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HEREDITAS DAMNOSA – HEREDITAS SUSPECTA THE RISK OF INHERITANCE ACQUISITION IN ROMAN LAW

1. The article is an attempt to present the risk associated with inheritance acquisition in Roman law. Acquisition of inheritance by the appointed successor could lead to negative consequences for the heir, the testator's creditors as well as the heir's creditors.

Acquisition of inheritance could result in the heir's impoverishment, because he was liable with his entire property for the debts encumbering the inheritance even if these exceeded the assets of the inherited estate. This could happen particularly in the case of *hereditas damnosa*[1], or the so-called cursed inheritance where debts were greater than the value of the bequest.

Acquisition of an inheritance by a successor could lead to impoverishment of the testator's creditors. This happened in a situation when the heir's property was excessively in debt. In such case those participating in the foreclosure of the heir's property would include his personal creditors, as a result of which the heir's property would be insufficient to cover all the inherited debts. This was possible particularly in the case of the so-called *hereditas suspecta*[2], i.e. an inheritance overcharged with debts where it was suspected the heir deliberately encumbered his property so that he was unable to satisfy the inherited creditors.

Finally, acquisition of inheritance could be harmful to the heir's creditors. This happened in a situation where the heir's property was not overcharged with

[1] Hereditas damnosa – "cursed inheritance" or passive inheritance, where debts exceeded the value of the estate D.17,1,32 Julianus). See: W. Litewski, *Słownik encyklopedyczny prawa rzymskiego*, Kraków 1998, p. 109; J. Sondel, *Słownik łacińsko-polski dla prawników i historyków*, Kraków 1997, p. 425. Widely: R. Świrgoń-Skok, *Hereditas damnosa – ryzyko nabycia spadku w prawie rzymskim* [in:] *Zbytek i ubóstwo w starożytności i średniowieczu*, eds. L. Kostuch, K. Ryszewska, Kielce 2010, p. 121–130.

[2] *Hereditas suspecta* is referred to in the following passages by Ulpian D.36,1,3pr; D.36,1,17,5 and D.36,1,57,2 Papinian.

debt while the inherited estate was significantly in debt and there was a risk that the heir's personal liabilities would not be fully satisfied, and that as a consequence, the heir's creditors would be impoverished.

All these negative consequences associated with acquisition of inheritance were linked with the merger of the testator's estate with the heir's property resulting from the acceptance of the inheritance, and the related liability for inherited debts.

2. In Roman law, following a testator's death, the heir only received the right to accept the inheritance (*delatio hereditatis*)[3]:

D.50,16,151: (*Clementius libro quinto ad legem Iuliam et Papiam*): *"Delata" hereditas intellegitur, quam quis possit adeundo consequi*.

Hence, nomination for inheritance only provided a legal option to obtain the estate. If the inheritance was to be actually transferred to the successors, it was to be acquired (*acquisitio* or *editio hereditatis*). Due to this Roman law distinguished two categories of inheritors:

G.2,152: *Heredes autem aut necessarii dicuntur aut sui et necessarii aut extranei*.

Two categories of successors include necessary inheritors (*heredes necessarii*), and voluntary inheritors (*heredes extranei*).

Necessary inheritors (*heredes necessarii*) were simply *heredes domestici*, i.e. all members of the deceased person's family who following his/her passing acquired status of persons *sui iuris* (G.2,156–157; I.2,19,2). They acquired the inheritance *ipso iure*, or at the time of nomination, without taking any action. The inheritance could be bequeathed to them without their knowledge or even against their will[4]. Necessary but not domestic inheritors included testator's slaves who were liberated in the testament and designated as heirs (G.2,153; I.2,19,1)[5].

Voluntary inheritors (*heredes extranei* or *voluntarii*) included individuals other than family of the deceased person (G.2,161–162; I.2,19,3)[6]. In order to

[3] More about appointment for inheritance, see: C. Beduschi, *Hereditatis aditio*, Milano 1976, p. 1 et seq.; Y. Gonzalez Roldan, *Propuesta sobre la ventral de herencia en el derecho romano clasico*, Mexico 1997, p. 11 et seq.; A. Montanana Casani, *La veuve et la succession hereditaire dans le droit classique*, RIDA 2000, no. 47, p. 415 et seq.; J.W. Tellegen, *The Roman law of succession in the letters of Pliny the younger*, Zutphen 1982, p. 21 et seq.

[4] The term *Heredes necessarii* is referred to e.g. in the following passages: G.1,54; Epit. Gai. 2,3,6; I.2,19pr; I.2,19,2; I.1,6,1.

[5] Cf. also: A. Guarino, *Il beneficium separationis dell' heres necessarius*, ZSS 1940, no. 60, p. 185 et seq.; *idem*, *Gai.2,155 e il beneficium separationis dell' heres necessarius*, SDHI 1994, no. 10, p. 140; H. Levy-Bruhl, *Heres*, RIDA 1949, no. 3, p. 137 et seq.; G. Scherillo, *Successione ed Estinzione dei raporti giuridici. Studi in onore De Francisco*, vol. 2, Milano 1957, p. 610 et seq.; R. Świrgoń-Skok, *Ograniczenie odpowiedzialności dziedziców koniecznych (heredes necessarii) za długi spadkowe w rzymskim prawie klasycznym* [in:] *Quid leges sine moribus. Studia nad prawem rzymskim dedykowane Profesorowi Markowi Kuryłowiczowi w 65. rocznicę urodzin oraz 40-lecie pracy naukowej*, ed. K. Amielańczyk, Lublin 2009, p. 143–160.

