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VOLUNTAS TESTATORIS AD SCAEV. D. 29,7,14 / AFR. 29,7,15

SCAEV. 8 *qu. D.* 29,7,14 pr.: *Quidam referunt, quantum repeto apud Vivianum, Sabini et Cassii et Proculi expositam esse in quaestione huiusmodi controversiam: an legata, quae posteaquam instituti mortem obierunt codicillis adscripta vel adempta sunt, a substitutis debeantur, id est an perinde datio et ademptio etiam hoc tempore codicillis facta valeat ac si testamento facta esset. quod Sabinum et Cassium respondisse aiunt Proculo dissentiente. nimirum autem Sabini et Cassii collectio, quam et ipsi reddunt, illa est, quod codicilli pro parte testamenti habentur observationemque et legem iuris inde traditam servent. ego autem ausim sententiam Proculi verissimam dicere. nullius enim momenti est legatum, quod datum est ei, qui tempore codicillorum in rebus humanis non est, licet testamenti fuerit: esse enim debet cui detur, deinde sic quaeri, an datum consistat, ut non ante iuris ratio quam persona quaerenda sit. et in proposito igitur quod post obitum heredis codicillis legatum vel ademptum est, nullius momenti est, quia heres, ad quem sermonem conferat, in rebus humanis non est eaque ademptio et datio nunc vana efficietur. haec in eo herede, qui ex asse institutus erit dato substituto, ita ut ab instituto codicilli confirmarentur*.

1. *Quod si duo instituti sint substitutis datis unusque eorum decesserit, utilia videntur legata: sed circa coheredem erit tractatus, numquid totum legatum debeat. si 'quisquis mihi heres erit' legatum erit, an vero non, quia sit substitutus heres, qui partem faciat, licet ipse non debeat. idem etiam potest circa nomina expressa tractari. multoque magis solum coheredem totum debere puto, quia is adiunctus sit, qui etiam tunc cum adiungebatur in rebus humanis non erat*.

AFR. 2 *qu. D.* 29,7,15: *Sed cum ea testatoris voluntas fuerit, ut ex universa hereditate legata erogarentur, dicendum scriptis heredibus profuturam doli exceptionem, si amplius quam hereditaria portio petatur.*

This interesting group of texts raises several issues among which we may identify:

(a) The role of the rescript of Severus and Caracalla providing that legacies charged on the instituted heir should be deemed to be charged also on the substitute, even though the testator had not expressly charged the latter.

(b) The difference in approach between Sabinus and Cassius on the one hand and Proculus on the other to the case in which a codicil charged a legacy on an *heres institutus* who had already died *vivo testatore*.

(c) The problem with respect to payment of legacies that arose where two or more heirs had been instituted, but not all were alive at the time of the testator's death. Were the legacies originally established in the will now to be paid entirely by the surviving heir(s), or was a reduction to be allowed? In examining this question did the jurists treat as relevant the form of wording used for the imposition of the legacies? In particular, did it matter whether a general formula such as *quisquis heres mihi erit* was used or whether the legacies were charged on the heirs by name (*nominatim*)?

(d) The relationship between Africanus's decision in 15 and Scaevola's in 14,1, and the extent to which the compilers intended the principle of *voluntas* to be transposed from the former to the latter passage.

A preliminary word on the question of interpolations is in order. A number of difficulties have been found with the lengthy passage from Scaevola. These focus upon the alleged unclassical use of certain words such as *repeto*, *collectio*, *tractari*, and *dari*, the intrusion of glosses (for example, *id est*

[...] *facta esset*), and a general impression of 'paraphrase' and 'overworking'.[1] Despite the magisterial authority of Lenel who remarked of the Scaevola passage 'ohne jeden Zweifel stark mit Interpolationen durchsetzt',[2] there appears to be no good reason for not accepting the substance of the texts as genuine.

1. The Rescript of Severus and Caracalla.

The original wording of the rescript has not been preserved, but its content has been summarised in two texts:

ULP. 4 *disp. D.* 30,74: *Licet imperator noster cum patre rescripserit videri voluntate testatoris repetita a substitto, quae ab instituto fuerant relicta* [...]
C. 6,49,4 (Diocl. and Max. 293 A.D.): [...] *cum divo Antonino parenti nostro deberi etiam a substitutis fideicommissum contemplatione iudicii testatoris quasi tacite ab his repetitum iam dudum placuerit* [...]

Legacies or *fideicommissa* expressly charged on an *heres institutus* were deemed to be equally charged on the heir appointed as substitute, should the person instituted fail to take. It seems that this rule was grounded upon the supposed *voluntas* of the testator. The mere appointment of a substitute in a will or codicil was to be construed as an appointment subject to the same charges as those imposed upon the heir for whom he substituted. The testator was deemed (silently) to have 'repeated' the charges, in the sense of making a specific request that they should burden the substitute.

The problem that arises with respect to the case put by Scaevola in 14 pr. is this. A testator, in ignorance of the death of the person instituted heir under his will, added a codicil in which he charged the instituted heir with certain legacies. The question discussed by the early jurists was whether the person who took the inheritance as substitute heir was also to be burdened with those legacies. Since the only point discussed was the validity of a legacy imposed by codicil on an *heres institutus* who was already dead at the time of the codicil, the implication is that Sabinus, Cassius and Proculus all accepted that in principle legacies charged on an *heres institutus* also burdened the substitute.

How is this to be reconciled with the fact that the burdening of the substitute, in the absence of express authorisation in the will or codicil, appears first to have been permitted by the rescript of Severus?

