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RENATA ŚWIRGOŃ-SKOK[1]

Heredis institutio caput et fundamentum totius testamenti est – as a rule of Roman inheritance law

Abstract

In the Roman inheritance law, until post-classical law, the appointment of an heir on the basis of the rule heredis institutio caput et fundamentum totius testamenti est, was the foundation of the whole will. Heredis institutio was a crucial element of the content of the will and it should be placed in the very beginning as all dispositions placed before it, were void. And remained this way until Justinian law where the above mentioned formalism was annulled.

First exceptions of the rule heredis institutio caput et fundamentum totius testament est and the order arising from testamentary dispositions placed therein, can be noticed in classical law, according to the constitution of custody, appointment to inherit by the own slave together with his liberation and disinheritance. Moreover, Roman law, based on the performance of praetors and Cesar law, exceptionally allowed the maintenance if the rest of the testamentary content (demises, trusts, liberations) when the heredis institutio fell or did not lead to inheritance.

And so, the acceptance of the heir appointed in a will becomes a sole formality in classical law, and a range of deviations and exceptions appear in the discussed rule Heredis institutio caput et fundamentum totius testamenti est. The Western Roman post – classical practice and Justinian omitted the above mentioned rule totally.

Keywords: heredis institutio, Roman law, testament

[1] Prof. Renata Świrgoń-Skok – Faculty of Law and Administration, University of Rzeszów; e-mail: rskok@op.pl.

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RENATA ŚWIRGOŃ-SKOK

Heredis institutio caput et fundamentum totius testamenti est – jako reguła rzymskiego prawa spadkowego

Streszczenie

W rzymskim prawie spadkowym, aż do prawa poklasycznego, ustanowienie dziedzica w oparciu o regułę *heredis institutio caput et fundamentum totius testamenti est*, było fundamentem całego testamentu. *Heredis institutio* była koniecznym elementem treści testamentu, należało ją umieścić na samym początku, ponieważ rozrządzenia zawarte przed nią były nieważne. Tak przynajmniej było, aż do prawa justyniańskiego, w którym powyższy formalizm został zniesiony.

Pierwsze wyjątki od reguły *heredis institutio caput et fundamentum totius testamenti est* i wynikającej z niej kolejności zamieszczanych rozrządzeń testamentowych, można zauważyć już w prawie klasycznym, odnośnie do ustanowienia opieki, powołania do dziedziczenia własnego niewolnika z równoczesnym wyzwoleniem oraz wydziedziczenia. Ponadto prawo rzymskie, w oparciu o działalność pretorów oraz prawo cesarskie, dopuszczało wyjątkowo utrzymanie pozostałej treści testamentu (zapisy, fideikomisy, wyzwolenia), gdy odpadła *heredis institutio* lub nie doprowadziła do dziedziczenia.

Zatem przyjęcie spadku przez ustanowionego w testamencie dziedzica staje się już w prawie klasycznym czystą formalnością, a omawiana reguła doznaje szeregu odstępstw i wyjątków. Natomiast zachodniorzymska praktyka poklasyczna i Justynian pominęli w ogóle wspomnianą zasadę.

Tak jak i we współczesnym polskim ustawodawstwie powołanie spadkobiercy jest uprawnieniem testatora, a nie konieczną treścią testamentu. Do typowych rozrządzeń testamentowych można zaliczyć obok ustanowienia spadkobiercy (art. 959 i n. k.c.), wydziedziczenie, ustanowienie zapisu. W prawie polskim ważny będzie testament zawierający tylko jedno rozrządzenie. W żadnym razie ustanowienie spadkobiercy w testamencie nie jest wymogiem jego sporządzenia, testator nie musi naruszać porządku dziedziczenia ustawowego, może się ograniczyć do dyspozycji o innym charakterze.

Słowa kluczowe: *heredis institutio*, prawo rzymskie, testament

In the field of public law, among others based on private property, the matter of continuation of family property through inheritance commonly appears, creating permanent constructions within the regulations of inheritance law. Many values and rules arisen in Roman law have remained their quality in present times, in the Polish and other European legal systems. Other, mainly those arisen in the oldest *ius civile* have kept their utility only in the Roman inheritance law.[2]

The aim of this article is to explain the force of the rule *heredis institutio caput et fundamentum totius testamenti est* – "the establishment of an heir determines the beginning and foundation of the whole will" (G.2,229; I.2,20,34) in the Roman law system, what its substance, consequences, and also limitations were.