[6] See also: I.2,19,5; C.2,2,2 Gordian; C.2,7,15,1 Leo.

obtain an inheritance they had to perform *aditio hereditatis,* that is a legal act by which *heredes voluntarii (extranei)* acquired the legacy[7].

By acquiring an inheritance, the person designated as a successor would become an heir (*heres*):

D.29,2,54 (*Florentinus libro octavo institutionum*): *Heres quandoque adeundo hereditatem iam tunc a morte successisse defuncto intellegitur*.

The inheritor assumed all the rights of the deceased person, from the moment of the testator's death irrespective of the time the estate was taken over. This however did not apply to strictly personal rights. The inheritance merged with the heir's own property:

D.50,17,62 (*Iulianus libro sexto digestorium*): *Hereditas nihil aliud est, quam seccessio in universum ius, quod defunctus habuerit*.

This is because inheritance acquisition resulted in a fusion of the testator's and the inheritor's property. Consequently, the heir owned the bequeathed assets, as well as the testator's liabilities and debts.

3. As a result of such fusion of the properties, liability for inherited debts could exceed the value of the inheritance and extend to the heir's personal property. Acquisition of inheritance could lead to impoverishment of the heir, because he was liable with his entire property for the debts encumbering the inheritance even if these exceeded the assets of the bequeathed estate.

This could particularly happen in the case of *hereditas damnosa,* or cursed inheritance, where debts exceeded the value of the estate[8]:

G.2,163: *Sed sive is, cui abstinendi potestas est, inmiscuerit se bonis hereditariis, sive is, cui de adeunda deliberare licet, adierit, postea relinquendae hereditatis facultatem non habet, nisi si minor sit annorum XXV: nam huius aetatis hominibus, sicut in ceteris omnibus causis deceptis, ita etiam si temere damnosam hereditatem susceperint, praetor succurrit. scio quidem divum Hadrianum etiam maiori XXV annorum veniam dedisse, cum post aditam hereditatem grande aes alienum, quod aditae hereditatis tempore latebat, apparuisset*.

According to Gaius, an underage person, being either a necessary inheritor in charge of the estate, or voluntary inheritor who received an inheritance, could be granted *restitutio in integrum* by the Praetor, if they had acquired a harmful inheritance (*damnosam hereditatem susceperint*). Additionally, the jurist reports

[7] See: B. Biondi, *Istituti fundamentali di diritto ereditario romano*, Milano 1948, p. 23 et seq.; C. Fadda, *Concetti fondamentali del diritto ereditario romano*, vol. 2, Milano 1949, p. 31 et seq.; G. La Pira, *La successione ereditaria intestata e contro il testamento in diritto romano*, Firenze 1930; 17 et seq.; L. Pietak, *Prawo spadkowe rzymskie*, Lwów 1882, p. 82 et seq.; P. Voci, *Diritto ereditario romano*, Milano 1960, p. 376 et seq.; A. Watson, *The law of succession in the later Roman republic*, Oxford 1971, p. 50 et seq.

[8] More: R. Świrgoń-Skok, *Hereditas damnosa*…, p. 121 et seq.

that starting from Hadrian's times, individuals of legal age would also be entitled to benefit from this privilege if, upon inheritance acquisition, any debts that had previously been hidden came to light.

A reference to *hereditas damnosa* is also found in Fragmenta Augustodunsiana:

Frag. August. 2,30: *Ita dixit : "Ignorans, cum lateret aes alienum, adii hereditatem; postea emersit grande debitum, apparuit damnosa ea hereditas; ergo a te peto, ut liceat mihi discedere". Concessit ei imperator*.

In the above passage the Author says that if a cursed inheritance was acquired and the inheritor was not aware of the existing debts, they could request that their personal property be separated from the estate after hidden debts came to light.

Justinian also writes about the possibility of applying the rule of *restitutio in integrum* if harmful inheritance is acquired:

I.2,19,5: *Extraneis autem heredibus deliberandi potestas est de adeunda hereditate vel non adeunda. sed sive is cui abstinendi potestas est immiscuerit se bonis hereditariis, sive extraneus, cui de adeunda hereditate deliberare licet, adierit, postea relinquendae hereditatis facultatem non habet, nisi minor sit annis viginti quinque: nam huius aetatis hominibus sicut in ceteris omnibus causis deceptis, ita et si temere damnosam hereditatem susceperint, praetor succurrit*.

Hence, a necessary inheritor in charge of the estate or voluntary inheritor who received an inheritance would not be later entitled to give up the inheritance. As an exception, when an underage successor had accepted an excessively encumbered bequest (*damnosam hereditatem*), they could ask the Praetor for *restitutio in integrum.*

This way an heir who acquired inheritance excessively burdened with debt could be granted *restitutio in integrum*, i.e. restoration to original condition, by the Praetor or province magistrate, and could evade adverse consequences of the inheritance acquisition, provided there were legal grounds for applying this principle. *Restitutio in integrum* granted by the Praetor resulted in a waiver of the effects of an executed legal action related to both material and formal law. Such person was no longer an inheritor. *Restitutio in integrum*, however, was recognised as *beneficium extraordionarium*; the possibility to refrain from acquisition of the inheritance did not result from a legal regulation but from assertion of rights by a person entitled to do so[9].

