THE SETTLEMENT OF THE FREEDOM OF DISPOSITION OF PROPERTY UPON DEATH IN HUNGARY BEFORE THE INTRODUCTION OF THE LAW OF ENTAIL (IUS AVITICUM) AND FOLLOWING ITS PROCLAMATION

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Abstract

The freedom of disposition of property upon death is the part of the owners' freedom to dispose of property as a constitutional right, on the basis of which they can decide on the further fate of their property in the event of the owner's death.
In Hungarian law of succession, the freedom of disposition of property upon death has never been completely unrestricted and over time the legislator has narrowed it down and granted the owners more room for maneuver over their property.

Keywords: Hungarian law of succession; reserved portion, disinheritance, ius aviticum, legal history.

1. Intestate succession and disposition of property upon death type of inheriting in the Arpadian Era up to the proclamation of the Law of Entail (ius aviticum)

The rules of intestate succession were introduced into Hungarian legislature by King St. Stephen's codices, which, in order to transform the instruments of ownership, had altered the Hungarian customary laws concerning inheritance, thus protecting private property,[1] as well as abolishing levirate marriages. In the Arpadian Era, as the main rule, the intestate succession predominated, according to which, on the basis of parentelar system of inheritance,[2] the generations followed each other in a specified order in inheriting after the testator: if there were descendants, then they would inherit, in their absence, the testator's ancestors, if they too had been eliminated as heirs, then eventually, the collateral relatives. In cases when there were no legitimate heirs, the testator's estate would revert to the king, the unowned estate was 'per force'[3] inherited by the Holy Crown. Deducted from chapter 35 of King St. Stephen's second

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[1]Second book of King St. Stephen's decrees CHAPTER 35. About the kings' donations and possession of assets.
'We respected the consistent request of the Council, that is, as long as he is alive, everyone should be the master of his property, including royal grants; except for those belonging to bishoprics or counties.
1. §. And upon his death, let his sons have similar hold of their inheritance.
2. §. And let no one suffer any damage in his assets for any wrongdoing, however, if he makes an attempt on the life of the King, or commits high treason, or escapes to foreign land.
3. §.Then let his assets be passed to the King, he himself be convicted, but let his innocent sons suffer no damage.'
https://mek.oszk.hu/01300/01396/html/01.htm, (13. August 2020.)

[2]MEZEY Barna (Szerk.): Magyar jogtörténet, Osiris Kiadó, Budapest, 2007, 85.

[3] TÓTH Lajos: A szent korona öröklésének kérdéséhez, Királyi közjegyzők közlönye, 1933/7, 254.

codex, sons had priority; the laws did not particularly mention daughters' inheriting.[4] King St. Stephen ensured the rights of widows and daughters[5] by abolishing the obligation of a new marriage, thus the woman could decide whether she wished to remarry or not; and if she did, she could choose her husband herself. If she did not wish to remarry, she had the possibility to stay in the husband's family and raise her children and from then on, she made decisions concerning her husband's complete assets. As a matter of fact, thus her situation remained similar to that in which she used to live during her husband's life. She did not gain the ownership of her husband's legacy, assets, as in accordance with the contemporary legislature, the woman could not inherit her deceased husband's estates, but she was legally granted the right to use it, the usufruct. If the woman remarried or deceased, these estates returned to the husband's relatives in the order that complied with the inheritance laws.

The possibility of making disposition of property upon death was declared as early as by King St. Stephen;[6] the right was rather restricted, because the consent of the King and the members of the genus had to be required for it[7] and only the circle of subjects defied by law could be named as heir, that is the testator's wife, sons, daughters and the Church, respectively. Therefore, he could pass a part of his assets to his daughters, too. Disposition of property upon death was not rare, we can find several examples in set of records for the creation of wills both created by men or women[8], in which they testated their property to one of their relatives or

[4]'It is likely that this wording, this silence of our oldest law was in accordance with the actual state, according to which the inheritance rights of daughters as opposed to those of sons were pushed to the background or perhaps did not exist at all.' See: ILLÉS József: A törvényes öröklés rendje az Árpádok korában, Az Athenaeum Irodalmi és Nyomdai R.-T. nyomása, Budapest, 1904, 26., 4th footnote.

[5]Second book of King St. Stephen's decrees chapter 24.

About widows and orphans. Apparently, we wish widows and orphans to have their share in our law with this reason: if a widow is left with sons and daughters and she promises to nurture them and live with them throughout her life, with our permission, let her have the power to do so and nobody shalt force her into a new marriage.

1. §. But, if having changed her intention, she wishes to remarry and leave the orphans; she shalt not possess anything of the orphans' assets, but be given only the garment appropriate for her to wear.

