APERTURA TESTAMENTI И НЕЙНИТЕ ПРАВНИ ПОСЛЕДИЦИ В РИМСКОТО ПРАВО (НА АНГЛИЙСКИ ЕЗИК)

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Резюме: Въпросите, засягащи наследяването и неговото уреждане в римската правна система, са изключително актуални в световната романистична правна литература. Още повече че сред решенията, които ясно се открояват в първичните и вторичните източници на римското право, можем да открием „вдъхновението“, от което произлиза съвременното наследствено право.

Анализът в тази статия е фокусиран върху някои от основните правни последици от прочитането на завещанието (*apertura testamenti)*, крайната цел на което е приемането на наследството. В тази връзка основната ни цел тук е да представим в хронологическа последователност очакваните правни последици, известни на древните римляни като*: delatio hereditatis, apertura testamenti, hereditas iacens, and aqusitio hereditatis*. В текста е включен кратък критичен преглед на споменатите понятия с поглед към съвременните системи на наследяване.

Заключителните наблюдения във връзка с основния предмет на изследването осветляват безспорния принос на римското право към наследственоправните концепции в съвременността, като същевременно обясняват и факта, че наследственото право претърпява значителни промени, обусловени от различни социално-икономически причини. Това обяснява защо понякога това право изглежда напълно различно от онова, което сме наследили от Древен Рим.

Ключови думи: Римско право; наследяване; testamentum; промени.

APERTURA TESTAMENTI AND THE LEGAL CONSEQUENCES THEREOF IN THE ROMAN LAW (ENGLISH LANGUAGE)

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Abstract: The issues concerning legal inheritance relations and their arrangement within the Roman legal system are quite topical in the world's Roman law literature. Even more so that amongst the solutions, clearly standing out in the primary and secondary Roman law sources, what can be found is an "inspiration" wherefrom the modern inheritance law has originated.

The analysis displayed in this paper is focused on some of the basic legal consequences of reading the will or *apertura testamenti*, the final aim of which is to receive an inheritance. In this regard, the fundamental objective of this paper is to present the chronological order of the expected legal consequences and to provide a detailed elaboration thereof, known to ancient Romans as: *delatio hereditatis, apertura testamenti, hereditas iacens, and aqusitio hereditatis*. A short critical review has been intertwined within the text, accompanied by the presence of the aforementioned concepts in the modern legal inheritance systems.

The concluding observations relating to the basic subject of interest, shed light on the indubitable contribution of the Roman law to the legal inheritance concepts over their modern counterparts, but simultaneously, it also explains the fact that inheritance law, in modern times, has undergone significant changes, conditioned by various socio-economic contexts, which explain why, at times, this law seems a bit different than the one we have inherited from ancient Rome.

Keywords: Roman law; inheritance; testamentum; changes.

INTRODUCTION

A special hallmark of the legal inheritance relations is the act of *mortis causa*[1], which in turn, is the main feature separating them from contractual relations and property law relations. Therefore, the first of the propositions which entails an application of the legal norms in the area of inheritance law is the occurrence of death of the testator[2]. Furthermore, there must be a legacy which can be inherited, as well as inheritors who are alive when the death of the testator occurs.

The cumulative coinciding of the aforementioned requirements, pursuant to the Roman law, meant there was an opportunity for the inheritors to exercise their subjective inheritance rights, based upon three legal grounds: testate, intestate succession and obligatory inheritance. In that context, precedence was given to the testate, while the intestate succession appeared subsidiary, nevertheless never could they both serve as a basis for granting inheritance in regard to one legacy: *nemo pro parte testatus pro parte intestatus decedere potest*.

1. DELATIO HEREDITATIS

The moment of granting inheritance[3] on any grounds was called *delatio hereditatis deffere hereditatem*[4] and, as a matter of fact, this moment coincided

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[1] *Hereditas viventis non datur.*

