system of professional activities embraces: 1) persons who undergo initial professional training in educational institutions and other institutions which carry out or provide for training of qualified workers and professionals; 2) employees who undergo initial professional training, re-training and advanced training during their work activities; 3) unemployed persons who are looking for job and need initial professional training, re-training or advanced training.

The attention is mainly paid to legal facts – the grounds for creation of such relations. It was ascertained that the main legal fact, on the grounds of which legal relations of employees' professional training are created, is the agreement of their assignment to an educational institution for professional training, re-training or advanced training.

The conclusion was made that the training agreement is of labor law nature as a special kind of agreement in the labor sphere, taking into consideration the fact that the training agreement has an independent subject matter and is the grounds for creation of not labor, but relations tightly connected with labor relations, which precede them or are accompanying them, related to training and professional education of employees directly at the employer's organization. The conducted analysis of the legal regulation of entering into training agreements in the legislation of foreign countries confirms the necessity of legal regulation of the relations which are created on the grounds of training agreement in Ukrainian labor legislation.

Keywords*: legal relations, tightly connected with labor relations, professional education, professional training, advanced training, training agreement.*

BARTOSZ SZOLC-NARTOWSKI,
Zakład Prawa Rzymskiego
Wydział Prawa i Administracji, Uniwersytet Gdański

THE WISHES OF THE HEIR AND THE SCOPE OF LEGACY IN ROMAN LAW

The debate held by ancient lawyers on the question of an heir`s power to decide upon the extent of a performance under the legacy per damnationem is the subject of this paper. Testator omitted to specify the amount of wine, olive or salt fish bequeathed under a legacy per damnationem. Does it make legacy invalid? – or maybe the heir has a power to decide on how much of these commodities are to be owned? Or perhaps the legatee is entitled to take all of the things left by testator? Should we rather upheld the will of the testator or bear the consequences of the testator's failure to express his will in a clear and definitive manner? Could the legacy per damnationem rely on a measure of cooperation between the testator and heir? What is the role of typical Roman social value like fides as far as the estimation of validity of such legacies is concerned? And what are the legal instruments to qualify the performance of the heir as proper or not? Was fideicommissum, emerging institution of inheritance law, more elastic instrument for testators? The paper includes tests of Roman jurists from the classical period taken from the famous Digests of Justinian, giving some proposals of their interpretations.

Key words: *Legacy, Testator, Heir, Roman Law.*

***Бартош Шольц-Нартовскі*. Воля спадкоємця і спадщина в римському праві**

Предметом цього дослідження є дебати римських правників щодо рішення спадкоємця про прийняття спадщини per damnationem. Спадкодавець не зазначив кількість вина, оливок чи солоної риби у заповіті per damnationem. Чи робить це спадщину нікчемною? Чи можливо спадкоємець може сам вирішувати, яка кількість цих речей повинні перейти в його власність? Чи можливо спадкоємець правомочний набути

усі ці речі у власність, що залишив спадкодавець? Чи ми повинні дотримуватися волі спадкодавця чи визнавати те, що спадкодавець не мав можливості зазначити свою волю у заповіті чітко і однозначно? Чи може спадщина per damnationet об'єднати і волю спадкодавця, і волю спадкоємця? Яка роль звичної для римського суспільства цінності bona fides, якщо її розглядати через призму таких видів спадщини? Які правові інструменти можна використовувати для правильності чи хибності оцінювання діяльності спадкоємця? Чи був fideicommissum, який тільки виникав як інститут спадкового права, більш гнучким правовим інструментом для спадкодавця? Ця стаття включає цитати римських правників класичного періоду, взятих з Дигестів Юстиніана, які надають різні варіації інтерпретацій цих текстів.