2. §. And if she is widowed without offsprings and she promises to stay widowed without remarrying, we want her to possess all his assets and, as well as to do whatever she intends to do with them. And upon her death, those assets shalt return to her husband's kins, if there are none, let the King be the heir. Https://mek.oszk.hu/01300/01396/html/01.htm, (13. August 2020.)

[6]Second book of King St. Stephen's decrees chapter 5. About the King's permission so that everyone can hold his property.

'By right of our royal power we decided to allow everyone to divide and donate what is his to his own wife, sons, daughters, as well as to his relatives or to the Church.'1. §. And his disposition shalt not be disrespected by anyone.'https://mek.oszk.hu/01300/01396/html/01.htm, (13. August 2020.)

[7]See: ZLINSZKY Imre: A magyar örökösödési jog és az európai jogfejlődés, Az Athenaeum R. Társulat kiadása, Budapest, 1877, 196-197.

[8]For example the serf of Veszprém, Acha's willin King Stephen II's era 1114—1131.With the consent of his female relatives,Scines donates the place called Chutus to the Abbey of Szentmárton. 1146., Will of a woman, called Margit 1152., Adalbert Hungarian lord, having been appointed legate to Roger King of Sicily, before setting off, makes a will. 1150—1154. Count Gergely's will. 1168., Kaba, landowner's will. 1173—1175. In: WENZEL Gusztáv (Szerk.): Árpádkori új okmánytár, Codex diplom. Arpadianus continuatus, Első kötet, 1001-1235., Eggenberger, Pest, 1860, 18., 24., 29., 30., 31., 33.,as well as the will of Pál, Archbishop of Spalato. 1020., will of Zirmus, prior, that is the urban leader of Spalato, 1078., the will of Gaudius of Salona (Spalato). 1150., Adorján's son's, István's will, for the benefit of the Monastery of Saint Benedict next to the River Garam around 1156. , Farkas' Paznan's son's will for the benefit of the Abbey of Saint Benedict next to the River Garam, which Stephen III confirms around 1165, for the Abbey of Zobor, 1185, King Béla III confirms Huda's will with which he liberates several of his servants 1186., Dispositions of property upon death of residents of Bentobeur from the end of the XIIth century, dispositions of property upon death of residents of Dessatrau for the benefit of the Franciscan Order around 1234.will of Gundula János, resident and landowner of Ragusa 1234. In: WENZEL Gusztáv (Szerk.):

abbey and the mentions requesting the consent of the genus or the King also can be seen in them.Thus, according to King St. Stephen's laws, the freedom of making disposition of property upon death was complete in material sense, because it covered the whole estate of the testator, however, related to subjects, it was strongly restricted, [9]it can be seen that the order of succession aimed at maintaining the family, it was completely organised around the family. We can see the first appearance of the subjective testamentary freedom in the Golden Bull (the Hungarian Magna Carta) proclaimed in 1222, when Andrew II enacted the possibility for testators without a son heir to testate their estate to any person respecting the daughter's quarter.[10] Under the legal institution of the daughter's quarter, the testator had to leave one quarter of his complete estate untouched for his daughters, over that he had no testamentary freedom, it could not be 'shortened and therefore burdened', [11], however, he was free to make disposition of property upon death over his assets besides that. The daughter's quarter– regardless of their number – (quarta puellaris seu quartalitium) was owed to all the daughters collectively and besides the unambiguity of the Golden Bull, it is important to highlight that according to the custom, then later also defied by law, [12] the daughter's quarter was owed to the entitled persons even in case of male heirs, and it was bequeathed both in kind or in money. With the appearance of the reserved portions for daughters thus the first factual restriction of the testamentary freedom was introduced, while according to the law, in case of male heirs, they were entitled to the testator's complete estate, and one could not deviate from this with a will. The so-called second the Golden Bull issued in 1231 by Andrew II confirmed the provisions concerning inheritance – including the legal institutions of the daughter's quarter – in the Golden Bull of 1222.[13] In my opinion it is important to highlight that although the Golden Bulls wrote about the testatory rights of royal servants and noblemen, it can be deducted from the preambles of the articles that the provisions refer to all citizens, as the Golden Bull

Árpádkori új okmánytár, Codex diplom. Arpadianus continuatus, Hatodik kötet, (A második folyam első kötete), 890-1235., Eggenberger, Pest, 1867, 15., 26., 43., 47., 59., 98., 102., 141., 353., 354.