[2] The ancient Roman jurists were perplexed by the question of what is implied by the term death and which moment should be considered as the moment when death occurred. Due to the fact that this paper regards the testate succession, we will only take into consideration the occurrence of death solely of physical persons (because only they can compose a will). Anyhow, the physical death, pursuant to the Roman law, was interlaced with the moment when the vital functions of the human organism are irreversibly shut down, a moment when their legal subjectivity ceases to be. However, the Roman law recognizes a so called 'civil death', which in line with precisely defined facts could take away the legal subjectivity of the person (loss of status because of *capitis deminitio* maxima or media), which is not a basis for granting inheritance and leads to an invalid will as a result of active *testamenti factio* – the ceremony of making a will (a close-up will follow in the part about nullity and voidness of the will. However, hereby the legal fiction used by the ancient Romans is worth mentioning, considering that legal subjectivity of the deceased person continues up to the moment of accepting the inheritance (that is how the postulate of *hereditas iacens* was created).
The inability to determine the exact time of death of persons inheriting each other, comorientes, imposed adherence to certain rules in such events. The classical law considered the comorientes as deceased in the same time, leading to their inability to inherit each other. Still, the Justinian legislation recognizes the legal presumption that the older have died before the younger and the children have died before the adults.
Proof of death of a certain physical person in the ancient Rome, was provided for each case separately, because no public books for registration of birth and death of persons existed.

[3] *Hereditas defertur.*

[4] *Deferro, deferre* meaning handing over, transferring.

with the time of death of the testator, under the assumption that all other requirements had been met. Ascribable to the fact that this was a moment when "someone could get something (inheritance) by accepting it"[5], the *delatio* sometimes could not coincide with the time of death if the provisions of the will stipulated a certain requirement that had to be met, or an order that had to be followed[6].

Nonetheless, the inheritors assigned in such a manner, were also obliged to formally accept the inheritance, and only thus could they be considered to have become the rightful inheritors to the legacy. Point at issue is about a so called accepting inheritance or *acqisitio*, which was different for different categories of inheritors, depending on whether it was *heredes necessarii* or *heredes voluntarii*.

Heredes sui et necessarii were the inheritors who did not have the right to give a negative statement of inheritance, i.e., regardless of their personal judgment, they became inheritors at the moment of *delatio* (in this case it regularly overlapped with acquisition).

Here we can include *sui heredes*[7], which is in fact comprised of all persons, who until the moment of death of the testator, are under his or her *patria potestas* or *manus*, which implies: born, adopted or foster children, those who have been conceived and are still unborn children, who following the birth would come under his or her "power"[8], family members, grandchildren of early deceased or emancipated male descendants, if they remained under the "power" of the testator, as well as a wife under *manus* in marriage. This rule originated from the then understanding of inheritance as a basis for continuing the family cult and tradition, therefore a much more important part was the collective interest

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5 See BERGER, Adolf. Encyclopedic Dictionary of Roman Law. New Series. Vol. 43, Part 2. Philadelphia, The American Philosophical Society, 1953 (Reprinted 1980 and 1991, p. 428.

6 Logically speaking, for the inheritance to be inherited by the inheritor, after he or she accepts it, the suspensive condition had to be met or an order to be followed. That is why the moment of delatio was postponed. Ibid.

7 Self-inheritors, since it was conditioned by the relation which they had with the testator prior to his or her death, in some regards had already possessed what they were about to inherit as legacy. To make a distinction in this case the term *heres suus* was used because *suus heres* referred to an inheritor to a previously defined testator.

8 *Nasciturus iam pro nato habetur*.

and the survival of the family community, than the special wishes and interests of the members[9].

Hredes necessarii, on the other hand, were the slaves, assigned as inheritors in a will, whereby their *manu*-mission was explicitly established or it was implied by the mere act of assigning them as inheritors[10].

The strict definition of *ius civile*, implying that this category could, in no case, deny inheritance, revised the *ius honorarium*, allowing them *ius abstinendi*, referring to the right to not accept an insolvent (over-indebted) legacy[11].

Gai. 2.158. Sed his praetor permitit abstinere se ab hereditate, ut potius parentis bona veneant.

The praetor endorses them to renounce their inheritance, if they find the sale of the parental belongings to be more preferable.

All other assigned inheritors were part of the group *heredes voluntarii (extranei)* becoming subject to acquisition exclusively following a given positive statement of inheritance.

2. APERTURA TESTAMENTI – READING A WILL

The existence of a will, as previously mentioned, derogated from the rules of intestate succession. Hence, the existence of a will could possibly mean that the *delatio* could, in fact, overlap with the moment of reading of a will or *apertura testamenti*.

The act of reading a will was interlinked with meeting certain conditions, serving as a guarantee for the validity of the last will of the testator.