The literature discloses a number of possible solutions. Sometimes it is argued that even prior to the rescript some jurists were prepared to apply a doctrine of *tacita voluntas* and assume that the testator, by naming the substitute, had intended that he should be subject to the same charges as the instituted heir.[3]

Sometimes it is supposed that, in the specific case being considered by Scaevola, the legacies had been expressly charged on the substitute, although this fact is not mentioned in the passage as it now appears in the Digest.[4] A variant of this view is that the testator, without expressly charging the substitute, had nevertheless used words of a generality sufficient to include the substitute, such as *vel*

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1 See in particular F. P. BREMER, *Iurisprudentiae Antehadrianea*, vol. 2,1, Leipzig 1898, p. 354, and vol. 2,2, Leipzig 1901, p. 21; G. BESELER, *Beiträge zur Kritik der römischen Rechtsquellen*, vol. 3, Tubingen 1913, p. 52 f.; *ZSS* 50, 1930, p. 67, note 1; ZSS 66, 1948, p. 273; F. PRINGSHEIM, *Festschrift fur Otto Lenel*, Leipzig 1922, p. 216, p. 220, note 4, p. 283 and note 5. Against the wide ranging assumption of interpolation by Scarlato Fazio (not seen) see A. METRO, *Studi sui codicilli*, vol. 1, Milano 1979, p. 36 f.

2 O. LENEL, *ZSS* 51, 1931, p. 5, note 1.

3 CUJAS, *Opera*, vol. 1 (*Ad Africanum Tractatus* II), Venice 1758-83), p. 1109 f; GLUCK, *Pandeckten* 44, Erlangen 1870, p. 265 f.

4 See R. J. POTHIER, *Pandectes de Justinien* (tr. M. DE BREARD-NEUVILLE) 11, Paris 1822, p. 259, note 1; BESELER, *Beiträge*, *op. cit.*, p. 3, 52 (inserting the appropriate words, which he believes to have been excised from the text); G. GROSSO, *I legati nel diritto romano*, 2nd ed., Torino 1962, p. 167, note 6; P. VOCI, *Diritto ereditario romano*, vol. 2, 2nd ed., Milano 1963, p. 90; METRO, *Codicilli*, *op. cit.*, p. 38 (following Voci).

quisquis mihi heres erit.[5] Of the latter two alternatives, the more likely is that the *quisquis* formula had been employed in the case under consideration by the jurists. Certainly, we cannot rule out this possibility as an explanation for the standpoint taken in the text.[6]

The most interesting of these approaches is that which supposes that the rescript was not entirely innovatory, and that throughout the classical period jurists may have been prepared to treat the substitute as burdened with legacies expressly charged only on the *institutus*. Two texts (apart from *D.* 29,7,14 pr. itself) can be cited in support of this approach, though it cannot be said that they yield conclusive results.

The earliest decision that has a bearing on the matter comes from Iulian: 61 *dig. D.* 35,2,87,4: *Qui filium suum impuberem et Titium aequis partibus heredes instituerat, a filium totum semissem legaverat, a Titio nihil et Titium filio substituerat. quaesitum est, cum Titius ex institutione adisset et impubere filio mortuo ex substitutione heres exstisset, quantum legatorum nomine praestare deberet. et placuit solida legata eum praestare debere: nam confusi duo semisses efficerent, ut circa legem Falcidiam totius assis ratio haberetur et solida legata praestarentur. sed hoc ita verum est, si filius antequam patri heres exsisteret decessisset. si vero patri heres fuit, non ampliora legata debet substitutus, quam quibus pupillus obligatus fuerat, quia non suo nomine obligatur, sed defuncti pupilli, qui nihil amplius quam semisses dodrantem praestare necesse habuit.*

The key to understanding this text lies in the time at which the *pupillus* dies.[7] If he dies *vivo testatore*, that is, before he ever becomes heir to his father, Titius takes his place under the so-called doctrine of *substitutio tacita*. The intention of the testator, implied from the substitution of Titius as heir should the son die while still a minor, is that Titius should also be substitute should the son predecease him. In this case Iulian held that Titius was to be burdened with the legacy charged on the *pupillus*. For the purpose of the *lex Falcidia* the legacy was now deemed to be charged on the whole inheritance, not just on Titius's half share, and so should be paid in full. One may therefore infer that Iulian would have held generally that a substitute was to be burdened with the legacies charged on the particular *heres institutus* whom he replaced.[8] If the *pupillus* died after his father but before becoming adult, Titius then became substitute under the special regime of pupillary substitution. He still acquired the burden of the legacy, but, since he was now liable on account of the *pupillus* rather than on his own account, it might be debited only to half the inheritance, so necessitating an appropriate Falcidian reduction.

In another text Iulian appears to take a different approach: ULP. 18 ad legem Iuliam et Papiam D. 31,61, pr.: *Si Titio et Maevio heredibus institutis qui quadraginta relinquebat a Titio ducenta legaverit et, quisquis heres esset, centum, neque Maevius hereditatem adierit, trecenta Titius debebit. 1. Iulianus quidem ait, si alter ex legitimis heredibus repudiasset portionem, cum essent ab eo fideicommissa relicta, coheredem eius non esse cogendum fideicommissa praestare: portionem enim ad coheredem sine onere pertinere. sed post rescriptum Severi, quo fideicommissa ab instituto relicta a substitutis debentur, et hic quasi substitutus cum suo onere consequetur adcrescentem portionem.*

A testator had instituted A and B as heirs, and had then charged A with a legacy of 200 and *quisquis heres esset* with a legacy of 100. Where A did not accept the inheritance, Iulian had held that B who now succeeded to the whole inheritance was not bound to pay the legacy of 200. This is a case of one coheir succeeding to the position of another, not a case of a substitute succeeding to the position of an *heres institutus*. It is perfectly possible that Iulian treated the two cases differently. The fact that Ulpian is recorded as applying the rescript of Severus and Caracalla to reverse Iulian's ruling does not supply a ground for holding that Iulian would have treated the succession to a coheir in the same way

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5 C. FERRINI, *Teoria generale dei legati e dei fideicommissa*, Roma 1976 (reprint of 1889 edition), p. 111, 114-5. Contra CUJAS, cited note 3, arguing that the *quisquis* formula might refer only to an *heres institutus* and not to a substitute.