[9] It is important to mention that King St. Stephen provided the right to make a disposition of property upon death to each citizen possessing assets – that is to both commoners and serfs. We can read King St. Stephen's concept of equal rights in his Admonitions written to Prince Imre: constantly bearing in mind that each man is in one state and nothing but humbleness elevates one and nothing humiliates one but pride and hatred. „(…) https://mek.oszk.hu/01300/01396/html/01.htm, (13. August 2020.)
FIRST BOOK OF KING ST. STEPHEN, FIRST HUNGARIAN KING'S DECRRES. TO PRINCE ST IMRE. CHAPTER 4. About the due honour of headmen and peer statesmen. 3. §.

[10]Article IV of 1222. So that the nobility be free with their cattle and estate.
If a nobleman dies without a male offspring, let the daughter get the quarter of his estate: with the rest, he should do whatever he feels like.
Section 1 If his death occurs without a testament, let some of his closer kins have, and if he should have no genus of his own at all, let the King inherit his estate.
https://net.jogtar.hu/ezer-ev-torveny?docid=22200004.TV&searchUrl=/ezer-ev-torvenyei%3Fpagenum%3D2#, (13. August 2020.)

[11] MÁRKUS Dezső (Szerk.): Magyar Jogi Lexikon, V. kötet, Pallas Irodalmi és Nyomdai Részvénytársaság, Budapest, 1904, 237.

[12] ILLÉS József op.cit. 35-36.

[13] Article XI of 1231.
succession order of royal servants' estates
a) If one of our royal servants dies without heirs, let her daughter inherit a quarter of his estates, about the rest he should make dispositions as he pleases.
b) and if upon unexpected death he fails to make provisions, let the closest kins inherit.
c) and if he has no relatives at all, let the King be the heir.
https://net.jogtar.hu/ezer-ev-torveny?docid=23100011.TV&searchUrl=/ezer-ev-torvenyei%3Fpagenum%3D2, (13. August 2020.)

confirmed the equality of rights stated by King St. Stephen.[14]. My standpoint is identical with that of the legal scholar, Hajnik Imre;[15] however, as far as the subjective restriction of the testamentary freedom is concerned, he thinks that taking the fact into consideration that the two Golden Bulls in their preambles confirmed the earlier articles, therefore they prevailed as norms, it was not possible to testate outside the family and the Church.[16]. In my opinion, it is not correct, the text of the Golden Bulls is unambiguous, and the prospective testator could do with his estate upon his death what he liked without the circle of the entitled persons defied by law. While Béla IV's decree did not particularly mention testamentary freedom, instead, in the preamble of the article he confirmed the freedom stated by King St. Stephen; Andrew III dealt with it in details. Besides confirming the testamentary freedom [17] and the existence of the daughter's quarter[18], in case of non-existent male heirs, he reintroduced that only the Church or the relatives could be named as an heir in the will, for the validity of which it was not necessary to apply for the King's approval.[19]. To counterbalance the narrowing down of testatory rights, Andrew III's decree stated the unlimited freedom of legal transactions among living persons, which was declared for the first time. Thus we can barely talk about testatory freedom in the Arpadian Era; the purpose of the legislator was to keep the family estate in the family. One cannot read about the institution of disinheriting in any of the acts of the era, the heirs could be left out of their portion with a disposition of property upon death for the benefit of the Church or another heir. The Law of Entail (ius aviticum) proclaimed by King Louis the Great on 11 December 1351, in Buda was another turn regarding testatory freedom. By dividing the possibility of making dispositions of property upon death overt the estate belonging to the testator's legacy into two parts, it forbade the free provision over every inherited – ancestral – estate and it ordered them to be inherited by the genus; testatory freedom was allowed exclusively in case of estate of acquisition – acquired – and not for every testator either.[20] By

[14]The two preambles write this word by word: '(…) we allow them as well as other serfs and royal servants of our country to enjoy the freedom and others provided by the King, which concern the settlement of our country's state, we confirm (...)'.
https://net.jogtar.hu/ezer-ev-torveny?docid=22200000.TV&searchUrl=/ezer-ev-torvenyei%3Fpagenum%3D2 and https://net.jogtar.hu/ezer-ev-torveny?docid=23100000.TV&searchUrl=/ezer-ev-torvenyei%3Fpagenum%3D2 (13. August 2020.)

[15] HAJNIK Imre: Magyar alkotmány-és jogtörténelem, Első kötet, Magyar alkotmány és jog az Árpádok alatt, Kiadja Heckenast Gusztáv, Pest, MDCCCLXII, 327.

[16] HAJNIK Imre op.cit. 321-323.

