

THE CALATIS COMITIIS TESTAMENT

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Abstract: *This paper aims to analyze the Calatis comitiis testament drafted before the curiata assembly bearing the name of comitia curiata which gathered on two fixed days of the year. Due to the fact that this type of will could be done only twice a year and only in Rome, the subsequent emergence of the will per aes et libram was fully justified. This will allowed the testator to designate his/her heir, the traditional opinion shared by most authors being that this will had the role of establishing a successor.*

Key words: *testament, congregation, heir.*

1. Introduction

According to the information transmitted by Gaius, it is known that this kind of testament, *Testamentum calatis comitiis* was made before the curiate assembly which especially bore the name of *comitia curiata* and which met on two fixed days of the year. The curiate assemblies were the oldest assemblies of the people in the royal era, assemblies of the patricians, into which plebeians were not admitted because in this early period of Roman history, plebeians had no political rights [12], the need to make a will before the people's assembly, divided into 30 curiae, being the most obvious evidence of how ancient the Calatis comitiis testament was. This was also called *comitia calata* from *calare*- to convoke.

These were summoned by the *calator*, i.e. the lictor in the service of the pontiffs, and these gatherings thus reconvened by pontiffs were aimed not only at making decisions regarding submitted laws, declaring war, sentencing a Roman citizen to death but also to carrying out

testaments. The presidency was held by the religious leader - at first the king, later on the *rex sacrorum* during the Republic, and then replaced by *pontifex maximus* – who was under the supervision of the college of pontiffs [23] under whose control were the cults as well as the religious authority.

Their meeting was held twice a year, probably on the 24th March and 24th May, as the old Roman calendar indicates, Q.R.C.F.: *quando rex comitiavit fas*, when it was allowed by the sacred authority that the king organize these meeting, in front of whom the testator could declare his/her will.

These days were preceded by 23rd March and 23rd May, the day in which the ceremony of cleaning the trumpets used to convene the people to the assemblies that took place. Moreover, the commissions were announced *trinum nundinum*, 3 to 8 days before, on the days of March 1st and May 1st.

Regarding the data concerning the *comitia calata*, there have been objections, stating that a more rational division would have been more comfortable, however it is

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possible that the two days reserved to the testaments have not been fixed taking into account the formalities concerning the testaments [14].

The question at this point is the nature of the will expressed, question on which authors, in the absence of any information, the texts only ascertaining the existence of this form of testament, had total liberty manifested in full by the multitude of assumptions made.

On the one hand, the idea that the testament *calatis comitiis* would have never contained establishments of succession manifested [16].

In this conception, the authority of the XII Table did not know other heirs apart from the *ab intestat* heirs, respectively *sui heredes*, who, as members of the family were the rightful owners and kept to pay debts *in infinitum*, and the other heirs, who ended by being assimilated to them in terms of the obligation to pay the debt, but could not collect the inheritance by the simple formula *heres esto*, but by the legacy *per vindicationem* - by this formula of legacy, the testator transmits directly to the legatee the direct ownership of a certain property, the name of the heir does not appear in the legacy as between the heir and the legatee, there was no legal relationship [19] - *the legacies per vindicationem and the appointments of guardians being, in this vision, the only testamentary dispositions permitted by the Law of the XII Table: uti legasset, super pecunia tutelave sua rei, ita jus esto* [27].

The *ab intestat* heirs being excluded under the principle *nemo potest partim testatus partim intestatus decedere potest*, the rest of the succession property would be subject to *usucapio pro herede* [11] considered, against the information given by Gaius, as applying not to the succession, but on the succession property individually and, as a result, there arises no obligation to pay the debt *in infinitum*,

but only within the limits of the assets acquired by each legatee.

Regarding the *heredis institutio*, this was brought back in an era previous to Plautus (254-184 BC), the testament *per aes et libram*, respectively by *nuncupatio* addressed to *familiae emptor* which, apparently, contained for the first time an establishment of a *heres scriptus*, assimilated to *sui heres* and the other heirs *ab intestat* on the obligation to pay the debt *in infinitum* and for which *cretio cum exheredatione* would have been created, when the testator has the successor disinherited if s/he does not pronounce him/herself on the acceptance of the succession in an interval of time, precisely in order to keep him/her from being a *heres suus*, heir against his/her will, and only from the moment the establishment of succession would have become *caput ac fundamentum testamenti*.

