THE NATURE OF THE FIDEICOMMISSUM
“SI SINE LIBERIS DECESSERIT”

by

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The hypothetical nature of the condition *si sine liberis decesserit* merits examination in itself in view of the importance which attaches to this subject from the dogma point of view and as a means of improving our knowledge of its application in Rome and also in view of the mutations of the institution of the fideicommissum *si sine liberis* in subsequent law, an institution which has caused wide-ranging controversy lasting to the present day when the precedent or subsequent nature of this condition is still being debated: this controversy is in turn involved in the political views on the prohibition of fideicommissa in the early civil codes, although this prohibition undoubtedly lasted only for a short while in contemporary legislations.

The condition *si sine liberis decesserit* evidently implies a substitution of heir; the testator demonstrates an intention whereby Titius should be the heir under the fideicommissum if the specific event occurs. The fideicommissioner or beneficiary under the fideicommissum is appointed to full enjoyment of the inheritance but his position is conditional upon the circumstance that at his death the trustee has no sons. This involves us in an examination of the structure of the conditional substitution of heirs with the fideicommissum *si sine liberis* forming part of this structure.

Vallet de Goytisolo summarises the three theses explaining the conditional substitution of heir: A) the thesis whereby the institution of the first-appointed is ordered like that of the heir subject to a condition subsequent and the institution of the second-appointed is ordered like an heir subject to a condition precedent; B) the thesis whereby the appointment of the party is deemed to be effected to a definite term (whether specified or not) and the second appointment is deemed a subsequent institution of an heir subject to the condition precedent from the time when that term expires; C) the thesis whereby the only conditional aspect (which is governed by a condition precedent) is the restoration or transfer of the assets of the fideicommissum from the appointed heir to the conditional substitute under the fideicommissum.

Of these three theses, the one considered most accurate is the third which, according to Vallet, is the only pertinent one from the ontological aspect.

One objection which must be raised regarding Thesis A is that the method of appointing the heir cannot support the condition subsequent, nor does it accord with the hereditary titularity with all the inherent consequences for the heir; merging inheritances, full administration of the inheritance, enjoyment of the benefice, etc. So the condition subsequent is not appropriate to the trustee.

nor is there any accord between the two categories of conditions. Moreover, if the condition subsequent were accepted, retroaction of its effects would also have to be admitted, involving the annulment of the first institution, and this is in no way possible in Roman Law where application of the *successio in locum et in ius* prevents the heir in trust from being subject to conditions subsequent.

Thesis B is confronted with the serious nature of the *heredis institutio* and the fideicommissum's own structure which prevents the making of a condition by depicting it as a term. The heir must eventually die and the *quando is incertus* but the testator does not make the fideicommissum subject to the arrival of that date as the essential factor of the restoration but provides that if on that date the heir dies without issue, restoration is effected. The conditioning event is the death of the heir without issue, not merely the date of the heir's death. If this thesis were accepted, one would have to allow that ownership of the inheritance by the heir was provisional (subject to a term) and this too is inconceivable in Roman Law.

In my opinion, Thesis C is correct. The structure of the fideicommissum *si sine liberis decesserit* is based upon the conditional nature of the restoration. Only if he dies *sine liberis* must the heir restore the inheritance to the beneficiary under the fideicommissum but his position as owner is absolute: he collects payments, pays debts and, as an heir and owner, receives the profits from the inheritance until the time of restoration which is subject to the condition that he dies *sine liberis* and is thus aleatory in that if he has issue, the heir can be sure that the fideicommissum will be extinguished since the condition is not fulfilled. Moreover, the duty to restore the inheritance if the condition is fulfilled is centred upon the inheritance of the party constituting the fideicommissum while that inheritance is in a state different from that in which it was received, i.e., after payment of debts and collection of moneys owing and after the hereditary profits have been used by the trustee. The trustee's powers of disposal over the inheritance are unimpaired, always excepting the right of the beneficiary under the fideicommissum (D, 36, 1, 46, 1; D, 46, 3, 104 et al.) I believe, therefore, that the safest arrangement is that the fideicommissum *si sine liberis* implies a condition precedent which encumbers the inheritance solely with restoration under the fideicommissum.

This does not exhaust the difficulties caused by the system of inheritances under fideicommissa subject to the condition *si sine liberis decesserit* because a major problem arises concerning the *liberi* referred to: if the appointed party predeceases them, is one to understand that the children "placed in condition" are appointed as ordinary substitutes for the trustee? The literature has termed this the problem of the children "placed in condition", that is whether the children *positi in condicione* are understood to be *positi in dispositione*. One author who has produced a masterly examination of this subject, referring to the Roman sources, that is Iglesias, has clearly opposed the view that *positus in condicione* should be deemed *positus in dispositione*.

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