In the Roman law, the establishment of an heir (*heredis institutio*)[3] was performed in the will and constituted the most important part of it, since the pre-classical period:

> G.2,229: *Ante heredis institutionem inutiliter legatur, scilicet quia testamenta uim ex institutione heredis accipiunt, et ob id uelut caput et fundamentum intellegitur totius testamenti heredis institutio.*

According to the extract placed in the Institutions of Gaius – the constitution of an heir (*heredis institutio*) had to be placed in the beginning of the will because it was considered as its base and all dispositions located before were void.

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2 B. Biondi, *Istituti fundamentali di diritto ereditario romano*, Milano 1948; idem, *Successione testamentaria e donazioni*, Milano 1943; P. Bonfante, *L'origine dell' hereditas dalla successione sovrana le critiche al concetto*, Milano 1905; C. Fadda, *Concetti fondamentali del diritto ereditario romano*, Vol. 1 and 2, Milano 1949; A. Hernández Gil, *Obras completas*, Vol. 4, *Derecho reales, Derecho de sucesiones*, Madrid 1989, p. 577 and other; G. La Pira, *La successione ereditaria intestata e contro il testamento in diritto romano*, Firenze 1930; M. Pampaloni, *Studi sull' istituzione di erede nel diritto romano e odierno*, Torini 1888; L. Piętak, *Prawo spadkowe rzymskie*, Lwów 1882; V. Robbe, *Diritto ereditario romano. I principi generali e fondamentali*, Napoli 1962; B. Santalucia, *Diritto ereditario romano. Le fonte*, Bologna 1999; A. Segré, *Ricerche di diritto ereditario romano*, Roma 1930; V. Scialoja, *Diritto ereditario romano. Concetti fondamentali*, Roma 1922; S. Solazzi, *Diritto ereditario romano*, Vol. 2, Napoli 1933; P. Voci, *Diritto ereditario romano*, Milano 1956; A. Watson, *The law of succession in the later roman republic*, Oxford 1971.

3 O. Lenel, *Zur Geschichte der heredis institutio*, "Labeo" 1966, 12, p. 358 and other; C.A. Maschi, *Ancora sulla solemnità della heredis institution nel diritto romano*, [in:] *Scritti in memoria di Antonino Giuffrè*, Vol. 1, Milano 1967, p. 643 and other; M. D'Orta, *Saggio sulla 'Heredis institutio'. Problemi di origine*, Torino 1996.

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As the lawyer states *„caput et fundamentum intellegitur totius testamenti heredis institutio* – the constitution of an heir is believed to be the beginning and foundation of the whole will". The cited rule meant that the constitution of an heir should be performed in the beginning of the will and that all other provisions would not be binding if there was no *heredis institutio* or it was void.

G.2,229: *Ante heredis institutionem inutiliter legatur...*

UE. 24,15: *Ante heredis institutionem legari non potest, quoniam et potestas testamenti ab heredis institutione incipit.*

Gaius in *Institutiones* and Ulpianus w *Tituli ex corpore* state that the constitution of a legate before *heredis institutio* was ineffectual.

An analogical situation occurred within the emancipation which also could not be performed before the constitution of an heir:

G.2,230: *Pari ratione nec libertas ante heredis institutionem dari potest.*

It is the same way in another excerpt of Gaius:

G.2,248: *Inprimis igitur sciendum est opus esse, ut aliquis heres recto iure instituatur eiusque fidei committatur, ut eam hereditatem alii restituat; alioquin inutile est testamentum, in quo nemo recto iure heres instituitur.*

Also, within the constitution of trust, it was initially required that an heir is constituted according to the law, and then a trust. Otherwise, the will was void.

Consequently, the whole final act of will could be considered a will, which only included the constitution of an heir because the will itself consisted of the constitution of an heir. Obviously, a will could include other provisions (disinheritance, substitutions, legates, emancipations, the constitution of a guardian, trusts), but they should be placed after the constitution of an heir in order to be valid. This seems legitimate, especially within those financial dispositions which required an heir in order to be performed, such as legates, emancipations or *mancipatio familiae.*

D.29,7,20 (*Paulus libro quinto ad legem Iuliam et Papiam*)*: Si palam heres nuncupatus sit, legata autem in tabulis collata fuerint, Iulianus ait tabulas testamenti non intellegi, quibus heres scriptus non est, et magis codicilli quam testamentum existimandae sint: et hoc puto rectius dici.*

