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BREAKING THE LAW TO DO THE RIGHT THING: THE GRADUAL EROSION OF THE VOCONIAN LAW IN ANCIENT ROME‡

The Voconian Law (*Lex Voconia*) passed at Rome in 169-168 BC laid down various strictures on inheritance which were to inconvenience subsequent generations. The precise terms of the law and the reason for its enactment have been much discussed by scholars. It is not my present concern to add to speculations as to its purpose and content, but to examine the way in which Romans chose to deal with the problems posed by two of its provisions: that no legatee might take more from an estate than the heir, and that no testator of the top census class could institute a woman as heir.[1] It is my contention that the latter of these in particular conflicted with established notions of family obligation and that the means chosen to deal with this conflict furnish a special insight into Roman attitudes to the law.

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Most of the authors cited can be found in any university library in the Loeb Classical Library series, which has Latin on one side and an English translation on the other, or the Budé editions, with a parallel French translation. Where I know of the existence of a Penguin Classic, I have mentioned it under the author's name – as I have any particularly helpful translation.

It says something of the nature of classical scholarship that the legal authors (as distinct from "literary" sources such as Pliny and Cicero) are usually classified separately. The classical jurists Paul and Ulpian are not commonly translated in their own right, but may be found embedded in English versions of Justinian's *Institutes* or the *Digest*.

The following abbreviations of Latin authors are employed:

Cic	Cicero
Verr II	the second Verrine oration
Rep	*de Re Publica* (sometimes called "On the Commonwealth")
leg	*de legibus* (On the Laws)
Att	letters to Atticus (Penguin)
fin	*de finibus bonorum. . .*
Gai	*Gaius*
Inst	*Institutes* (parallel trans in F de Zulueta's edn, Vol I (1946))
Aul Gell	Aulus Gellius
NA	*Noctes Atticae* (Attic Nights)
Just	Justinian
Inst	*Institutes* (parallel trans with commentary by J A C Thomas (1975))
Dig	*Digest*
Liv	Livy
	Ab Urbe Condita – usually entitled "The History of Rome"
Plin	Pliny (the Younger)
Ep	*Epistulae* – Letters (Penguin)
Pan	*Panegyricus*
Val Max	Valerius Maximus
CIL	Corpus Inscriptionum Latinarum – an enormous collection of inscriptions in Latin, not trans.

Note, too, the stock abbreviation of *fideicommissum* to *fc,* and of *senatusconsultum* to *sc* (plurals: *fca, sca*).

1 The terms of the law are not all known, but this much is derived from scattered references in, eg, Cic *Verr* II.1. 42 (107), *Rep* III.7, *leg* II.19.48 Gai II.226,274; Ulpian 22.17; Paul *Sententiae* IV.8.1-9.

A small sample of the scholarship on the subject is: Mommsen, "De Lege Voconia:

In spite of my stated intention not to be drawn unduly on the vexed question of the purpose of the Voconian Law, it must be set in its historical context. Earlier laws[2] had limited legacies and gifts. The Voconian Law seems to have been aimed at improving on these statutes and, like them, stressed the ties of family over those of preference. It is rather ironic that the Voconian Law later caused problems for many who put family first by its flat prohibition of the institution of female heirs by the very wealthy. The protracted war with Hannibal 218-201 BC, followed by wars essentially of conquest in the Greek East 197-167 BC must have resulted in a great reduction of manpower and a consequent accretion of wealth in female hands. The attempt, unsuccessful as it was, to extend sumptuary measures restricting female display beyond the Hannibalic war suggests that some elements of the Roman ruling class found the very idea of female luxury distasteful.[3] It has been suggested [4] that the impetus came from the fact that women and orphaned children were not subject to the military *tributum* levied at times of national stress and that the Voconian Law was designed specifically to increase the revenue of the state in time of war.

Be that as it may, the ruling concerning women affected only the wealthiest group in the state – the group which, as it happened, was most influential in promulgating legislation. Members of other census categories remained free to institute sisters, wives and daughters as heirs. In the absence of a will, the rules of the Twelve Tables governing intestate succession applied. It is quite likely that these rules pre-dated the possibility of individual testament and were even more venerable than the law of the Twelve Tables,[5] codified in the mid-fifth century BC and revered ever after as the basis of the Roman legal system.[6]

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1 *Cont.*
excursus ad Juv. *Sat.* 1.55" *Ges Schr* III; Steinwenter, "Lex Voconia" entry in Pauly-Wissowa, *Realenzyklopädie* (1925) Vol XII (generally referred to as P-W or RE by classicists); Kaser, *Das Römische Privatrecht* I (rep 1971) sections 189 ff; Wesel, "Uber den Zusammenhang der 1 Furia, Voconia u Falcidia" *ZSS* (röm Abteilung) 1xxxi (1964) 308.

2 The *lex Cincia* of ca 204 BC invalidated large gifts (possibly only outside the family circle) and the *lex Furia testamentaria* of ca 201 BC limited the value of legacies granted in wills.

3 The *lex Oppia,* passed during the most stringent period of the war with Hannibal, forbade women to wear gold, dyed cloth or to ride in carriages within Rome. It was revoked in 195 BC, though not without protest. Livy 34.1-8 provides a colourful reconstruction of the debate which raged over the issue in 195 BC.

4 See Pomeroy, "The Relationship of the Married Woman to her Blood Relations in Rome" (1976) 7 *Ancient Society* 215, 222. From 406 BC (Liv *Per* xli) it had been the custom in time of war to impose a levy – *tributum* – on men liable for service in the citizen army. The levy was based on the value of their holdings as assessed by the censors: this assessment determined their assignment to one of the five census classes. It is debatable whether the early census had included men not of military age (ca 18-45 years) and women during this time. See, eg, Brunt, *Italian Manpower 225 BC -AD 14* (1971) 113-115. le Gall, "Un critere de differentiation sociale: la situation de la Femme", in *Recherches sur les Structures Sociales dans l'Antiquite Classique* (1970) 275-277.
The exclusion of women from the *tributum* payment would do much to explain the passing of the law at this time.

5 *Pace* Watson, *Rome of the Twelve Tables* (1975). He sees them essentially as amendments to the existing law.