[17] Article XXVI of 1291 about the free dispository right of noblemen and Saxons without heir
Also: we have allowed that if someone among the noblemen or the mentioned Saxons dies without leaving heirs, the hereditary, purchased, or even his acquired estates must not be seized for the Treasury. But upon his death, the person should have the freedom to testate these to his relative collectively or to any of his relatives or to his wife or for the sake of his salvation, to the Church, or to donate these to anyone even in his life.https://net.jogtar.hu/ezer-ev-torveny?docid=29100026.TV&searchUrl=/ezer-ev-torvenyei%3Fpagenum%3D2, (13. August 2020.)

[18] Article XXX of 1291 about the redemption of the marital entail from the Saxons' estates and the daughter's quarter.
Also: an outsider should not be registered into the estates (….) of noblemen and the mentioned Saxons (…..) neither through marital entail nor via the quarter entitled to daughters, but the heirs of the deceased or closer relatives from the genus should purchase them according to the fair estimation as usual in our country.
https://net.jogtar.hu/ezer-ev-torveny?docid=29100030.TV&searchUrl=/ezer-ev-torvenyei%3Fpagenum%3D2, (13. August 2020.)

[19] HAJNIK Imre: op.cit. 328.

[20]In Section 10 of the Preamble to the Act of 1351, Louis I confirmed the provisions of the Golden Bull of 1222, except for its Article IV: 'Section 11 Except for the above mentioned article, namely: 'The noblemen deceasing without leaving heirs, still alive or upon their death, are entitled and free to testate, to sell, to donate, to alienate their estate to the Church or other persons to their liking.' What is more, exactly its opposite, they should not have

proclaiming the Law of Entail, King Louis the Great thus introduced into Hungarian inheritance law that the estate inherited from the ancestors of owners without heirs also remained undoubtedly within the genus, that is, it ruled out the above mentioned subjective unlimitedness granted by the Golden Bull of 1222. According to the law, while owners with no heir could make disposition of property upon death, even if limited in range; owners having heirs could not make dispositions of property upon death even concerning their acquired estate after the Law of Entail was enacted. Our ancestors considered ancestral estate 'what we inherit after our fathering ancestors throughout intestate succession'',[21]all other assets were considered acquisition assets. Therefore the estate-element passed down from child to father, or from brother to brother did not belong to the circle of ancestral estate, except if the brothers inherited it from their ancestors.[22]The Law of Entail had made the ancestral estate practically unmarketable, because its owner could not alienate it in his life, he could not make disposition of property upon his death, and only testators without heirs could make disposition of property upon death regarding the acquired estate. It can be stated that King Louis the Great practically paralysed the possibility to make dispositions of property upon death by the introduction of the Law of Entail almost completely, with the law coming into effect our inheritance right was determined by the Law of Entail for half a millennium, and because of the restricted testamentary freedom, 'typically'[23] the intestate succession prevailed instead of the testamentary.

2. The first attempt of codifying Hungarian law under the Law of Entail: the creation of the Tripartitum (Triple Book). Exclusion from inheriting in the Tripartitum

The compilation of decrees regulating Hungarian succession law, but generally the compilation of royal decrees had not happened up to the XVIth century, there are no authentic records about the existence of such data. King Ulászló II charged royal judge István Werbőczy, master of judgement, with compiling and wording in writing the so far accumulated customary law and laws.[24] By 1514, Werbőczy completed his Triple Book (Tripartitum),[25] which he did present to the Diet (National Assembly) that year.[26] The Diet appointed a ten-membered committee [27]to supervise the codex, which accepted the correctness of the work, and following this, the estates

the right to do so, but in accordance with the law and act, their estates should clearly and inevitably, without the slightest contradiction, go into the hands of the closest kins and genus.'
https://net.jogtar.hu/ezer-ev-torveny?docid=35100000.TV&searchUrl=/ezer-ev-torvenyei%3Fpagenum%3D3, (13. August 2020.)

[21]WENZEL Gusztáv: Az 1848. előtti magyar magánjog tekintettel újabb átalakítására,Nyomatott a Magyar Királyi Egyetemi Könyvnyomdában, Budapest, 1885,252.

[22]See: ZSÖGÖD Benő: Öröklött s szerzett vagyon, Tanulmány újabb irodalmunkból, Függelékkel a kiskorúak utáni törvényes öröklésről, II. változatlan kiadás, Politzer Zsigmond kiadása, Budapest, 1897, 90.

[23] MEZEY BARNA op.cit. 132.

[24]Werbőczy István Hármaskönyve, Paying attention to the authentic issue of MDXVII, it was published by: Magyar Tudományos Akadémia, Második kiadás, Pest, MDCCCLXIV, Eggenberger Ferdinánd akad. könyvkereskedése, Ajánlás Ulászló királyhoz, 1-2.

