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Senatus Consultum Orfitianum

The *Senatus Consultum Orfitianum* is a senatorial decree enacted under Marcus Aurelius in 178 CE that gave children priority over other heirs in inheriting from an intestate mother (Ulpian, *Reg.* 26.7). The jurists Gaius and Paul wrote monographs on the decree,¹ and the lengthy comments of Ulpian in the twelfth book of *ad Sabinum* are also preserved in the *Digest* (D.38.17.1).

Under the Twelve Tables, children did not inherit from an intestate mother (Paul, *Sent.* 4.10). This was due to the fact that, unlike men, women did not have power over free citizens and therefore could not have *sui heredes*, children who had been in the power of the deceased who became independent upon his death (Gaius, *Lex Julia et Papia*, Bk 10, D.38.16.13; Gaius, *Inst.* 3.14). They would also have only been in the third class (*unde cognati*) of the praetorian order of succession, fairly low down the line. The decree thus represented a significant shift, prioritizing children over others. Prior to the *sc Orfitianum*, children would only have had this position if the wife had been married *cum manu*, a form of marriage that brought the wife into her husband's family, but was effectively obsolete in the imperial period.

The category of children included emancipated offspring and those who had been given away in adoption, meaning the significance of this change should not be underestimated. It also included illegitimate children (Ulpian, *Sabinus*, Book 12, D.38.17.1.2; *Inst.* 3.4.3; cf Paul, *Sent.* 4.10), and would have represented a large improvement in their chances of inheriting any property at all, since illegitimate children otherwise had no *paterfamilias* from whom they could inherit. The implications were also significant for children of freedwomen, who would have been superseded by the patron before the *sc*. For certain groups this was therefore a considerable improvement, though Justinian later excluded illegitimate children in cases where legitimate offspring survived, or the mother was of high rank (C.4.57.5).

The decree is typically discussed in conjunction with the earlier *sc Tertullianum* (Hadrianic era), which had raised a mother in the line of succession to her intestate children. However, while the *sc Tertullianum* applied only to women with the *ius liberorum*, the *sc Orfitianum* did not require women to possess the *ius*; it also applied to women of freed status (Ulpian, *Sabinus*, Book 12 D.38.17.1 pr). Furthermore, the *sc Orfitianum* included several restrictions that the earlier decree lacked: those condemned on a capital charge or professional gladiators (who had not had their status restored) were disqualified, as were sons in the *potestas* of men in these categories. These disqualifications were later relaxed (Ulpian, *Sabinus*, Book 12, D.38.17.1.6).

The *sc* by no means ensured that a woman's estate would not ultimately end up in her husband's hands, since children in power were included under the terms of the decree. In this case, the property would then become their father's.² If the aim of both these *senatus consulta* was to keep property in the close family,³ it would explain why this was not seen as a problem. This issue was not addressed until much later, when Constantine gave the father only a usufruct on property inherited from the mother's side.⁴

The *sc Tertullianum* and *sc Orfitianum* are typically discussed in the context of the developing shift from agnatic to cognatic ties in succession law. Meinhart 1969 remains the most comprehensive monograph on the *senatus consulta*; Koehn 2017 has recently re-examined the *sc Orfitianum* in the

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¹ See Honoré 2010, 149 for possible corrections to the inscriptions to the jurists in D.38.17.5-9.

² Gardner 1998, 232.

³ McGinn 1998, 109-113.

⁴ See Sargentis 1999, 407, 417.

context of the older debate about the influence of philosophy on Marcus Aurelius' legislative programme. Babusiaux 2015, 78-80 is an up to date discussion of the sources; Gardner 1998, 220-233 remains a good introduction in English to both *senatus consulta*.

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