The term *hereditas damnosa,* or cursed inheritance, also appears e.g. in a text by Julianus:

[9] More about *restitutio in integrum* (D.4,1,6; D.4,4,18,5; D.4,4,3,1), its legal basis, nature of the proceeding for its issuance and its effects in: W. Bojarski, *In integrum restitutio w prawie rzymskim*, „Roczniki Teologiczno-Kanoniczne" 1963, vol. 10, p. 15 et seq.; M. Kaser, *Das römische Privatrecht*, vol. 1, p. 215 et seq.; *idem, Zur In integrum restitutio, besonders wegen metus und dolus*, ZSS 1977, no. 94, p. 101 et seq.

D.17,1,32 (*Iulianus libro tertio ad Urseium Ferocem*): *…hereditas interdum damnosa est (...) Praeterea volgo animadvertere licet mandatu creditorum hereditates suspectas adiri, quos mandati iudicio teneri procul dubio est*.

The passage presents a case of a cursed inheritance (*hereditas interdum damnosa est*). If, at a request of a creditor, an inheritor accepts such an inheritance burdened with debt, then he will be entitled to *actio mandati* against the principal.

Hence, if designated to acquire excessively indebted inheritance, the hair would be able to make a pact (*pactum de non petendo pro parte*) with inherited creditors:

D.2,14,7,17 (*Ulpianus libro quarto ad edictum*): *Si ante aditam hereditatem paciscatur quis cum creditoribus ut minus solvatur, pactum valiturum est*.

D.2,14,7,18 (*Ulpianus libro quarto ad edictum*): *Sed si servus sit, qui paciscitur, priusquam libertatem et hereditatem apiscatur, quia sub condicione heres scriptus fuerat, non profuturum pactum vindius scribit: Marcellus autem libro octavo decimo digestorum et suum heredem et servum necessarium pure scriptos, paciscentes priusquam se immisceant putat recte pacisci, quod verum est. Idem et in extraneo herede: qui si mandatu creditorum adierit, etiam mandati putat eum habere actionem*.

In the above passages, Ulpian writes that a valid agreement may be concluded by an heir with inherited creditors, whereby he undertakes to pay to the testator's creditors a certain amount of what is due to them. Only after that would he accept the inheritance. This right could be claimed by heirs designated unconditionally, i.e. domestic heirs (*herdes suus*) and by slaves designated as inheritors and liberated at the same time (*servus neccessarius*). Such right would also apply to *herdes extranei* if they accepted the inheritance at the request of creditors[10].

The above means (*restitutio in integrum* and *pactum de non petendo pro parte*), intended to protect successors against acquisition of cursed inheritance (*hereditas damnosa*) potentially leading to their excessive impoverishment, were however treated as extraordinary legal measures, to be granted at request if there were grounds for applying such measure.

On the other hand, legal measures, applicable generally, and intended to limit successors' liability for inherited debts included *beneficium abstinendi*, or the right to refrain from accepting insolvent estate which was granted by the Praetor or province magistrate to necessary inheritors:

G.2,158: *Sed his praetor permittit abstinere se ab hereditate, ut potius parentis bona veneant*.

According to Gaius, *heredes domestici* were entitled to abstain from acquiring the inheritance, as a result of which the testator's estate would be sold.

[10] More on this issue in: P. Voci, *Diritto ereditario romano*, vol. 1, Milano 1960, p. 617.

The privilege of *beneficium abstinendi*[11] was granted by the Praetor to a necessary heir (*heredes sui et necessarii*), whereby they could abstain from taking over an insolvent inheritance by refusing to handle the related affairs (D.29,2,87pr)[12]. For those wanting to benefit from this privilege, the Praetor could define a time limit for deliberation (*tempus ad deliberandum*); after this time, if no statement was submitted by the heir, the right was lost (D.25,8,8; D.28,8,1). The abstaining party continued to be an inheritor under civil law, however the Praetor treated them as if they were not (D.40,4,32). This means he refused the right of claims related to the inheritance to be lodged by or against the abstaining party (D.38,9,2). The Praetor would also grant *bonorum possessio* to the latter party's successors and if no one wanted to receive *bonorum possessio,* he would open a procedure for creditors' advantage (D.29,2,57pr).

A slave designated in the testament to be the heir (*servus cum libertate heres institutus*) and liberated thereunder, was not entitled to *beneficium abstinendi*; however the Praetor in such a case could grant *beneficium separationis*, i.e. a privilege of separating the estate from the heir's own property in order to limit their liability for inherited debts to the estate exclusively[13]. Slaves were most commonly designated by the testament to be heirs (*servus neccessarius*) in the case of successions which were excessively in debt, so that the infamy resulting from *venditio bonorum* would affect the slave rather than the testator's descendants (G.2,154).

G.2,155: *Pro hoc tamen incommodo illud ei commodum praestatur, ut ea, quae post mortem patroni sibi adquisierit, sive ante bonorum venditionem sive postea, ipsi reseruentur; et quamvis pro portione bona venierint, iterum ex hereditaria causa bona eius non venient, nisi si quid ei ex hereditaria causa fuerit*

[11] Sources of Roman law contain only one reference to *beneficium abstinendi* in the text D.29,2,71,4 by Ulpian. Other terms to be encountered in sources of Roman law, and related to the benefit of abstaining from inheritence include: *facultas abstinendi* – D.29,2,85 Papinian; *ius abstinendi* – D.28,5,87,1 Maecianus; *potestas abstinendi* – D.4,2,21,5 Paulus; D.29,2,11 Pomponius; G.2,163; I.2,19,5; Epit.Ulp. 22,24. See: B. Biondi, *Istituti fundamentali*…, p. 23 et seq.; C. Fadda, *Concetti fondamentali del diritto ereditario romano*, vol. 2, Milano 1949; p. 36 et seq.; G. La Pira, *La successione ereditaria*…, p. 48 et seq.; P. Voci, *Diritto ereditario*…, p. 537 et seq.; R. Świrgoń-Skok, *Beneficja spadkowe w prawie rzymskim*, Rzeszów 2011.