The above is based on the fact that in general, for the exposure regarding the evolution of the Roman testament, it assumes the isolation in which the old Roman law was in relation to the old Greek law and the Germanic one, premises considered unfounded [14]. If it were artificially attempted to harmonize the old Roman law with other contemporary legislations, harmony which is not at all a historical necessity [6], this would lead to a conflict with the subsequent Roman law, quite impossible to accept.

Because of this system, the manner in which the Romans managed to establish the institutions of the classical era becomes impossible to explain, hence the significant questioning of its validity. It is not clear why the phrase *heres esto* would have received legal effectiveness following the subsequent doctrine of Plautus, an efficacy which would not have been acquired legally during the XII Tables.

The assumptions about the ignorance in the old *cretio* law of the fact that the heirs

were forced to pay debts are not credible; those regarding *usucapio pro herede* contradict Gaius.

Finally, the assumption that the ones gratified by testament were forced to pay debts firstly *intra vires hereditatis* (the heir responds within the limits of the assets) and then *hereditatis ultra vires* (the heir responds beyond the assets) is a genuine practical impossibility. Also, the object of the testament was not to distribute isolated goods, but to give a heritage to a proprietor with all the civil and religious duties related [14].

On the other hand, it was stated that in the *calatis comitii* testament, a direct establishment of a heir would not come into effect, as in the classical law, but by an indirect procedure, namely the adoption of the heir - *adrogatio* - this conception probably occurred because, in the absence of children, the testament may have seemed a kind of direct adoption which was meant to compensate for the lack of offspring: the stranger, to whom the *pater familias* liked to settle upon his property, was to be adopted by him in order to produce a special effect *post mortem* [20].

These two systems and several others of the same type lead to contradictions and insurmountable difficulties in terms of their consistency with the historical and legal Romanian realities.

The main reason that led to the building of the two systems are primarily contradictions that we all feel between the primacy of the testament, the acknowledged freedom of the testator to dispose of his/her assets only on his/her own will, on the one hand, and the foundation of the succession law *ab intestat* family joint ownership, which acts in such a way that the descendant collects the succession property as an owner rather than heir, by virtue of a pre-existing right that the testament could deprive him/her of.

The aversion to accept the testamentary freedom in the primitive law is strengthened by the appeal to the comparative law, the second reason that led to the creation of two systems [14].

Thus, the testamentary freedom of the Romans seems to be an abnormality, a monstrosity in the primitive Roman law in the conception of these authors.

However, the objection arising from the comparative law is not sufficiently convincing, this method serving only to explain some obscure institutions, to clarify them through analogies that may be relevant to other systems of law as compared to that for which the main study is completed. The comparative method of explanation is inefficient confronted with the finding that an institution exists in a legal system but lacks in other systems, this not being evidence in favour of the idea that the institution would not exist in the law system in question.

The system of the classic law is the one in which the testamentary freedom predominates, a system radically different from what Schulin claimed to be entitled primitive, but the system of the classic law has always seemed immemorial, even primitive in terms of age and could not reveal any trace of a certain moment when an upheaval occurred in the principles of the Roman law, by law or by custom, which would have led to changes in the fundamental rules that were followed.

Also, no passage from a supposed ancient system of law can be found, in which there was no establishment of heirs, to a classic law system, in which the heir is a prerequisite for a legacy to be done - this passage appears inexplicable.

If the antinomy acknowledged between the testamentary succession and the *ab intestat* succession can be explained in historical-legal terms, without having to sacrifice one or the other, without denying the existence of the testamentary

succession and its original character and without denying the existence of ab intestat succession, based on family property and its also original character, this explanation would have the potential to be, if not perfect, at least closer to reality.

Consequently, we can start from the assumption that the *calatis comitiis* testament allows the testator to designate the heir that this testament serves to the establishment of succession - in fact this is the traditional opinion shared by most authors [6].

The designation of the heir takes the form of a solemn order, an imperative declaration and there is no reason why we could doubt that this testament was the starting point for the traditional form of establishing the heir: *Titius heres esto* [24] - Titius be heir.

From the words addressed by the head of the family who makes a will before the people's assembly inspired the formula *nuncupatio* from the testament *per aes et libram, ita do, ita lego, ita testor, itaque, vos Quirites testimonium mihi perhibetote* - so I give, bind, test; therefore ye Romans, give me your testimony.

