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# Usufruct, a convenient way for circulating the unalienable properties of Church and State into aristocratic inheritance

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► **To cite this version:**

Jean Berger. Usufruct, a convenient way for circulating the unalienable properties of Church and State into aristocratic inheritance: Cambridge. King's college. table ronde/round table: "Église et transformation sociale/ Church and social Transformation". 2019. halshs-04374076

**HAL Id: halshs-04374076**

**<https://shs.hal.science/halshs-04374076>**

Preprint submitted on 5 Jan 2024

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Cambridge. King's college.  
table ronde/round table :  
« Église et transformation sociale/  
Church and social Transformation»,



18 janvier 2019.

## Usufruct, a convenient way for circulating the unalienable properties of Church and State into aristocratic inheritance

[fig. n°1-Title]

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[fig. n°2-Presentation's plan]

First of all, I would like to thank the professors John ARNOLD and Charles DE MIRAMON for kindly inviting me to speak here today at this — not so — round table about « the Church and social transformation ».

Then, I have to apologise immediately for so many reasons.

In the first place, I will mostly talk about an earlier period.

In a second place, although we are supposed to focus on « social transformation », instead of « transformation » I will mainly speak one aspect of « social reproduction » and the underestimated church part in it.

Lastly, I'm probably the worst English speaker of this honourable audience, it means that I must stick out like a sore thumb in this temple of knowledge. Consequently I beg your indulgence.

Anyway, this presentation will intend to briefly review what seems to me an important issue encountered during my doctoral research, the usufruct.

I actually went through this theme to prepare some papers and more widely to deal with the relationship between church and state, and finally to reconsider the origins of the ecclesiastical lordship.

[fig n°3-Map]

I- Itinerary of searching and previous reminder

1) From the particular to the general : remarks about the Brioude's charters

Brioude is a small sub-prefecture of one of the less populated French départements. Brioude is located in Auvergne, and has been quite important at the end of the West Roman Empire and the beginning of the middle ages. Indeed, it was a privileged burial place, above all because of the Holy martyr Julian of Brioude's grave, saint and soldier, patron saint of all the Auvergne based people, which has given his name to every numerous village of France and neighbouring countries called Saint-Julien. Julian is one of the most famous and iconic Gallic saints, with Martin and Maurice.

## [fig n°5-Avitus coinage]

It was probably no coincidence, that in 455, the only Gallic Emperor, Avitus, native of Auvergne, choose this place to be his burial. And so will do, a few centuries later, the Carolingian dukes of Aquitaine, Charlemagne's nephews, called the « Wilhemids ». Up to now, Saint-Julien de Brioude still remains the largest romanesque church of Auvergne.

## [fig, n°6-Liber de Passione manuscript]

After the *Liber de passione Juliani*, wrote by the bishop Gregory of Tours, also native of Auvergne, at the end of the VI<sup>th</sup> century, which provides us an accurate picture of a merovingian church, no textual documents are conservated until the IX<sup>th</sup> century. From that time, an important cartulary is conservated, containing more than 500 charters, and the greater number dated from the X<sup>th</sup> century. The overwhelming majority of those charters are donations to the church of Saint-Julian, but the gifts are endowed with a special clause, the *retentio usufructus*, « reservation of the usufruct », that is the right for the donor to keep the estate for using and harvesting it, but with a lifetime enjoyment, even if he no longer owns the property of it. Most of the time the clause use explicitly the juridical term *usufructus*, but sometimes merely use the phrase « *ut quamdiu vixerit* » (« as long as he live, he will hold the estate »).

This kind of donation is quite special because the donor keeps with him the thing given. It questions what giving means. Specialy when, in some cases, only the most documented ones, you can observe a same aristocratic family groupe, reiterating nearly the same donation of the same estate, one or two generations later, and, by the way, continuing to make his members benefiting of a lifetime usufruct.

At this point, usufruct, seems to be a real land tenure, as confirmed in the main text of the charters or in the XI<sup>th</sup> century title of the cartulary : « *Liber de honoribus sancto Juliano collatis* » (the « Book of honors conferred to saint Julian »). To go further, in the charters, *usufructus* is sometimes also replaced by the word *beneficium*, which means that is an ecclesiastical lordship's matter. Estates given to the saint by the families are becoming unalienable, and this is the common characteristic of the *res religiosa* or *publica* : as « honors » they cannot be given away, be sold or transferred upon another.

So rereading of this cartulary and these charters reveals a system, in which aristocratic families pool together the enjoyment and the benefit of these unalienable « honors ». The gift, in fact, is essentially the endlessly, symbolic and regular repetition of the *traditio*/trading gesture for the benefit of the saint's *Majestas*. It less about generosity and benevolence of the donors than about a social display of his social statue. Clearly, it's a way for securing his wealth and position in society by turning them as a part of a sanctuary.

And that the big issue, beyond this monographic focus and the testimony of the Brioude charters, studying the usufruct probably allows to provide a better comprehension of the medieval societies

## 2) Principles, background and transformation of the usufruct during the Late Antiquity

Usufruct is a specific technic of the Roman law. Quite ancient, it had been particularly explored and developed by the late Roman Empire's juriconsults, under and after the reign of the oriental dynasty of the Severans and the Roman law's true classical era. At this time this specific technic was quite sophisticated, but based on simple ideas and key concepts :

The first is the distinction between *propietas*/property and *possessio*/possession, the distinction between theoretical and real ownership, between an eminent and useful property. So the

*Res*, the goods, the thing, could be divided between an *anima*, a soul, a stronger title, and a *corpus*, a body, a practical and material benefit, and could consequently be founded on two different people.

The great German Jewish scholar, Ernst LEVY, in his very famous master piece « *West roman vulgar law* », published in 1951 after an exile in the USA, had a particular attention to the usufruct in order to bring out the evolution of the law at the end of the Western Empire. After a long term and patient indexation of all kind of juridical sources, he had shown how the whole juridical material were influenced and transformed by what he called « the vulgar law ». We presently call it « the provincial law », the way law were observed and justice delivered into the provinces. Either the way local customs have influenced it.

In doing so, Ernst LÉVY has proved that the classical and technical distinction between *possessio* and *proprietas* had evolved in a opposition between *dominium*/full property and usufruct. While in the texts the use of the term *possessio* has become less precise, usufruct allowed to replace and simplify the technical *ius in re aliena* : like « servitudes (fr.) », legal constraints and easement rights. So Ernst Levy, observe a kind of empowerment of the usufruct, through its reservation, it become nearly similar to *dominium* but without *aliendi licentia*, right to transfer, sell or give. Anyway, in Levy's opinion, the usufruct's reservation, had become a flexible notion, as he said « characterized by the absence of interest unclear-cut notions».

The second important point about the donations which contain an usufruct's reservation, in accordance with the law, is that the transfer of the good is always considered fully done and transferred, even if it has not happened. Because usufruct is considered as an « obligation », the donor, the former owner, for being the recipient of the usufruct, need to totally relinquish the thing. In Roman law, obligation is not all about the land tenure, but more about relationship between parties, and as a contract it needs two sides. Consequently it's impossible for the owners to create an obligation on their own thing. From such a perspective, the medieval usufruct will preserve the spirit of the roman law, and necessarily introduce personal relationship and mutual an unequal duty. We shall come back further in this presentation on the symbolic and also decisive function of the *traditio*, endlessly asserted and accomplished in the Brioude's charters for the benefit of the saint by the local authority.