Ключові слова: *спадщина, спадкодавець, спадкоємець, заповіт, римське право.*

***Бартош Шольц-Нартовски*. Воля наследника и наследство в римском праве**

Предметом этого исследования являются дебаты римских юристов касательно решения наследника о принятии наследства per damnationet. Наследодатель не обозначил количество вина, оливок или соленой рыбы в завещании per damnationet. Делает ли это наследство недействительным? Быть может наследник сам решать, какое количество этих вещей должно перейти ему в собственность? Быть может наследник правомочен принять все эти вещи в собственность, которые оставил наследодатель? Должны ли мы придерживаться воли наследодателя или признать то, что наследодатель не имел возможности указать свою волю в завещании четко и однозначно? Может ли наследство per damnationet объединить и волю наследодателя, и волю наследника? Какова роль обычной для римского общества ценности bona fides, если ее рассматривать сквозь призму таких видов наследства? Какие правовые инструменты можно использовать для правильности или неправильности оценивания деятельности наследника? Был ли fideicommissum, который только возникал как институт наследственного права, более гибким правовым инструментом для наследодателя? Эта статья включает цитаты римских юристов классического периода, взятых из Дигестов Юстиниана, которые представляют разные вариации интерпретаций этих текстов.

Ключевые слова: *наследство, наследодатель, наследник, завещание, римское право.*

1. In this paper, I will attempt to determine whether and, if yes, in which extent, one party had a power to decide about the content of an obligation and in which fashion one was obliged to exercise that power.

2. The following remarks will be however limited to legacies. The question here is not whether the existence of an obligation under a legacy *per damnationem* could be made contingent upon the heir's will, but rather, was the heir at liberty to decide upon the scope of his obligation and, if so, based on what criteria?

3. In the course of my research, I came across a very interesting passage on *arbitrium boni viri*, relating a debate held by ancient lawyers on the subject of an heir's power to decide upon the extent of a performance under a legacy, i.e. the exact quantity or volume of things bequeathed under a legacy. The discussion was reported by Iavolenus in the second book of extracts from Labeo's posthumous writings. The same issue was raised by the compilers of the Code of Justinian in Book 33 of the Digests, entitled "concerning bequests of wheat, wine and olive".

> D. 33.6.7 *pr.* (*Iavolenus libro secundo ex posterioribus Labeonis*): *Quidam heredem damnaverat dare uxori suae vinum oleum frumentum acetum mella salsamenta. Trebatius aiebat ex singulis rebus non amplius deberi, quam quantum heres mulieri dare voluisset, quoniam*

> *non adiectum esset, quantum ex quaque re daretur. Ofilius Cascellius Tubero omne, quantum pater familias reliquisset, legatum putant: Labeo id probat idque verum est*[1]. / A certain individual charged his heir to give to his wife wine, oil, grain, vinegar, honey, and salt-fish. Trebatius said that the heir was not obliged to deliver any more of each article to the woman than he desired, since it was not stated how much of each article was to be given. Ofilius, Cascellius, and Tubero think that the entire amount of the said articles which the testator left was included in the legacy. Labeo approves of this, and it is correct[2].

A testator bequeathed to his wife wine, olive, vinegar, honey and salt fish under a legacy *per damnationem*, but in so doing, he had failed to specify the amount of these commodities she would be entitled to. Trebatius was of the opinion that the wife was entitled to no more than the heir was willing to provide. However, there is a preponderance of legal opinion in support of the wife's right to take all of the things accorded to her by the *paterfamilias* in his will. This line of interpretation suggests that the lawyers of the day sought to specify the extent of obligations to be performed. Otherwise, if we were to dismiss the argument proposed by Trebatius, we could only invalidate the legacy – a solution repugnant to jurists. In such a way, the successor is made to bear the consequences of the testator's failure to frame his bequest in clear language.

At this point, I would like to stop to examine in more detail the solution that was rejected[3]. The passages proves beyond all doubt that the construal of legacy *per damnationem* was a hotly debated issue at the end of the Republic. Trebatius' view, leaving it to the heir to decide upon the measure of his performance seems unreasonable, as the heir could easily claim full compliance with his obligation by giving the wife only a token amount of what she was entitled to. The stance proposed by other jurists is more reasonable, as they simply strive to uphold the wife's legacy, that legacy being a form of spousal support. By taking the opposite view, we would allow the vaguely formulated legacy to become void and the wife to become destitute.