First and foremost, the will had to be read before an authorised official. Since the reign of Hadrian that official was the *statio vicesimae*. Along these lines, it was first the stamps and the signatures of the witnesses that were verified, then followed the reading of the will, *aperire*.

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[9] *Sive velint, sive nolint.*

[10] See more about this part in the rendition about *heredis institutio*, where we deliberate much on the consequences of assigning one's own or someone else's slave as a testate successor.

[11] Whereby, a condition of heredes sui was to refrain from managing the legacy immixtio, while the slaves had the option of *beneficium separationis*: to separate the part of the legacy, they could receive at the moment of becoming free and thus, they no longer were held responsible for the debts incurred by the legacy.

The provisions referred to in the will were read in a loud and clear manner before the attendees, *recitatio testamenti*. After the content was familiar, the read will, accompanied by minutes from the inheritance proceedings wherein the will was read, was deposited in an archive.

Upon a request by interested parties an inspection of the deposited will was allowed, *inspicere*, and the parties were also allowed to make a copy thereof, *describere*[12].

3. *HEREDITAS IACENS* – VACANT SUCCESSION

The ancient Roman jurists had different viewpoints in regard to one disputable issue, the legal nature of legacy that arises as a result of the fact that between the moment of *delatio* and the moment of acquisition, sometimes there was a time distance. Such an opportunity at the beginning was excluded in cases when inheritance was received by *heredes sui et necessarii*, because as witnessed, they became inheritors without the possibility to refuse the inheritance, at the moment of *delatio*[13]. Nevertheless, in all other cases there was almost invariably a time period that passed until the final reception of legacy. Despite the real existence in that time period, the legacy could undergo changes. Namely, it could increase or decrease in value.[14]

The remedies in terms of this contentious legal phenomenon, were ranging from the idea that the inheritance should be considered "nobody's thing", *res nullius*, all the way to the belief that legal fiction shall apply by believing that the life of the testator continues up to the moment of acquisition (according to Salvius Julianus) or that the inheritor obtains its role at the moment of death of the testator (Cassius was of such an opinion).

Gai. D. 45.3.28.4. Illud quaesitum est, an heredi futuro servus hereditarius stipulari possit. Proculus negavit, quia is eo tempore extraneus est. Cassius respondit posse, quia qui postea heres extiterit, videretur ex mortis tempore defuncto successisse.

This question revolves around whether the slave, to whom the inheritance belongs, by way of a stipulation, shall become obliged in favour of the future in-

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[12] More on the procedure of reading a will, see BERGER, Adolf. Op. cit., p. 364.

[13] The praetorian law intervened in this case as well. Namely, these inheritors were given tempus deliberandi, a hundred-day period during which the inheritor had the time to reflect prior to giving a statement of inheritance.

[14] Due to fruits of nature or manmade product that are subject to decomposition or wear and tear, which changed the content of the legacy.

heritor. Proculus negates this, because the slave at that time was an extraneus. Cassius, on the other hand, was of an opinion that the slave could be obliged, owing to the fact that those who are to become heirs, shall be considered heirs as of the time of death of the testator.

For the sake of truth, all provided alternatives had their own shortcomings making them seriously questionable. Thus, the danger in treating legacy as 'nobody's thing, lies in the open opportunity for anybody to obtain the right to receiving inheritance by way of *ususcapio*[15].

When considering the act of giving inheritance to an inheritor, in retrospect, up to the moment of death of the testator, it was difficult to determine the inheritor, having in mind that sometimes it was not entirely clear who is to become an inheritor. In parallel, it was complicated to provide arguments that the testator "was alive" up to the moment of the legacy transfer.

The ancient Roman legal thought did not come across convincing arguments for none of the opinions accepted in the post-classical period. Namely, it was believed that since the moment of death until the moment when the inheritor received the inheritance, the legacy was supposed to be considered a separate legal matter, a vacant succession or *hereditas iacens*, which, on the other hand, was directly opposed to the principle of universal succession, as per the introduction of a third party between the testator and the legacy.

Still, regardless of the disputable legal concept, until the moment of accepting the pool of assets of the legacy by all persons assigned for inheritance, the legacy was considered *hereditas iacens*.

4. AQCUISITIO HEREDITATIS – ACCEPTING INHERITANCE

The next phase of the final acquisition of the legacy was accepting the inheritance, whereby the inheritor was considered to have acquired the right to receive the legacy.