In the cited extract, Paulus disputes the opinion of Julianus and states that tables where there is no indication of an heir, and where only dispositions (legacies) are included, cannot be a will.[4]

Similarly, Modestinus analyzed the problem of the constitution of pupilar substitution:

> D.28,6,1,3 (*Modestinus libro secundo pandectarum*): *Substituere liberis pater non potest nisi si heredem sibi instituerit: nam sine heredis institutione nihil in testamento scriptum valet.*

According to the lawyer, the constitution of an heir, and also other provisions included in the will, do not lead to legal effects if the testator does not constitute an heir.[5]

Disinheritance appeared similarly. Due to the rule *sui heredes instituendi sunt vel exheredandi* (UE 22,14) there was a legal duty to disinherit an own heir in case of lack of will to constitute him an heir. However, disinheritance could only occur if someone was constituted as an heir. The efficiency of disinheritance was linked to the efficiency of the constitution of an heir.[6] There was a logical subordination between the constitution of an heir and the performance of disinheritance. If a will fell, the disinheritance became void.

> D.28,5,69(68): (*Pomponius*, *libro septimo ad Quintum Mucium*): *...et momentum aliquod habebunt. sic enim filii exheredatio cum eo valet, si quis heres existat: et tamen nemo dubitat, quin, si ita aliquis filium exheredaverit: 'Titius heres esto: cum heres erit Titius, filius exheres esto', nullius momenti esse exheredationem.*

Therefore, without the constitution of an heir in the Roman law, there was no will and the lack of appointing heirs led to the nullity of other provisions contained in the will:

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4 Compare: D.28,1,1; UE 20,1; C.14,6,28.

5 See: D.50,17,181.

6 And in the Polish law there is independent disinheritance; see: E. Skowrońska-Bocian, *Testament w prawie polskim*, Warszawa 2004, p. 156; eadem, *Komentarz do kodeksu cywilnego. Księga czwarta. Spadki*, Warszawa 2005, p. 181. It also accepts the so called negative will, which only includes the dismissal of inheritance by a statutory heir; see: J. Biernacki, *Testament negatywny oraz jego właściwości i skutki*, "Przegląd Notarialny" 1949, 1–2, p. 130–144; E. Niezbecka, *Skutki prawne testamentu negatywnego i wydziedziczenia*, "Rejent" 1992, 7–8, p. 16–27; J.S. Piątkowski, *Prawo spadkowe. Zarys wykładu*, Warszawa 2003, p. 100–101.

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G.2,116: *Sed ante omnia requirendum est, an institutio heredis sollemni more facta sit; nam aliter facta institutione nihil proficit familiam testatoris ita uenire testesque ita adhibere et ita nuncupare testamentum, ut supra diximus.*

According to *ius civile*, the validity of the will should be examined by firstly analyzing matters linked to *heredis institutio*. If it came out that the constitution of an heir was performed contrary to legal requirements, then the will would became void. And on the contrary, the will was the only legal action in the Roman law, on the basis of which an heir could be appointed. An heir could not be constituted in a codicil, which was recognized as a second act of last will in imperial law:

G.2,273: *Item codicillis nemo heres institui potest neque exheredari, quamuis testamento confirmati sint; ...*

I.2,25,2: *Codicillis autem hereditas neque dari neque adimi potest, ne confundatur ius testamentorum et codicillorum, et ideo nec exheredatio scribi, directo autem hereditas codicillis neque dari neque adimi potest.*

A codicil was understood as those dispositions of last will, due to which the testator did not appoint an heir but performed other dispositions in case of death.[7]

Except the order to appoint for inheritance, a proper, legal form was necessary for *heredis institutio*. Particular oral or written forms were required, which contained the word *heres*. Also, until the end of classical law an imperative form was needed:

G.2,117: *Sollemnis autem institutio haec est: TITIUS HERES ESTO; sed et illa iam conprobata uidetur: TITIUM HEREDEM ESSE IUBEO; at illa non est conprobata: TITIUM HEREDEM ESSE VOLO; sed et illae a plerisque inprobatae sunt: TITIUM HEREDEM INSTITUTO, item: HEREDEM FACIO.*

Gaius, in his *Instituiones*, states that in order to constitute an heir the formula: *Tituvs heres esto* (Titus shall be heir) or *Tituvm heredem esse iubeo* (I order Titus to be heir) had to be utilized. In terms of statements *Titium heredem instituto* (I appoint Titus as heir) or *Titium heredem facio* (I make Titus heir), only few permitted their validity.