The *calatis comitiis* testament is perhaps the most convincing evidence that supports the concept of sovereign succession [6] respectively sending by the *pater familias* to his successor the authority over the group. Nothing is more natural than the way in which the transmission of the right confers power by the current holder to his successor.

Tests confirming the veracity of this concept are brought both by the solemn nature of the words used in the investiture of the successor with this quality, as well as the place where they are delivered, namely the *comitia curiata*. If, at the beginning, the establishment of the heir would have been an act with strictly economic connotations, of purely private

interest, it would have been difficult to understand the need to make it under the circumstances.

A private act, similar to the *mancipation* would have been perfectly sufficient, *mancipatio familiae* probably being as old as the *calatis comitiis* testament or at least as the private property, serving to the transmission of assets that were privately owned by *pater familias*.

The testament, considered a process of designating the head of the gens can be compared with the designation of the king, since it is the same kind of power and the king was created on the model of *pater gentilis*.

Originally, the king was not appointed or elected, nor inherited the title, the legends on the first kings of Rome show no son succeeding his father.

According to these legends, the first kings, except the Etruscan kings, are presented as elected by the people - this choice being an anticipation of the republican institutions, of the mode of election of magistrates, these expectations being numerous at the Latin historians and are recognized by the modern ones [26].

But the genuine designation process of the king is the one according to which the predecessor designates his successor, the designation of the successor both in case of the king or *rex sacrorum*, who is designated by pontiffs, the appointment being made in oral form before the assembly, the successor being appointed by the predecessor [13].

Regarding the establishment of the testamentary heir in the *calatis comitiis* testament, the same difficulties and uncertainties are encountered, as well as in the other divergent systems mentioned above, due to the incompatibility felt regarding the testamentary succession and the ab intestat one, respectively between the testamentary freedom and the co-ownership right of the descendants.

On the one hand, it was asserted that, before the Law of the XII Tables, *pater familias*, could not make a testament, being able to establish testamentary heirs only if he had descendants, and his will was opened only in the absence of *sui heredes*.

On the other hand, on the contrary, it was argued that *the pater familias* had originally the obligation to establish only his progenies and could not draw the testament other than for *sui heredes*, for the Romans, the successor type being the one given by nature [17]. He chose from them the most worthy of continuing him, and made him his heir. Bonfante states that the testament must have represented in principle in the old age, a choice between *sui heredes*, originally the only natural heirs, but Sollazi replaces "in principle" with "always" and does not admit that in exceptional cases it was permitted to search the future chief outside the group [6].

These two views, no matter how contradictory, encounter the obstacle that testamentary freedom is attested in the Roman law for the whole period covered by genuine documents, namely that freedom existed even in the era of the Law of the XII Tables, and *intestato moritur, eui heres suus non escit, adgnatus proximus familiam habeto* [28].

If *pater familias* originally could make his testament only in the absence of *sui heredes*, it is unexplained why during Plautus' time (sec.III BC), this was an imperative obligation, not only to make the testament, but precisely for the establishment of *sui heredes*, in order to establish his descendants. On the other hand, if he could provide only the *sui heredes*, the issue is to determine the time when he received the testamentary freedom and the reason for which he received it, two aspects that are not explained by the ancient texts.

Bonfante does not treat the issue explicitly if the testamentary freedom of *pater familias* was at first restricted, limited to descendants, point on which he seems undecided, Sollazi, on the contrary, being sure of it [22].

They both agree that the purpose of the designation is to maintain unity, to prevent family disintegration, to conserve its power. But in this conception, starting from the second generation, the group is larger than a family in the strict sense, there are several families, not only the father and his descendants. This invariably leads to the conclusion that the area of sovereignty goes beyond family, in the agnatic meaning of the word, the heir being the future *pater gentis* - the sovereign heir who receives together with the assets, the power over them, not being able to collect the assets if s/he does not have the power [26].

As nothing is more absent in the Roman law than the concept of a power quartered in one family and handed down from generation to generation to the only direct descendant, which would be led to the right of primogeniture – an inexistent law in the Roman law - we can conclude that the testament *calatis comitiis* in its original splendour, is the solemn designation by *pater gentis* of his successor, the one who is to have authority over the gens and on the common and inalienable property, on the land, the territory where they lived and which provided subsistence. This designation was made at the curiate assembly and *pater gentis* freely elected the future head of all the members of the gens.