[25]The legal codex divided the customary law and the decrees created so far into three parts.

[26]TIMON Ákos: Magyar alkotmány- és jogtörténet különös tekintettel a nyugati államok jogfejlődésére, Ötödik bővített kiadás, Hornyánszky Viktor Könyvkiadóhivatala, Budapest, 1917, 633.

[27]Its members were: Wárdai Pál sz.-Zsigmondian provost and royal chancellor, Batthyány Benedek castellan of Buda, Ellyewelghi János the palatine's, and Bellyeni Albert and Bolyar Pal chiefs justice, Gibartlii Kesserw István deputy-palatine, Mekchei György royal secretary, Zob Mihály and Dombó Pál judges of the royal Court of Appeal, PetrowcziHenzelffy István, the manager of royal affairs. See: WENZEL Gusztáv: A magyar magánjog rendszere, Harmadik kiadás, Első kötet, Nyomatott a Magyar Királyiegyetemi Könyvnyomdában, Budapest, 1885, 89.

requested the King to confirm the completed work with his seal, then to distribute the copies to the counties for purposes of application.[28]However, the royal confirmation of the Triple Book did not happen, so the codex never entered force, the assumed reason of which Werbőczy saw in the lengthy copying, while King Ulászló II had to leave the country for a longer period due to his official duties, then following his return, he had other immediate tasks in his schedule, therefore the codification of the national law was pushed to the background.[29] Despite this, the Triple Book spread all over the country, courts applied it everywhere[30] and it provides a determining support for the development subsequent legal literature.[31]

According to the Tripartitum, the testator's estate was divided – in accordance with the contemporary effective Law of Entail – into ancestral and acquired estate, the codex provided free disposition over the acquired estate, [32] while it ruled the application of intestate succession concerning the inherited (ancestral) estate. In accordance with the feudal system, there were different testamentary laws and intestate succession rules concerning the estates of noblemen and commoners: according to the intestate succession for the nobility, first the testator's legal descendants inherited in the same proportion per person, namely on the basis of the old customary law, male heirs having priority.[33] Legitimate children were considered those who were born into a legitimate wedlock, as well as within ten months following the death of the father.[34] In the absence of the testator's descendants his ancestors inherited, and if the testator's parents were not alive either, his collateral kinsmen.[35]And if the testator had no collateral heirs either, ultimately the royal fiscus (treasury) inherited.[36] The inheritance rules of commoners differed from those of noblemen that the estate of the person without heirs was inherited by the landowner and besides this, commoners without heirs could make dispositions of property upon death only over the half of their acquired real estate, the other half of it was entitled to the landowner.[37]

The testator's ancestral estate thus was passed down to the destined heir from the genus – or to the fiscus, or to the landowner –, they could neither be disinherited nor excluded from this; by separating the ancestral and the acquired estate, the rules allowed the testator to exclude the

[28]'Article LXIII. of 1514: the decrees are to be collected, amended and sent to the counties. Furthermore, all the decrees be amended and compiled, Your Royal Majesty, have it read out, following the reading out, having confirmed and sealed it, have them sent to the counties.'
https://net.jogtar.hu/ezer-ev-torveny?docid=51400063.TV&searchUrl=/ezer-ev-torvenyei%3Fpagenum%3D7, (13. August 2020.)
[29]Werbőczy István Hármaskönyve… „Werbőczy István az olvasóhoz", 375-376.
[30]WENZEL Gusztáv: A magyar magánjog rendszere … 90-91.
[31]Werbőczy és a Hármaskönyv. Dr. Illés József egyetemi nyilv. rendes tanár előadása a Magyar Jogászegylet teljes ülésén 1942. március 21-én. Magyar Jogászegylet könyvtára. 22. Magyar Jogászegylet kiadása, Budapest, 11.
[32]Tripartitum Part I., 57th Title.
So that every lord and nobleman is free to make disposition about his own real estate
We have to know that every baron and magnate and landowner nobleman who has got sons and daughters, without their consent, or even against their will, is free to make dispositions over his own assets, real estate and possession rights which has acquired and won with his services, or purchased with his own money (which is also acquired with services)and still in his life (as he wishes) and also he has the complete right and power to alienate them; none of the sons' and daughters' objections or protests or any other resistance can stand in his way. See: WERBŐCZY ISTVÁN HÁRMASKÖNYVE. A M. Tud. Akadémia által gondozott harmadik kiadás. After the first original publication in 1517, it was translated and affixed with a legal and technical dictionary and with a detailed index.Kolosvári Sándor és Óvári Kelemen. Issued by: Magyar Tudományos Akadémia, Budapest, 1894.
[33]Tripartitum Part I.17th Title.
[34]Tripartitum Part II. 62 th Title.
[35]Tripartitum Part I. 47 th Title.
[36]Tripartitum Part I. 10 th Title.
[37]Tripartitum Part III., 30 th Title.