6 Cf Liv III.34 – echoed in the 4th C AD by Ausonius xi. 61-62. Roman boys learned the Twelve Tables off by heart as part of their formal education and their frequent, reverential citation is the reason for the survival of the segments we have – probably representing one third of the whole.

The Roman system is often characterized as archetypically patriarchal. Certainly a Roman *paterfamilias* had near-absolute authority over his children, who were incapable of owning or administering property during his lifetime (unless "emancipated" by him from his *patria potestas*), and property passed *through* males, but to males and females alike.[7] Thus a man's children inherited equally without distinction as to sex or order of birth on his intestate death. If a son had predeceased the father, the son's surviving children took his share, but the children of a daughter did not inherit. Married daughters might have passed into the succession network of their husbands' families, by *conventio in manum,*[8] but otherwise children – and grandchildren – in the "paternal power" who would become independent on the death of the *paterfamilias* were termed *sui heredes* and had an assumed claim on the family estate.[9] If the *paterfamilias* did not wish them to be equal heirs, he had to disinherit them formally in his will.[10]

There are instances of differential inheritance between sons and daughters – possibly to be explained by the fact that daughters took a substantial portion of the family estate with them into marriage in the form of dowry – but it can be taken that there was a firm tradition at Rome that property passed to daughters. It was a custom which all but the very wealthy were able to continue, and it remained a strong social imperative long after the passing of the Voconian Law. The fact that women tended from about the late second or first centuries BC to remain *in patria potestate* after marriage meant that even adult, married daughters were likely to remain the intestate heirs of their fathers and brothers.

I have chosen to look at the category of daughters in part because they figure in the attested evasions of the Voconian law, but more particularly because they highlight the genuine conflict between the written law and the unwritten code which governed people's lives. Wives and sisters appear in Roman wills, but there was not such a strong tendency from the late Republic to regard them as "rightful heirs" in the same sense as a daughter (who was, after all, a *sua heres*). A testator who passed over his children in favour of a former slave, mistress or

7 Just *Inst* II.13.5, Paul *Sent* 4.8.20.

8 Similarly, the wife of the *paterfamilias* might have been in his *manus* (= *in manu mariti*) and would be entitled to share with her children on her husband's (intestate) death. There were three ways traditionally in which a woman passed into her husband's *manus* (akin to the father's *potestas*) on marriage – see Gai I.109-113. The consequence in each case was that her property passed into his hands for the duration of the marriage and she did not become "independent" (*sui iuris*) until his death. From about the second century BC, the other form of marriage – irritatingly labelled "free marriage" by the scholars of the early twentieth century – became increasingly popular. The two forms co-existed, but in the early empire "*manus* marriage" became virtually extinct. In "free marriage", strict separation of the property of husband and wife was observed, save for the dowry, which was officially the property of the husband for the duration of the marriage.

9 Indicating, according to later jurists, the *paterfamilias*'s position as life-long trustee of the family estate, a reflection of the archaic view of property as a perpetual family possession rather than an individual one. Consider Paul, cited in *Dig* 28.2.11: ". . . even in the *pater's* lifetime, they are regarded as owners in some fashion . . . and so, on his death, they did not appear to take an inheritance but rather do they acquire free administration of the estate." (Thomas's translation).

10 By name in the case of sons: as "all other heirs" in the case of daughters and grandchildren Gai II.128 and compare Ulpian 22.20 ff.

friend would have been universally frowned upon. As we shall see, legislation progressively (if slowly) enforced the notion that children in particular had in some sense a right to inherit, and, in spite of the principle of testamentary freedom, it was always imprudent to exclude them without good cause.[11] Evasion of this law is not to be seen in the same light as modern tax avoidance or administrative corruption in the ancient world. I would argue that the testators who tried to circumvent the Voconian Law were following a recognized social obligation and were viewed sympathetically by respectable people.

In the event, it was not overly difficult to avoid the consequences of the law. Outright gift was not possible in Roman law, although the *lex Cincia* which formulated this principle might have made exceptions for close relations and was a *lex imperfecta,* one of those wonderful Roman laws which declared an act illegal without invalidating it or punishing it.[12] I have found no examples of the use of gift or false sale – the common means today of seeing that children avoid paying death duties on their patrimony – to secure the "rights" of daughters. This need not mean it did not occur, but I have reservations about it.

Dowry was the great exception to the ban on gifts *inter vivos* and was obviously suitable in the case of daughters. Not only could the dowry be paid at the time of marriage, but a father could allocate a sum in his will to be paid on the occasion of his daughter's marriage after his death. Alternatively, a certain portion of the dowry could be paid during the father's – or mother's – lifetime, with the stipulation that the remaining amount be handed over on the death of the parent. The dowries of the daughters of Scipio Africanus the elder seem to have combined these two arrangements. His elder daughter was probably betrothed shortly before his death, and his younger one at some time after it. His wife inherited his estate before the passing of the Voconian Law, and probably arranged the younger daughter's dowry, as well as inheriting the debt of the earlier dowry. Her own death followed the Voconian Law. Her heir and adoptive grandson, Scipio Aemilianus, then proceeded to pay the remaining half of each of the large dowries. The device had enabled the older woman to enjoy her husband's wealth for her lifetime, before passing on a substantial portion of it as an inherited debt to her male heir.[13]

The dowry was at law the property of the husband, and if the woman concerned was in his *manus* any other property which came to her during the marriage was classed as dowry and subsumed in his ownership. A daughter would therefore benefit from such an

11 See, eg, the rather sensational cases cited in Val Max VII.7, and the social assumptions and legal procedures of the younger Pliny's letters, such as *Ep* V.1, VI.33.

12 Although, as Jolowicz points out in his *Historical Introduction to the Study of Roman Law* (1965) 85, the praetor had some power to check the practice.