Subsequently, due to political circumstances, the gens' power will be suppressed together with the common property and the land will be divided between families, *pater familias* together with the land ownership receives the right to bequeath, to make a *calatis comitiis*

testament, just like *pater gentis* - without being limited to his descendants and the *sui heredes*, respectively he acquires testamentary freedom.

The will was made as an oral statement in front of the curiate assembly. The problem that occurs here is *the role of the curiate assembly*, if the assembly voted, consented and if the pontiffs, regardless of the power to supervise and control - perhaps the pontiffs had previously investigated in order to determine the honesty of the testator's intentions and the respectability of the heir established - they had the power to authorize the testament, or if pontiffs or the people had only a passive role: they listened to the statement and served as collective witnesses [23].

This problem is not unclear for the classical period that we know, at that time, the assembly and the pontiffs only had a passive role. Moreover, the curiate assembly is in complete decadence, the citizens no longer participate in it, being composed only of the lictor of the 30 curiae, the testamentary freedom is complete, both in the *calatis comitiis* testament, as well as in the *per aes libram* one obviously within the limits fixed by the law.

Most authors [9] assumed that the primitive role of the people was to authorize the testator, to make the choice valid by voting, the testament being a true *lex publica* - opinion initiated and supported by two illustrious authors Ihering and Mommsen [15].

This view is based primarily on the analogy with *adrogatio*, which occurs before the curiate assembly and is subject to a *rogatio*, an application for authorization whose terms have been transmitted to us by Aulu Gellii: *velitis, jubeatis, Quirites, uti Lucius Valerius Lucio Titio, tam jure legeque filius sier... et ita ut dixi, ita, vos Quirites, rogo* [3] - please rank, you Romans, that Lucius

Valerius be the son of Lucius Titius, both by right and by law. I require this to you, Romans, so that it is as I said.

But Aulu Gellii is the same one who states that the assembly in which *adrogatio* was performed, was called curiate assembly [3], not *calata*, and the assembly convened distinguished itself from other assemblies in that they stopped in the first phase - without going to the voting stage - leaving people *confusus in contione* [21].

To the above argument is added a more general one, based on the alleged nature of the testament. The testament is considered a derogatory special law compared to the general law of succession, the law under which the assets must come to the family. Consequently, the testament could be a legislative act, beyond the power and character of a simple act of private law, requiring the express authorization of the legislature, respectively of the people [14]. The contrary conception is based on the idea that, wanting to attribute the testament the genuine *lex publica* character, the authors made an anticipation, the way the Roman historians often do - the fact that some authors have attributed the curiate assembly from the royal era a legislative role, namely that of century assembly and of the tribal one during the Republic - which is also contrary to the conception regarding the autonomy of the testator's will [5].

It is generally acknowledged that the curiate assembly did not vote laws before the advent of the Law of the Twelve Tables, the custom being the Romans' only source of law. The legislative activity of the assemblies started only after the Law of the Twelve Tables, just as the elective activity only began during the Republic.

To conceive a testament as a law, which has to be voted by the people, although it

takes the form of a law, would be an anticipation, perhaps even of a few centuries, which would introduce a new notion in a culture that does not know it - the testament *calatis comitiis* being previous to the occurrence of the Law of the XII Tables. If the form that adrogatio has indicates that citizens are required to approve this act, the testament does not have the same aspect, the argument invoked by analogy being thus removed.

The testament does not contain demands, *rogationes*, with a mandatory character regarding the establishment of an heir: *Titius heres esto* - the testator does not seek the approval of the meeting, but its testimony [9]. Aulu Gelliu states that the will was made *in populi contione* [3] and he also tells us that the difference between *comitiatus* and *contio* is that *comitiatus* was an *agere cum populo* with the purpose of *rogare quid populum, quod suffragiis suis aut iubeat aut velet* and *contio era verba facere ad populum* making *sine ulla rogatione* [3].

The testament was thus a sovereign act of *pater gentis*, and subsequently of *pater familias*, by virtue of family autonomy understood as distinct legal order from that of the state, a manifestation par excellence of this autonomy being the normative power, namely the testament was originally a *privat lex* [4], the statement being the most truthful form in which it announced patricians who will be the heir, but without asking the assembly's opinion.

The advantage of this concept is that it makes unnecessary the assumption that the Roman law has changed at some indeterminate point and it evolved in terms of the freedom to test. This assumption was however necessary for the systems of authors for whom, if at the moment of *per aes et libram* testament's appearance, the

testament *calatis comitiis* was still being subject to approval, its great usefulness would have been the consolidation of this freedom.

