CUSTOMARY LAW, *AVITICITAS* AND THE ALIENATION OF RURAL PROPERTY IN HUNGARY AND TRANSYLVANIA (15TH TO 19TH CENTURIES)

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Landed property in Hungarian and Transylvanian noble society was usually worked by individual families, but owned collectively by the larger kindred group, each of whose members retained a concurrent legal interest in it. This practice, which was called 'ancestral inheritance' or *aviticitas*, was feted by some Hungarians in the later nineteenth century as one of the distinguishing features of the 'national genius': 'the inheritance of our forbears', 'the pillar of the nation', 'the legacy of one thousand years', and so forth.[1] In fact, there is nothing unusual about *aviticitas*. Similar methods of land holding operated in most cultures where there was little exposure to Roman Law influences - the Romanian principalities, Muscovy, Ireland, Anglo-Saxon England, and so on.[2] The basic principles of *aviticitas* in Hungary and Transylvania, as well as of its various manifestations elsewhere, can be summarized as follows:

1. Land belonging to the progenitor of the kindred, the *avus*, went upon his death to his direct male heirs. They in turn passed on the land to their own sons, the sons to their grandsons and so on. With the passage of each generation, the land was subdivided (although some portions might be retained in collective ownership).[3]

2. If the grandsons or their descendants had no direct heirs, the property went to cousins and uncles. The rights of those closer by degree to the dead man trumped the rights of more distant kinsmen.[4]

3. All kinsmen had therefore an interest in the ancestral property, since by the biological misfortune of others, either they or their heirs might in time obtain a part of it. As a consequence, they had the legal right to block its full or partial alienation.

4. Land acquired by anyone's efforts was freely alienable by him. Once it had passed to heirs, however, it became hereditary, with the first acquirer now constituting the founding *avus* in respect of the property and its descent.

To these four principles, we should add a fifth, which was more specific to Hungary and Transylvania:

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[1] Mádl 1970, p. 102–3; Ráth 1861, 1, p. 97; Ráth 1861, 2, p. 220, 227.
[2] Rady 2013, p. 11; Kelly 2009, p. 100–105; Farrow 2004, p. 41–45; Mumby 2011, p. 399–415 .
[3] Homoki-Nagy 2006, p. 238.
[4] See Homoki-Nagy 2000, p. 220–1.

5. All land was held to originate (however remotely) in a royal grant of donation, as a consequence of which a property that had no heirs reverted to the crown. Landowners who retained property to which they had no title were thus described as 'concealers of the royal right.'[5]

These arrangements carried obvious benefits. Distant relatives and their lines might expire on account of an absence of direct heirs, yielding a windfall to their surviving kinsmen. This was by no means an unusual event. It is reckoned that in pre-modern societies, the birth of six children would give a one-third chance of a son surviving his father; twenty per cent of couples would have only female children; and a further twenty per cent of unions would be without issue.[6] In addition, the regime of *aviticitas* meant that there were legal measures that might be deployed to prevent the alienation or dissipation of land to which members of the kindred had a prospective right of inheritance. Transactions that were injurious to kinsmen might thus be voided and deemed to hold no force. Compulsion was backed up by moral force. Werbőczy in his *Tripartitum* of 1517, which sought to codify a part of Hungary and Transylvania's customary law, thus described the cheating of a kinsman out of his land as the most frightful of crimes (although the penalty he prescribed was purely rhetorical).[7] Mutual advantage thus combined with arrangements law and notions of the moral economy to embed *aviticitas* as the most important principle governing noble landholding until 1848.[8]