The imperative form, according to Marcianus, a lawyer of the 2nd and 3rd century, was also maintained in the following passage:

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[7] See: P. Voci, *Diritto ereditario...*, op. cit., p. 96; J.J. Szczerbowski, *Forma kodycylu w świetle prawa justyniańskiego*, "Studia Prawnoustrojowe" 2007, 7, p. 219 and other.

D.28,5,49pr. (*Marcianus libro quarto institutionum*): *His verbis: „Titius hereditatis meae dominus esto", recte institutio fit.*

The usage of the form *Titius hereditatis meae dominus esto* (Titus shall be the owner of my inheritance) was not straightforward and did not raise any doubts.

Also the omission of the word *heres* in *heredis institutio*, at least in classical law did not lead to inefficiency of the constitution of an heir.

D.28,5,1 pr.: (*Ulpianus libro primo ad Sabinum*): *Si autem sic scribat: „Lucius heres", licet non adiecerit „esto", credimus plus nuncupatum, minus scriptum: et si ita: „Lucius esto", tantundem dicimus: ergo et si ita: „Lucius" solummodo. Marcellus non insuptiliter non putat hodie hoc procedere. divus autem Pius, cum quidam portiones inter heredes distribuisset ita: „ille ex parte tota, ille ex tota" nec adiecisset „heres esto", rescripsit valere institutionem: quod et Julianus scripsit.*

In the analyzed extract written by Ulpian in his comment *ad Sabinum* it arises that Sabinus and most certainly Julian, Marcellus and Caesar Antonius Pius agreed the constitution of an heir to be legitimate even if there was no word *heres* in the formula. Such a statement was supported by the fact that more was expressed verbally instead of written, and that is what should be considered (*credimus plus nunupatum, minus scriptum*).[8]

All other designations, for example *Titium heredem esse volo* – I want Titus to be my heir (G.2,117), in which there was no imperative mood were rather considered as a universal trust.[9] In post-classical law, it was even underlined that generally trusts vary from wills by *verba preativa* (asking words) included in them instead of *verba imperative* (imperative words).[10]

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8 Also compare: D.28,5,9,2; C.6,23,7.

9 M. Kuryłowicz, *Zapis uniwersalny i podstawienie powiernicze (uwagi historyczno-prawne)*, "Rejent" 1991, 1, p. 33 and other; and F. Longchamps de Bérier who is the author of two publications concerning this subject (*O elastyczność prawa spadkowego. Fideikomis uniwersalny w klasycznym prawie rzymskim*, Warszawa 2006; *Il fedecommesso universale nel diritto romano classico*, Warszawa 1997) and many aricles among others: *Warunki, terminy i fideikomis uniwersalny w rzymskim prawie prywatnym*, "Studia Iuridica" 1999, 37, p. 95 and other; *Z badań nad rzymskim prawem spadkowym: konstrukcja dogmatyczna fideikomisu uniwersalnego*, "Studia Iuridica" 1997, 34, p. 107 and other; *Fideikommissum hereditatis w źródłach rzymskiego prawa klasycznego*, "Prawo Kanoniczne" 1998, 41(1–2), p. 223 and other; *Fideikomis uniwersalny a swoboda dysponowania majątkiem na wypadek śmierci: zmiany zakresu podmiotowego w rzymskim prawie spadkowym*, "Studia Iuridica" 1998, 36, p. 137 and other; *Szacunek dla woli zmarłego na przykładzie rzymskich fideikomisów*, [in:] A. Pikulska-Robaszkiewicz (ed.), *Profesorowi Janowi Kodrębskiemu in memoriam*, Łódź 2000, p. 209 and other.

10 See: UE.24,1; UE.25,1.

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This requirement was voided by the constitution of Constantinus II in 339 A.D.

C.6,23,15pr. (*Imperator Constantinus*): *Quoniam indignum est ob inanem observationem irritas fieri tabulas et iudicia mortuorum, placuit ademptis his, quorum imaginarius usus est, institutioni heredis verborum non esse necessariam observantiam, utrum imperativis et directis verbis fiat an inflexa.*

In imperial law *heredis institutio* could be performed by using any words, enabling to clearly recognize the will of the testator, which was especially underlined as a factor influencing the validity of making a will in post-classical law.[11]

Moreover, the appointment should be performed in the Latin language, but the Constitution of Theodosius of 429[12] allowed the Greek language and in Justinian law the testator could perform *heredis institutio* in a preferred way, as long as his statement included the will of appointment of a particular person to inherit.[13]

However, some exceptions from the rule *heredis institutio caput et fundamentum totius testamenti est* and the order of testamentary disposals could be noticed in the views of Proculian school concerning the topic of the constitution of custody.