The third point, about usufruct is the fact that this obligation was originally *ad tempus*, and for a certain limited time. It means for a defined time frame. Although, during Late Antiquity, usufruct has become very systematically applicable for a life time period. Despite the classical Roman law, if we recall the definition of interpersonal roman obligation and if we consider the Late Antiquity historical context, we can see this application is quite logical. Indeed, when the beneficiary is not a physical person — for example in our case, the church —, the donor, won't be able to survive the recipient. By all accounts, observation of life time usufruct's reservation in the Roman provincial law during Late Antiquity is a substantial indication and testimony of the past increase of the gifts to an institutional third-party for a legal person, not a physical one.

All these considerations explain how original is the titles « organisation » in the juridical handbook called *Fragmenta vaticana* (Vat lib. 5766). This handbook have been found by philologists in a palimpsest manuscripts found in Bobbio and containing John Cassian's works. It's probably a copy made during the V<sup>th</sup> century in the Rhône Valley, of a IV<sup>th</sup> century treatise. For the first time in a legal codification, usufruct has been one of the main subject. It also got an independant title in it, just after a previous title about the purchase and sold, and just before one about union and dowry.

### 3) The *res maternae*, legal and roman basis of the medieval usufruct.

The main law code of the Germanic people written in the early middle ages, specially the Wisigothic and Burgundian ones, are much more Roman than Germanic. They summarize and sort

of the text of the classic codes, selecting the most useful ones. It's relevant to observe a coherent selection outcome about usufruct. Text dealing about usufruct are almost entirely dedicated to marriage and *res maternas*, that is essentially dower and dowry.

It's a critical moment for creating and renegotiating usufruct into each family and between the two allied families. There is a considerable literature about this subject, but I will spare you the details. Once again, we could simply explain usufruct utility : property of the dower and dowry goes to the children and parents only retain usufruct from these. The aim of these matrimonial reserve is to protect the widow and also the children in case of husband's death from his parents. Let's recap, dowry is given by the futur bride's families, betrothed to the engaged boy at the *sponsalium*. Then after, for the wedding, the groom and his family give the dower to the couple with a *donatio nuptialis* or *condonatio*. It frequently goes with an usufruct's reservation. The most important part of the *bona materna*, the two thirds, come from the bride's family, and the other third from the groom's family.

Dower and dowry are not a simple trade between family and clan. Construction of the *bona materna* lead to a regulated *dominium* unavailability and mutualisation, banking on the couple's fertility and its procreation, a collective investment depending on further events. The necessary long term unalienability of the *bona materna* needs safe guarantee. At this point, invoking Maurice GODELIER'S work on economical anthropology, is a necessity to understand how the church, as a space of ritualised unavailability, has constituted a secure repository for the aristocratic *bona materna* but also a way to exerce a collective control over its own reproduction.

Over a long period, this legal back-ground was quite burdensom. But it can be an useful pre-condition for puting in perspective and understanding the permanent presence of the usufruct's reservation in the medieval charters of donation given for the benefit of the church.

## II- Donations and usufruct's reservation : a skewed knowledge ?

### 1) Behind the *precaria*

During the middle ages we specially find usufruct in a particular class of diplomatic text, the *precariae*. The famous French historian of the institutions, Numa Denis FUSTEL DE COULANGES, had studied that particular class. Having noticed that they were used to grant some *beneficium*, that is temporary tenure or enjoyment of an estate, the scholar have proposed to identify in that class the feodality's root. Obviously, he was quite right and, at the time, was brilliant. Since that time, *precaria* have become a kind of « totem » for the French medievalists. However, to so deeper, through a long term middle ages, under a same word, *precaria* doesn't appear to be a self-sufficient diplomatic class.

### [fig. n° 7- *Precariae*'s typology]

Recently, *Precariae* were highlighted by medievalists in international academic meetings dealing with the « transfert patrimoniaux » during the early middle ages, under the direction of François BOUGARD. Studies have then shown how various they were. In especially Laurent MORELLE'S issue, who have identified the core of that class of charters, its principal subset (*oblata, remuneratoria, data*), and a more accurate chronology. By doing so, he also clearly defined a specific and succesfull type, the classical form of the medieval *precaria*, developed during and due to the Carolingian dynasty. We can find very numerous ones in the archives muniments of the monastery located in the heart of the Carolingian Empire. To put simply, most of the *precaria* associate a private and lay people with principaly a monastery or its abbot in order to allow and set the enjoyment of an ecclesiastical tenure. So there is the lay person, who is the *precator*, the one who ask for the benefit of the ecclesiastical good and frequently accomplish a preliminary donation, then oftentimes the ecclesiastical representative of the community, who is the *prestator*, the legal owner

who lend the tenure. In fact Laurent MORELLE has proved that the classical Carolingian *precaria*, the one called *remunatoria*, that is with a previous donation, tend to divide its written document on the same scroll in two parts. First the preliminary *testamentum*/donation and then the cession and the retrocession, the *precaria* itself.

Outside that chronologic and geographic area, we could anyway find usufructs or equivalent formulas in charters. Admittedly with quite the same concrete effects about ecclesiastical tenure, but clearly belonging to other diplomatic classes and also distinct historical tradition. That is the case with the donations including an usufruct reservation. Indeed, Jean-François LEMARIGNIER, Ian WOOD and also Laurent MORELLE, following Ernst LÉVY, have already precised that the oldest *precariae* and also the small group call *precaria oblata*, were entirely similar to donations with usufruct reservation. In that view, the very old fashioned formulary of the Brioude's donations, and also whose of most of the southern cartularies of the *Romania*, with their usufruct's reservation, appears to be fossils of the ancient legal habits. In that area, by predating and also by surviving the *precariae*, the donations with usufruct seem to express quite clearly a juridical and social inertia which the church was one of the most important repository.

I won't go any further here about the *precaria*, specially about its origine. After FUSTEL DE COULANGES hypothesis about the roots of the medieval *beneficium*, by examining it, Ernst Levy and Claudio SANCHE-ABORNOZ, have totally disagreed in their respective conclusions. The first one, has postulated a decadence and then a total disappearance in private law of the classical Roman *precarium*, replaced later by a public procedure for the allocation of the fiscal land, the *conductio*. The second one, through analyse based regressively on the Spanish medieval records of the XI<sup>th</sup> century, has established that the antic *precarium* have been maintained above all. Actually Paola BIAVASCHI is according to these constracted positions an equal value, insisting for its part on the importance of *patrocinium* in the occidental pre-medieval society, which as provocs a real new deal about the traditional distinction between private and public. That goes back to our donations with usufruct's reservation, which, beyond the *precariae*, should probably be a part of the same phenomen.

Anyway, when some renowned French medievalist pretend to discover : « a generalisation of the usufruct during the Carolingian age », that is a serious approximation, probably due to the elementary distorting prism of the transmission and loose of the scroll.

## 2) Donations to the church including an usufruct's reservation

Donations with an usufruct's reservation are indeed quite an astonishing transfert, exactly because there is no real concrete transfert, only a symbolic legal *traditio*. Enjoyment stay in place, in the donor's hand. Furthermore, the real transfert of the good, at the end of the usufruct and the donor's life time, save for some very rare exception, is never documented. Therefore donatations including usufruct remain an exotic oddity, still waiting for interest in spite of a quite important documentation and comparable data, specially in the southern area, Iberian, Italian, Burgundian, Aquitanian, and sometimes ever further. Even into the diplomatic category of the donations, the ones with an usufruct's reservation have been left behind the donations *post obitum* or *causa mortis*, which appear to have been much more and well studied about the testament and will history — or in studies — discussing about memory and its maintain, although if the words *post obitum* seem to appear in Carolingian records age. It's certainly in order to stipulate and to strenghten a previous usufruct clause.