The principal difficulty with *aviticitas* was the limitation that it imposed on the individual holder to do as he wished with his land. He might want to sell a part of his inheritance, or to leave some of it to his daughters. Since wealth ceded to women was upon their marriage removed from the kindred's stock of land, there was always opposition to women having the right to inherit land. It was only where there was a social tendency towards endogamy (as among the nobles of Turopolje in Zagreb County) that rights of female inheritance to land was generally uncontested.[9] In Hungary and Transylvania, therefore, the daughters had, at least in principle, to be satisfied with cash from the father's estate. Moreover, to be effective any alienation of inherited land required the consent of every kinsman who might be considered to have a putative right to it. Since no period of limitation applied to the assertion of a kinsman's right, or that of his heirs, sales and pledges might be contested long after the event, rendering the new owner's possession precarious. The uncertainties attaching to the descents of ancestral land meant that cases might come to court which involved the re-investigation of transactions made several centuries before.[10]

The rights of the kindred were understood as customary, and thus to be sanctioned by social observance. The customary law, however, was far from fixed. It could be overturned by the plenipotentiary power that attached to the ruler, who might by virtue of his royal office set aside conventions that were potentially injurious. There consequently developed in Hungary

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5 DRMH, 4, p. 331 (Glossary).

6 Wrigley 1978, p. 141.

7 Stephen Werbőczy, *Tripartitum opus iuris* (= DRMH 5), p. 105 (I. 34). It is not our purpose here to describe the applicability of Hungarian law to Transylvania. There were procedural differences, but substantive elements largely coincided. The *Tripartitum* was regularly used in Transylvanian courts; Hungarian statutory law was later considered persuasive, but not binding, in the Principality.

8 Indeed, elements survived in the 1959 Hungarian Civil Code in respect of the rights of collateral relatives to succeed to a part of the property of a deceased person without direct heirs. These rights are not included in the 2013 Civil Code, which instead affirms the principle of unlimited testamentary disposition.

9 Karbić 2002, p. 167–76.

10 MOL, O39, Decisiones Curiales, 38/2 (1773), p. 868 (involving the genealogy of an ancestor who had died a century earlier); pp. 914–19 (reopening a case over the division in 1564 of property among kinsmen); MOL, 13 (1750), p. 554–92 (concerning the descents of properties in the sixteenth century, the earliest from 1523).

and Transylvania a branch of the law that was equitable and followed its own rules, which then in time became customized. (There is an obvious parallel here with chancery jurisdiction in England). By virtue of his equitable jurisdiction, the ruler might convert or 'prefect' daughters into sons, which permitted the existing conventions of inheritance to be maintained under the fiction that the girl was male.[11] From the seventeenth century, the monarch might also grant the privilege of *fidei commissio*, which converted land into a trust, the curatorship of which was vested in a single heir.[12] Both arrangements were, however, coupled to the principle of *salvo iure alieno*, according to which the grant of prefection or of a land trust should not be made in the event of it being at the expense of another's rights. Thus, prefection could only be made when there were no close kinsmen who might have a claim to the estate, and a land trust only be created out of acquired, as opposed to hereditary, property.[13]

The second solution lay with customary adjudication itself. Customary law courts in Hungary and Transylvania did not dispense justice in the manner of continental courts today, fitting the circumstances of the case before them to a body of rules and thus reaching a verdict in syllogistic fashion, by way of judicial subsumption.[14] Instead, they looked towards an outcome that was fair and which comported with a larger understanding of justice.[15] The courts might have a recollection of how they had previously proceeded in analogous cases. This did not, however, amount to a body of case law jurisprudence, if only because previous legal determinations were not recorded in any systematic fashion. Moreover, the courts were far from lawyerly in their composition. Lower courts were analogous to assemblies, often drawing upon an extensive lay membership. Higher courts were similarly crowded, comprising in the case of Hungary's Curia courts several dozen or more barons, prelates, noble assessors and protonotaries, as well as the judges and their deputies.[16] The higher courts in Transylvania were only a little less numerous in their composition.[17] Many of the members of these higher courts were, however, functionally illiterate and had to have documents read to them.[18] The Latin of one sixteenth-century vice-palatine was, indeed, so rudimentary as to earn him the name of 'Cicero'.[19] The justice which the courts administered was thus not a learned law, communicated among a group of skilled and educated practitioners in the manner of a Common Law jurisdiction. It corresponded instead with what their largely lay membership thought to be right on occasion and as befitted the case, which meant that the principles of *aviticitas* might be set aside in the interest of a larger truth.[20]