G.2,231: *Nostri praeceptores nec tutores eo loco dari posse existimant: sed Labeo et Proculus tutorem posse dari, quod nihil ex hereditate erogatur tutoris datione.*

Gaius, while analyzing matters of placing in will the appointing of a tutor before the heir, or after it, cites the words of Labeon and Proculus, according to which even if the constitution of a custodian before *heredis institutio* is performed, it still should be valid because this is a disposal with a non-material character. It seems that maintaining it in force does not violate the whole structure of a will and the mentioned rule.

The first explicit exception from the rule *caput et fundamentum intellegitur totius testamenti heredis institutio* were the regulations in reference to the constitution of an own slave as heir.

G.2,186: *Sed noster servus simul et liber et heres esse iuberi debet, id est hoc modo: STICHUS SERVUS MEUS LIBER HERESQUE ESTO, vel: HERES LIBERQUE ESTO.*

11 See: C.6,23,15,1.

12 Leges novellae ad Theodosianum pertinentes – Nov. 3, Nov. 2.

13 C.6,23,7.

G.2,187: *Nam si sine libertate heres institutus sit, etiamsi postea manumissus fuerit a domino, heres esse non potest, quia institutio in persona eius non constitit; ideoque licet alienatus sit, non potest iussu domini noui cernere hereditatem.*

A slave constituted as heir together with the emancipation (*servus cum libertate heres institutus*) and death of the testator became a free person and at the same time a necessary heir. However, before he could even be one, he should have been liberated and appointed to inherit. As the lawyer indicates, the formula: *Stichus servus meus liber heresque esto, vel: heres liberque esto* should be used. The order did not matter, whether he was liberated first or appointed as heir first. The sole fact of becoming free mattered. Otherwise, for example if an own slave was appointed as heir, without becoming free, then even later emancipation did not make him an heir.[14]

Also before the disinheritance[15], imperial law allowed an exception from the rule *caput et fundamentum intellegitur totius testamenti heredis institutio:*

D.28,2,3,3: (*Ulpianus libro primo ad Sabinum*)*: Ante heredis institutionem exheredatus ab omnibus gradibus summotus est.*

D.28,5,1 pr.: (*Ulpianus libro primo ad Sabinum*)*: Qui testatur ab heredis institutione 'plerumque' debet initium facere testament. licet etiam ab exheredatione, quam nominatim facit: nam divus Traianus rescripsit posse nominatim etiam ante heredis institutionem filium exheredare.*

In the extracts presented above, the matter of disinheritance is analyzed together with its placement in will. Ulpian states that in order to maintain the validity of

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14 Further about *servus cum libertate heres institutes* (G.2,153: *Necessarius heres est servus cum libertate heres institutus, ideo sic appellatus, quia sive velit sive nolit, omni modo post mortem testatoris protinus liber et heres est*) see: T. Duplá Marín, *El servus hereditarius y la teoría de la herencia yacente*, Valencia 2003, p. 40 and other; eadem, *Reflexiones acerca del Tratamiento Jurisprudencial y Doctrinal del Servus Hereditarius*, [in:] *El Derecho de Familia: de Roma al Derecho actual*, Huelva 2004, p. 177 and other; R. Świrgoń-Skok, *Beneficja spadkowe w prawie rzymskim*, Rzeszów 2011, p. 62 and other; eadem, *Ograniczenie odpowiedzialności dziedziców koniecznych (heredes necessarii) za długi spadkowe w rzymskim prawie klasycznym*, [in:] *Quid leges sine moribus? Studia nad prawem rzymskim dedykowane Prof. M. Kuryłowiczowi w 65. rocznicę urodzin oraz 40-lecie pracy naukowej*, Lublin 2009, p. 143 and other; eadem, *Kategoria spadkobierców koniecznych (heredes necessarii) jako przykład zapewnienia ciągłości w rodzinie rzymskiej w okresie prawa klasycznego*, "Studia Iuridica Lublinensia" 2010, 14, p. 135 and other.