The reference text explaining that usufruct reservation in donation achieve virtually the necessary *traditio*, is an imperial constitution enacted by Theodose in 417. It precises that the same applies for the dowry and pretends to restore an earlier law. First comment, this text takes place in the Theodosian code and *Brevarium Alarici* eight book. In both, the book is placed between a previous book about the military status and a following one about sacrilege. Its own content apparently seem surprising. In deed it deals with municipal or fiscal magistrates, donations, then

about children's inheritance and finally about the *bona materna* and matrimonial issue. In fact, all these subjects, concern more or less directly the administration of the provincial cities. Effectively, at this time, as we could read it in an other imperial constitution of the book eight, the donations have to be recorded *ad urbe*, that is in Roma or in Constantinople, to the tax master, or in provincial towns and citadel to the defensor. (*C. Th.* 8.12.8). These texts and this book's meaningful organisation indicate that the matrimonial inheritance local observation was decisive and had supported the local administration. All through the matrimonial trade, the declining Roman Empire, had founded public service based on delegation to rule its provincial town, using the provincial or vulgar law and the habits of notables.

As we have seen before, the imperial constitution published in 417, which stipulate the fact that an usufruct's reservation achieve the *traditio*, pretended to restore an earlier law. It refers to a former constitution of Theodose published two years before. This law explains that it's necessary to secure the transfert of the donated thing to forbid the usufruct's reservation. There after restoring the usufruct's reservation, the second constitution admits and remarks that : « it's more appropriate to work for respecting the law instead of increasing it ». The famous scholar Jean GAUDEMET was said about this repentance : « the emperor give up in front of the common practice ».

With the usufruct's reservation, donation remains in balance between the direct one, the donation *inter vivos*, and the indirect one, expected one *causa mortis* and realised *post obitum*. That means they are the only kinds of donation selected among the greater variety of the constantinian ones in the Theodosian code. Consequently donation including usufruct reservation gets a testamentary dimension, and its practical effects delaying to the donor's time of death, seem to have been particularly appropriate for pious fondation or endowment, and also for religious conversion. Indeed, to make the church the donee, the donor create an assurance, because the ecclesiastical institution must survive him. The life time usufruct and the legal transfert achievement could have been closely tied up to liberalities toward church.

### **[fig. 8- Idda's son papyrus scroll]**

When we look at the records, in spite of enormous documentary casualties, we are able to find quite easily interesting charters which could be used as decisive chronological milestones. Firstly, into the Ravenna's papyri, under the Exarchate, we already note some donations with usufruct's reservation in favour of the local church. **[fig. 9-detail]** Like this one, that has been given by Bonus in the middle of the VI<sup>th</sup> century. He was a *bracarius*, a tailor, a trouse's maker. Him and Martyria, his wife, while they are probably, as their euphemistic names suggest it, realising a religious conversion. In another hand, in Gaul, regardless to worst documentary casualties, we could also find some relevant and ancient original charters. For example, this other papyrus, a donation by the anonymous Idda's son, who do legacies to his family and to different churches around Paris concerning estates that have already been his mother's usufruct and for which he keeps in turn usufruct for himself. In these donation, it's exactly the same usufruct's inheritance as those observed in the numerous carolingian *precaria*e by Brigitt KATSEN or Hans Werner GOETZ. The enjoyment of the good, even if it's an unalienable property of the church, could circulate into a successoral community, more specially between the cognatic parents, which have and share rights on the *bona materna*.

### **[fig. n° 10- H.W. Goetz's schema]**

Now is the point at which we could compare and connect this successoral system, supported by the usufruct, with the funeral practices, rituals and regulations, also with the marriage issue and foremost with the incest matter. Henceforth, in both cases, thanks notably to the recent Eric REBILLARD conclusion, how the church were having an « wait-and-see » attitude as regards the regulation. Indeed, until the carolingian aera, this fields remain regulated through the ancient Roman, civil, religious and provincial law, rather than faith considerations or spiritual motives.

Added there is no apparent reason to suggest that matrimonial transfer and inheritance did not. Behind to that the craze for *precariae* during the carolingian age, or the permanent use of the donation with usufruct's reservation, either way we are allowed to consider the critical function of the church in matrimonial and successoral business, these straddling and including religious, public private activities, and of course making society doing so.

III- « Devolution », the cognatic succession.

I use the term « devolution », because, it's proven that it is, in France, during the Ancien Régime, that word used to mean the enjoyment of an unalienable thing that which been transferred in a successoral way, not directly, in a straight way in heritage by the father to the heir, but obliquely by the cognation.

1) *Patronus peculiaris*.

**[fig. n°11-schema of tax's collect under the merovingian, illustrating structure of the state]**

*Patronus*, in the early medieval charters, is the meaningful formula used to name the holy patrons of the royal sanctuaries, cathedrals or basilicas, and that benefit from immunity. Most of the time, historians, choose to translate this latin term by « particular » or « special ». In my point of view *peculiaris* takes from the juridical vocabulary, referring to the *peculium* and the restricted right of the slave, or recently freed slave, to possess things that still remain in his master's property. To understand the symbolic back-ground of this expression, we've got to keep in mind, the main importance of *patrocinium* in Late Western Antiquity and pre-medieval period. The relationship of dependence and protection have been christianised. As Peter BROWN say about the rapprochement merged of the cult of the saints and *patrocinium* : « It was a solution both more clear-cut and antiseptic than almost any outlet for the display of wealth and power that had been previously found in the civic life of the classical world ».

Nevertheless in the western context most of the documents called « private » deeds, even in the formulaes, only concern the upper class, the provincial aristocracy or nobility. It's quite difficult to define what mean aristocracy or nobility at this time. As Charles DE MIRAMON has proved recently regarding the late medieval period, there is no obviousness in this field. What is hard for medieval is even more so for Antiquity. Christophe BADEL, in his synthesis, has given for the whole roman period a mixed picture of nobility. In my point of view, it's important to keep in mind that the medieval *fiscus* is the heir of the imperial *res privata* and « sacred largesses ». To put it very simply, in the roman Empire, in the province area, the Emperor was sharing the administration of his « private » estates with the people wearing the title of « patricians ». As the prosopography simply suggests, the « patricians » were the cognatic relatives of the Emperor, his parents in law. All around them, there was the class of the so-called illustrious, *spectabiles*, remarkable, which were having a senatorial rank. All of them, by their matrimonial and parental relationships were supporting the provincial administration as a family business. By having done so, they were largely overlapping our modern and antagonists categories of public and private. Church has naturally accommodated these social and economical organisations.

As we can see, liberalities with life time usufruct's reservation to the church, at the very end of the western roman empire, had offered assurance for the provincial notables and leaders. As the jurisconsults Paul was saying, the only limit for detaining, is by preserving the thing provided (*salva rerum substantia*). In this crisis time, when direct ruling by the state were no longer feasible, it was a way to protect and maintain an administrative organization, increasingly delegated to the families.



During the merovingian period, the delegation of fiscal or ecclesiastical lands *in beneficium* by the King to his followers, were made directly by him or *verbo regis* through the church estates. It was very usual and it have been made possible by the usufruct. By doing so, the *fiscus*, as the church, could have been an assurance for the matrimonial trade. For example, in the Marculf's formulary, the twelfth charter of its first book, there is a *preceptum* of *condonatio*. It's a mutual donation between spouses and it mentions a mutual usufruct's reservation for them, certainly guarantee from fiscal estates. If we look closer to the dowry charters, in the oldest merovingian formularies and charters, we sometimes find discreet but relevant evidences.