Another advantage is that it is no longer necessary to assume a lesser seniority of the *in procinctu* testament, a testament that excludes any idea of voting [23].

The calatis comitiis testament does not yet have a patrimonial character, above all, perhaps uniquely, it appoints the successor. The consequence is indirectly the placement of the territory under the authority of *pater gentis*, together with the group members and the related assets. But this testament does not grant ownership on the land of *pater gentis*, this is the collective property of the gens, being inalienable and indivisible.

At one time, the unity of the primitive gens was broken by the tribal division - territorial constituencies - of the Roman territory around the city, the excessive power of the sovereign body overshadowing the power of the state which became aware of its role and strength, the most effective way of making it disappear should probably have been dividing its land. With this division, the land becomes an object of private property of the agnatic family in the strict sense of the word - property under the power of *pater familias* [18].

The gens' unity was destroyed and *pater gentis* suppressed, various *pater familias* inside it receive, in addition to their share of the land, the right to transmit the authority over the land, that is, the right to make a *calatis comitiis* testament as the old *pater gentis* did before.

This right passes on to *pater familias* unchanged, being still an institution of heir; but the situation is actually completely changed. In the hands of *pater familias*, the testament becomes above all a way of transmitting the property, a heritage act. Without producing any

formal change, its nature is transformed together with the property regime.

On the death of *pater familias*, as many families would have appeared as the families who would have become *sui iuris* by his death.

They become *sui iuris*, meaning that *pater familias* in his turn *ex iuris* and not *ex testamento*. For assets, in contrast, the testament dominates, thus it is the *pater familias*' will that allows the operation of the transmission.

From this moment, when the testament becomes patrimonial, a series of modifications take place.

The first is the possibility of establishing several heirs, not only one, as in the sovereign testament, in which the unity was the essential condition. *Pater familias* may appoint as heirs all those entitled to succession by the custom and in particular women, whom the Roman law, unlike other systems like the Greek or the German one, does not cut out from the succession.

Also, the author, through his testament, is able to emancipate his slaves, to appoint a guardian for his minor children, these individuals collecting their share of the inheritance; it is necessary that they protect the assets belonging to them and that they cannot manage, to bequeath them, to gratify with their assets considered individually, people who do not have the status of heir.

This transformation probably occurred by the appearance of the Twelve Tables Law (449 BC) whose content tends to support this hypothesis: *uti legassit super pecunia tutelave suae rei, ita ius esto* [27], but the interpretation of this provision displays three types of difficulty.

First, the context of the text at the publication of the law must be established. This was often quoted by the juriconsults and other authors in studies expressing divergent views.

A second difficulty arises in connection with the meaning of the word *legassit*, which was interpreted as giving the right to make a complete testament, and in a narrower sense, the opportunity to make legacies [11].

Last, the most uncertain is related to determining the meaning of the term *pecuniary*, interpreted in a narrower or broader sense, covering all the assets of the testator.

The whole phrase, which is supported by the collections of Roman law texts, is given by Ulpian: *uti legassit super pecunia tutelave suae rei, ita ius esto* [24]. A little bit divergent formula is to be found at the legal adviser Paul: *at cum dicitur, super pecuniae tutelave* [25].

Finally, Cicero: *pater familias uti super familia pecuniaque sua legassit, ita ius esto* [8]. Still, the texts are considered incorrect given the fact that the preposition *super* [12] governs the accusative and the ablative, and definitely not the genitive.

Pecunia suae rei is a repetition and the two words seem to indicate the same idea actually, *tutela suae rei* clearly designates the guardianship of children rather than of the assets.

Pecunia tutelave [25] seems to be an explanatory addition made to the text of the Twelve Table Law at a date difficult to determine and which corresponds to an extension made to the sense by the interpretation of that provision - some authors have argued that *pecunia tutelave* is an insertion in the original text a quite ancient one, regarding the fact that Ulpian considered these words as belonging to the original text.

Regarding the quote from Cicero, this has been subject to changes probably done by a scribe in order to bring the law in line with the concept of his time and to assert that in the meaning of words *sua res sua* or *pecunia sua* it could be found, as the legal

advisors of his time thought, already all the assets of pater familias, respectively pecunia familiae.

Having in view those stated above, it can be said that the original expression was *uti legassit suae rei, ita jus esto* [9].