Let us by way of illustration, take three examples, drawn from the fifteenth and eighteenth centuries. Andrew, the prior of Pécs chapter, was a wealthy but lonely man. He had inherited substantial properties in Győr County that formed a part of the ancestral estate of the Pécz kindred, to which he belonged, but his immediate relatives had predeceased him.[21] In 1402, he made over his entire estate to noblemen from the Marczali and Berzenczei families. These were

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[11] Fügedi 1998, p. 53–62

[12] Katona 1894, p. 31–4.

[13] 1397: 54 (DRMH 2, p. 25, and note p. 181); Katona 1894, p. 32, 75.

[14] Merryman/Pérez-Perdomo 2007, p. 36; Wieacker 1995, p. 141–2.

[15] See thus Carbasse 1986, p. 25.

[16] Rady 2012, p. 457–60, 465–6.

[17] Bónis/Degré/Varga 1998, p. 127–32.

[18] 1500: 11 (DRMH 4, p. 1435).

[19] Szabó 1909, p. 80, 189, 195. See also Szilágyi 1930, p. 99.

[20] As urged by a Frankish church council in 825, which stressed the need to follow the *ratio veritatis* and not the *consuetudo vetustatis*. See Rio 2011, p. 9.

[21] The case is the subject of Nagy 1892. The text of the case is given on p. 28–49.

related to him by a common *avus*, Andrew's great-great-great-great grandfather, who had died about a century before. Andrew's grant acknowledged the Marczali and Berzenczei as his kinsmen, left him in occupation of the estate until his death, and imposed upon the future owners certain conditions in respect of the repayment of loans and other obligations that Andrew had contracted. Andrew reiterated the agreement in 1411 in respect of some further properties that had since fallen to him. Plainly, though, Andrew soon thought better of the arrangement, possibly (as he later claimed) because the Marczali and Berzenczei had not discharged the duties that he had previously laid upon them. He now made over his property directly to his principal creditors, adopting them as his brothers. The new agreement was confirmed by Sigismund in 1415.[22] Upon Andrew's death, which must have occurred in the early 1420s, the newly adopted kinsmen made entry to the estate, but objection was raised by the Marczali and Berzenczei. The matter thus ended up in the court of the palatine in 1425.

We will not deal with the details of all that took place over the next eight years. The case was delayed by the deaths of some of the litigants, by searches for documents, by the appearance of allegedly long-lost relatives who needed their own claims to be assessed, and by the discovery of an ancient charter, the text of which had been amateurishly altered. The claims, however, of the Marczali and Berzenczei were good. Although their earlier agreement with Andrew was properly considered void, they were able to demonstrate a common descent going back over a hundred years and thus by implication their rights to Andrew's inheritance. The palatine's court, nevertheless, threw out their case, imposing upon them perpetual silence. The court in its judgement argued that common descent was insufficient, for there had with the passage of each generation to be redistributions of property between the lines of the kindred in order for the right of inheritance to remain concurrent.[23] Since that had not taken place, the Marczali and Berzenczei should be considered 'as if men of another kindred' (*veluti hominess alterius generationis*) and thus had forfeited their right of succession.[24]

The court's judgement was remarkable and it might be thought perverse were it not that the court's membership included on this occasion the palatine, no less than three prelates, the tavernicus (the appeal judge for the cities), the high judge, the royal treasurer, the vice-chancellor, several barons, four protonotaries and an unnamed number of noblemen.[25] We can certainly sympathize with the verdict that they gave. Andrew had made all sorts of arrangements in respect of his property that would have had to be unpicked, to the detriment of his newly-adopted brothers and creditors. The Marczali and Berzenczei were remote and distant kinsmen and their suit was plainly opportunistic. Nevertheless, in finding against them, the palatine's court demonstrated the malleability of the customary law and the way in which doubts might arise in matters that were otherwise thought to be governed by strongly normative rules.