members of the genus from the acquisition estate in case of the existence of certain attitudes paralelly handing out their due portion of the ancestral estate. The Tripartitum ruled about the attitudes serving the basis for excluding from the acquired estate in the following ways:[38]

> *'Furthermore, we have to know that the father can force his son who has grown into life and come of age – but not the prepubescent one – to divide his inheritance and his other estate, but he cannot disinherit him in the following cases.*
> *Section 1First: if the son places a violent hand on his parents, or he commits any other serious and conspicuous insult against them.*
> *Section 2 In addition: if he initiates a criminal charge against the parents in a case which does not constitute endangering the prince/chieftain or the whole public safety of the country.*
> *Section 3. In addition: if he is endeavouring to put an end to his parents lives, that is, with poison or with in another way he is seeking their hurt.*
> *Section 4. In addition: if against the father's will, while viciously wasting the paternal assets, he is befriending evildoers or other people leading unholy life.*
> *Section 5. In addition: if he fails to ransom or to rescue or to voucher for the father taken captive from the hands of the enemy or from the dungeon when he would have the means.'*

Opinions concerning the real meaning of the above presented reasons differed saying that if the law forces the ungrateful child through his father to divide the ancestral estate, that is, he is given an estate while his father is still alive: 'he is rather rewarded than punished.'[39] Actually, the sanction nature of the division and the meaning of the provision was that when the son got his due portion from the ancient estate – being given nothing from the acquired estate –, his inheriting claims had to be considered satisfied and he became excluded from the possibly more valuable divisions, as well as following the division he was also excluded from the complete estate acquired by the parents. Besides the fact that we can see the possibility of depriving someone of inheriting for the first time in the Tripartitum, the legal codex had settled several other significant issues in relation to the institution. The Triple Book allowed the deprivation of the acquisition portion only in case of the testator's pubescent children, that is children over twelve, [40]they could stand up to others and initiate a lawsuit. It can also be deducted from the provisions over the legal and not legal age of children (Part I, 111.Czim Section 6-7) that exclusively men over twenty-one and women over sixteen could make testamentary declarations, for which the King's consent was necessary only if the declaring man was single and close to dying out or to the end of the family line.[41]

Apparently, for cases of descendants' exclusions the Tripartitum primarily considered the most serious crimes committed against persons – acts committed against life, physical integrity, health – acts the existence of which may entail the exclusion from inheriting; but sanctioning lifestyle conflicting morality also appeared, while Section 5 can rather be put to the category of legal consequences in case of ungratefulness with a parent. In connection with Section 5 it is worth mentioning that according to the

[38]Tripartitum, Part I., 52 [th] Title cases in which the father can force his son to divide his assets.
[39]See: KARVASY Ágost: Észrevételek a végrendelkezési jognak a törvényes osztályrész általi korlatolását illetőleg, Jogtudományi közlöny, 1866/20, 308.
[40]Tripartitum, Part I., 111[th] Title.
[41]Tripartitum, Part I, 65[th] Title.

Tripartitum, the paternal power over the children ceased to exist in case of the father's captivity (Part I. 56. Czim, Section 3), therefore if the father did not return, his estate had to be divided among his children, however, if the son – although he could have done – failed to free or voucher for his father, then as in accordance with the above mentioned things, besides gaining integrity, he was also excluded from his portion of the acquisition. The listed attitudes can be clearly identified, each point is well-defied, even Section 4, which is based on a subjective element, contains an objective criterion: the deliberate wasting of the inheritance had to be stated for its existence. By evildoers the Tripartitum meant perpetrators of crimes, while unholy – that is unbeliever – people were considered illegal and anti-social.[42] Not only did the Tripartitum provide the possibility to exclude the descendant's legal claim for inheritance, but the parent could also be forced to divide the asset in case of certain attitudes he followed:[43]

> *'And vica versa, the son (even if still under the paternal power) can force and enforce his father to divide the real estate and assets in the following cases, the predominant paternal power cannot stand in its way:*
> *Section 1 First: when the father is wasting his assets and has alienated both his and his sons' assets not out of necessity and for the right cause, but rather out of treachery, or he is intent on alienating them and this intention of his becomes known to his son.*
> *Section 2 Furthermore: when he has not alienated the inheritance and the possession right, neither does he intend to alienate them, but he does not cultivate them properly, lets them to their demise.*
> *Section 3 Furthermore: if the father chastises the son monstrously and ruthlessly without the fair reason and without a major misdemeanour.*
> *Section 4 Furthermore: when his father forbids his adult-ages son from the marital ties.*
> *Section 5 Furthermore: when the father forces his son to commit a crime.*