[12] R. Świrgoń-Skok, *Zasady odpowiedzialności spadkobierców za długi spadkowe w prawie rzymskim*, „Zeszyty Naukowe Uniwersytetu Rzeszowskiego" 2011, Seria Prawnicza, Prawo 10, p. 209–220.

[13] H. Ankum, *La classicite de la separatio bonorum de l' heres neccessarius en droit roman*, Studi Groso 2, Torino 1968, p. 365 et seq.; W. Bojarski, *Separatio bonorum* [in:] *Księga Pamiątkowa ku czci Profesora Leopolda Steckiego*, Toruń 1997, p. 603 et seq.; M. Bretone, *Gai. 2,187–189*, Labeo 4, 1958, p. 301 et seq.; A. Guarino, *Gai. 2,155 e il beneficjum separationis dell' heres necessarius*, SDHI 1944, no. 10, p. 240 et seq.; *idem*, *Il beneficjum separationis dell' heres necessarius*, ZSS 1940, no. 60, p. 185 et seq.; R. Świrgoń-Skok, *Ograniczenie odpowiedzialności dziedziców*…, p. 143 et seq.

adquisitum, velut si ex eo, quod Latinus adquisierit, locupletior factus sit; cum ceterorum hominum, quorum bona venierint pro portione, si quid postea adquirant, etiam saepius eorum bona venire soleant.

According to Gaius, *servus neccessarius* would benefit from the privilege based on which, whatever after the patron's death they acquire for themselves, by sale of the assets or following other lawful activities, would be owned by them. Even if only some of the inherited debts were to be paid back by way of *venditio bonorum*, the property of the liberated slave would not be subject to enforced seizure unless they acquired something due to the inheritance.

Apart from that, heirs to inheritance excessively burdened with endowments could be granted *beneficium legis falcidiae*, i.e. a privilege limiting the value of bequests to one quarter of the inheritance[14]:

G.2,227: *Lata est itaque lex Falcidia, qua cautum est, ne plus ei legare liceat quam dodrantem: itaque necesse est, ut heres quartam partem hereditatis habeat: et hoc nunc iure utimur*.

Based on *lex Falcidia* a general rule was introduced whereby, after all the bequests were deducted, the heir nominated in the testament was to retain at least one quarter of the inheritance *(quarta falcidia)*. If such bequests amounted to more than three quarters of the inheritance, they were to be decreased proportionately[15].

Being the last (and historically the latest) privilege granted to those receiving cursed inheritance, *beneficium inventarii* limited the heir's liability for inherited debts to the value of the inheritance. An heir who within a specified time

[14] Concerning *lex Falcidie* resolutions of the Plebeian Assembly from year 40 BC., See: H. Ankum, *La Femme Mariée et la loi Falcidia*, LABEO 1984, vol. 30, p. 28 et seq.; F. Bonifacio, *In tema di lex Falcidia*, IURA 1952, vol. 3, p. 229 et seq.; G. Franciosi, *Lex Falcidia, SC Pegasianum e disposizioni a scopo di culto. Studi Donatuti*, vol. 1, Milano 1973, p. 401 et seq.; V. Mannino, *Cervidio Scevola e l' applicazione della Falcidia ai legati fra loro connessi*, BIDR 1981, vol. 84, p. 125 et seq.; P. De La Rosa Diaz, *Algunos aspectos de la lex Falcidia* [in:] *Studios en homenaje al Prof. F. Hernandez-Tejero*, vol. 2, 1994, p. 111 et seq.; P. Stein, *Lex Falcidia*, „Ateneum" 1987, vol. 65, p. 453 et seq.; F. Schwarz, *Die Rechtswirkungen der lex Falcidia*, ZSS 1943, vol. 63, p. 314 et seq.; F. Schwarz, *War die lex Falcidia eine lex perfecta*, SDHI 1951, vol. 17, p. 225 et seq.; R. Świrgoń-Skok, *Ograniczenie odpowiedzialności spadkobiercy za nadmierne zapisy na tle historycznoprawnym* [in:] *Ochrona strony słabszej stosunku prawnego. Księga jubileuszowa ofiarowana prof. A. Zielińskiemu*, ed. M. Boratyńska, Warszawa 2016, pp. 421–432; A. Wacke, *Die Rechtswirkungen der lex Falcidia, Studien Kaser*, Berlin 1973, p. 209 et seq.

[15] These limitations were then adopted in fideicommissa. *Senatus consulta Pegasianum* from Vespasian's time (year 73 AD.) introduced changes in fideicommissa, particularly in *fideicommissum hereditatis* whereby the heir could retain 1/4 part of the bequest, the so-called *quarta ex S.C. Pegasiano*. An ordinance of Emperor Antonius Pius (Gai2,224–7; Gai.2,254; D.35,2,18pr) extended the application of *quarta Falcidia* to intestate heirs. In the times of Justinian, the provisions related to *lex Falcidia* were expanded to include *mortis causa capio* and particularly *donatio mortis causa*.

limit prepared a detailed inventory of the inherited assets was liable for the debts only up to the value of the estate. The institution of the benefit of inventory was introduced by Justinian in the constitution from year 531[16]:

I.2,19,6: *Sed nostra benevolentia commune omnibus subiectis imperio nostro hoc praestavit beneficium et constitutionem tam aequissimam quam nobilem scripsit, cuius tenorem si observaverint homines, licet eis adire hereditatem et in tantum teneri in quantum valere bona hereditatis contingit, ut ex hac causa neque deliberationis auxilium eis fiat necessarium, nisi omissa observatione nostrae constitutionis et deliberandum existimaverint et sese veteri gravamini aditionis supponere maluerint*.