6 See further on this in section III below.

7 See especially VOCI, *Diritto ereditario romano*, *op. cit.*, vol. 2, p. 777.

8 FERRINI, *Legati*, *op. cit.*, p. 110 argued that the will under consideration by Iulian had expressly charged the substitute with the legacy. Contra GROSSO, *Legati*, *op. cit.*, p. 167, note 3.

as succession by a substitute to an *heres institutus*.[9]

The only other text that may evidence the position prior to the enactment of the Severan rescript is from Papinian:[10] *8 resp. D.* 31,77,15: *Ab instituto extraneo praedia libertis cum moreretur verbis fideicommissi reliquierat et petierat, ne ex nomine familiae alienarentur. substitutum ea praedia debere ex defuncti voluntate respondi, sed utrum confestim an sub eadem condicione, voluntatis esse quaestionem: sed coniectura ex voluntate testatoris capienda mors instituti exspectanda est.*

Here we have an unequivocal decision which contemplates the automatic passing of legacies charged on the *heres institutus* to the charge of the substitute. It is true that the decision is grounded upon the *voluntas defuncti*, but the intention of the testator is here a presumption invoked to justify the passing of the burden to the substitute. It does not appear to have been inferred from the particular circumstances of the case or the actual language employed in the will.

The difficulty posed by the text is its relation to the rescript of Severus and Caracalla. It is possible that Papinian gave his decision after the enactment of that rescript; the matter cannot be determined.[11] Yet, if this were the case, it is surprising that no mention is made of what must have been accepted by the jurists as a recent and authoritative source by which to sustain the passing of the burden of the legacies from the instituted heir to his substitute.

Although we cannot treat the juristic decisions given prior to the Severan rescript as establishing conclusively a line of opinion throughout the classical period which approved the automatic passing of legacies from the instituted heir to his substitute, it is difficult to discount entirely such evidence as there is.

It seems probable that some jurists were prepared to hold that the substitute was burdened with legacies charged on the *heres institutus*, even though they had not been charged specifically on him by the will or a codicil. Consequently, the rescript of Severus may have had more a declaratory than an innovative character. It was intended more to resolve doubts among the jurists and establish as an express principle what was implicit in earlier decisions, rather than actually to change the hitherto accepted law.[12]

The rescript itself grounded its ruling upon the *tacita voluntas* of the testator. It is unlikely that this ground was introduced, as it were, for the first time. The previous line of authority which had culminated in the enactment of the rescript was no doubt perceived by its drafters as also resting upon an interpretation of *voluntas*.

Yet, it cannot be assumed that all jurists prior to the time of the rescript would have grounded their decision upon the notion of *voluntas*. In particular, it does not appear that the early classical jurists recorded by Scaevola in 14 pr., who all held that the substitute acquired the burden of legacies charged on the *heres institutus*, necessarily based their view upon the assumed intention of the testator.[13]

2. The Views of Sabinus, Cassius and Proculus.

Sabinus and Cassius, in holding that the legacy was validly charged on the substitute, applied to the construction of the codicil what is sometimes termed in modern literature the 'finzione codicillare'[14] or

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[9] The part of the text referring to the rescript is often regarded as an interpolation. See, for example, D. JOHNSTON, *The Roman Law of Trusts*, Oxford 1988, p. 123 ff. Contra VOCI, *Diritto ereditario romano*, *op. cit.*, vol. 1, 2nd ed., Milano 1967, p. 696.

[10] Two texts from PAUL (*D.* 30,126,1 and *D.* 31,82,1) are arguably too late to be cited as evidence for the position.

[11] Cf. the remarks of H. J. WIELING, *Testamentsauslegung im römischen Recht*, München 1972, p. 185, note 21.

[12] Cf. the treatment of GROSSO, *Legati*, *op. cit.*, p. 166 f.

[13] If they had been considering a case in which the testator had imposed the legacy on *quisquis mihi heres erit*, arguably they would then have reasoned that he had intended the substitute to take the burden.

[14] VOCI, *Diritto ereditario romano*, *op. cit.*, vol. 2, p. 90; G. NEGRI, *La clausola codicillare nel testamento inofficiosi*, Milano 1975, p. 306 f.

'codicillarrechtliche Fiktion'.[15] According to this principle (*ratio iuris*) the codicil was deemed to be *pars testamenti* and so was to be construed as though it had been written at the same time as the will itself. It therefore followed that the charge on the *heres substitutus* was valid, since he was alive at the time of the writing of the will, although dead by the time the codicil was added.

Sometimes it is supposed that the Sabinian jurists were actuated by a desire to give effect to the *voluntas testatoris*.[16] On this view they invoked the *ratio iuris* according to which codicils were to be treated as *pars testamenti*, because it permitted implementation of what they took to be the testator's intention.

Two points may be made with respect to this supposition. In the first place, the *voluntas testatoris* does not appear as a ground in the formal reasoning; nor is it really possible to take the *ratio iuris* itself as derived from, based upon, or somehow crystallizing a broader principle of interpretation framed in terms of *voluntas*. In the second place, even if Sabinus and Cassius were influenced by a consideration of the testator's intention, it is difficult to see any evidence from which it could be gathered. The death of the *heres institutus* after the writing of the will was a highly material fact. Would the testator's intention with respect to the charging of a legacy have been the same, if he had known of the death? We do not appear to be justified in holding that the early Sabinians had applied a principle of construction based upon *voluntas testatoris* to obtain a solution to the difficulty.