In the above mentioned cases the parent had to give the son his portion of the ancestral estate, that is for the son the inheritance opened earlier, while the father had to depart from a possibly significant part of his estate before his death. It is important that the division did not affect the estate the father had acquired with his services or merits even in this case; he was not obliged to give the child his due portion. The Tripartitum is exhaustively listed and well-identified about excluding parents; it made the forcing of the division possible only on the basis of objective reasons: we can observe jeopardising the child's raising or making his situation impossible and punishable attitudes committed against the child by the parent. Section 1 and 2 – like the contemporary succession order entirely – unambiguously were designed to protect the estate of the genus, keep it together by preventing the uneconomic estate-management, its unreasonable alienation. On the basis of the Tripartitum, the paternal power extended to the father's chastening his sons of legal age in accordance with what they deserved, he could even have them locked up,[44] however, if the chastening was unfair and

[42]See: e.g. Tripartitum, Part I, 6th Title About the definitions of the law and its props. 'Section 6 It is said in the definition that the law is God's gift. Because according to Chrysostomus, God's law is the one fair path, which does not bend either to the right or to the left. Without law, therefore, the nation which despises the word of God and the lesson of the laws is rushing to its damnation on various paths of delusion. (...)'
[43]Tripartitum, Part I, 53 th Title. About cases in which conversely the son can share with his father.
[44]Tripartitum Part I, 51 th Title. About the division of assets between fathers and sons and about the paternal power.

disproportional, that served as a basis for applying for the division of the paternal estate together with the termination of the paternal power. Section 4 was a right provided for sons over twenty-one, in addition, sons could force their father to divide and give the estate since they reached the twelve-year-old age, and this had to be done not in the form of initiating criminal procedures, instead it was proper to warn and request their father to do so.[45]

Both noblemen's and commoners' estates were entitled to the above possibilities of dividing the estate, as they referred to those who without any discrimination possessed ancestral estates.

The Tripartitum contains the intestate succession, the circle of legal heirs and the rules for exclusion accurately and in detail, the provisions can easily be followed, logically structured, building on each other. According to Illés József, university lecturer, the Tripartitum suffered no significant attack up to the XIXth century,[46]following the decline of the estate system, aspirations wishing to abolish and undermine the work evoking this old, undesirable era started to spread intensively. It is a tell-tale fact that we cannot find any legislation concerning disposition of property upon death in the Tripartitum. This could probably be contributed to the fact that due to the Law of Entail, wills could not be widespread before the creation of the Tripartitum, because we could see that the legal institution significantly narrowed the circle of assets, over which one could make a disposition of property upon death. It was possible to make disposition of property upon death over movable properties and purchased items, but taking into consideration that if the owner of the purchased items did not make disposition of property upon death concerning these items, then they became ancestral asset for the heir, therefore they fell under the prohibition of disposition of property upon death. The above mentioned justify why the Tripartitum did not regulate the issue of disposition of property upon death, at the same time, the legal codex treated it as a legal institution, in which the testator could order a guardian to his children in case of his death.[47] The content elements required for the validity of the will could be known from earlier decrees, and then from Werbőczy's legal codex, however, the accurate establishment of their formalities had been unregulated since King St. Stephen, [48]which state prevailed till the creation of Article XXVII of 1715.[49]The article is not lengthy (it consists of 11 sections only), however it provides an extensive regulation about the ways of making dispositions if property upon death. The most important rules worded by the article are that a distinction has to be made between written and oral wills; in addition, naming an heir is not a validity element of wills made after the proclamation of the article. Oral wills could be made in the presence of two witnesses; in addition they were possible to be made by soldiers, final wills between parents and children, in addition, final wills made in case of pestilence,[50] that is, in extraordinary cases. In the same cases legislature did not require witnesses to make a written will; the article (Section 5) collectively named the wills created in the above mentioned specific cases exceptional wills on the basis of the exceptional circumstances. Written wills could be created validly at a verified place, in the presence of authoritative persons – chapters,