Indeed, in the formula n° 54 from Angers, the provision of a dowry was with no mention of an usufruct, but with the signifiant expression *Ut quamdiu vixerimus*, the estate was located in a « *super terrarium sancti Illius* ». In the same book of formulas, the very first, which seems to be very archaic, is intitled « *cessio* ». In fact there is also a provision of a dowry, (« *Haec omnia subscripta rem in tuae iure et dominacione hoc recipere debias, vel posteris suis, inter nus procreati fuerunt, derelinquetis, salvi jure sancti illius, cuius terre esse videtur* »), and has no clause of usufruct and no mention of it. After having specified that the *ius* and *dominiatio* of the estates would be due to the spouses descendants, a relevant clause of non-prejudice appears « *salvi iure sancti illius, cuius terre esse videtur* ». Also in this case, the dowry is once again taken on the church property. In the second book of Marculf's collection, dedicated to the private deeds, the seventeenth charter, a kind of short handbook for making a will in just one charter, explain about the usufructs given by the husband to the bride and sharing by them. If they had wanted to give it to various sanctuaries (*loca sanctorum*), after their death, their heirs will inherit this usufruct and after their own death, in turn, have to redistribute at the same time this inheritance to their near relative (*propinqui*) and to the *loca sanctorum* (« [...] *pars parte per manu nostra visi sunt condonasse ita ut dum pariter advixerint in hunc seculum omnes res eorum suprascribtas ab utrasquae partes pariter debeant possidere, vel si eis pro animabus eorum aliquid exinde ad loca sanctorum dare decrevit voluntas, eorum liberum maneat arbitrium et qui pare suo ex ipsis in hunc seculum praestis extiterit, ambobus rebus quamdiu vixerit usufructuario ordine debeat possidere ; et post amborum quoque de hac luce discessum, sicut eorum delegationis contenenur, tam ad loca sanctorum quam benemeritis vel eorum propinquis debeant revertere heredis tam suprascribtas villas quam et de presidio eorum quicquid morientes reliquerint* »)

### [fig. n° 13- *stemma cognationum* from Haenel]

#### 3) kinship and priestly nobility

To conclude this talk, without any regards to our chronology, I will jump over the middle ages, and deal about a famous practice and word inseparable to the modern catholicism, and to a certain extent to the anglicanism: the Nepotism (« it just cannot stop its true colours from shining through », see for example the numerous « livings » transmission from uncle to nephew between the clergymen in the romanesque literary works of Jane AUSTEN).

Nepotism, in an italian and modern neologism, is an explicit word from the brainchild of Milan's citizen, Gregorio Leti. This intellectual from european standing, converted to calvinism, and, among other things, was Cromwell's biographer. He was also a tireless traveler, and had finished his life in Amsterdam. His lexical invention has triumphed thanks to a fierce essay in which he had targeted the endogamous running of the Roman Curia. At this point, we've got to underline that Leti was having an important capacity to look at himself with distance. Indeed, he was himself the nephew of an italian bishop and thus destined to an ecclesiastical career.

This way, in spite of a very long term period, we should bring closer and compare this pejorative « nepotism » simultaneously to our successoral observations about usufruct at the medieval period. Specialists of the Burgundian kingdom, as Laurent RIPART or Florian MAZEL, for the central medieval period, that they name « avuncular succession », litteraly, not friendly one, but by the uncle, seems to be an expression of the cognatic devolution. We shall seriously consider the

word and the thing, because despite some focuses and studies, describing time to time this way of transmitting office in the ecclesiastical hierarchy, it seems to be continually efficient from Antiquity to Modern Times in the Western church. With Martin HEINZELMANN, who has described this kind of succession for the Rhine's bishop from the VI<sup>th</sup> to the VII<sup>th</sup> centuries, it confirms pretty clearly this reality, as far as the documentation could inform ourselves. For the early period, or more exactly before the gregorian reform — which have strongly bequeathed us too much exclusive categories between « lay » and « religious » world — Nepotism is not confined to the church, but was concerning all kinds of « Honors », in the way the early XII<sup>th</sup> century canons of Brioude were understanding this term.

To conclude, pre and early medieval periods have instituted a new deal in the core of the social, politic and religious organisation. At this time, the old and distant figure of the Emperor, in front of a provincial society entrenched in the *patrocinium* relationship, with all the civil administration, had been henceforth replaced by the community of the holy saints. The *patroni peculiares*, with their *majestates* protecting cities, every basilicas, by a fictional and absolute ownership. Also, the matrimonial capital of the notables, legally concentrated into their sanctuaries. Henry of Bracton, in his *De Legibus et Consuetudinibus Angliae*, defined it in that way, when he was trying to define the Crown and the Common Utility, which are together the public sphere and the corner stone of his juridical works. He did so by bringing back to the definition of the roman jurist Gaius about the *res sacra, sancta et divina* which are *res nullius*, unalienable ones (« *Est etiam res quasi sacra res fiscalis, quae dari non potest neque vendi neque ad alium transferri a principe vel a rege regnante, et quae faciunt ipsam coronam et communem respiciunt utilitatem* », « A thing quasi-sacred, which cannot be given away or be sold, or transferred upon another person by the Prince or ruling King, and those things make the Crown what it is and regard to common utility »). In this kind of symbiosis between *fiscus* and *ecclesia*, supported by the matrimonial trade by provincial aristocracy, the members of the clergy with their benefactress families, under the immunity of the sovereign, will forge and promote a new legal notion. They made so by practising the circulation of the unalienable things, balancing successfully the two old ideas of *res sacra* and *publica* : the *res communis*.

Cambridge, King's college, table ronde/round table :  
« Église et transformation sociale/The Church and social Transformation »,  
18 jan. 2019.

L'usufruit,  
un moyen de faire circuler  
les biens inaliénables du fisc et de l'Église  
dans les successions aristocratiques.

/  
Usufruct,  
a way for circulating  
the inalienable properties of Church and State  
into aristocratic inheritance.

Jean BERGER, chercheur associé/research associate, CIHAM (UMR 5648)



## **I- Itinéraire de recherche et rappel**

- 1) Du particulier au général : observations sur la diplomatie brivadoise
- 2) Principe et évolution de l'usufruit à la fin de l'Antiquité.
- 3) les *res maternae* socle juridique tardo-impériale de l'usufruit médiéval

## **II- Donations et réserve d'usufruit. État de la question et biais de connaissance.**

- 1) derrière les *precariae*.
- 2) Les donations aux églises avec *retentio usufructus*

## **III- Dévolution, la succession cognatique.**

- 1) *Patronus peculiaris*
- 2) Parenté médiévale et noblesse sacerdotale

## **I- Itinerary of searching and previous reminder**

- 1) From the particular to the general : remarks about the Brioude's charters
- 2) Guidelines, background and transformation of the usufruct during the Late Antiquity
- 3) The *res maternae* legal and roman basis of the medieval usufructus.