13 The events are related by the historian Polybius xxxi.26-27. Boyer, "Le droit successoral romain dans les oeuvres de Polybe" (1950) 4 *RIDA* 169 states his opinion that the dowry was set in Scipio Africanus (maior)'s will as a *legatum per damnationem,* the legacy of a debt. Pomeroy, supra n 4, suggested that the intention was to circumvent the Voconian Law. The time span between the death of Africanus in 184 BC and of his widow Aemilia in 162 BC necessitates a dual explanation. See also my forthcoming paper "Polybius on Roman Women and Property" (1985) *AJP* 106.

arrangement, but would not be the owner at law of the property in question until her marriage ended. A woman who was not in her husband's *manus* could accept a legacy or inheritance. In such a case, her father could name someone else heir and grant her a *legatum partitionis,* that is, the heir would have to share the estate equally with her.[14] This would be a suitable means of disposing of an estate if a testator had several children, one of whom was male, for the ban was only on women being heirs, not legatees, and such a will would be valid as long as no single legacy exceeded the share of the heir.

In many instances, then, dowry or legacy would provide a means of allowing a daughter to benefit without illegality from her father's fortune even if he belonged to the wealthiest property classification. The particular difficulty arose if he had a single child, a daughter, to whom he wished to pass the whole of his estate. It has been pointed out by J A Crook[15] that the simplest method of ensuring that she took the whole estate would have been for her father to make no will at all, so that she would take on the rules of intestate succession. He uses the fact that the Voconian Law made no provision for such an eventuality and that we have no knowledge of any such instances as evidence of the Roman horror of intestacy. His case seems to me to be strong, though *ex silentio,* because we have examples of testators going to complicated lengths to achieve the end they could easily have attained by making no will at all.

It seems advisable at this point to outline the requirements of a valid Roman will. Its essential element was the institution of an heir by the proper wording and ceremony in the presence of witnesses.[16] If the heir or heirs refused the inheritance, or were not instituted correctly, the will failed and the estate devolved upon the intestate heir. If the heir accepted the estate[17] he or she accepted also any charges on the estate and the obligation to pay out legacies. Although the *lex Furia* had limited the amount of any one legacy, and the *lex Voconia* had stipulated that no single legacy could exceed the share of the heir, neither law provided against the erosion of an estate by multiple legacies.

One other device was open to the testator of the top class who wished to institute a daughter heir, and that was the *fideicommissum hereditatis,* whereby an heir was instituted formally on the understanding that he pass over the whole of the inheritance by *cessio* to a specified party. The *fc* had no standing at law in the Republic. It was a commission given the heir on trust and dependent on his good faith, or *fides,* for its execution. It was clearly a useful means of passing a whole estate on to someone, such as a foreigner or Junian Latin,[18] who did not have the capacity to inherit but was capable of accepting the *in iure cessio hereditatis,* which was not classed as an invalid gift at law. The *fc* could

14 See Crook "Intestacy in Roman Society" (1973) 199 (ns 19) *Proceedings of the Cambridge Philological Society* 38-44, 43.

15 Ibid.

16 See Gai II.104, 116; see also II.229.

17 Or belonged to a category – such as that of *suus heres,* who need not formally agree, or that of *heres necessarius* who could not refuse to take.

18 *Peregrini* were foreigners living within the Roman rule, and of free birth or status, but without Roman citizenship; Junian Latins were a special category of freed slaves without full civil status. Nor could "uncertain persons" (*incerti personae*) such as unborn children, be provided for. See Gaius II.109 for such limitations.

be included in the written testament or consist of an informal agreement between the testator and the official heir: in either case, the obligation was moral, not legal. The flaw, of its dependence on the *fides* of the heir, might have aroused the suspicions of a sceptical reader. And with some justification.

In a philosophical work *de finibus bonorum et malorum* (II.17 (54-55) composed in 45 BC, Cicero recalled an incident he had witnessed in his youth some forty years before, when one P Sextilius Rufus had called his friends together to ask their advice about a will in which he had been named heir.[19] The testator, Fadius Gallus, had stated in the will that there had been an agreement between himself and Sextilius Rufus that the whole estate should in fact be passed on to Fadia, the daughter of Fadius Gallus.

Before his assembled friends, Sextilius denied that he had ever been party to such an agreement and claimed that the will placed him in a moral dilemma, for to honour his dead friend's request would be tantamount to disobeying the *lex Voconia,* since Fadius Gallus had belonged to the top property class. Sextilius said that he had sworn to uphold this law[20] and was loath to break such a solemn vow. His friends soon put him out of his moral misery by assuring him that he ought not to give Fadia more than her entitlement under the law, which probably left her with a half-share of the estate, so her plight was not desperate. If Sextilius had refused outright to enter into the inheritance, she would have taken the whole estate as intestate heir. Doubtless the punctilious Sextilius had qualms about letting her friend suffer the posthumous ignominy of being labelled as *intestatus.*[21]

This was not an inspiring instance of *fides,* but his surrender to temptation is less noteworthy than the encouragement he received from his respectable advisers. Cicero, who in the *de finibus* was arguing the philosophic point that doing evil need not distress its perpetrator, used Sextilius as an example of a rogue who paraded his immoral action, heedless of the voice of conscience, the bad opinion of others or the sanction of the law.[22] Cicero writes that none of the gathering really believed Sextilius's denial of a pact with the deceased Fadius Gallus and characterizes the action as a clear choice of material advantage over the good opinion of truly upright people.

In other words, Cicero viewed Sextilius Rufus – who upheld the law – as the villain of the piece and the father who had attempted to evade

19 Most of the friends summoned to this "council" were distinguished contemporaries of Sextilius Rufus. Cicero and other young men (*adulescentes* xvii.4) were virtually onlookers, not expected to pass judgement. Examples of such *consilia* for the purpose of soliciting the advice of friends can be found eg in Cic *Att* xv.11; Plin *Ep* I.9.2; V.1.

20 Although Sextilius mentioned the *lex Voconia* in particular, he was probably referring to the mandatory oath sworn by magistrates on taking up office, and new senators, to uphold the laws in general. On these oaths see Steenwenter, 'iusiurandum' in P-W II; Mommsen, *Staatsrecht* III.882 (1886); Taylor, *Roman Voting Assemblies* (1966) 81. The *Lex Bantia* (=*CIL* 1.22.582) gives the provisions of the oath.