Our second case derives from the eighteenth century, and thus from the period after which a part of Hungarian customary law had been codified in the *Tripartitum*. The royal right of escheat in the event of death without heirs arose from the supposed origin of all noble property in the royal gift. As custom of the realm, the royal right of escheat was supposed to take precedence over local customary arrangements, unless a royal privilege was obtained setting custom of the realm aside. Plainly, however, the courts did not always see it this way. Some courtsand judgements recognized that a *usus*, practised only by a few, could have the consequence

[22] Fraternal adoption required the royal consent, since it was potentially harmful to the interests of the crown.

[23] The court ingeniously linked the passage of generations to the time limit of the *prescriptio*.

[24] The judgement is given in Nagy 1892, p. 47–48.

[25] Naggy 1892, p. 48.

of overriding the normal conventions of customary law.[26] Accordingly, a Hungarian court in the early eighteenth century set aside the principle that the land of a kinless man reverted to the crown, acknowledging that there were exceptions deriving from actual use. On this occasion, the Curia court of the Royal Table upheld the right of the Tybold family, which was defunct in the male line, to inheritance on the distaff side, even though this right had not been ceded by royal charter. In its judgement, the court considered the right of female succession to have been *continuo usu firmata etusuroborata* in the family's past conduct. The suit for escheat launched by the crown's agent was accordingly dismissed.[27] The court was here satisfied that special rules of inheritance applied within the Tybold family and that it would be inequitable on this occasion to press for the confiscation of the estate on the grounds of a supposedly superior custom of the realm. This was not an isolated case of a court affirming the efficacy of *usus* over custom, for we know of other examples that point in the same direction.[28]

Our final illustration is taken from Cluj County. The aristocratic Korda family had a habit of not paying its bills, and Baroness Susanna was no exception. She had built up debts to a citizen of Cluj, to such an extent that her indebtedness was manifest and she was arraigned in 1752 before the Cluj county court. The court determined that she should repay what she owed in instalments. Should she fail to meet the deadlines, then the court would seize her dower, wherever it lay, notwithstanding any protests that she laid.[29] The baroness's dower was not, however, acquired property. Dower constituted the gift of the husband at marriage, was usually worked as part of his estate, being released to the wife in the event of his death. After the death of both, it passed tothe sons of the marriage or, if there were none, to the wife's immediate relatives.[30] It could not as a consequence be alienated except with the consent of all of these. Plainly, however, the court on this occasion determined differently, once again subordinating the established regime of inheritance to what they deemed to be a just solution.

These three cases might be thought to be exceptional. We can, however, point to other instances which indicate inconsistencies in the customary law's application to property rights. The definition thus of acquired land was vague and differed over time. On the one hand, it was understood that *acquisita* lands that were bought, and which thus constituted *emptitia*, were freely disposable.[31] Land, however, that had been acquired by gift of the ruler occupied a much less certain place, since it was tied to the performance of service.[32] Likewise, if a nobleman had little inherited land but plenty of acquired land, was it possible for him to exclude his sons by testament from a share of the *acquisita*? There were at least two schools of thought on this and so contradictory rulings.[33] In respect of pledges of land, the rights of relatives who had been harmed by the transaction were treated with equal imprecision. It was thus uncertain whether the relatives had the right to retake the land by paying its value or whether they

[26] Kovács 2005, p. 103; MOL, O39, Decisiones Curiales, 39/2 (1774), p. 7 (in respect of a commercial *usus*).

[27] MOL, E14 *Acta Hungarica*, 4, pp. 365–406, esp. p. 383 (1720). The property thus passed through marriage to the Szepessy, Majthényi and Almássy families.