The act of accepting inheritance was definitive. The positive statement regarding the accepting of inheritance could not be withdrawn[16] nor could it be

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[15] Out of those reasons the ancient law prescribed that in such a case the rules for nobody's things, that by way of occupation and expired deadline for sustenance could be ascribed to someone, would not apply, instead a special *ususcapio pro herede* was foreseen.

[16] *Semel heres semper heres.*

conditioned and postponed. Simultaneously, the statement on accepting inheritance adhered to the principle of universal succession, therefore even if the inheritor accepted only certain things or rights arising from the legacy, the inheritance was considered accepted as a whole. Accepting inheritance, in principle, was not given a deadline during which the inheritor was obliged to do so. Because this solution negatively reflected upon the rights of the legacy trustees, who could ask the inheritor to give a statement of inheritance. However, the inheritor could be granted by the praetor, a reflection period, *tempus (spatium) deliberandi,* lasting 100 days almost invariably, during which he or she was supposed to accept of refuse the inheritance[17].

Refusing the inheritance, on the other hand, could be done in any manner; By means of implied actions or explicit statements on refusing inheritance or *repudiatio*. Similarly like the statement on accepting the inheritance, the refusal was irrevocable[18].

Although the sources of Roman law do not clearly state a strictly prescribed form which was supposed to be used for expressing the acceptance of inheritance, the most frequent forms popular in practice were the *cretio* and the *pro herede gestio,* as well as the *aditio nuda voluntate*.

Cretio, as a solemn formalist manner of giving a positive statement of inheritance was obligatory only when the testator requested, in his or her own will, explicitly for that to be done by the assigned inheritor. It was a kind of formula, whereby the inheritor, stating that the testator assigned him or her as an inheritor, accepted the inheritance he or she was assigned for. Usually, the testator denoted a period in which the inheritor was supposed to articulate his or her stance, normally a 100-day period, after which the inheritor would lose his or her right to inheritance[19].

Such formalism was abandoned within the course of time. The statement on accepting inheritance could be given in any other form. Because of an ever more frequent missing *cretio*, it became obsolete in Justinian law.

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[17] The classical law, considered the lack of statement on accepting inheritance for a refusal, while in Justinian legislation it implied acceptance.

[18] Except in cases of *restitutio in integrum ob aetatem.*

[19] For a period defined as tempus utile, *cretio vulgaris* was foreseen while for a period defined as *tempus continuu, cretio continua*. For a failure to meet the deadline *exheredatio* followed.

The implied actions taken by the inheritor, which undoubtedly and clearly indicated that he or she intended to accept the inheritance, were also considered an act of *acquisitio*, the so called *pro herede gestio*; although in such cases it was necessary to take into account the possibility for it to be a quasi-contract[20].

Nonetheless, if the inheritor acted as an owner, this undoubtedly implied to the conclusion that he or she accepted the inheritance.

The classical law recognizes another manner of accepting inheritance, typical even for Justinian time. This manner is known as *aditio nuda voluntate*, or informal unambiguous acceptance, which does not foresee an obligation to utter a precisely defined formula, instead what was sufficient was just a plain unambiguous statement wherefrom it could be concluded that the inheritor accepted the inheritance.

Ius honorarimum stipulated a bit different manner leading to coming into inheritance. Namely, if there were no successors, *ius civile*, upon a request of an inheritor, the praetor granted *bonorum possessio*, based on the grounds stated in the specified findings. This could be performed in a 100-day period as of the moment of *delatio*, and the inheritor acquired an ownership over the inheritance received in such a manner, upon expiry of the stipulated one-year period[21], whereby it transformed into an inheritance right in accordance with *ius civile*.

The official request of an inheritor pursuant to the praetorian law was made redundant in the post-classical period. What sufficed was a statement by the inheritor before a competent state authority which was a guarantee that he or she accepted the inheritance. On the contrary, failing to give a statement would imply that he or she refused the inheritance.

In the event of having an inheritance the inheritor of which passed away prior to accepting thereof, pursuant to the classical Roman law, *ius adcrescendi* was practiced for his or her possible co-inheritors.

PS. 4.8.24. Ex pluribus heredibus isdemque legitimis si qui omiserint hereditatem vel in adeundo aliqua ratione fuerint impediti, his qui adierunt vel eorum heredibus omittentium portiones adcrescunt

[20] Namely, the potential inheritor could undertake actions such *as negotiorum gestor*.