The reasoning of Proculus is not directly recorded. From Scaevola's approval of his position it can perhaps be inferred that the grounds stated by the later jurist were also those of the earlier. Proculus's focus therefore may be taken to have been more on the empirical state of affairs than on the need rigidly to apply a legal principle. He did not dissent from the principle which treated a codicil as *pars testamenti*, but he was not prepared to apply it in such a way as to produce an arguably absurd result.

The principle, in other words, should not be applied in a case where one of the parties to the legacy was already dead at the time the legal relationship was created.[17] The actual argument appears to have been based on an analogy. It was admitted that a legacy was void if created in favour of a person already dead. It must, therefore, further follow that it was equally void if charged upon a person dead at that time. Again, there is nothing to suggest that Proculus was specifically concerned with the question of *voluntas testatoris* or was ready to reject a principle of construction based on *voluntas*, where its application would infringe the fundamental rule that the parties to a legal relationship must be alive at the time that relationship was created.[18]

3. The Wording of the Legacy.

To set the scene for a discussion of this issue , a number of general distinctions may usefully be made. First, it is necessary to distinguish between language by which a class of heirs is identified in general terms without the mention of specific names, such as through the formula *quisquis mihi heres erit* or the phrase *mei heredes*, and that by which the heirs are identified by name (*nominatim*). With respect to the second branch of this distinction, we further have to distinguish between the position in which the heirs are identified purely by name, for example, let A, B, and C be under an obligation to pay or give etc., and that in which they are identified primarily in their character as heirs, although their names may also be mentioned, for example, let my heirs A, B, and C etc.[19]

Second, we have to identify the varying contexts in which different legal consequences might flow from the choice of general language or specific denomination. These are (i) the question whether the substitute is automatically to be burdened with legacies charged on the *heres institutus*, (ii) the question whether two or more heirs collectively charged with the payment of a legacy are liable *pro parte*

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15 GLUCK, *Pandeckten* 44, *op. cit.*, p. 268.

16 P. STEIN, *Cambridge Law Journal* 31, 1972, p. 23; G. L. FALCHI, *Le controversie tra Sabiniani e Proculiani*, Milano 1981, p. 229, note 160.

17 See especially STEIN, op. cit.; NEGRI, *La clausola*, *op. cit.*

18 So STEIN, *op. cit.*

19 For this point see POMP. *D.* 45,3,37.

hereditaria or in equal shares (*viriles portiones*), and (iii) the question whether that share of a legacy born by an heir who for some reason does not take the inheritance passes to the charge of his coheirs.

As to the first issue, one view, perhaps the majority, in the modern literature is that, where the heirs charged with a legacy are identified in general terms, for example, by the formula *quisquis mihi heres erit*, a substitute will automatically take the same burden as the *heres institutus*.[20] Another view is that the burden of the legacy charged on the *heres institutus* passed to the substitute, prior to the enactment of the rescript of Severus and Caracalla, only where it had been expressly charged (*repetitio*) on the latter.[21] Of these two views, the former appears to accord better with what one would take to be the natural sense of the general words describing the class of heir. Where the heirs to be charged are identified merely by name, for example, let A, B, and C pay etc, there is disagreement on the point whether, prior to the rescript of Severus and Caracalla, a substitute, in the absence of express words, took the burden charged on the heir for whom he substituted.[22] It has been argued above that probably there had been differences of approach among the classical jurists, and that the matter had finally been authoritatively settled by imperial rescript.

As to the second issue, the apportionment of liability between coheirs collectively charged with a legacy depended in the first instance upon the type of legacy.[23] Where the legacy was *per vindicationem*, the heirs were always liable *pro parte hereditaria*. Where the legacy was *per damnationem*, apportionment of liability appears to have depended, at least in the opinion of some jurists, upon the nature of the language by which the legacy was imposed. In the case of imposition by general words, for example, *quisquis mihi heres erit*, there appears to have been a juristic consensus that liability was *pro parte hereditaria*. In the case where the heirs charged were identified merely by name, for example, let A, B, and C pay etc, there were disagreements, perhaps even giving rise to a dispute between the schools. The Proculian jurist Neratius stated that, where heirs had been required by name to give something, their liability was in equal portions (*viriles portiones*), whereas, if not expressly named, their liability would have been *pro parte hereditaria* (*D.* 30,124). On the other hand, Pomponius in his commentary *ad Sabinum* held that, where some only of the heirs were charged by name with the payment of a legacy, they owed in equal shares (*viriles partes*), whereas if all had been so charged , they owed *pro parte hereditaria* (*D.* 30,54,3). Paul cites a number of early Sabinian jurists to the effect that, where only some of the heirs are charged by name, they owe *pro parte hereditaria*, and adds *idem est, cum omnes heredes nominantur* (*D.* 45,2,17). These texts are explained variously in the literature.[24] For our purpose, it is not necessary to go into the particular explanations which have been advanced. We need merely establish the conclusion that there was no accord among the classical jurists as to whether coheirs charged specifically by name with a *legatum per damnationem* were liable in equal portions (*viriles portiones*) or *pro parte hereditaria*.

There remains the third issue as to whether the burden of each heir is increased should one coheir fail to take the inheritance.[25] A rather elliptic text of Celsus, referring to ancient principle (*ius antiquum*), implies that, where an heir has been charged with a legacy by name but does not take the inheritance, the coheir will not acquire the burden (*D.* 31,29,2). The text seems to permit the inference that the position would have been different if the legacy had been imposed on *quisquis mihi heres erit*, or generally on the heirs.

Iulian, considering a case in which an individual had imposed *fideicommissa* by codicil on his intestate heirs, held that, should one of two *heredes legitimi* repudiate the inheritance, the surviving heir

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20 FERRINI, *Legati*, *op. cit.*, p. 121; GROSSO, *Legati*, *op. cit*., p. 165. But contra CUJAS, cited above at note 3, 5.