[28] For other disputes that partly turned on a family's rights to inheritance in the female line, for which no proof other than use was offered, see MOL, O39, Decisiones Curiales, 38/2 (1772), p. 869; MOL, O2, Processusdelegatorii, Bundle 1, no 2 (1699). The ease with which noblemen were able to inveigle their daughters into the possession of inherited estates was noted at the High Judge Conference of 1861. See Ráth 1861, 2, p. 432.

[29] ANC, Prefectura județului Cluj, Fond 3, nr 126, Protocollum inclyti ComitatusColosiensisGenerale (1731–61), p. 135.

[30] Wenzel 1863–4, 2, p. 198.

[31] MOL, O39, Decisiones Curiales, 13 (1750), p. 559. See also, *Tripartitum*, I. 19 (DRMH 5, p. 75).

[32] MOL, O39, Decisiones Curiales, 39/2 (1774), p. 154.

[33] Pólya 1894, p. 142. For a later period, see MOL, O39, *Decisiones Curiales*, 39, part 2 (1774), p. 154, affirming the nobleman's unlimited freedom to dispose of *acquisita* by will.

were obliged to redeem the pledge in full, even though the cost of redemption often carried a hidden interest charge.[34]

Beyond these ambiguities, however, we may point to specific procedures becoming settled in actual practice, even to the extent of acquiring court recognition, which further called into question some of the basic assumptions of *aviticitas*. The first of these lies in respect of the cession to daughters of only cash inheritances. We now know that in about a half of cases from the later Middle Ages daughters were given property in place of a cash settlement.[35] Even after Werbőczy's *Tripartitum* had emphatically lain down the principle that daughters be given money and not land (except as a temporary expedient), courts acknowledged contrasting practices, to such an extent that the cession of land remained normal in Transylvania.[36] The second practice was a device in medieval procedural law known as the *assumptio oneris*.[37] This had its origin in the difficulty with which the consent of distant relatives might be obtained in order to approve the alienation of property. A long-lost cousin or forgotten hermit might appear, indicate that he had not been consulted over a sale or pledge, and thus void it. In order to remove this possibility, courts permitted alienors to vouch for their relatives. If a relative subsequently appeared to contest the alienation, then he was obliged to forfeit a cash penalty, equivalent in the early sixteenth century to the value of fifty peasant plots.[38] This device proved a convenient mechanism whereby to push through an alienation with the minimal agreement of kinsmen and, on account of the penalty prescribed, a powerful inducement to those who had been robbed of their right of consent, not to contest a sale after it had been agreed. The *assumptio oneris* survived into the modern period, being also adopted by peasants in their own transactions,[39] although its significance declined with the introduction of new procedures for the notification of kinsmen.[40] Besides the *assumptio oneris*, there was, however, a further device to which noblemen might have resort in order to loosen the constraints of *aviticitas*. This was the usurious contract, entered into with Jews. This is so startling (and so unknown to historians) as to merit detailed discussion.

By the late fifteenth century, the financial operations of many Hungarian Jews were more akin to banking than to pawn-broking. The interest charges payable on loans made by Jews were high-in the region of 35–50% or more per annum-but mainly because the risks of default or of the debt's cancellation were so high.[41] Surviving accounts give the impression that most Jewish loans were made to townsfolk, either because they were more likely to need commercial capital or as a consequence of the towns themselves keeping better records. Nevertheless, there is evidence not only of nobles but also of peasants taking out loans from Jews.[42] The mechanisms by which debts were contracted demonstrate some sophistication. The terms of the debt were recorded in special letters of credit that might be witnessed by the local town magistracy or by a place of authentication. These specified the interest on the loan and additional penalties for

[34] Pólya 1894, p. 140–2.

[35] Banyó 2000, p. 76–91.

[36] Kovács 2005, p. 73–5. For the sixteenth century, see also Jakó 1990, 2, nos 4207, 4370, 4783, 4858, 4911. See also *Tripartitum*, I. 88 [1] (DRMH 5, p. 171).

[37] For this and much of what follows, see Rady 2002, p. 23–36.