## **II- Donations and usufructus reservation : a skewed knowledge ?**

- 1) Behind the *precariae*
- 2) Donations to the church including an usufruct's reservation

## **III- « Devolution », the cognatic succession.**

- 1) *Patronus peculiaris*.
- 2) Kinship and priestly nobility

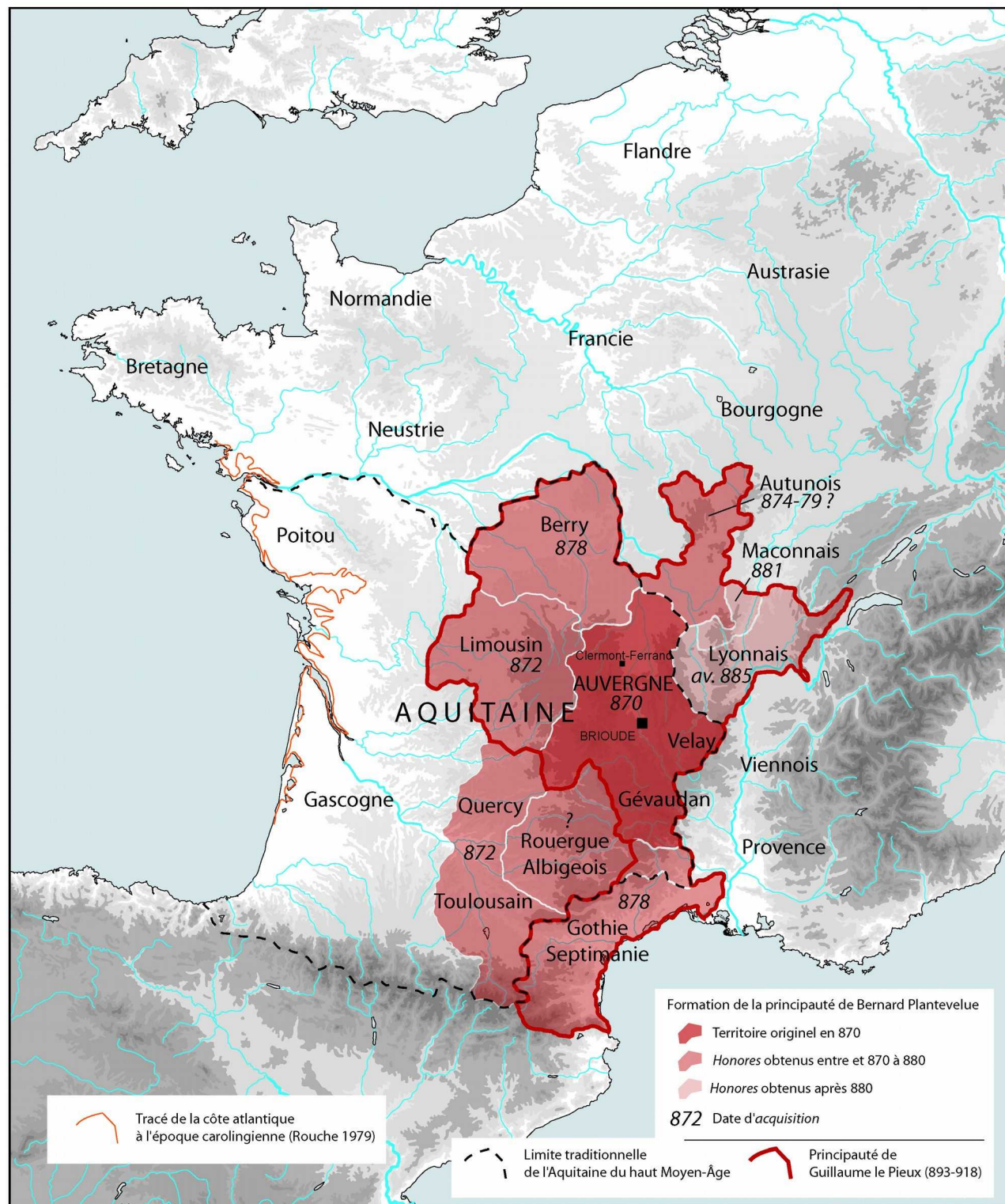
# Auvergne

and

# Brioude,

center of the  
Aquitanian principedom  
of the « Wilhelmids »  
at the beginning of  
the X<sup>th</sup> century

© R. Lauranson-Rosaz







*Solidus* and *tremissis* from the gallic emperor *Avitus* († 455)

semfelice equae auri consistebat  
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uocet aduinenteno cre resona  
rent populari nondurancib: ad  
sacerdote uenit. Nulle acce  
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uati submotoy: uidel aurū qasi  
informacer: etolū ai mō mulier  
migreli cū flama p p hurear  
Tunc sacerdos onuit ad dnm  
ut qd malicia eui populū fuerat  
declaret: tandē hū poenā cer  
sare uiber: & a corpore. Et opto  
tumulo discorsit. Uocoy: mulie  
ris: amplius pūm audiat: in  
der ergo quantū distat ut con  
uerationē. caelate. & opolen  
tū saecularē: quantū distat  
in termis pūm diuiciat: & sū pō  
pat: uider opalia martirib:  
sine conlata pma. aduicarioli  
grosae compendia. Et tu o homo  
mostalū dēclat: abicelorb:  
scilicet a uitali. Nagonizos cu. CVI  
concupescenē: sicut. Tenlicel  
oculū dū conēplari: alima  
cū rem mar: orre pdeplex: di  
uicariū oblatio opalen: eoz tu  
cogred: aomb: iniqui fluctuaris  
& sedis: aūlonar: rē: sicut  
flamit: & ungulū. Tunc dē: de  
ru pessimū: aculū: auiciat: cū p  
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re. Et tumū: sibilor nonrefre  
nat: corpore: comotiones. Et lūc  
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aduertur spm: & sū: aduertur: q  
carne. & haec inuicē: aduertur:  
sibi: utū: qd uolumus: illa geramū.  
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nancē. lege: i mentis: mea: & cap  
tuū: meducantē: in lege peccatū.  
Ergo: sicut: in sū: cap tuū: abeluci  
in lege: peccatū: Tūc: fronte: tuā  
signū: crucis: in signo: q p pellat  
sacula: huius: inuidia: q auicē:  
prudēciū: crux: pellit: omne: cri  
men: fugunt: cruce: & uel: nec  
talidicā: signo: meū: fluctua  
re: nec: pū: qualis: sic: huius  
uicallū: sacre: cū: sū: for: tū: do  
qd: lona: qert: nup: & uolū:  
**P**APUS CHUS PICTAUGESIS  
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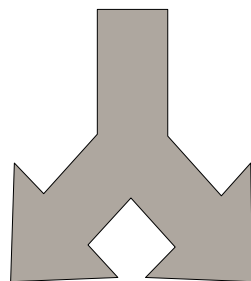
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97  
tempore cum illor gloria ad eter  
na circumdat. nos aut excus  
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p crimine actione in pscuo  
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NI: MARTYRIS**  
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re uoluit.  
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ab hostilitate liberauit  
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rū basilicae portauerunt  
VIII De sedama paralytica  
X De eo qui p uisitorē suū dē bā  
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IUNXIT.

BnF, ms. lat. 2204, f° 53v°-54r°, fin du IX° s., anthology from Venantius Fortunatus and Gregorius Turonensis (compiled at Saint-Claude in the Jura ?)