The above passage says that, pursuant to Justinian's Constitution, a successor who compiled a detailed inventory of the inherited assets within specified time, was liable for debts only up to the value of the inheritance. The heir could also request time for deliberation.

Benefit of inventory was neither applicable *ex lege*, nor was it awarded *ex officio*. Furthermore, no separate statement of intent was required from the inheritor. If the heir did not request *tempus ad deliberandum,* they could start drawing a detailed inventory of the inherited assets within 30 days after the testament was opened or they learned about the nomination for the inheritance; the inventory was to be completed within 60 days. If the heir lived away from the location of the estate, he had one year from the date of the testator's passing to complete the inventory of the assets. The inventory was to be executed in the presence of a notary and witnesses, and it was to be signed by the inheritor. If the person nominated for the inheritance completed the inventory within the specified time limit, their liability for inherited debts was limited to the value of the inheritance (*intra vires hereditatis*). The heir should satisfy creditors of the estate and legatees in the order they come forth. He could also seek to get reimbursement for funeral expenses and to recover any debts owed to him be the deceased testator. The inventory also provided grounds for determining *quarta falcidia*[17].

[16] Besides that, Justinian's C.6,30,22 reports information about the benefit awarded by Emperor Gordian to soldiers, based on which they were liable for debts limited by the inheritance. Justinian acknowledged that these privileges preceded his *beneficium inventarii.*

[17] More details about *beneficium inventarii* See: R. Reggi, *Ricerche interno al beneficium invenntarii*, Milano 1967, p. 3 et seq.; R. Świrgoń-Skok, *Przyjęcie spadku z dobrodziejstwem inwentarza. Od prawa justyniańskiego do kodeksu cywilnego*, „Zeszyty Prawnicze UKSW" 2011, vol. 11, no.1, p. 339–357; Dobrodziejstwo inwentarza (beneficium inventarii) i jego realizacja w prawie rzymskim [in:] *Egzekucja z majątku spadkowego. Ograniczona i nieograniczona odpowiedzialność za długi spadkowe*, ed. M. Załucki, Warszawa 2016, p. 24–50; *Beneficium inventarii in the Roman tradition of European private law*, „Constituição, Economia e Desenvolvimento: Revista da Academia Brasileira de Direito Constitucional" 2017, vol. 9, no. 17, p. 278–297, P. Voci, *Diritto ereditario*…, p. 618 et seq.

4. Likewise, the testator's creditors could incur losses possibly leading to their impoverishment. This happened when the heir's estate was excessively burdened with debts. In such case, the heir's creditors would participate in the foreclosure of the heir's property as a result of which the heir's property would not be sufficient to satisfy all the inherited debts. This was possible particularly in the case of the so-called *hereditas suspecta,* i.e. inheritance in debt where the heir was suspected to deliberately encumber his own property with debts, so that he was not able to satisfy inherited creditors. Purposeful encumbrance of property with debts was recognised in the cases where inheritance excessively burdened with bequests was accepted and the inherited estate was released by the nominated inheritor to a fideicommissary. The following texts refer to this issue:

D.36,1,3pr (*Ulpianus libro tertio fideicommissorum*): *Marcellus autem apud Iulianum in hac specie ita scribit: si ad heredis onus esse testator legata dixerit et heres sponte adiit hereditatem, ita debere computationem Falcidiae iniri, ac si quadringenta per fideicommissum essent relicta, trecenta vero legata, ut in septem partes trecenta dividantur et ferat quattuor partes fideicommissarius, tres partes legatarius. Quod si suspecta dicta sit hereditas et non sponte heres adiit et restituit, centum quidem de quadringentis, quae habiturus esset heres, resident apud fideicommissarium, in reliquis autem trecentis eadem distributio fiet, ut ex his quattuor partes habeat fideicommissarius, reliquas tres legatarius: nam iniquissimum est plus ferre legatarium ideo, quia suspecta dicta est hereditas, quam laturus esset, si sponte adita fuisset*.

In the above passage Ulpian, referring to a statement by Marcellus, ponders the questions how *quarta falcidia* should be calculated and what share of the inheritance will be received by legatees and fideicommissaries if an heir has voluntarily accepted inheritance excessively burdened with endowments which are part of the burden borne by the heir, and alternatively what the situation would look like if the inheritance were recognised as indebted and an heir were to accept it involuntarily and then to release it to a fideicommissary. In his response he claims that both the legatee and the fideicommissary would receive the same amount in both cases. The jurist adds that it would be inequitable if a legatee received more in the case of suspected indebtedness of the inheritance (*quia suspecta dicta est hereditas*) than in the case of an inheritance accepted voluntarily by the heir.

D.36,1,17,5 (*Ulpianus libro quarto fideicommissorum*): *Sed et si quis non hereditatis suae partem dimidiam rogavit heredem suum restituere, sed hereditatem Seiae, quae ad eum pervenerat, vel totam vel partem eius, heresque institutus suspectam dicat, cum placeat illud quod Papinianus ait ex Trebelliano transire actiones, dici poterit, si suspecta dicatur hereditas, cogendum heredem institutum adire et restituere hereditatem totamque hereditatem ad eum cui restituitur pertinere*.