[21] *Usucapio pro herede* is a special case of sustenance of the estate for the sake of the insistence upon resolving the status of the legacy as soon as possible. Read the text hereinafter.

If one of several inheritors had given up his or her inheritance or was prevented from receiving it for some reason, his or her shares were allocated to those who received the inheritance or to their successors.

This practice was abolished and replaced by the already mentioned *transmissio Iustiniana.*[22]

The legacy comprised of both rights and liabilities of the testator could come across a situation of "uncertainty" if none of the assigned inheritors accepted the inheritance, or there was no will, and neither testate nor intestate successors who could be assigned for inheritance. Then the legacy in a way was considered a *res nullius*, due to the fact that, by way of occupying the legacy anyone, meeting the requirements for *ususcapio pro herede*, could acquire the right to ownership.

In that case, there was supposed to be a special kind of sustenance which as a postulate, was created for a faster resolving of that 'uncertain situation' the legacy is in. Unlike the regular *usucapio*, the period that should pass amounted to a year (similarly like the period for *res mobiles* and for *res immobiles*)[23]. In addition, *bona fides* or *iusta causa*[24] were not required in *usucapio*. An inheritor could acquire the legacy (or the things from the legacy) although he or she knew that they belonged to the inheritors. Such privileged *usucapio*, in fact, presented direct pressure on potential inheritors to accept or refuse the inheritance as soon as possible, because the ancient Romans were especially concerned about carrying out the family *sacra* of the testator, but also due to timely settlement of debts towards the trustees[25].

Be that as it may, *usucapio pro herede*, was losing its meaning in the course of time. Firstly, it was recognised only for sustenance of certain items of the legacy[26], while a *Senatus consulata* introduced in Hadrian's time, foresaw an opportunity for the inheritor to file a suit and claim the items which were part of the legacy from the *usucapio*, and during the reign of Marcus Aurelius it was

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22 C. 6.30.19.1.

23 Because legacy was considered *res ceterae*, and for these cases there was a one-year period.

24 Ancient law does not have such kind of provisions even for regular *usucapio*.

25 BERGER, Adolf. Op. cit., p. 752–753.

26 In classical law known as *improba et lucrativa*.

sanctioned as a criminal act[27]. Justinian legislation fully abolished *usucapio pro herede*.

Thus, the legacy that failed to belong to someone in one of the aforementioned manners would belong to the state. Such legacy without an inheritor was known as *bona vacantia* and afterwards it was handed over to the *fiscus*[28], and if insolvent it was handed over to the trustees, if no, then the trustees were supposed to be paid and the legate provisions to be implemented.

CONCLUSION

The general conclusion which can be easily made from this partial analysis of the Roman laws succession system is that the influence of the Roman legal mind upon the creation of the modern succession systems is significantly striking in comparison to the modern tendencies for this area. Of course, this conclusion refers to the general principles and foundations which are taken into account.

However, looking from historical point of view, it seems that the succession law is an area which underwent most modification and derivations of the Roman law rules compared to the rest ius privatum.

This is mainly due to the influence of the tradition and the customary law, from which it can be deviated in practice very slowly and difficult. Sometimes, even the statistics shows it, besides the different legal regulation of the succession rights, the successors find valid way to distribute the bequest without breaking the established tradition.

On the other hand, we should not neglect the influences and the modern tendencies in the area of family law, new quality of the family relations conditioned by the extremely rapid development of all life areas which have a tendency completely opposite of the traditional ones so far known to us.

Therefore, we think that, *de lege ferenda*, the influence of the tradition will be more and more neglected, and the modern notion of the interpersonal rela-

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[27] Dishonest occupation of someone else's *crimen expiltae hereditatis.*

[28] The state treasury (*aerarium*), considered *iustus* successor, and replacing the inheritor, *heredis loco*, because it could legally be considered a successor. See ROMAC, Ante. Rimsko pravo. Zagreb, Biblioteka "Udžbenici i skripta", 1981, p. 385.

tions will more and more come to the fore, which will inevitably have influence in the future regulation of the intestate succession.

At the end, it is probably unnecessary to explain the meaning of the succession law, first of all as a law providing the subject a right to ownership. "During a man's life, it is possible for him never to be affected by the rules of usucaption or the accession for example, but of course he could not avoid the rules of succession law." [29]

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