15 Further see: S. Kursa, *La diseredazione nel diritto giustinianeo*, Bari 2012; idem, *Forma wydziedziczenia w prawie justyniańskim*, CPH 2011, 63(2), p. 65 and other; idem, *Powody wydziedziczenia descendentów wg noweli 115. cesarza Justyniana*, "Studia Prawnicze" 2008, 8, p. 85 and other; idem, *Powody wydziedziczenia ascendentów wg noweli 115. cesarza Justyniana*, CPH 2009, 61(1), p. 17 and other; P. Voci, *Diritto ereditario romano*, Vol. II, *Parte speciale*, Milano 1963, p. 637.

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this institution, the testator should principally appoint the heir in the beginning of the will and then perform disinheritance. At the same time, he points out that in reference to the constitutions of Caesar Trajan, the testator can commence with disinheritance of a son by his name and then appoint an heir. This way, the son being disinherited before appointing an heir, is considered as disinherited in all degrees.

As W. Dajczak, T. Giaro and Longchamps de Bérier[16] point out, such placement of disinheritance before *heredis institutio* arises from priority. Disinheritance is a prior, more primary matter than the constitution of an heir.

Another exception occurred in imperial law in case of military wills (*testamentum militis*)[17] where the rule *heredis institutio caput et fundamentum totius testamenti est* was not followed. This kind of will utilized many reductions and easements, among other in the scope discussed:

> D.29,1,1pr (*Ulpianus libro quadragesimo quinto ad edictu*)*: ... faciant igitur testamenta quo modo volent, faciant quo modo poterint sufficiatque ad bonorum suorum divisionem faciendam nuda voluntas testatoris.*

Caesar Trajan, in his *mandatum* stated that soldiers can prepare wills in an unrestricted form, since the sole will of disposition of own goods is crucial, instead of the maintained form.

Moreover, praetorian law was not bound by the rule *heredis institutio caput et fundamentum totius testamenti est*. Praetors, on the grounds of their *imperium*, could maintain demises and liberations in force even if *heredis institutio* fell or did not lead to inheritance:

> D.29,4,1pr (*Ulpianus libro quinquagesimo ad edictum*)*: Praetor voluntates defunctorum tuetur et eorum calliditati occurrit, qui omissa causa testamenti ab intestato hereditatem*

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16 W., Dajczak T. Giaro, F. Longchamps de Bérier, *Prawo rzymskie. U podstaw prawa prywatnego*, Warszawa 2014, ed. 2, p. 311.

17 *Testamentum militis* was commenced by Julius Cesar and then confirmed and finally determined by Titus and Domitian, Nerve, Trajan, Hadrian and Antonius Pius in their mandates. This was a private privilege grated to soldiers (D.29,1.24 Florentinus), during the constitution of which, they utilized many reductions and conveniences (D.29,1,3 Gaius; C.6,21,6). Such a will was also utilized by Justinian but he did not treat it as a private privilege but it became an unusual form used whenever normal procedure could not be utilized due to exceptional circumstances. See among others: A. Guarino, *Sull' origine del testamento dei militari nel diritto romano*, [in:] *Pagine di diritto romano*, Vol. 6, Napoli 1995; V. Scarano Ussani, *Il testamento militis nell età Nerva e Traiano*, "Atti Accademica Napoli" 1983, 94. See also: M. Jońca, *Forma i czas obowiązywania „testamentum in procinctu" w prawie rzymskim*, „Prawo – Administracja – Kościół" 2004, 5(4).

partemve eius possident ad hoc, ut eos circumveniant, quibus quid ex iudicio defuncti deberi potuit, si non ab intestato possideretur hereditas, et in eos actionem pollicetur.

Ulpian, in his comment towards the praetorian edict informs that praetors were guards of efficiency of last will dispositions of the testator. In a situation when a testamentary heir, who was at the same time a statutory heir, rejected the appointment due to will in order to inherit without will, a praetor could grant a complaint to the legatee, on the basis of which they could obtain what they gained on the basis of a void will.[18]