This passage describes a case where the whole inheritance is released to a fideicommissary by the nominated heir who consequently is suspected of having deliberately encumbered the estate with debt in order to make it impossible to satisfy the inherited creditors (*heresque institutus suspectam*). Ulpian, referring to S.C. Trebellianum (55 AD), states that such person (fideicommissary) may lawfully be faced with complaints (*transire actiones*), because he has obtained the heir's position.

D.36,1,57,2 (*Papinianus libro vicensimo quaestionum*): *Qui fideicommissam hereditatem ex Trebelliano, cum suspecta diceretur, totam recepit, si ipse quoque rogatus sit alii restituere, totum restituere cogetur. Et erit in hac quoque restitutione Trebelliano locus: quartam enim Falcidiae iure fideicommissarius retinere non potuit. Nec ad rem pertinet, quod, nisi prior, ut adiretur hereditas, desiderasset, fideicommissum secundo loco datum intercidisset: cum enim semel adita est hereditas, omnis defuncti voluntas rata constituitur. Non est contrarium, quod legata cetera non ultra dodrantem praestat: aliud est enim ex persona heredis conveniri, aliud proprio nomine defuncti precibus adstringi. Secundum quae potest dici non esse priore tantum desiderante cogendum institutum adire, ubi nulla portio remansura sit apud eum, utique si confestim vel post tempus cum fructibus rogatus est reddere: sed et si sine fructibus rogatus est reddere, non erit idonea quantitas ad inferendam adeundi necessitatem. Nec ad rem pertinebit, si prior etiam libertatem accepit: ut enim pecuniam, ita nec libertatem ad cogendum institutum accepisse satis est. Quod si prior recusaverit, placuit, ut recta via secundus possit postulare, ut heres adeat et sibi restituat*.

Faced with such a situation where recovery of their debts was unlikely due to the excessive indebtedness of the heir's property, testator's creditors could demand a guarantee from the heir that he would not diminish the inherited estate at the expense of the creditors, in the form of stipulatory promise (*satisdatio suspecti heredis*). Such promise was received when it was suspected that the heir was deliberately encumbering his own property (*heres suspectus*). The Praetor imposed an obligation on a suspected heir to submit stipulatory *cautio* with guarantors. The heir's failure to fulfil his promise was followed by *missio in bona*, and then *venditio bonorum*. If the heir was too poor, or could not find guarantors, the guarantee contained proscription on the sale of assets[18].

D.42,5,31 (*Ulpianus libro secundo de omnibus tribunalibus*): *pr. Si creditores heredem suspectum putent, satisdationem exigere possunt pro suo debito reddendo. Cuius rei gratia cognoscere praetorem oportet nec statim eum satisdationis necessitati subicere debet, nisi causa cognita constiterit prospici debere his, qui suspectum eum postulaverunt. 1. Sed suspectus heres non isdem modis, quibus suspectus tutor aestimatur: siquidem tutorem non facultates, sed*

[18] As regards *satisdatio suspecti heredis* – or stipulatory guarantee of suspected heir, see: D.42,5,31 Ulpian. Cf. P. Voci, *Diritto ereditario*…, p. 627.

fraudulenta in rebus pupillaribus et callida conversatio suspectum commendet, heredem vero solae facultates. 2. Plane in recenti aditae hereditatis audiendi erunt, qui suspectum postulant: ceterum si probentur passi eum in hereditate morari nec quicquam possint obicere criminis quasi dolose versato eo, non debebit post multum temporis ad hanc necessitatem compelli. 3. Quod si suspectus satisdare iussus decreto praetoris non obtemperaverit, tunc bona hereditatis possideri venumque dari ex edicto suo permittere iubebit. 4. Plane si doceatur nihil ex bonis alienasse nec sit quod ei iuste praeter paupertatem obiciatur, contentus esse praetor debet, ut iubeat eum nihil minuere. 5. Quod si nec inopia laborantem eum creditores ostendere potuerint, iniuriarum actione ei tenebuntur.

D.26,5,18 (*Ulpianus libro 61 ad edictum*): *In dando tutore ex inquisitione et in eum inquiritur, qui senator est: et ita Severus rescripsit*.

D.26,10,8 (*Ulpianus libro 61 ad edictum*): *Suspectum tutorem eum putamus, qui moribus talis est, ut suspectus sit: enimvero tutor quamvis pauper est, fidelis tamen et diligens, removendus non est quasi suspectus*.

D.41,4,7,5 (*Iulianus libro 44 digestorum*): *Qui sciens emit ab eo, quem praetor ut suspectum heredem deminuere vetuit, usu non capiet*.