One of the key demonstrations of the Lévy's *West Roman Vulgar Law* :

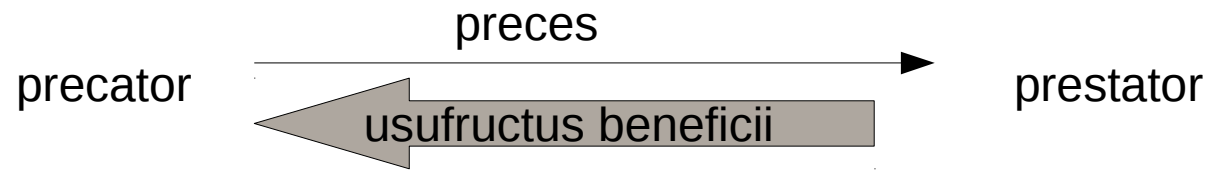
Res =  
Possessio + Proprietas



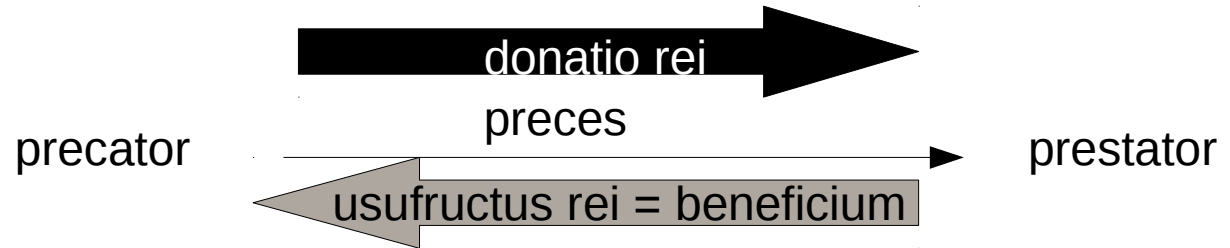
dominium /////  
usufructus



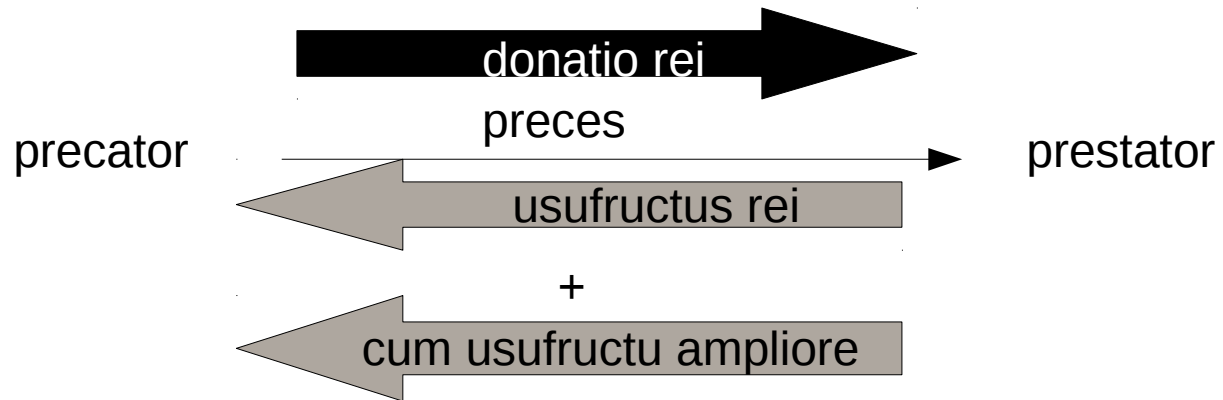
*Precaria data :*

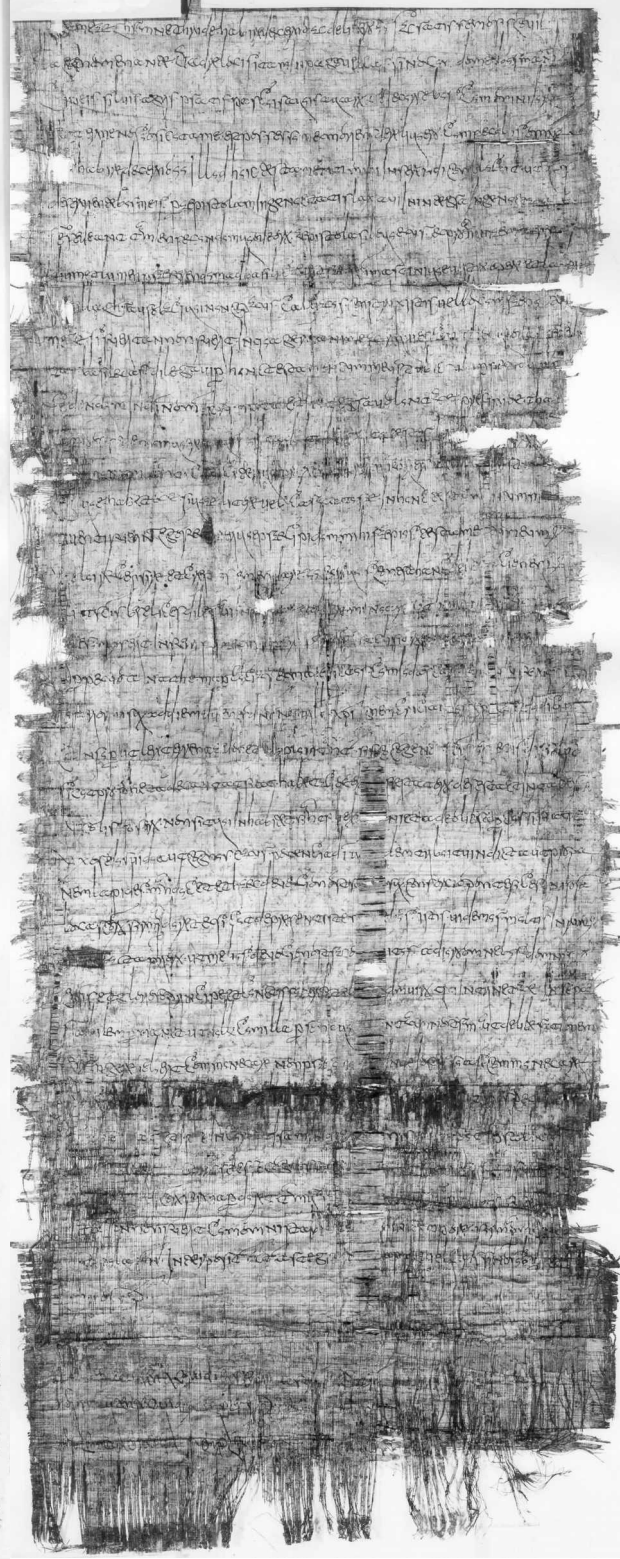


*Precaria oblata :*



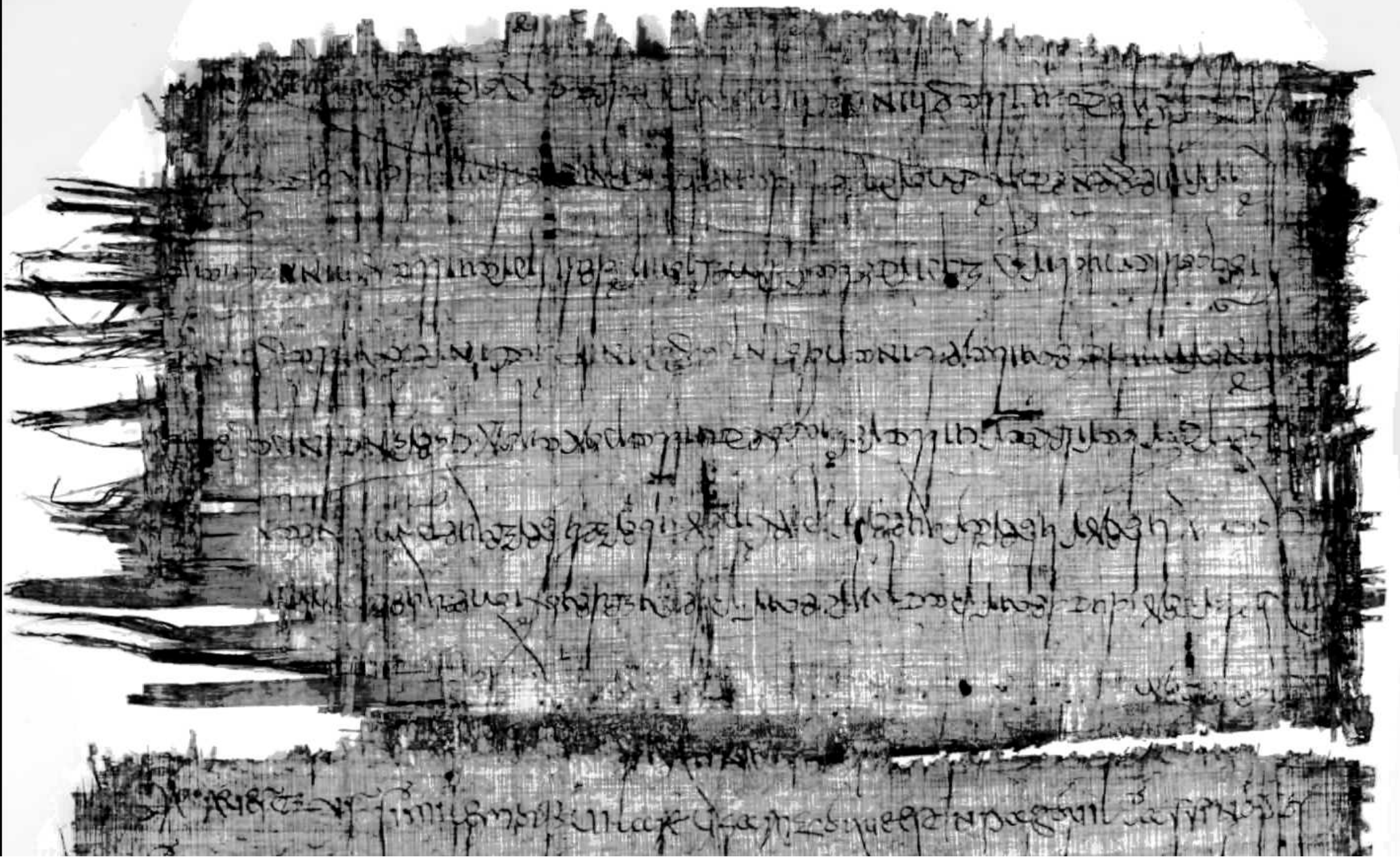
*Precaria remuneratoria :*