21 It was a stock curse in Latin to wish intestacy on an enemy : *intestatus moriatur!* I am unconvinced by Daube's ingenious re-readings in (1965) 39 *Tulane Law Review* 253 ff, and *Roman Law: Linguistic, Social and Philosophical Aspects* (1969) 71-75 on "The Horror of Intestacy" amongst Romans. See again Crook, supra n 14.

22 *Fin* II.17 (#54).

the law as dutiful.[23] No allowance need be made in this instance for special pleading, because Cicero was arguing a philosophical case, not pleading a cause at court, and offered up the anecdote in the confident expectation that his cultivated readers – some forty years after the event – would share his judgement.

In preparing a case for a jury in 70 BC, Cicero had also appealed to the sentiment that fathers ought to institute daughters as heirs as if it were a natural and proper desire, although the "victim" was again someone who had attempted to evade the *lex Voconia* and the "villain" the official who thwarted the device. The incident figures in one of the famous Verrine orations which were not actually delivered in court. The events described took place in Sicily in 75-74 BC. The wealthy Annius Asellius, a Roman citizen who had not been relegated to the top class in the last census, had instituted his daughter sole heir before his death in 75 BC and the will was pronounced valid. Thus far, urges Cicero, everything was in accord with the demands of nature, justice, and legal practice as it stood at the time.[24] When Verres became governor in the following year, he pronounced an edict which retrospectively invalidated such wills – that is, where the testator had the requisite fortune for classification in the top class of the census rolls, even if he had not been registered as such.[25] Cicero claimed that this ruling was a result of an agreement Verres had made with the reversionary heir in this particular case. Appealing to the jurors as fathers, he urged that daughters, so dear to them, had every right to the goods which had been shared with them in the fathers' lifetime.[26] It is notable that the philosophic work concerned morality and the law: the court argument adds sentiment to this.

This was only one charge in Cicero's prosecution, and some of his legal points are dubious,[27] but it is worthy of note that, according again to Cicero,[28] the edict lapsed, contrary to the usual practice, after Verres ceased to be governor, and was not incorporated in the standing edict of the province. As a consequence, many wealthy Sicilians (Roman citizens) who were not listed in the first census class in spite of their wealth, were able confidently to institute daughters as heirs.[29] Interestingly, a specific example he cites is that of a woman, Annaea, who instituted her daughter heir after Verres's departure from Sicily, on due consultation with her relations. One is bound to wonder how she came by her fortune, if not by inheritance.

Although Cicero's arguments are partial, there is some reason to believe that he was expressing a general belief. The basis for this view –

23 He characterized Sextilius as *callidus improbus* ("a cunning scoundrel") *fin* II.17 (#54) and Fadius Gallus as having pursued the proper course – *quod debuisset fin* II.17 (#55).

24 Cic *Verr* II.i.41 (#104).

25 Ibid #105-106.

26 Ibid #112 (xliv).

27 Cassissi "L'Editto di C.Verre e la 'lex Voconia' " (1948-1949) 3 *Annaili del Seminario Giuridico Univ di Catania* 490-505 analyses legal aspects of the edict, and discusses the two conflicting tendencies of the *lex Voconia* and inheritance customs.

28 Ibid 114.

29 Ibid 43.111. For a summary of the history of the Roman census, see Hausmanninger ("*census*"), *der Kleine Pauly* Vol I (1964) and the works cited in n 4 above for further detail on its deterioration in late Republican times, esp in Italy.

that the lex Voconia, insofar as it related to the institution of female heirs (especially daughters), was considered unjust lies in the subsequent history of the statute and that of the *fc*. Thus far, I have concentrated on "dodges" employed by individuals to circumvent the law without actually breaking it (although the latter was sometimes open to question). There were other ways in which the Roman legal system could accommodate resistance to laws considered inequitable without actually revoking them – a course which, as we shall see, they found abhorrent.

The praetors were responsible for the development of the *ius honorarium* (as distinct from the *ius civile,* or written law). Arising from individual decisions, this law was embodied in the praetorian edict which each praetor announced at the beginning of his annual, elective term of office. The praetorship was a prestigious rung (the second highest) in the ladder of office which noble Romans aspired to climb, and those who attained it were not necessarily legal experts, although they were expected when judging difficult cases to consult those friends whose scholarly interests had given them a gentlemanly expertise in legal questions. Nor did each praetor start from scratch: although there was nothing to correspond to the binding power of precedent in British law, the decisions and edicts of praetors over the years were collected in a "perpetual edict", subdivided into the various arms of the law dealt with by the city praetor. The praetor reading out his own edict was virtually parroting established trends, and perhaps adding a little of his own ideas, in a guarantee that he would uphold justice throughout his term of office – though there was no means of redress if he deviated from his stated policy.[30]

The institution of the praetorian law thus allowed a law which met with popular disfavour to be undermined by praetorian interpretations of its application. As in any state, judicial decisions at Rome tended to be conservative, but not quite as conservative as the legislature. Praetors could, for example, award estates to heirs even when wills were not properly drawn up. Certain conventions arose from interpreting the rules of succession, which brought it into conformity with common notions of right, though the civil law was not altered.[31]

The specific application of this for the *fc* is not easy to see. If, as Cicero suggests, right-thinking people were agreed that a *fc* of the whole or part of an estate was a morally binding trust, it ought to follow that praetors – and consuls, if appealed to in their judicial capacity – might eventually award possession to the thwarted party. But it was not as straightforward as that. David Daube, who has written briefly on the *fc* as an "altruistic dodge",[32] stressed the fact that the praetor would be influenced by current political and other trends – so that a private agreement to benefit a proscribed man was annulled both on the ground of its contravention of the law in question and because of the political

30 See Jolowicz, supra n 12 at 95-99, where he quotes the imperial jurist Papinian's definition of praetorian law as "the innovations of the praetor for the purpose of aiding, supplementing or correcting the civil law" *Dig* 1.1.7.1. Lenel, *Edictum Perpetuum* (3rd edn 1927) contains a collection of praetorian quotes culled from other sources.