For the classical jurists, the text above has an undoubtable and very general sense, that of making a will and all of its contents. Pomponius: *verbis legis duodecim Tabularum his, uti legassit suae rei, ita jus esto. Latissima potestas tributa videtur, et heredem instituendi, et legata et libertates dandi, tutelas quoque constituendi* [26] - in the words of the Law of the Twelve Tables, as the way in which a legacy regarding an asset on his own will be made, so it is the law; it meant the awarding of a large capacity to rule and establish an heir, to make legacies and liberations and also, to establish guardianships.

And Gaius can be interpreted in this general sense: *sed quidem licebat totum patrimonium legatis atque libertatibus erogare, nec quidquam heres relinquere praeterquam inane nomen heredis. Idque lex Duodecim Tabularum permittere videbatur, qua cavetur ut quod quisque de re sua testatus esset, id ratum haberetur hic verbis: uti legassit suae rei, ita jus esto* - some time ago, though, it was allowed to waste all the related assets through legacies and liberations and the heir only had the title of heir left; and this shows that this was allowed in the XII Tables Law, which states that, as someone ordered his heritage, to be followed precisely in these terms: in the way someone disposed of his/her wealth, so be it right.

If we go beyond the *re sua quisque testatus esset*, it might be said that Gaius justifies the entire will using the content of the Law of the Twelve Tables, respectively gives *legare* the sense of *testari*. This is the common opinion of the

authors [14] who explain the Law stating that what it establishes is the testator's freedom of action and interprets it as a consequence of a reform, which would have avoided the *calatis comitiis testament* from the authorization of the people, being voted into a law - they ascribed *legassit* the meaning of *legem facere* [9] a sense which disappeared before the advent of the XII Tables Law [20].

Then came the tendency to reduce the importance of this text, the generality assigned by the classical jurists being considered as the original meaning of the Law of the XII Tables.

What the Law of the XII Tables X allowed wasn't the making of the testament, the establishment of succession existing long before, but enshrined the making of legacies, to add to the testament besides the establishment of succession, provisions in favour of the legatees. The law uses the term *legare*, a term designating the act of making a testament being *testari*, while *legare* designates the act of bequeathing in favour of a legatee.

The meaning of the quote from Gaius seems to be that the Law of XII Tables sanctioned the appearance legacies, liberations and guardianships as testamentary provisions, that it validated the provisions that were inserted into the testament [6].

In this respect, Justinian understood Gaius and reproduced his statements in a clear manner: *cum enim olim law duodecim Tabularum, libera erat legandi potestas, ut liceret vel totum patrimonium legatis erogare, quippe ea lege ita cautum esset: uti legassit suae rei, ita jus esto* - In the past, according to the Law of the XII Tables, the ability to make legacies was complete so that it was possible to exhaust all of his/her assets by legacies because it was thus required by law, when it stated: *uti legassit suae rei, ita jus esto; the text in*

the Institute brings no information in addition to that of Gaius, who was his model, but it follows beyond any doubt that the law gives the freedom potestas legandi, at least that was its meaning in the classic text.

The law of Table XII through its regulations permitted the insertion into the calatis comitiis testament of the provisions related to legacies. The law simply drew conclusions from the consequences associated to the transformations produced when the testament becomes patrimonial, establishing heirs, a unique object of the eater gentis testament, adding provisions on the assets of pater familias.

Then there is the hypothesis whether the expression sua res pecunia restricts the freedom to assign legacies only to certain parts of pater familias's heritage. Each of these terms, used together or separately, referred to the whole patrimony in the view of the classical legal advisors [14].

Probably, initially the family designated a category of assets and pecunia another category. The difficulty consisted in being able to operate the distinction. The distinction would correspond to the difference between res Mancipi - land, slaves, work cattle - that would be *family*, and *res nec Mancipi* - the money and the claims to money - that would be pecunia [18].

In another view, the distinction is slightly different: *the family* would designate res Mancipi, but mainly the family property that was inalienable, of which pater familias could not have and could not deprive his children of and *pecunia*, on the contrary, designates the assets which may be controlled through legacies. Precisely in order to emphasize this distinction mark, the jurists would have explained sua res from the Law of the XII Tables XII by pecunia, understood in the ancient sense.

According to the same view, these jurists would be the ones of the VIth century B.C.

and in Appleton's opinion, a conjecture which is deemed gratuitous [20], it would have been Sextus Aelius Catus (198 B.C.) [1].