Another legal measure benefitting inherited creditors, *separatio bonorum*[19] was granted in order to separate the inherited estate from the heir's personal property, in order to limit his liability for inherited debts to the value of the inherited estate. The privilege was available for testator's creditors and legatees (D.42,6,6,pr Julian), these however could only receive what was due to them only after debts were recovered in full by the testator's creditors. The privilege was granted at a request (*postulatio, impetratio*), after the case was carefully examined by the Praetor or province magistrate[20]. Their decision to award *separatio* depended on a specific condition, i.e. the fact of the heir's insolvency[21]. As a result of *separatio bonorum* consequences of inheritance acquisition were partly revoked, i.e. only with respect to the testator's creditors. This, however, did not apply to the heir and his creditors. After the inherited estate was separated from the heir's personal property, the former was released to the testator's creditors so that they could recover their debts. This happened by way of *venditio bonorum.*

[19] More about *beneficium separationis bonorum* (in source texts referred to as: *commodatum, separationis commodum, ius separationis, separatio bonorum or bonorum separatio* or *separation*): D.42,6,1,10; D.42,6,1,3 – Ulpian; D.42,6,5 Paulus; C.7,72,2 Gordian; D.42,6,6,pr and 1 Julianus; C.7,72,7 Diocletianus and Maximian) see: B. Asftolfi, *Separazione dei beni del defunto da quelli dell' erede*, NDI 1970, no. 17, p. 1 et seq.; W. Bojarski, *Separatio bonorum*, p. 607 et seq.; H. Levy-Bruhl, *Heres*, p. 167 et seq.; G. Scherillo, *Separazione*, NDI 1963, vol. 9, p. 8 et seq.

[20] These issues are referred to in source texts by Ulpian D.42,6,1pr; D.42,6,1,14 and in the constitution C.7,72,2.

[21] D.42,6,6 Julian; D.42,6,1,1 Ulpian.

5. In summary, it may be concluded that in Roman law, acquisition of inheritance could not only entail improvement of the heir's financial status but also his impoverishment. A risk of damage to the heir's material status resulting from their liability for inherited debts occurred particularly in the case of *hereditas damnosa*, or cursed inheritance, excessively burdened with debt.

Wishing to protect their personal property, heirs would conclude agreements with inherited creditors, whereby they undertook to pay to the testator's creditors a certain amount of what was due to them. They could also be granted *restitutio in integrum*, i.e. restoration to original condition, by the Praetor or province magistrate, and this way avoid the adverse consequences of the inheritance acquisition. These, however, were extraordinary legal measures. The principal legal measures protecting heirs against excessive liability for inherited debts included *beneficium abstinendi*, or the benefit of refusing to accept inheritance burdened with debts; *beneficium separationis bonorum*, i.e. the benefit of separating the inherited estate from the heir's personal property, as well as *beneficium legis falcidiae* – privilege limiting the value of endowments to one quarter of the inheritance, and *beneficium inventarii*, or limitation of liability for inherited debts up to the value of the inheritance.

However, those affected by impoverishment, in addition to heirs also included testator's creditors. This situation could happen in the case of the so-called *hereditas suspecta*, i.e. indebted inheritance where the heir was suspected to deliberately encumber his property with debts so that they could not satisfy the inherited creditors.

Faced with such a situation where recovery of their debts was unlikely due to the excessive indebtedness of the heir's property, testator's creditors could demand a guarantee from the heir that he would not diminish the inherited estate at the expense of the creditors, in the form of stipulatory promise (*satisdatio suspecti heredis*). Besides that, inherited creditors and legatees could obtain *separatio bonorum* as a result of which the inherited estate was separated from the heir's personal property and his liability for inherited debts was limited to the value of the inheritance.

Bibliography

Ankum H., *La classicite de la separatio bonorum de l' heres neccessarius en droit roman*, Studi Groso 2, Torino 1968.

Ankum H., *La Femme Mariée et la loi Falcidia*, LABEO 1984, vol. 30.

Asftolfi B., *Separazione dei beni del defunto da quelli dell' erede*, NDI 1970, no. 17.

Beduschi C., *Hereditatis aditio*, Milano 1976.

Biondi B., *Istituti fundamentali di diritto ereditario romano*, Milano 1948.

Bojarski W., *In integrum restitutio w prawie rzymskim*, „Roczniki Teologiczno-Kanoniczne" 1963, vol. 10.

