam Rutilius, quod is C. Sulpici Gali propinqui sui Q. pupillum filium ipse paene in umeros suos extulisset, qui

[1] On the text see Pease, *M. Tulli Ciceronis de natura deorum* ii (Cambridge, Mass., 1958), pp. 566ff.

[2] Cf. Cicero, *de div.* 2. 36. 76.

[3] Cf. Frontinus, *Strat.* 4. 1. 23; Valerius Maximus, 2. 7. 10: Broughton, *The Magistrates of the Roman Republic* i (New York, 1951), p. 475.

[4] On the vexed question of Paterculus' sources see Schanz–Hosius, *Geschichte der römischen Literatur bis zur Gesetzgebung des Kaisers Justinians* ii, 4th edit. (Munich, reprinted 1959), pp. 584f.