21 VOCI, *Diritto ereditario romano*, *op. cit*., vol. 2, p. 162.

22 See above at note 3, 4, 5.

23 See generally FERRINI, *Legati*, *op. cit.*, p. 118 f.; GROSSO, *Legati*, *op. cit.*, p. 159 ff.; VOCI, *Diritto ereditario romano*, *op. cit.*, vol. 2, p. 240 f.; R. GREINER, *Opera Neratii*, Karlsruhe 1973, p. 40.

24 See previous note.

25 Generally see FERRINI, *Legati*, *op. cit.*, p. 116 f.; GROSSO, *Legati*, *op. cit*., p. 169 ff.; VOCI, *Diritto ereditario romano*, *op. cit.*, vol. 1, p. 694 f.

was not burdened with a *fideicommissum* charged on the repudiating heir. The language in which the case is reported (*si alter ex legitimis heredibus repudiasset portionem, cum essent ab eo fideicommissa relicta*) suggests that the *fideicommissa* had been imposed on the heir by name (ULP. *D.* 31,61,1). Although Iulian's ruling was given with reference to a case of intestacy, it is likely that he would have held the same for a case in which the *fideicommissa* had been imposed on an heir instituted under a will.

Ulpian, as we have already seen, is recorded as reversing Iulian's decision on the ground that the rescript of Severus and Caracalla was applicable to a coheir as though he were a substitute (*quasi substitutus*). If this part of the text is an interpolation,[26] it is possible that Ulpian himself would have accepted Iulian's ruling. On this assumption the decision attributed to him in 61 pr. has to be explained on the ground of the wording by which the *fideicommissum* was imposed.[27] The case there considered is that in which a testator has instituted Titius and Maevius as his heirs, and then has imposed a legacy of 200 on Titius and of 100 on *quisquis heres esset*. Where Maevius did not accept the inheritance, Ulpian held that the burden of the legacy passed to Titius. There is no mention of the rescript of Servus and Caracalla as a ground for this decision. It seems likely that Ulpian's reason for coming to a conclusion different from that of Iulian lay in the fact that the legacy was imposed upon whoever should be heir and not upon a particular heir by name.

The texts on accrual so far considered establish the rule that a legacy specifically charged on an heir does not burden the coheir(s), should the former not take the inheritance. Should the legacy have been charged jointly on two or more heirs, the position was different. In this case failure by any of the heirs so charged to take the inheritance threw the whole burden of the legacy or *fideicommissum* on those coheirs who did take. This rule is clearly stated by Pomponius: *nam et si duos ex heredibus suis nominatim quis damnasset et alter hereditatem non adisset, qui adisset totum deberet, si pars eius qui non adisset ad eum qui adisset pervenerit* (*D.* 30,16,1).[28]

We may conclude that the jurists did solve the problem of accrual according to the language with which the legacy was imposed upon the heir who failed to take. Should the *quisquis* or similar generic formula be employed, or should the legacy be imposed jointly on named heirs, the burden passed to the surviving coheir(s). But should the legacy have been imposed specifically by name on an individual heir, such accrual did not occur, the surviving coheirs taking their share *sine onere*. This conclusion is confirmed by a statement attributed to Paul: *sed ea, quae ab eo [coherede], si omiserit hereditatem, non augebuntur, scilicet si ab eo nominatim data sunt, non 'quisquis mihi heres erit'* (*D.* 35,2,1,13).[29]

After this general excursus we may now turn to the examination of the Scaevolan text. Although 14 pr. gives no indication of the manner in which the legacy imposed by the codicil was worded, 14,1 puts a case in which the formula employed was *quisquis heres mihi erit*. Indeed, some old authorities have interpreted the text as putting two cases: that in which the legacy was charged in the *quisquis* form and that in which it was charged by name on the heirs (*idem etiam potest circa nomina expressa tractari*). The argument is that the rule held to govern the former was deemed by Scaevola to apply all the more strongly (*multoque magis*) to the latter.[30] In fact, this explanation appears to rest upon a misinterpretation of the phrase *nomina expressa* which refers not to the case in which the legacies have been charged on the heirs by name, but to that in which the payment of debts (*nomina*) has been

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[26] See note 9 above.

[27] See above at note 9.

[28] See also PAUL. *D.* 30,122,1, recording an opinion of Sabinus to the same effect. Cf. VOCI, *Diritto ereditario romano, op. cit.*, vol. 1, p. 694, note 21.

[29] The position in which a coheir burdened with a legacy fails to take the inheritance has to be distinguished from that in which he has accepted, but then has become unable to pay on the ground of insolvency. Whether the legacy was imposed in general terms or specifically by name, the shares of the solvent heirs are not increased (MOD. *D.* 31,33, pr.).

[30] CUJAS, cited note 3, p. 1109 f.; POTHIER, cited note 4, p. 260, note 5.

charged on the heirs.[31] The point being made by Scaevola is that the charging of debts on the heirs raises the same questions and requires the same answers as the charging of legacies. Furthermore, the phrase *multoque magis* refers not to the sentence mentioning *nomina expressa*, but to the issue raised in the clause beginning *sed circa coheredem erit tractatus*.

The case put by Scaevola is the following. A and B are instituted heirs, each being furnished with a substitute, but B dies *vivo testatore*. A codicil written after B's death imposed legacies in the form *quisquis mihi heres erit*. The jurist accepts without argument both that the legacies are valid and that the substitute to B does not incur any liability with respect to them. The difficulty is the extent of the liability incurred by A. Is he to be liable for the whole of the legacies or only for half, on the ground that the substitute has now become coheir with him? Scaevola decides that A is liable for the whole, since the imposition of a legacy on B was initially void, as B was already dead at the time the codicil was added. This at least seems to be what is meant by the last clause of the passage: *quia is adiunctus sit, qui etiam tunc cum adiungebatur in rebus humanis non erat*.