Bojarski W., *Separatio bonorum* [in:] *Księdze Pamiątkowej ku czci Profesora Leopolda Steckiego*, Toruń 1997.
Bonifacio F., *In tema di lex Falcidia*, IURA 1952, vol. 3.
Bretone M., *Gai. 2,187–189*, Labeo 4, 1958.
De La Rosa Diaz P., *Algunos aspectos de la lex Falcidia* [in:] *Studios en homenaje al Prof. F. Hernandez-Tejero*, vol. 2, 1994.
Fadda C., *Concetti fondamentali del diritto ereditario romano*, vol. 2, Milano 1949.
Franciosi G., *Lex Falcidia, SC Pegasianum e disposizioni a scopo di culto. Studi Donatuti*, vol. 1, Milano 1973.
Gonzalez Roldan Y., *Propuesta sobre la ventral de herencia en el derecho romano clasico*, Mexico 1997.
Guarino A., *Gai. 2,155 e il beneficjum separationis dell' heres necessarius*, SDHI 1944, no. 10.
Guarino A., *Il beneficium separationis dell' heres necessarius*, ZSS 1940, no. 60.
Kaser M., *Das römische Privatrecht*, vol. 1, München 1971.
Kaser M., *Zur In integrum restitutio, besonders wegen metus und dolus*, ZSS 1977, no. 94.
La Pira G., *La successione ereditaria intestata e contro il testamento in diritto romano*, Firenze 1930.
Levy-Bruhl H., *Heres*, RIDA 1949, no. 3.
Litewski W., *Słownik encyklopedyczny prawa rzymskiego*, Kraków 1998.
Mannino V., *Cervidio Scevola e l' applicazione della Falcidia ai legati fra loro connessi*, BIDR 1981, vol. 84.
Montanana Casani A., *La veuve et la succession hereditaire dans le droit classique*, RIDA 2000, no. 47.
Pietak L., *Prawo spadkowe rzymskie*, Lwów 1882.
Reggi R., *Ricerche interno al beneficium invenntarii*, Milano 1967.
Scherillo G., *Separazione*, NDI 1963, vol. 9.
Scherillo G., *Successione ed Estinzione dei raporti giuridici, Studi in onore De Francisco*, vol. 2, Milano 1957.
Schwarz F., *Die Rechtswirkungen der lex Falcidia*, ZSS 1943, vol. 63.
Schwarz F., *War die lex Falcidia eine lex perfecta*, SDHI 1951, vol. 17.
Sondel J., *Słownik łacińsko-polski dla prawników i historyków*, Kraków 1997.
Stein P., *Lex Falcidia*, „Ateneum" 1987, vol. 65.
Świrgoń-Skok R., *Beneficja spadkowe w prawie rzymskim*, Rzeszów 2011.
Świrgoń-Skok R., *Beneficium inventarii in the roman tradition of European private law*, „Constituição, Economia e Desenvolvimento: Revista da Academia Brasileira de Direito Constitucional" 2017, vol. 9, no. 17.
Świrgoń-Skok R., *Dobrodziejstwo inwentarza (beneficium inventarii) i jego realizacja w prawie rzymskim* [in:] *Egzekucja z majątku spadkowego. Ograniczona i nieograniczona odpowiedzialność za długi spadkowe*, ed. M. Załucki, Warszawa 2016.
Świrgoń-Skok R., *Hereditas damnosa – ryzyko nabycia spadku w prawie rzymskim* [in:] *Zbytek i ubóstwo w starożytności i średniowieczu*, eds. L. Kostuch, K. Ryszewska, Kielce 2010.
Świrgoń-Skok R., *Ograniczenie odpowiedzialności dziedziców koniecznych (heredes necessarii) za długi spadkowe w rzymskim prawie klasycznym* [in:] *Quid leges sine moribus. Studia nad prawem rzymskim dedykowane Profesorowi Markowi Kuryłowiczowi w 65. rocznicę urodzin oraz 40-lecie pracy naukowej*, ed. K. Amielańczyk, Lublin 2009.
Świrgoń-Skok R., *Ograniczenie odpowiedzialności spadkobiercy za nadmierne zapisy na tle historycznoprawnym* [in:] *Ochrona strony słabszej stosunku prawnego. Księga jubileuszowa ofiarowana prof. A. Zielińskiemu*, ed. M. Boratyńska, Warszawa 2016.
Świrgoń-Skok R., *Przyjęcie spadku z dobrodziejstwem inwentarza. Od prawa justyniańskiego do kodeksu cywilnego*, „Zeszyty Prawnicze UKSW" 2011, t. 11, 1.

Świrgoń-Skok R., *Zasady odpowiedzialności spadkobierców za długi spadkowe w prawie rzymskim*, „Zeszyty Naukowe Uniwersytetu Rzeszowskiego" 2011, Seria Prawnicza, Prawo 10.
Tellegen J.W., *The roman law of succession in the letters of pliny the younger*, Zutphen 1982.
Voci P., *Diritto ereditario romano*, Milano 1960.
Wacke A., *Die Rechtswirkungen der lex Falcidia, Studien Kaser*, Berlin 1973.
Watson A., *The law of succession in the later roman republic*, Oxford 1971.

Summary

The article presents risks associated with inheritance acquisition in Roman law. Indeed, in Roman law, acquisition of inheritance could not only entail improvement of the heir's financial status but also his impoverishment. Negative consequences associated with inheritance acquisition could affect the heir, as well as the testator's creditors and the heir's creditors. A risk of damage to the heir's material status resulting from their liability for inherited debts occurred particularly in the case of *hereditas damnosa*, or cursed inheritance, excessively burdened with debt. However, those affected by impoverishment, in addition to heirs also included testator's creditors. This situation could happen in the case of the so-called *hereditas suspecta*, i.e. indebted inheritance where the heir was suspected to deliberately encumber his property with debts so that they could not satisfy the inherited creditors.

Keywords: consequences of inheritance acquisition, heir, *hereditas damnosa*, *hereditas suspecta*, Roman law

HEREDITAS DAMNOSA – HEREDITAS SUSPECTA RYZYKO NABYCIA SPADKU W PRAWIE RZYMSKIM

Streszczenie

W niniejszym artykule zostało przedstawione ryzyko związane z nabyciem spadku w prawie rzymskim. Bowiem w prawie rzymskim nabycie spadku mogło nieść ze sobą nie tylko polepszenie sytuacji majątkowej spadkobiercy, ale także jego zubożenie. Negatywne konsekwencje związane z nabyciem spadku mogły występować zarówno dla samego spadkobiercy, jak i wierzycieli spadkodawcy, a także wierzycieli spadkobiercy. Ryzyko pogorszenia sytuacji majątkowej spadkobiercy będące wynikiem odpowiedzialności za długi spadkowe występowało zwłaszcza przy *hereditas damnosa*, czyli spadku szkodliwym nadmiernie obciążonym długami. Jednak zubożenie mogło nastąpić nie tylko po stronie spadkobierców, ale również wierzycieli spadkodawcy. Taka sytuacja miała miejsce przy tzw. *hereditas suspecta*, czyli spadku zadłużonym, przy którym dziedzic jest podejrzewany o celowe zadłużanie swojego majątku, aby nie być w stanie zaspokoić wierzycieli spadkowych.

Słowa kluczowe: skutki nabycia spadku, spadkobierca, *hereditas damnosa*, *hereditas suspecta*, prawo rzymskie