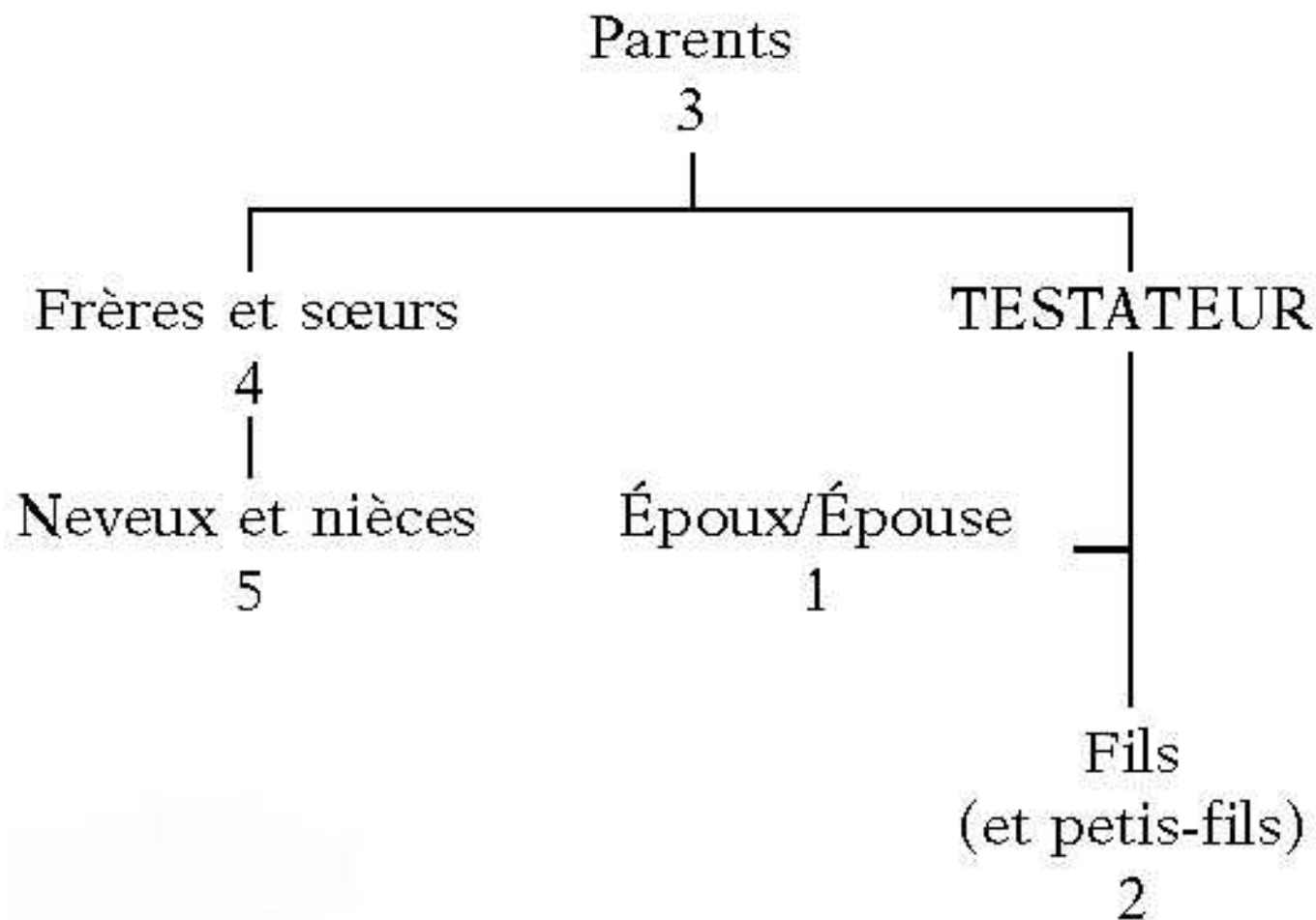
Papyrus scroll (picture in two parts) of the donation made by Idda's son, who were giving some estates to various churches. The usufruct of the *villa Ghinnachario*, which were belonging to his mother (deceased) is been keeping by her mother's husband for his life time. Then after, with all the other estates the son has given, he was keeping in turn for himself their usufruct.