The issue which confronts us is, to what extent was Scaevola's decision dependent upon the generality of the wording by which the legacy was charged on the heirs? We may isolate two stages in the jurist's reasoning. The first question logically to be considered by Scaevola is whether the substitute takes the burden of the legacy charged on the *heres institutus*. In line with the reasoning deployed in 14 pr., he clearly has to answer this question in the negative. Despite the generality of the designation of the heir to be charged with the legacy, Scaevola accepted that the substitute could not be liable, because the portion of the legacy referable to the instituted heir who had already died was void. This now left the second question concerning the extent of the liability of the surviving coheir. In holding that he was liable for the whole, Scaevola focused primarily on the fact that the immunity of the substitute did not affect or cancel in any way the liability of the surviving heir on whom the legacy was also originally charged. The language used by the testator (*quisquis mihi heres erit*) showed that whoever took the inheritance as heir(s) should bear the burden of the legacy.

Would Scaevola have come to the same decision if the legacy had been charged on the heirs by name? The evidence surveyed above suggests that his decision would have depended upon the precise way in which the legacies had been imposed. If they had been charged on A and B jointly, then the fact that B could not take, having predeceased the testator, would lead to the whole burden falling on A. On the other hand, should the legacies have been imposed specifically on B alone, his inability to take would have ensured that A, irrespective of whether there was a substitute for B or not, would take the inheritance exempt from the burden.

4. The Relationship between 14,1 (SCAEVOLA) and 15 (AFRICANUS) and the question of *voluntas*.

Africanus lays down the rule that, where the testator has intended that the legacies should be paid out of the whole inheritance, any heir can be sued for the whole, but has the *exceptio doli* by which he may limit the claim in proportion to his share of the inheritance. The compilers, by attaching this rule to 14,1, have modified the decision of Scaevola by permitting the heir held liable for the whole legacy to plead the *exceptio doli* in order to secure a proportionate reduction. How novel was this modification? The first question we have to decide is the original bearing of the rule laid down by Africanus. We cannot simply assume that he was dealing with the same sort of situation as Scaevola.[32]

The first possibility that suggests itself for the original context of 15 is the imposition of a legacy collectively on several heirs. In such a case all the heirs are liable in proportion to the share of the inheritance which they acquire. Ulpian states the rule in this way: *[heredes] ipso iure pro ea parte legata debent, pro qua heredes sint* (*D.* 36,3,1,19). The significant phrase in this formulation is *ipso iure*. This shows that the action of the legatee against any individual heir was initially limited *pro parte hereditaria*. There was no need for the heir to plead the special defence of *exceptio doli*. The position

[31] See the translation of the text in ALAN WATSON (ed.), *The Digest of Justinian*, Philadelphia 1985, vol. 2, p. 906.

[32] The point is recognised by LENEL, *ZSS* 51, 1931, p. 5, note 1, though cf. *Palingensia Iuris Civilis*, Graz 1960 (reprint of 1889 ed.), vol. 1, p. 4, note 1, where he refers the text to the case put by SCAEVOLA in 14,1.

with respect to legacies was the same as that with respect to debts, where responsibility for payment was imposed generally on the heirs.[33] Consequently, it does not seem that Africanus could have been considering the normal case in which a legacy was charged on several heirs.

Another possibility is presented by the sort of situation in which a person, in making certain dispositions of his property by codicil, was under the impression that only one individual was his intestate heir, whereas in fact there was more than one. For example, he may have thought that he had only one son and so have directed him by codicil to make certain payments, whereas it turned out that he had another son born posthumously. This kind of situation clearly caused problems, and the response of the jurists may have varied. Iulian, dealing with a codicil which imposed *fideicommissa* on *quisquis mihi heres erit*, held that the intestate heirs were liable, and that these included a posthumously born *proximus agnatus* or *suus heres* (*D*. 29,7,3). Paul laid down a similar rule in general terms (*D*. 29,7,16). On the other hand, Marcellus in a case in which a son had been charged with *fideicommissa* in a codicil, held that he was liable for the whole, even though a further son was born posthumously.[34] Ulpian, while agreeing that the posthumous son was not liable, held that the liability of the other should be restricted to one half (*D*. 29,7,19).[35]

It may be that Africanus in such a case adopted the same view as Iulian, that is, held that both the (intestate) heir initially mentioned in the codicil and any posthumously born heir were liable for *fideicommissa* charged in the codicil. He may further have amplified the position by stating that, although either of the intestate heirs could be sued for the whole, the *exceptio doli* was available to effect a proportionate reduction in liability. Nevertheless, there is still a difficulty in applying 15 to such a situation. The language used by Africanus – the granting of the *exceptio doli* to the *scripti heredes* – suggests that he was thinking not of a codicil directed to an intestate heir, but of a will which instituted more than one heir.

We are left with the possibility that Africanus was in fact considering the same kind of situation as Scaevola, that is, one in which a testator had instituted two or more heirs, with substitutes, and had subsequently charged the instituted heirs with legacies or *fideicommissa*, unaware that one was already dead. Can we obtain any indication from the wording of the text as to the form in which the legacies or *fideicommissa* were imposed on the heirs? Cujas argued that Africanus was dealing with an imposition in the form *quisquis mihi heres erit*, citing in support the fact that the heirs were declared to be liable *pro parte hereditaria* and not in equal portions (*viriles portiones*).[36] However, as we have already seen, the evidence for the classical period is inconclusive. In the case of *legata per damnationem* or *fideicommissa* imposed specifically on two or more heirs by name, some jurists held that liability was *pro parte hereditaria*, others that it was in equal portions. We cannot be sure which view Africanus would have followed.