[38] The penalty was responsive to inflation, amounting to 1000 florins by the 1780s. See RL, C/71, Sigray család, Box 1, I–1f.

[39] MOL, O7 Actus Solennes, Bundle 1, fol. 20 (1671).

[40] Procedures thus tended to conflate *Tripartitum* I. 59 and I. 60 (DRMH 5, pp. 129–35) in respect of giving suitable notice. See OSzK, MSS, Qu. Lat. 2378, Commissio Systematica, *Observationes in Tripartitum*, fols26*v*–30*v*.

[41] The Buda *Stadtrecht* of c. 1400 inveighed against usury, but reserved its penalty to the Day of Judgement. See Mollay 1959, p. 126 (art. 192).

[42] MZsO, 1, p. 132–3; MZsO, 5/1, p. 59.

late repayment.[43] The debt itself might, however, be sold on, in the manner of a bill of exchange and was, in this sense, a negotiable instrument.[44] Upon repayment, the letters were cancelled. Although urban magistracies sometimes kept a record of the debts that individual citizens had incurred, there was no formal system of registration before the eighteenth century.[45]

Loans taken from Jews were invariably collateralized, either against movables, usually jewellery, or against landed property. Movables were usually lodged with the lender until such a time as the debt was discharged. Land, however, was not administered in the usual manner of a pledge, whereby the property was retained by the lender until the loan was repaid. It remained instead with the borrower, although the borrower might at the time of the contract be obliged to hand over to the lender his deeds to the land. Only in the event of the debt not being repaid or of the deadlines on instalments being missed was the land physically possessed by the lender.[46] In respect of land that was put up as collateral, the debt was thus secured in the manner of what might also be known as a *hypotheca* or mortgage loan, and not in the manner of a pledge.

There is nothing particularly exceptional about this arrangement. The *hypotheca* had been in use in the Austrian lands since the thirteenth century, where it was generally known as the *jüngere Satzung* (to distinguish it from the *altere*, which was the loan rose on a pledge given in pawn).[47] Hungary is not supposed to have had the mortgage loan before the 1770s (or even later).[48] Plainly, however, it was familiar with this form of capital-raising by no later than the close of the Middle Ages and noblemen were ready to contract debts by mortgaging parts of their estate to Jews. It was, indeed, easy for them to do so. Since they were not obviously surrendering the physical possession of the land at the time of the contract, they did not require the consent of their kinsmen in the manner of a sale or pledge. If the land became forfeit on account of non-payment of the debt, the lender had the letters of credit with which to pursue his suit, and the courts generally regarded these as outweighing the rights of relatives. Should the courts be reluctant to enforce the terms of letters of credit, the king might intervene by instructing officials and magistrates to pursue the debt, and the collateral upon which it rested, on the lender's behalf.[49] Equally, however, the ruler often acted on behalf of noble and other debtors, obliging Jewish financiers to cancel interest payments or even to forego a portion of the capital sum originally lent.[50] Petitions to the ruler for cancellation were usually accompanied by a statement of distress or by a description of the way in which a small debt had escalated through interest and late-payment charges, from 25 to 250 florins and so on. The frequency, with which petitions of this type were approved by the ruler, sometimes expressly by way of his *plenitudo potestatis*, is demonstrated not only by the extant record but also by the inclusion in chancellery formularies of titles specifically dedicated to the royal *relaxatio usurae*.[51]

The mortgage loan contracted on noble land did not survive, as far as we know, into the modern period. Nevertheless, it is illustrative of the methods that noblemen might use in order to obviate the constraints of *aviticitas*. The readiness of the courts to sanction mortgage loans

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43 MZsO, 1, p. 271; MZsO, 5/1, p. 48–9, 118.

44 MZsO, 5/1, p. 67, 107.

45 1723: 107. The Buda *Stadtrecht* laid down that all loans should be recorded on letters issued by the city magistracy. See Mollay 1959, p. 129 (ch. 201).