31 Gai II.145, 149a.

32 Supra n 21 at 96-102. See also the even briefer summary of Daube's argument in (1964) 61 *Proceedings of the Classical Association* 28-29.

climate, although the agreement had been sealed by oaths and the near-sacred bonds of client-patron relationship.[33] The praetor had great discretionary powers, particularly in an area like this, where cases could involve such different circumstances, and personal, political or general prejudice always played their part.[34] The *fc* was, after all, a private agreement unenforceable at law and was, one presumes, always designed to circumvent the restrictions of the law of succession.

The establishment of the principate changed this slightly. The emperor Augustus provided a kind of supreme appellate authority in his own person.[35] Many people appealed to him when cheated of *fca* and he decided each case on its merits. In favourable instances, he instructed the consuls to interpose their authority to ensur the transfer of property from the heir to the *fideicommissarius*. When these decisions were generally applauded, Augustus gave a general direction (*adsidua iurisdictio*) that *fca* be upheld in court. So many cases were then brought that a special praetor was created to pronounce the law solely on such cases (the *praetor fideicommissarius*).

This represents a great change from the days, some seventy years earlier, when Sextilius Rufus was able so cavalierly to renege on his agreement. It has often been argued, and I would usually agree, that the distinction between Republican and Imperial is artificial in the case of the law, which continued much as before.[36] Yet in this case we can see the imperial authority hastening a social process in response to popular demand. Augustus's measures confirm Cicero's judgement that it was the act of a scoundrel to betray a *fc*. Yet the fact remains that one of the prime motives for instituting a *fc* must have been to evade existing laws on the extent of legacies or the categories of legitimate heirs. Augustus's reform amounted therefore to official sanction of illegality.

This is the more ironic in that the question of hereditary succession in general and legacies in particular had become more rather than less of an issue since the *leges Furia* and *Voconia* had been promulgated some two centuries earlier, and the question was dear to Augustus's own heart: he cannot be characterized in general as upholding the testator's absolute freedom to dispose of an estate. In the very late Republic measures had finally been taken to remedy the great flaw of these earlier laws, which had restricted individual legacies without setting limits on the number of legacies attached to any estate.[37] The *lex Falcidia* of 40 BC determined

33 Again, Verres was the "villain" *Verr* II.1.47 #123 ff. Daube rightly points out (supra n 21 at 97 and n 4) that, although this agreement was not a *fc* as later defined at law, it fitted into the general category of such informal measures in the Republic.

34 Consider the case of the eunuch excluded from an estate to which he had been named heir because the consul considered his presence in the court an affront and defilement. Val Max VII.6.

35 Though in what capacity it is difficult to say, since he was not always consul and his perpetual tribunate should have given him powers of intervention rather than the role of judicial overseer. Our source for his involvement in cases of *fca* is Just *Inst* II.23 *pr*-1, which provides a brief history of the *fc*. The author states that Augustus became involved either because of a particular relationship with the appellant or because his own health had been invoked in the oath sworn or "because of the signal perfidy of certain people" — shades of Sextilius Rufus!

36 See esp Finley, "Generalization in Ancient History" Gottschalk (ed), *Generalization in the Writing of History* (1963) 19-35 and cf Jolowicz, supra n 12 at 5-6.

37 The *lex Furia* set a limit of 1,000 asses to each individual legacy; the *lex Voconia* ruled that no single legacy could exceed the share taken by the heir(s). Gai II.225-227.

that no more than three quarters of an estate could be eroded by legacies, and that an instituted heir (or heirs) must be awarded one quarter of the total value of the estate.[38] The great advantage of this ruling was the inducement to the heir to accept the inheritance, rather than letting the whole will fail by his refusal to enter on it. Legatees gained only what they were granted, but an heir who accepted an inheritance accepted all its encumbrances, even if these exceeded the estate. There was now some guarantee that the heir would gain something for his trouble in paying out legacies from the estate.

The legislative moves against excessive legacies were almost certainly influenced by the wish to keep estates within families. As the Republic drew to a close, the practice of *captatio* had already developed, whereby individuals would cultivate wealthy testators in the hope of consideration in their wills. Augustus sponsored legislation designed to revive traditional family institutions, particularly within the upper class, and introduced specific sanctions on the unmarried and the childless of the wealthiest stratum of society. Certain material and political rewards were offered those who produced three legitimate children, but the strongest measures were those which prohibited the unmarried or childless from taking legacies.[39] Yet Augustus himself supplied a means of evading his rulings, or those inspired by him, in elevating the *fc* to an enforceable charge. Daube finds it incredible that Augustus did not foresee this loophole, and suggests that praetors would not have allowed claims which subverted the emperor's "moral rearmament" programme. I am not quite convinced. As I have pointed out, the very notion of the *fc* – especially if it involved passing on the whole estate – was that the testator was able through this extra-legal means to evade the usual strictures on testamentary disposition. From the time of Augustus's general ruling, any heir who accepted his inheritance could be obliged to surrender whatever portion he had agreed to hand on.

Therein lay the great flaw in Augustus's move, for since the *lex Falcidia* the heir to an estate encumbered with legacies still retained a quarter, while the heir who took an estate burdened with *fca* had no such right – merely the obligation, now enforceable, to honour all the *fca*, and since he was the heir at civil law he remained liable for any other charges on the estate. Many individuals who received such *fca* concluded oral contracts[40] specifying the heir's release from such obligation, but some heirs found it simpler to refuse such a "tied" inheritance outright – thus invalidating the will and, usually, depriving the *fideicommisarius* of any claim to the inheritance. So natural justice was not always observed. The *fc* had become subject to much the same sort of problems which had beset the earlier institution of legacies. The abiding concern, that an estate should not be so eroded that the heir was entirely disadvantaged, was in a sense frustrated by Augustus's cavalier gesture.

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38 Gai II.227, Just *Inst* II.23.

39 The literature on these laws is voluminous. A few samples are: Brunt, supra n 4 at 566 ff; Csillag, *The Augustan Laws on Family Relations* (1976); Field, "The Purpose of the *Lex Julia* et *Papia Poppaea*" (1945) 40 *Classical Journal* 398-416; Frank, "Augustus' Legislation on Marriage and Children" (1976) 8 CSCA 41-52; Raditsa, "Augustan Legislation Concerning Marriage, Procreation, Love Affairs and Adultery" (1980) II.13 *ANRW* 278-339; Wallace-Hadrill, "Family and Inheritance in the Augustan Marriage Laws" (1981) 207 (ns 7) *Proc of the Cambridge Philological Society* 58-80.