On this reconstruction Africanus may have been considering a case in which the legacies or *fideicommissa* had been charged in the form *quisquis mihi heres erit*, or specifically by name on the instituted heirs. In either case the substitute took free from the burden which passed *in toto* to the surviving *heres institutus*. At least this was the position in strict law. Africanus was prepared to modify the strict law by permitting the heir sued for the whole legacy to limit his liability in proportion to the share of the inheritance which he took, that is, to half.

The interest of the reasoning in 15 lies in its reliance upon the notion of *voluntas*. This is introduced in the context of the source from which the legacies are to be paid. Africanus's premise is the intention of the testator that the legacies be paid *ex universa hereditate*. How exactly is this statement to be explained? One may infer from the explicit reference to the *universa hereditas* that Africanus

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[33] See W. W. BUCKLAND, *A Textbook of Roman Law*, 3rd ed. by P. STEIN, Cambridge 1963, p. 317.

[34] This may be distinguishable from the approach of Iulian on the ground that the *fideicommissum* was charged specifically by name and not in terms of the *quisquis* formula.

[35] On this text, long recognised as interpolated, see FERRINI, *Legati*, *op. cit.*, p. 104 and note 1; VOCI, *Diritto ereditario romano*, *op. cit.*, vol. 2, p. 230; JOHNSTON, *Roman Law of Trusts*, *op. cit.*, page 125, note 16; U. MANTHE, *Das senatus consultum Pegasianum*, Berlin 1989, p. 52, note 54.

[36] CUJAS, cited note 3, p. 1111.

was postulating a contrast between a case in which the legacies were charged only on a particular portion of the inheritance, perhaps allocated to a particular heir, and that in which they were charged on several heirs, but without specification of particular items of property or shares of the inheritance from which they were to be paid. In the latter case it could be inferred that the testator intended each and every portion of the inheritance to be chargable. Such an intention was inferable from the nature of the language used in the disposition of the legacies or *fideicommissa*.

Whether or not the testator actually had the intention ascribed to him, or whether the jurist was simply prepared to attribute that intention in the absence of words in the codicil or will evidencing a contrary or different intention, is of no consequence. The point is that the jurist, on the basis of the language of the will or codicil, was able to argue that the testator had intended a particular state of affairs. The unstated but important assumption is the invocation of a further, more general principle providing that the distribution of the estate should proceed according to the wishes of the testator.

What, then, is to be made of the introduction of the *exceptio doli* from the perspective of *voluntas testatoris*? The structure of the reasoning could suggest that the defence was introduced on grounds of equity to correct an undesirable consequence of the principle which required that effect should be given to the testator's intention. The implication of the first part of Africanus's reasoning could appear to be that, since the legacies were to be charged on the whole inheritance, the testator had intended that the surviving heir might be made liable for the whole. Since, in the jurist's view, this would have been unreasonable, he was prepared to allow the *exceptio doli* to limit the action of the beneficiary *pro parte hereditaria*.

There is, however, another way of looking at the matter. Although the *voluntas testatoris* is mentioned only in conjunction with the fact that the legacies should be paid out of the whole inheritance, a further inference as to the range of *voluntas* is possible. The meaning might be that the testator had intended not only that the legacy should be chargeable on each and every portion of the inheritance but that, despite the availability of the whole inheritance for payment, the surviving heir should be personally liable only for an amount corresponding to his share in the inheritance. For example, if he was made heir as to one third, the intention of the testator on this interpretation was that he should be liable only for a third of the legacy. In order to give effect to this aspect of the testator's intention, the jurist accorded an *exceptio doli* for the case in which the heir was sued for more than the amount he should properly pay. This explanation of the ground for the grant of the *exceptio doli* is preferable to that which sees it as a limitation placed upon *voluntas*, because the governing factor in Africanus's reasoning is precisely the *voluntas testatoris*. Hence, one would expect that the main rule established by the text would itself rest upon an implementation of *voluntas*.[37]

The effect of the compilers' positioning of 15 and its linking to 14 with the conjunction *sed* is to import the notion of *voluntas* into the problem discussed by Scaevola. The earlier jurists whose opinions are cited by Scaevola in 14 pr. do not appear to have invoked a principle of *voluntas testatoris*. Scaevola himself does not explicitly do so, but his decision in 14.1 may be explained on the assumption that he inferred from the formula *quisquis mihi heres erit* an intention on the part of the testator that whoever was heir should pay the whole. But he does not appear to have placed any particular emphasis upon the notion of *voluntas* as such. Africanus, on the other hand, explicitly relied upon *voluntas* as the pivot of his decision. By linking the *voluntas* of 15 with the decisions in 14, the compilers have raised two principal questions.

The first question concerns the purpose of the compilers. Did they intend that the rules established in 14 should now be explained as deriving from the *voluntas testatoris*, or were they concerned merely to make the substantive point that the *exceptio doli* was to be available where the surviving heir was sued for a greater portion of the legacy than his share of the inheritance warranted? In view of the emphasis on *voluntas* in 15, it would be strange if they had not seen the consequences of their linking of the texts. Certainly they might have expected any reader of the two passages to infer that *voluntas* was the governing principle underlying the rules which they established. What is not clear on the

[37] On 15 see CUJAS, cited previous note; POTHIER, cited note 4, p. 260, note 6 (both accepting that the *stricto iure* rule under which the surviving heir was liable for the whole of the legacy, despite the acceptance by the substitute, was qualified on grounds of *aequitas*); E. COSTA, *L'exception doli*, Roma 1970 (reprint of 1897 ed.), p. 226 f. (explaining the *exceptio doli* as grounded on the *voluntas testatoris*).

particular evidence surveyed here is whether the compilers as a matter of policy favoured the resolution of problems of construction in wills by recourse to the *voluntas testatoris*, and so wished to give a special prominence to the role of *voluntas* in the reasoning of both 14 and 15.