It is possible that in the era of the Law of the XII Tables, the difference between the meanings of the terms familia and pecunia *to have been there yet, but it seems at least strange that the jurists of the VIth century B.C. use the word pecunia in order to explain the obscurity of the term sua res, precisely in its original meaning that was no longer the sense of their time, with the possibility that they no longer know it* [15].

The hypothesis that the term familia designated a category of inalienable assets, un-transmissible to others than children, is a debatable issue usually considering the rule: *si intestato moritur, adgnatus proximus familiam habeto, aiming at the testament calatis comitiis.*

However, it cannot be excluded that originally, the Law of the XII Tables would have restricted the ability to bequeath related to the assets designated by pecunia, the family representing assets that should have been assigned either to *sui heredes, or for the erdele established in the testament, in the same way in which it can not exclude the view according to which these terms are not actually opposed entities, but are legal terms designating the entire heritage of different historical epochs - familia being the ancient one, and pecunia a more recent one - from their merger resulting familia pecuniaque* [9].

The second addition brought to the Law of the XII Tables, *tutelave* is probably contemporary with the insertion of the term pecunia, *both being considered inconsistent with elegancia and absoluta brevitatis of the style of law* [9].

Despite the inaccuracy of the expression *guardianship suae rei*, this is interpreted by the jurisconsults as giving pater

familias the right to appoint a guardian of his minor children.

Ulpian: *testamento quoque nominatim tutores give confirmantur eadem lege duodecim Tabularum his verbis: uti legassit super pecunia tutelave suae rei, ita just esto, qui tutores give appellantur* [24] - the guardians appointed by testament will be confirmed by the law of the XII Tables, by these words: when somebody has made a legacy regarding pecunia or tutela, so it is the law. These tutors are called dati.

The extensive interpretation proved to be necessary in order to establish the possibility to appoint guardians, to make liberations, and finally, in a much wider extension, considered even abusive, the jurists see in this law text the consecration of the entire testamentary law - an interpretation probably necessary in order to legalize the per aes et libra testament.

In conclusion, we can say that the calatis comitii testament was originally a solemn declaration

by which pater gentis appointed his successor, the verbal appointment being made in solemn terms: *Titius heres esto*.

Given that Roman society was profoundly patriarchal and the members of the curiate assembly, although they did not exercise a judicial control, exercised a certain social control, it is easy to imagine that the testator would not have appeared before this meeting in order to implement the primary feature of this act [2] - the artificial creation of an heir - only in case this establishment was not a really reprehensible deed in the others' eyes [5].

The law did not prohibit the establishment of foreigners, women or prepubescent, but it is hard to believe that pater familias would have made such a decision having children of age, especially given the implications regarding the private and sacred character of this act [11].

That statement took the form of a law and was made before the curiate assembly - who only acknowledged, it did not vote although at the appearance of this form of testament for a short time, the convened assembly may have sanctioned the testament by its vote [7] for political-religious reasons, the people's contribution gradually becoming a mere formality, long before the Law of the XII Tables [14] - it proves how ancient this form is, through which pater gentis designated as successor the most worthy member of the gens, with the choice being limited to his own descendents. This way would explain the testamentary freedom that passed unaltered onto pater familias.

The sovereign testament lasted until the disappearance of the gens as autonomous and sovereign body and sovereign following the triumph of the gens. With the division of the gens' land, its disintegration and the disappearance of pater gentis, instead, pater familias acquires in addition to the individual family property, the right to make the calatis comitii testament.

At this point, keeping the form and the procedure, the testament changes its character, it is no longer a sovereign testament, but a patrimonial one, a fact enshrined in the Law of the XII Tables, which allows besides the establishment of succession, the making of legacies, probably for a restricted share of the family heritage, respectively *res sua* interpreted as *pecunia*.

Over time, jurists, through extensive interpretation, widen the scope of the final text of the law including all assets, *familia pecuniaque*, which the testator may have entirely through legacies. Also as a result of extensive interpretation, the Law of the XII Tables allows the appointment of guardians, the liberation of slaves, consequently all the provisions that will be stipulated in the classic testament.

The patrimonial *calatis comitiis* testament became obsolete before the end of the Republic. According to the information given by Cicero, it seems that in 149 BC it no longer existed - it is no longer mentioned alongside the *per aes et libram* testament, only the *in procinctu* testament [8].

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27. XII Table 5.3.
28. XII Table 5.4.