46 MZsO, 1, pp. 264, 267; MZsO, 5/1, pp. 48–53, 87, 118; MZsO, 9, p. 71.

47 Flossmann 2005, p. 173.

48 See thus Botos, 1998, p. 10–11; Botos 2002, p. 8; Zlinszky 1891, p. 303–6.

49 MZsO, 1, p. 148, 155–6, 212–4, 236, 321.

50 MZsO, 4, p. 86. See also Ujvári, 1929, p. 693.

51 MZsO, 1, pp. 173, 177, 194–5, 209, 267, 295, 321; MZsO, 4, p. 86; MZsO, 5/1, pp. 59, 87; MZsO, 8, p. 73. For formularies, see MZsO, 5/1, pp. 113, 129. See also Komoróczy 1999, p. 13.

securitized on land, to permit mechanisms that restricted the kinsmen's right to object to alienations, and to recognize the grant to daughters of ancestral land indicate the extent to which customary practices might cut across the customary framework of *aviticitas*. In this respect, they suggest that the three unusual court verdicts, which we previously identified, correspond with a general approach followed by the courts in favour of a loosening of the customary law in specific circumstances. This is exactly what we would expect. Customary law was the law of the courts, but the courts were not lawyerly. They dispensed a justice that comported with communal apprehensions of what the law's content should be. They might, thus, twist the rules in the interests of a just and expedient settlement, even to the extent of turning established arrangements on their head. In time, court decisions that subverted the basic propositions of the customary law might themselves acquire a strongly normative character.

István Széchenyi did not understand this. He believed what he had been told by his bankers that because his property was ancestral, he was not its absolute owner and could not therefore use it as security on a loan. In fact, by the time Széchenyi was writing, there were methods in place to allow estates to be used as collateral, on pain of sequestration (*zárlat*) for default.[52] A few had even been converted into companies and their shares sold off.[53] (We suspect that Széchenyi was refused credit because he was a notorious spendthrift). As a consequence, Széchenyi presented the customary regime of landholding in the Hungarian countryside as an inflexible constraint upon ingenuity, investment and the bourgeois modernization of social relations (*polgárosódás*). Certainly, by the 1830s, the terms of Hungarian customary law had become more rigid and schematic, largely on account of the proliferation of scholarly texts which described it in terms of a set of normative propositions.[54] Historically, however, Hungarian customary law were never as unyielding as Széchenyi portrayed it. As in all customary regimes, what the law was in specific circumstances was contested, open and negotiable, consisting of conflicting strands and priorities. Its content was uncertain and malleable, because the interest of the courts was not to arrive at lawyerly verdicts but at solutions that comported with what its members thought on occasion to be right. As elsewhere, the customary law in Hungary and Transylvania was, at best, a point of reference that might be departed from, and not a straitjacket.[55]

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[52] Enforcing the *zárlat* was not, however, always easy. See MOL, O52, Váltófőtörvényszék iratai, 4 (1842), pp. 25, 61 (noting the obstruction of Baron Ignác Eötvös).

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CUSTOMARY LAW, *AVITICITAS* AND THE ALIENATION OF RURAL PROPERTY IN HUNGARY AND TRANSYLVANIA (15TH TO 19TH CENTURIES)

(Abstract)

Landed property was held throughout our region under what was called customary law. Most historians have treated customary law as composed of normative propositions in the form of fixed rules. This approach is mistaken, for medieval and early modern courts were neither lawyerly in their composition nor lawyerly in their regard for the law. The courts were mostly made up of lay participants. Their interest was not in applying a series of rules to the cases that came before them, but instead in arriving at solutions that were just and equitable. This paper looks at the principle of *aviticitas*, which is frequently presented as constituting a set of binding and fundamental propositions, which vested the ownership of property in the extended family or kindred group. It indicates that courts often arrived at judgements that were at odds with *aviticitas* and either developed or recognized practices that contradicted its most basic assumptions. The paper looks at three court judgements, the institutions of female succession, the device in law known as the *assumptio oneris*, and mortgage loans.