The second question concerns the extent to which the compilers have effected a change in the law. It is possible that the classical jurists had differed not only in their reasoning but also in their conclusions. Whereas Scaevola had held that the surviving coheir was to be liable for the whole of the legacy, the earlier jurist, Africanus, had been prepared to allow the *exceptio doli* by which the action was limited *pro parte hereditaria*. Sometimes it has been thought that Scaevola would have held the same, and indeed for the same reason as Africanus (38).[38] On this view Africanus is taken as making explicit what had been merely implied in 14,1. Scaevola himself would have allowed the *exceptio doli* on the ground of the *voluntas testatoris*. However, there is no proof that this was the case. It is equally possible that Scaevola took a different approach to, and formed a different conclusion from, Africanus. Consequently, there is nothing surprising either in the fact that Scaevola and Africanus might have resolved the problem differently or in the fact that their solutions were dictated by different approaches to the construction of wills and codicils, one operating certain particular rules of construction, the other relying more generally on *voluntas*. If this is correct, it appears that the compilers, through the positioning of 14,1 and 15, have brought the law into line with the principle stated by Africanus.

Concluding remarks on *voluntas.*

Examination of the issues raised by the passages from Scaevola and Africanus suggests some reflections on the role of *voluntas* as a principle of interpretation for the construction of wills. First of all, we may distinguish a number of distinct approaches to the problem of construction. Sometimes difficulties are solved through the application of particular principles or on the basis of particular perspectives which are not derived from *voluntas*. Examples are supplied by the solutions of Sabinus, Cassius, and Proculus to the difficulty that arose where a legacy had been imposed by codicil on an *heres institutus* who had predeceased the testator. Sabinus and Cassius, taking to an extreme the principle that a codicil formed part of the will and so should be construed in the light of circumstances obtaining when the will was drafted, upheld the validity of the legacy. Proculus, on the other hand, taking a more pragmatic approach, argued that no legal relationship could come into being unless the parties to it were both alive, and so treated the legacy as void.

Sometimes the use of certain language by the testator is deemed to entail a certain legal consequence. For example, a legacy imposed on *quisquis mihi heres erit* will be held to be imposed on the substitute as well as the *heres institutus*. A legacy imposed jointly on 'my heirs A, B, and C' will be held to fall wholly on the surviving heir(s) should one or more of those named not take the inheritance. Further, a legacy imposed by name on A, B, and C who have elsewhere in the will been identified as heirs will be held to be apportioned between them equally (*viriles portiones*) and not in proportion to their respective shares in the inheritance *(pro parte hereditaria)*. Conversely, should the legacy be imposed on 'my heirs A, B, and C', the apportionment will be deemed to be *pro parte hereditaria*. Although no mention may be made of *voluntas* in the reaching of these results, it is difficult to doubt that the legal consequence in question is thought to represent the intention of the testator, such intention being inferable from the particular words he has chosen to adopt. In cases of this kind the function of *voluntas* can be said to have been 'frozen' or 'crystallised'. The jurist is not asking, what did the testator intend by these words? He is making the assumption that, if certain words are used, then a certain legal consequence is to follow.

Finally, we have the case in which the notion of *voluntas* is explicitly invoked by the jurist as a reason for establishing a particular interpretation of the duties imposed by a will. An example of this use is supplied by Africanus in 15. Here the jurist is not directly inferring a particular legal consequence from the actual language used in the will by the testator. His argument proceeds on a more general and abstract level. The unstated major premise is that the construction of the will should follow the wishes of the testator. The stated minor premise is that the testator intended that the legacies be paid *ex universa hereditate*, the conclusion being that each heir is therefore liable *pro parte heredi-*

[38] See, for example, CUJAS, cited note 36.

taria.[39]

Where the jurist establishes a legal consequence on the basis of the intention of the testator, whether or not he expressly invokes the notion of *voluntas*, he is inferring from the language of the will the presence of an intention with a stated content. Sometimes it may be the case that there can be no reasonable doubt as to the intention of the testator. But frequently there is an ambiguity. The ambiguity may be limited in scope, such as the question whether the formula *quisquis mihi heres erit* discloses an intention to refer to the substitute as well as to the *heres institutus*. On the other hand, the ambiguity may be very considerable, as in the case where the testator has neither employed the *quisquis* formula or a similar phrase nor expressly directed that the substitute be burdened with a legacy charged on the *heres institutus*. In such a case the jurist may find useful the doctrine of *tacita voluntas*. Although there is nothing in the language to suggest whether the testator intended that the substitute be burdened or not, the jurist is still prepared to infer, from the absence of any contrary expression of will, that there was such an intention.

Considered from the perspective of the operation of legal rules, the notion of *voluntas* is not a device employed by the jurists to identify the actual wishes of the testator. While the starting point of juristic reasoning is the assumption that the intention of the testator as disclosed by the language of the will should be implemented, the actual process of reasoning operates with a series of presumptions and inferences. What varied was the nature of the evidence on the basis of which the presumptions were made or the inferences drawn. Sometimes the language is such that it might reasonably be taken as expressing a particular intention on the part of the testator, but sometimes, as testified by the phrase *tacita voluntas*, there is no linguistic expression in the will of the testator's wishes that can be considered as tolerably clear. In all likelihood he had not contemplated the point at issue and had formed no intention as to what should be done. In such a case the jurists may still impose a solution allegedly derived from *voluntas testatoris*. But the gap between the evidence furnished by the language of the will and any supposed intention on the part of the testator may be so great as to warrant one to speak of *voluntas* in effect as a 'legal fiction'.[40]

[39] It is perfectly possible that the notion of *voluntas* might also be explicitly invoked in the previous class of case in which the intention of the testator is inferable from the particular language used. The point is that it is often unnecessary to make an explicit appeal to *voluntas*, since the wording of the will sufficiently on its face discloses what the testator had in mind.

[40] Cf. the remarks of VOCI, *Diritto ereditario romano*, *op. cit*., vol. 2, p. 169.