This was not just an opposition of reasonable versus unreasonable, but rather a presentation of two opposing solutions, each of which had its rational and juridical basis. Legacy *per damnationem* relied on a measure of cooperation between heir and testator, with the testator acting as an intermediary tasked with giving effect to the testator's will, i.e. as a trustee. In that sense, it was of key importance for the testator to trust the heir. Besides, as the legacy addressed everyday needs, the heir was possibly familiar with the wife's situation. As C. Ferrini and G. Grosso point out, this type of legacy required taking into account not only the testator's but also (although to a limited extent) the heir's wishes. These wishes were complemented by mutual trust. The weight of the matter provided the impulse for Trebatius to clarify the issue through a ruling in a specific case. However, the attempt to make legacies by damnation more flexible failed. This shortcoming was rectified later when *fideicommisus* was made contestable. Trebatius did not need to use the apparently later distinction into *arbitrum merum* and *arbitrum boni viri,* seeing instead social ties as a guarantee ensuring the heir's compliance with his obligations. We have reports from Proculus concerning the issue of fixing shares in a company. The subsequent introduction of the *arbitrium boni viri* criterion in determining the extent, to which an obligation was recognized, had a standardizing and objectifying influence.

The text under discussion makes no mention, however, of the testator entrusting the heir with delimiting the scope of the obligation. Such a solution was proposed by Trebatius. Apparently, jurists considered this too much of an interference with the testator's wishes. On the other hand, the same jurists tried to uphold the wife's legacy.

4. It is a different matter altogether if the testator specifically entrusted someone with setting out the scope of the obligation. It is interesting to read Celsus' account of a discusion between Tubero and Labeo about the interpretation of testamentary provisions, in which the father conferred upon his daughter a dowry to be disbursed to her at her tutors' discretion (*arbitratu tutorum*).

> D. 32.43 *(Celsus libro quinto decimo digestorum): Si filiae pater dotem arbitratu tutorum dari iussisset, Tubero perinde hoc habendum ait ac si viri boni arbitratu legatum sit. Labeo quaerit, quemadmodum apparet, quantam dotem cuiusque filiae boni viri arbitratu constitui oportet: ait id non esse difficile ex dignitate, ex facultatibus, ex numero liberorum testamentum facientis aestimare*[4]. / Where a father ordered a dowry to be given to his daughter, to be fixed by the judgment of her guardian, Tubero says that this should be considered just as if the dowry had been bequeathed to her to the amount which would be approved of by a reputable citizen. Labeo asks in what way a dowry can be fixed for a girl in accordance with the judgment of a good citizen. He says that this is not difficult when the rank, the means, and the number of children of the party who made the will are taken into account.

It is easy to understand why such a matter was left to the tutors, for they were the ones who had the daughter's best interests at heart. There must have remained, however, some doubts as to this solution or, possibly, there were trends working to standardize legislation[5]. According to Tubero, *arbitrium* should have the form of *arbitrium boni viri* or – to be more precise – the provision should be understood as if it was to be executed according to *arbitrium boni viri*. Such a solution seems to have the aim of clarifying the performance and ensuring that the legacy remained valid. Labeo asks how it would be known in what amount the dowry should be fixed for each testator's daughter. This questions raises doubts about the validity of Tubero's stance. It is not clear what the legal opinion on this matter is. On one hand, the doubts raised by Labeo is removed, as the jurist explains how the criterion of *boni viri* should be applied in this case, i.e. he says that the key factors in deciding the matter include the testator's dignity, estate and number of children. This answer is trivial, suggesting that the ruling might have been intended to be ironical. Perhaps Labeo believes that if there are certain objective criteria, on which to base the amount of performance due from the heir, it is perhaps extremely cautionary, yet not entirely unreasonable, to invoke *arbitrium boni viri*. There might have been another idea at work here: adopting *arbitrium boni viri* means that the substance of the legacy has been determined and so the legacy is enforceable.

5. At times, the testator would leave it to the heir's discretion whether he should fulfil the condition or not. The example was provided by Cervidious Scaevola in a text in the fourth book of responses.