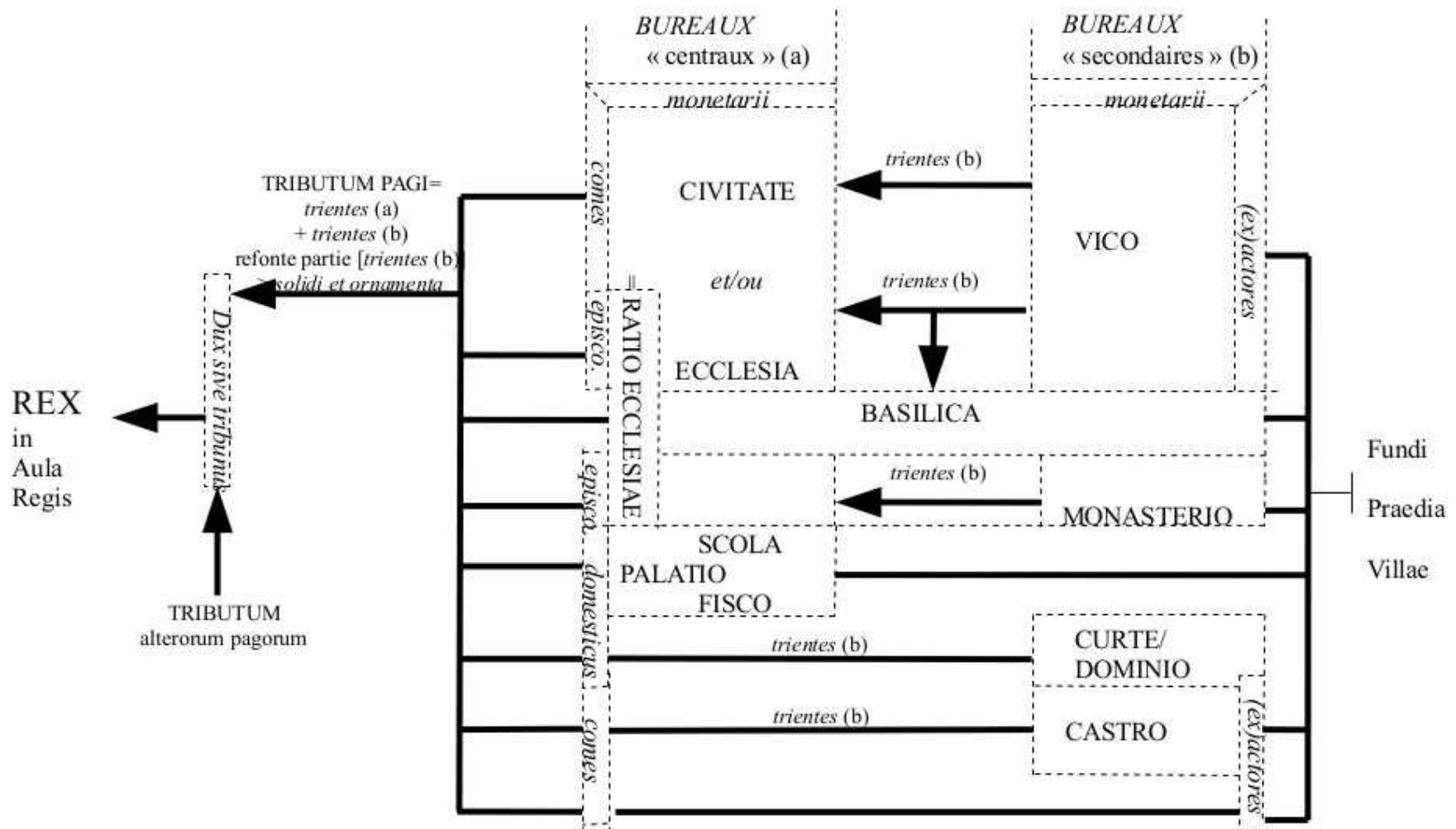
(Paris, AN, K 3 n° 1/2 [TELMA, n° 4483], [700], papyrus).



« [l.7] husufructo, dum advixerit tantum, suprascribta villa Ghinnachario possedeat » (détail, l. 1 à 8, Paris, AN, K 3 n° 1/2 [TELMA, n° 4483], [700], papyrus) ;

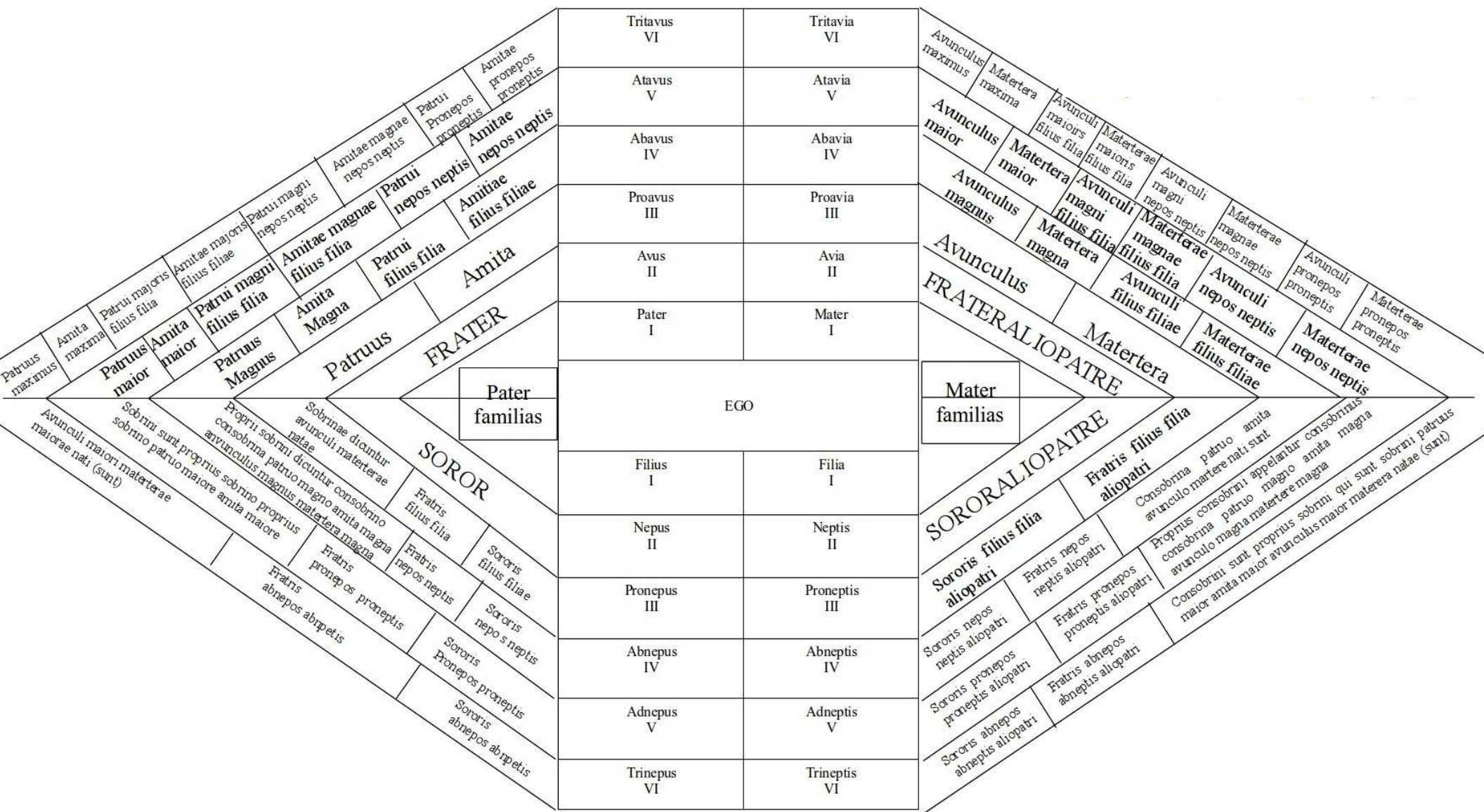
Successoral system  
of the usufructs in the Sankt Gallen's *precaria*  
bring to light by Hans Werner Goetz.





SCHEMA GRAPHIQUE DE L'ORGANISATION  
 MONÉTAIRE DE L'ENCAISSE FISCALE MÉROVINGIENNE  
 EN GAULE FRANQUE,  
 Première moitié VII<sup>e</sup> siècle.  
 (d'après Durliat, Poly et Boyer).





*Stemmata cognationum*, illustrating *Sententiae Pauli* in carolingian manuscripts from Aquitaine of the *Epitome Theodosiani* redrawn and schematized by Gustav Haenel