D.29,4,6pr. (*Ulpianus libro quinquagesimo ad edictum*)*: Quia autem is qui ab intestato possidet hereditatem conveniri potest, si omittit causam testamenti, quaesitum est, si quasi ex voluntate testatoris videatur omisisse, an cogatur praestare. ut puta fratrem suum scripsit heredem et codicillos fecit ab intestato petitque a fratre, ut, si legitima hereditas ad eum pertinuerit, fideicommissa praestaret quibusdam: si igitur omissa causa testamenti ab intestato possideat hereditatem, videndum est, an legatariis cogatur respondere. et iulianus libro trigesimo primo digestorum scribit cogendum primum legata praestare, mox dimissis legatis si quid superfuerit ex dodrante, tunc fideicommissa cogi praestare: ceterum si legata absumant dodrantem, tunc nihil fideicommissariis praestandum: habere enim integrum quadrantem legitimum heredem oportet. ordo igitur a iuliano adhibetur, ut prius legata praestentur, deinde ex superfluo fideicommissa, dummodo quadrans non tangatur. ego puto iuliani sententiam ita accipiendam, ut, si omissa causa testamenti ab intestato possideat hereditatem, cogatur omnimodo legata praestare: nec enim utique omittere ei hereditatem permisit, qui fideicommissa ab eo relinquit ab intestato.*

In the text extract of Ulpian, the lawyer is wondering if a person appointed to inherit on the basis of a will in which a demise was placed, and who is at the same time a will heir, after the decline of a will received the inheritance on a statutory basis, would perform demises or only trusts which were placed in the codicils prepared by the testator in case of lack of obtaining the inheritance on the statutory basis. Ulpian, relying on Julian, states that such an heir who accepted the inheritance on the statutory basis, with omission of testamentary appointment, should be also responsible for demises which he is obliged to perform in the first place.

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18 EP § 168 *Si quis omissa causa testamenti ab intestate possideat hereditatem*. See: O. Lenel, *Das edictum perpetuum*, Leipzig 1907, p. 351.

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Then, he performs trusts, but ¼ of the inheritance should remain for his benefit on the basis of *beneficjum legis Falcidiae*.[19]

Due to the fact that on the grounds of praetor law an heir, who declined his appointment to inherit a will and came into possession of inheritance on the basis of law, is treated as if he accepted the inheritance *ex testamento:*

D.29,4,18pr (*Gaius libro secundo de testamentis ad edictum praetoris urbani*)*: Si duo heredes instituti ambo omissa causa, testamenti ab intestato possideant hereditatem, tunc, quia uterque praetorio iure perinde habetur atque si ex testamento hereditatem adisset, pro partibus in singulos competit actio.*

Similarly in D.29,4,1,9[20]:

D.29,4,1,9 (*Ulpianus libro quinquagesimo ad edictum*)*: Non quaerimus, qui praetermissa causa testamenti ab intestato hereditatem possideant, utrum iure legitimo possideant an non: nam quoquo iure possideant hereditatem vel partem eius, conveniri ex edicto poterunt, utique si non ex alia causa possideant: ut puta si quis omisit quidem hereditatem, sed ex causa fideicommissi possidet missus in possessionem fideicommissorum servandorum causa: vel si proponas eum crediti servandi causa venisse in possessionem: nam nec ex hac causa legatariis respondere cogetur. totiens igitur edictum praetoris locum habebit, quotiens aut quasi heres legitimus possidet aut quia bonorum possessionem accipit ab intestato aut si forte quasi praedo possideat hereditatem fingens sibi aliquem titulum ab intestato possessionis: quocumque enim modo hereditatem lucrifacturus quis sit, legata praestabit, sane interveniente cautione „ evicta hereditate legata reddi".*

In the cited passage, the lawyer informs that it was not important for a praetor, whether the heir came into possession of inheritance estate on the grounds of a will or law, as he was still obliged to perform demises (*non quaerimus, qui praetermissa causa testamenti ab intestato hereditatem possideant* (...) *legata praestabit*).

Obviously, the rejection of appointment to inherit on the grounds of a will lead to the coming into possession of inheritance estate on the grounds of law. In a situation, when a person does not embrace the inheritance, all demises fall.

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19 D.29,4,18,1: *Admonendi sumus huic, in quem ex hac parte edicti legatorum actio datur, beneficium legis falcidiae concedendum*.

20 See also: D.29,4,1,5; D.29,4,6,3; D.50,17,55.

D.29,4,17 (*Gaius libro septimo decimo ad edictum provinciale*)*: Si quis omissa causa testament omnino eam hereditatem non possideat, excluduntur legatarii: nam liberum cuique esse debet etiam lucrosam hereditatem omittere, licet eo modo legata libertatesque intercidunt. sed in fideicommissariis hereditatibus id provisum est, ut, si scriptus heres nollet adire hereditatem, iussu praetoris adeat et restituat: quod beneficium his, quibus singulae res per fideicommissum relictae sint, non magis tributum est quam legatariis.*

However, since the times of *senatus consultum Pegasianum* of 72, there was a mechanism of forcing heirs to accept the inheritance. If the one appointed to inherit refused to accept, the universal fiduciary turned to the praetor to force the heir to accept and pass the inheritance on the grounds of *senatus consultum*.[21] Of course, the applicant was responsible for the inherited debt.[22]

Final matters linked to *heredis institutio* were regulated by Justinian.[23] In Justinian law, the requirement of maintaining proper order during the placement of particular dispositions in the will, did not last.