[45]Tripartitum Part I, 53 [th] Title. Section 6.
[46]Werbőczy és a Hármaskönyv. Dr. Illés József egyetemi nyilv. rendes tanár előadása … 13.
[47]Tripartitum Part I, 114[th] Title. About the second, that is, the so-called testamentary guardianship.
[48] In the absence of regulations concerning the formality of wills, the rules of Roman law were applied.
See: WENZEL Gusztáv: Az Ausztriai Általános Polgári Törvénykönyv magyarázata, Magyar-, Horvát-, Tótország, a Szerbvajdaság és a Temesi Bánság viszonyaira alkalmazva, Pesten, GeibelArmin sajátja, 1854, 370.
[49] 1715. évi XXVII. törvénycikk a végrendeletekről. https://net.jogtar.hu/ezer-ev-torveny?docid=71500027.TV&searchUrl=/ezer-ev-torvenyei%3Fpagenum%3D23, (13. August 2020.)
[50]„(…) pestilence or other life-endangering, at the same time contagious or fast-spreading (rapid) epidemics (…)'
See: MÁRKUS Dezső (Szerk.): Magyar Jogi Lexikon, VI. kötet, Pallas Irodalmi és Nyomdai Részvénytársaság, Budapest, 1907, 1029.

convents, the normal judges of the country and the protonotary (assistant judge) – or created by the testator, signed and also signed by five witnesses, and if the prospective testator could not write, the signature of a sixth witness was also necessary on the document. Thus the article made a distinction between the legal institutions of public wills and written private wills.

3. The abolition of the Law of Entail in our country

Due to the expansion of enlightenment ideas, the medieval institutions became outdated in our country too, so the legal life and politics in the first half of the XIXth century were characterised by the desire to abolish the Law of Entail: several outstanding statesmen of the era recognised the paralysing effect the entail system had on the economy and they raised their voices in order to demand the abolishing this obsolete institution from legislature.[51] In accordance with the requests, the proposal for abolishing the Law of Entail was at last made during the Diet of the estates in 1847-1848[52] and as a result of that, the abolishing of the Law of Entail was proclaimed and it was ordered that in order to fully and perfectly abolish the entail system, the ministry work out a civil code and submit it of the next Diet.[53]The creation of the civil code did not occur as a consequence of the events in 1848-49 and following the suppression of the war of liberty, the Habsburg Empire began the transformation of the legal system after the Austrian model, within the framework of which Emperor Franz Joseph I in an open emperal order ruled the termination of the entail system, as well as the entry into force of the Austrian Civil Code, together with it the termination of laws and customary law applied or in effect so far.[54] Thus the institution of the entail system was abolished stated by law, therefore in principle; testamentary freedom was extended to the complete estate of citizens, but in the five years that passed between its abolition and the entry into force of the Austrian Civil Code, courts – in the absence of a civil code – had to apply the rules of inheriting in effect before 1848 regardless of the abolition of the entail system.[55] The further application of the ACC was rejected by the Temporary Legislative Rules established by the Judge Royal Meeting, but in the absence of a Hungarian civil code it could only refer back to times before the Article XV of 1848 stating the abolition of the Law of Entail, without applying the rules of the entail system. The Law of Entail never returned to Hungarian legislature in its entirety, however, in the rules of succession lines it still survives in our legally organised legislature in our present days.

Summary

Keeping the family estate together thus was a highlighted purpose of the state as early as following the introduction of intestate succession by King St. Stephen, the extent of testamentary freedom was constantly changing in legislature concerning Hungarian inheritance

[51]For example Kossuth Lajos, Széchenyi István or Deák Ferenc as well.
[52]MÁRKUS Dezső (Szerk.): Magyar Jogi Lexikon, V. kötet… 798.
[53] XV. TÖRVÉNY-CZIKK. Az ősiség eltörléséről. 1.§. In: Corpus Iuris Hungarici, MAGYAR TÖRVÉNYTÁR 1000-1895,MILLENNIUMI EMLÉKKIADÁS, BUDAPEST, FRANKLIN - TÁRSULAT MAGYAR IROD. INTÉZET ÉS KÖNYVNYOMDA, 1896, 237.
[54] HIRDETÉSI NYILTPARANCS 1. Czikk. See: WENZEL Gusztáv: Az Ausztriai Általános Polgári Törvénykönyv magyarázata… 53.
[55] ZLINSZKY Imre: A magyar magánjog mai érvényében különös tekintettel a gyakorlat igényeire, Hetedik kiadás, Budapest, Franklin-Társulat Magyar Irod. Intézet és Könyvnyomda, 1899, 1033.

laws; slowly though, but apparently it did increase. Testatory freedom was most restricted during the five hundred years' existence of the entail system; as the Law of Entail did not simply preserved the estate system, but the whole structure of feudalism, therefore it became the main obstacle of capitalism and the development of citizenship in the modern era.