40 Ie *stipulationes* – Gai II.252.

If we are to believe the literature – especially the satirical literature – of the period,[41] the practice of hunting out legacies from the childless (and others) was rife, and public disapproval was expressed in legislation. But this over-simplifies: Cicero, Horace and Pliny all criticize others for touting for inheritances from people unrelated to them, and all profited in their life-times from many such inheritances.[42] Within the complex Roman web of patronage, inheritance was a way of demonstrating ties of gratitude, friendship or political sympathy. Within the elite, it was common to name grades of heir, originally to ensure that the estate did not go by the rules of intestacy, but eventually as a courtesy. The famous "*testamentum Dasumii*" contains several such grades, although there is no question that the testator expected his daughter to accept the inheritance.[43]

Up to a point, legacy-hunting (*captatio*) was the vulgar pursuit of one's enemies – one's friends were appreciated at their true worth in the wills of others. It was quite an established practice to leave substantial legacies to old family servants, for example, or supporters from a lower social group. Juvenal especially gives a lurid picture of complaisant husbands rejoicing in being cuckolded in the hope of being named heir by the rich seducer or becoming eligible through spurious paternity for such legacies and inheritances. I would suggest that a cautious attitude ought to be taken to hints that such practices were the order of the day.

Not surprisingly, given the official desire to control legacies for their own sake and to use inheritance as a means of enforcing the imperial code of family allegiance, *fca,* once having been given the seal of approval, were slowly brought under similar regulations. Under Nero, the *SC Trebellianum* of 56 AD relieved the heir who surrendered an estate promised by *fideicommissum hereditatus* of all obligations from the time of the transfer. There had obviously been difficulties in persuading all such "straw heirs" to accept until this firm guarantee. Under Vespasian (some time between 70 and 73 AD), the *SC Pegasianum* granted the heir the right to retain at least a quarter of such an estate, thus bringing his rights into line with those of an heir to an estate hung down with legacies. This ruling also allowed an heir who still refused such an inheritance to be compelled by the praetor to accept it if the receptor of the *fc* took him to justice. The *SC Pegasianum* also extended to *fca* the Augustan restrictions on legacies to the childless and unmarried – so the *fc* could no longer be employed to get around those particular laws.[44]

Unfortunately, there were still problems of a rather Gilbert and Sullivan kind, for though the *SC Pegasianum* was intended to amend the *SC Trebellianum,* it did not supersede it, so there was some judicial confusion as to how far each law was applicable in individual cases.[45]

41 See, eg, Hor *Sat.* II.v; Juv *Sat* I.1; Plin *Ep* II.20 on the fears (in the event, unfounded) expressed about the will of the wealthy Ummidia Quadratilla and VIII.18 of similar sentiments about Domitius Tulliua; see also *Ep* VII.24.

42 Eg, Plin *Ep* IV.10, V.1, VII.11, 14; Cic *Att* XIII.46.

43 *CIL* VI.10229. Hopkins, *Death and Renewal* (1983) 235-247, discusses these distinctions.

44 *Inst* II.23.

45 See the discussion by Thomas. *The Institutes of Justinian* (1975) 157-159. For the jurisdiction of the *praetores fideicommissarii* – two were appointed under the emperor Claudius (40-54 AD) – see eg *Dig* 1.2; Ulpian *Tit* 25, 12; Quintilian *Inst Or* 3, 6, 70.

One is bound to wonder if the *praetor fideicommissarius* was commonly prone to nervous disorders and ulcers. Eventually, Hadrian (117-138 AD) introduced some legislative housekeeping. Henceforth, *fca* were subject to much the same restrictions as legacies,[46] but for a less demanding approach to their formulation.[47] Roman testamentary rules were generally strict about verbal formulae, although the praetor had some discretionary powers to allow for the ignorance of the vast number of subjects whose knowledge of the law, or even of Latin, was far from perfect. From the time of Hadrian's reform, the *fc* was virtually a legacy in which greater freedom of formulation was possible – they could now stand even if they had been expressed in Greek! [48] So the *fc* had metamorphosed from an informal agreement by an heir to pass over some or all of an estate, an agreement which decency demanded he honour but he was legally free to ignore, to an enforceable charge, then part of a compulsory inheritance, and gradually made subject to similar restrictions and reasonable guarantees for the heir until it was barely distinguishable from legacy. The only advantage I can see for *fc* at this stage was for the testator with a last-minute bequest or little Latin, or one who wished a Junian Latin to inherit his estate. The use of the *fc* as a "dodge" had been virtually eliminated by its incorporation in the legal process.

We began this study with the *lex Voconia.* The *fc* probably originated in the wish to evade its strictures, rather than in "the natural desire of testators to leave the house to John and the best teaset to Mary, and so on," [49] which legacies satisfied. What became of the *lex Voconia* itself, while the *fc* was making its slow progress towards legal respectability? It must still have been in force in 9AD, for the *lex Papia Poppaea* issued under Augustus's infuence released free-born women with three children or freed slave-women with four children from its restrictions.[50] Pliny the Younger refers in his *Panegyric* of the emperor Trajan[51] (98-117AD) to public revenue from wills which failed because of the *lex Voconia,* but it is possible that this referred only to the rules on legacies. More likely, the law could still be invoked against female heirs to huge estates. The intriguing thing is that we know of so many very wealthy women in the upper class who must surely have come by their fortunes by inheritance, which remained one of the chief modes of real and capital acquisition in the ancient world (the other being dowry). Even allowing for the fact that some might have been mothers of the requisite number of children, or have received large multiple legacies, it is at least suspicious to see the parade of names from Terentia, wife of Cicero, Junia, sister of Caesar's killer Brutus,[52] Junia Silana, whose wealth and childlessness had incited the greed of Nero's mother (so the historian Tacitus tells us) and the younger Pliny's mother-in-law Pompeia Celerina, whose estates were

46 Junian Latins were the exception – see Gai I.22, Ulpian I.10: they could still benefit from *fca,* but older legislation barred them from being instituted as heirs or from receiving legacies.