C.6,23,24: (*Imperator Justinianus*)*: Ambiguitates, quae vel imperitia vel desidia testamenta conscribentium oriuntur, resecandas esse censemus et, sive institutio heredum post legatorum dationes scripta sit vel alia praetermissa sit observatio non ex mente testatoris, sed vitio tabellionis vel alterius qui testamentum scribit, nulli licentiam concedimus per eam occasionem testatoris voluntatem subvertere vel minuere.*

I.2,20,34: *Ante heredis institutionem inutiliter antea legabatur, scilicet quia testamenta vim ex institutione heredum accipiunt et ob id veluti caput atque fundamentum intellegitur totius testamenti heredis institutio. pari ratione nec libertas ante heredis institutionem dari poterat. sed quia incivile esse putavimus, ordinem quidem scripturae sequi (quod et ipsi antiquitati vituperandum fuerat visum), sperni autem testatoris voluntatem: per nostram constitutionem et hoc vitium emendavimus, ut liceat et ante heredis institutionem et inter medias heredum institutiones legatum relinquere et multo magis libertatem, cuius usus favorabilior est.*

In the extracts of the Justinian Constitution of 528 cited above and the Institutions of Justinian, matters linked to *heredis institutio* and the rule *heredis institutio*

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21 Further see: G.2,258; D.36,1,2; D.36,1,28,12; D.36,1,61pr; D.36,1,65,11; D.38,2,20,5; D.36,1,6pr; D.36,1,69pr and 2; PS.4,4,3; I.2,23,6.

22 See: D.36,1,4; I.2,25,6; UE.25.16; GA. 73; PS.4,4.

23 Western-Roman post-classical practice omitted the rule *heredis institutio caput et fundamentum totius testamenti est.*

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caput et fundamentum totius testamenti est were regulated once again. Justinian leaves the priority of appointment of an heir and states that in order for a will to be binding, the order of placement of particular dispositions in a will does not matter. The will of the testator, instead of the order of the written document, should be considered (*ordinem quidem scripturae sequi (quod et ipsi antiquitati vituperandum fuerat visum), sperni autem testatoris voluntatem*). And so, not only the demises but also the liberations in Justinian law are binding despite the fact of being placed after the constitution of an heir or among the constitution of an heir, or before such.[24]

In order to briefly sum up, it can be stated that in the Roman inheritance law, until post-classical law, the appointment of an heir on the basis of the rule *heredis institutio caput et fundamentum totius testamenti est*, was the foundation of the whole will. *Heredis institutio* was a crucial element of the content of the will and it should be placed in the very beginning as all dispositions placed before it, were void. And remained this way until Justinian law where the above mentioned formalism was annulled.

First exceptions of the rule *heredis institutio caput et fundamentum totius testament est* and the order arising from testamentary dispositions placed therein, can be noticed in classical law, according to the constitution of custody, appointment to inherit by the own slave together with his liberation and disinheritance. Moreover, Roman law, based on the performance of praetors and Cesar law, exceptionally allowed the maintenance if the rest of the testamentary content (demises, trusts, liberations) when the *heredis institutio* fell or did not lead to inheritance.

And so, the acceptance of the heir appointed in a will becomes a sole formality in classical law, and a range of deviations and exceptions appear in the discussed rule *Heredis institutio caput et fundamentum totius testamenti est***.** The Western Roman post – classical practice and Justinian omitted the above mentioned rule totally.

As well as the current Polish law, where the appointment of an heir is the right of the testator instead of being the necessary content of the will. Typical will dispositions include: the constitution of an heir (article 959 and other of the Polish Civil Code), disinheritance and the constitution of a demise. In the Polish law, only a will with one disposition will be valid. The appointment of an heir in a will is not a necessity of the preparation thereof, the testator does not need to infringe the order to statutory succession, as he may limit himself to dispositions of different nature.

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24 G.G. Archi, *Contributo alla critica del „Corpus Iuris": CI. 6. 23. 24 e I. 2. 20. 34 in tema di heredis institutio*, "Iura" 1954, 5, p. 171 and other.

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