47 Ulpian *Tit* xxiv lists the acceptable forms of wording for legacies.

48 See esp Ulpian xxv.

49 Crook, *Law and Life of Rome* (1967) 120 points out that the Roman conception of the universal succession of the heir did not allow for this sort of wish.

50 Dio LVI.10.

51 *Pan* 42 – delivered 100 BC, but polished and published somewhat later.

52 Junia's wealth is even more puzzling, in that she was the wife and sister of leading anti-Caesarians, whose property ought to have been proscribed. Yet she died an unrepentant, wealthy Republican in 22AD, Tac *Ann* III.76.

scattered over Italy.[53] And these are only a few names plucked from the many.

Aulus Gellius reported a discussion he had attended in the reign of the emperor Pius (138-161 AD), in which the Voconian law had been cited as an example of a statute initially well conceived to stem the tide of luxurious ostentation, but had been rendered anachronistic by the increased wealth of Roman society and had fallen into disuse.[54] Gaius, whose guide for law students belongs to the same period, speaks in the present tense of the possibility of evading the strictures of the *lex Voconia* on female inheritance by means of the *fc,*[55] and elsewhere tells us that Hadrian reformed the laws on *fca* to bring them in line with those on legacies[56] – which may mean that its restrictions on legacies remained in force, though the prohibition on the institution of female heirs by the wealthiest census group did not. More likely is the possibility that these were pedantic points of information with no contemporary relevance: Gaius elsewhere devotes attention to listing details which he subsequently concedes to be anachronistic.[57] Daube sees these passages as instances of Gaius copying from some older source.[58] The Aulus Gellius passage is really unequivocal, and I think we can take it as firm evidence that the law had become absolute by the early second century AD.

The Aulus Gellius passage suggests that the growth of large fortunes rendered the law obsolete – there is some suggestion that the early restrictions were based on an estate valuation which was laughably low by later Republican standards.[59] Under the empire, the rich became even richer. If the military *tributum* of the second century BC had been a prime reason for the law, that had long since ceased to apply to Romans, and the census – on which the official property stratification was based – fell into disuse.

These factors rendered the law irrelevant as far as the effective prevention of excessive female fortunes was concerned. The rulings on legacies had been superseded by later and superior legislation. To

53 Junia Silana Tac *Ann* III.19; Terentia Att II.4.5; II.15.4; *fam* XIV.1.5; Pompeia Celerina eg Plin *Ep* I.4.

54 *NA* xx.1.21-23.

55 Gai II.274.

56 Gai II.287.

57 Eg, Gai.I 168, where agnatic *tutores* are listed among those capable of ceding *tutela feminarum* (guardianship of women). Details of the procedure are given 169-170, before Gaius concludes in 171 with the information that agnatic *tutela* over women had been abolished by Claudius about a century earlier. Compare this information on *manus.*

58 "Greek and Roman Reflections on Impossible Law", (1967) *Natural Law Forum* 1, 31 ff.

59 There is some doubt about the actual terms of the restrictions. Cic *Verr* II.1. 41 ff says it extended to those testators with property valued at 100,000 asses or more, while Dio LVI.10 gives the limit as 25,000 drachmas, or 100,000 sesterces, being twice the sum Cicero had suggested in 70 BC. Cicero's wife had a dowry of 400,000 sesterces in about 80 BC (Plut *Cic* 8.2) as well as her personal property. He told of a man whose suit was rejected 45 BC because his estate was worth only 800,000 sesterces (*Att* XIII.28.4) and in one of his philosophical works he gave an annual income of 100,000 sesterces as that of a gentleman of modest means. *Par Stoic* 49. 400,000 sesterces was the minimum property qualification for inclusion in the equestrian class, and 1,000,000 sesterces for that of a senator in the very late Republic.

Romans of a later age, the perpetrators of the Voconian law were to be revered for their intentions, but rather puzzled their descendants by their quaint notions, which seemed, if anything, somewhat unjust. Cicero has a character in his Republic [60] use it — rather as I am doing — to illustrate the observation that notions of justice change within a society. His main argument that states need not be founded on justice is not intended to convince, but his puzzlement at the intention of the law accords with Cicero's own attitude as expressed elsewhere. In the Verrine orations[61] he almost suggests that it was a purely misogynist measure. Aulus Gellius reports Sextus Caecilius as characterizing the law as an outmoded sumptuary measure. St Augustine viewed it as outright injustice to the female sex.[62] Cicero's sentimental appeal to the jurors of 70 BC probably held true for all of them:

> "I have no doubt, gentlemen, that you find this affair harsh and unworthy — just as I do, for my daughter has a place very close to my heart. It must be the same for every one of you moved by the same kind of tenderness for your daughters. And has not nature decreed that nothing could be sweeter and dearer to us?" [63]

And so on. It was unfair to women in general [64] and particularly unkind to deny the natural desire of a father to pass on his estate to a daughter. Again I should stress that it was only the top class which suffered this restriction: the custom of instituting children heirs without significant distinction between the sexes predominated in Roman society. It was only the ruling group which had to resort to dodges to achieve what was regarded as the proper course.

It is almost a commonplace now that laws out of key with contemporary attitudes must fall by the way, and this is surely what happened in the case of the *lex Voconia.*[65] What is more interesting in the Roman case is the extent to which society was prepared to connive at evasive measures in living with a law which not only had no popular support but actually ran counter to received notions of right. Behind it all was the stated Roman reverence for the view of the ancestors — who might be the decemviral codifiers of the firth century BC, or the legislators of a generation or two before — coupled, I think, with an endemic preference for the "dodge" over institutional legal remedies. The vast female fortunes which appear scattered through Latin literature must have run counter to the spirit of the *lex Voconia* and must have been transmitted by such means as avoiding classification in the census, employing legacy almost as if it were heirship, disguising inheritance as dowry or resorting to *fc.* The gradual authorization of *fc* in turn shows not only a readiness to honour the "dodge" and elevate it, but a reluctance to do the job efficiently. The slow progression which led from the *lex Furia testamentaria* of circa 200 BC restricting *legata,* to the *lex Falcidia* of 40 BC, was virtually repeated step by step for the laws on *fc,* as if no lesson had been learned en route — not even the fairly obvious

60 *Rep* III.10 (17). Philus describes it as "utterly unjust".
61 *Verr* II.1.41 (106) where he equates citing the *lex Voconia* (jocularly) with being a *mulierum adversarius.*
62 *Civ Dei* III.21.
63 *Verr* II.1.44.
64 Why, Cicero asks, should a priestess of Vestal be able to inherit when her mother may not? *Rep* III.10.
65 See esp Biondi, *Successione Testamentaria — Donazioni* (1943) 120.

lesson that heirs would be greatly tempted to refuse estates which involved inconvenience and obligation without any material advantage. It is also noteworthy that this slow and painful process was much the same under the empire, although it might reasonably have been expected that a more centralized, continuous authority would have produced a more thorough-going approach to legislation. Augustus's fairy godmother gesture enforcing *fca* was more authoritative than that of an annually elected magistrate, but no better conceived.

The failure to revoke the *lex Voconia* is particularly significant. If, as I have argued, there was general agreement on the inapplicability of the law as it concerned female heirs, this could have been remedied by legislative measures, just as the inadequacies of its rulings on legacies had been remedied. The difference probably lies in the fact that there was still agreement on the general principle that an estate ought not to be eroded by legacies, particularly if these went outside the family, and the successive legislation on the subject amounted to an improvement in the means of achieving the same general end conceived by the "ancestors" of 201 and 169 BC. In the case of female heirs, a repudiation of the earlier law was required and this seems to have been something Romans baulked at.

The debate recreated by Livy centring on the repeal in 195 BC of the sumptuary *lex Oppia* passed in 215 BC is revealing. The consul Cato (later to be censor) argued that rescission of any single law which had passed into custom and experience would weaken the whole fabric of law as an institution.[66] To this the tribune Marcus Valerius replied that, of course, laws intended for posterity were sacrosanct: he bases his argument on the distinction between such laws and contingent measures like the *lex Oppia,* which he classes with military conscription and levies on the wealthy undertaken only under the extreme pressure of war and ceasing as soon as the special circumstances passed.[67] It would seem to the modern mind that the *lex Voconia,* too, fell into this category. And not only to the modern: the learned discussion overheard by the young Aulus Gellius early in the second century AD gave the law as an example of a statute overtaken by changing social phenomena.[68]

Yet in both debates, the opposing view holding to the importance of upholding traditional law – however defined – was firmly argued. In both debates, the argument against maintaining some laws for their own sake was very carefully expressed and did not question the wisdom of a general reluctance to undo the work of "the ancestors". The mentality which could cope with the judicial complications of such devices as the *fc* and avoidance of census classification, not to mention the simultaneous validity of two contradictory rulings like the *sensatusconsulta Trebellianum* and *Pegasianum* in an age of sophisticated juristic analysis, was not one in which rationality was the overriding concern. Again, this is demonstrated by the patchy legislative history of the *fc* spanning more than two centuries. The contradiction between the *sca* was not solved until the Justinianic reforms five centuries later.

Rome is not the only society in which law has been slow to respond to changes in community attitudes, nor the only one in which inappropriate

66 Liv 34.3.3-5.
67 Liv 34.6.
68 *NA* xx.1.23.

laws are left on the books and ignored by common consent – regulations concerning appropriate dress on the public beaches and proper compensation for the seduction of daughters or maidservants tend to be removed if at all only when their use by an eccentric draws attention to them or a conscious, wholesale attempt is made to "clear out" the legislative attic. Nor is it surprising that there should be frequent divergences between the written and judicial tradition: conservative as the judiciary tends to be, it is universally quicker than the legislature to respond to changing ideas of fairness and it is only reasonable that written legislation should come eventually to draw on a judicial convention which has grown from practical consideration of the regulations in question.

The conflict between the law on the one hand and notions of fair play on the other must arise from time to time in most societies, and the machinery of the law will tend to grind very slowly and rather reluctantly to the station where the two are reconciled – before attitudes begin again to change and demand some new accommodation. Law will thus generally lag behind custom, particularly in states with a strong respect for the wisdom of a past age – and particularly in areas pertaining to people such as women (in the Roman case) or foreigners, who have no direct access to the organs of government.

The erratic, not to say chaotic, approach to reform is more distinctively Roman. It is as if legislative change was so distasteful to the Roman temperament that it could be tolerated only in small doses, especially if it contradicted some long-established principle. Even legislation such as the *leges Furia* and *Voconia* – which themselves contradicted the established principle of the testator's freedom of legacy[69] – was enshrined by its written character: the effective evasion of its terms gained some acceptance, but the abolition of the statutes apparently remained unthinkable.

The evidence suggests that praetorian law provided a readier vehicle for legal change than the legislative assembly or the senate. Gaius' *Institutes* furnish examples of the juxtaposition of the civil law and praetorian practice, particularly in the area of succession, where community ideas of right and wrong were strong and would tend to evolve over the generations until there was a great gap between morality and the letter of the law.[70] Legislative remedy was a last resort, to be employed only when dodges and praetorian law still failed to bridge such a gap, and, as we have seen, the remedy could be haphazard and imperfect as well as excruciatingly slow.

It would appear that the possibility of abolishing the law which caused such ramifications was an impiety not to be contemplated. A law such as the *lex Voconia* might be thwarted in practice and even in theory, by elevating a device for its evasion to rival status, but the form of respect for the ancestors was better observed by politely ignoring it and allowing it to lapse than by efficiently removing it from the legal system. Inconsistency and inconvenience were apparently an acceptable price to pay for this particularly Roman solution to the universally familiar conflict between inherited law and contemporary morality.

69 *Twelve Tables,* V.3 (Bruns, *Fontes* (1901-1969) and cited by Gai II.224, Just *Inst* II.22 pr. See also Cic *de inv* 2.50.148.

70 Eg, II.118-119 and see II.1491 (following Kübler's reading) on *bonorum possessio.*