D. 33.1.13.1 (*Scaevola libro quarto responsorum*): *Uxore herede scripta ita cavit: "Libertis meis omnibus alimentorum nomine singulis annuos denarios duodecim ab herede dari volo, si ab uxore mea non recesserint". Quaero, cum pater familias sua voluntate de civitate difficile profectus sit, ea autem adsidue proficiscatur, an liberti cum ea proficisci debeant. Respondi non posse absolute responderi, cum multa oriri possint, quae pro bono sint aestimanda: ideoque huiusmodi varietas viri boni arbitrio dirimenda est. Item quaeritur, cum proficiscens eis nihil amplius optulerit ac per hoc eam secuti non sint, an legatum debeatur. Respondit et hoc ex longinquis brevibusque excursionibus et modo legati aestimandum esse*[6]. / A man, having appointed his wife his heir, provided as follows, in his will: "I wish twelve denarii to be paid every year by my heir to each of my freedmen for his support, if they do not abandon my wife." As the testator very seldom left the town, and his wife frequently did so, I ask whether the freedmen should accompany her on her journey. I answer that a positive opinion cannot be given on this point, as many things might arise which it would be well to take into consideration; and therefore a case of this kind should be submitted to the judgment of a good citizen. It was also asked, as when the woman went on her journeys she never offered to pay anything additional to her freedmen, and for this reason they did not accompany her, whether they would be entitled to their legacies. The answer was that this should be determined by taking into account the length, or the shortness of the journeys, and the amount of the legacies.

The testator has designated his wife as a legatee, subject to the proviso that my legatee should pay each of my freed slaves 12 denari's maintenance every year as long as they stay in my wife's service. As the testator rarely left the city, while the wife was constantly away, the question arose: will the freed slaves have to travel with her? Here, the jurist points to *arbitrium boni viri* as a useful criterion, as he claims that no clear-cut answer can be given. There are a number of situations that have to be evaluated on a case-by-case basis as appropriate – *pro bono sint aestimanda*. Therefore, the facts of the case should be judged according to *arbitrium boni viri*. We should consider the testator's, but also – to a limited extent – the heir's will, as the latter is the extension of the former.

6. In another passage (D. 33.1.3.1-3, Ulp. lib. 24 ad Sab.), their heir was tasked with providing payments under a legacy granting 30 [...] to be paid out three times annually in unequal instalments. Ulpian responds that the heir should pay out the instalments in an amount that would behove an honourable person, or – as he says – in a manner that is commensurate with the deceased person's financial position and the size of the estate he has left behind.

D. 33.1.3 (*Ulpianus libro vicesimo quarto ad Sabinum*): *Si legatum sit relictum annua bima trima die, triginta forte, dena per singulos debentur annos, licet non fuerit adiectum "aequis pensionibus". 1. Proinde et si adiectum fuerit "pensionibus", licet non sit insertum "aequis", item si scriptum fuerit "aequis", licet non sit adiectum "pensionibus", dicendum erit aequas fieri. 2. Sed si adiectum "pen-*

sionibus inaequis", inaequales debebuntur: quae ergo debeantur, videamus. Et puto eas deberi (nisi specialiter testator electionem heredi dedit), quas vir bonus fuerit arbitratus, ut pro facultatibus defuncti et depositione patrimonii debeantur. 3. Sed et si fuerit adiectum "viri boni arbitratu", hoc sequemur, ut pro positione patrimonii sine vexatione et incommodo heredis fiat. 4. Quid si ita "pensionibus, quas putaverit legatarius?" an totum [tostum] petere possit, videamus. Et puto totum non petendum simul, sicut et in heredis electione. Fieri enim pensiones debere testator voluit, quantitates dumtaxat pensionum in arbitrio heredis aut legatarii contulit. 5. Sed si ita sit legatum "heres meus Titio decem trima die dato", utrum pensionibus an vero post triennium debeatur? Et puto sic accipiendum, quasi pater familias de annua bima trima die sensisse proponatur. 6. Si cui certa quantitas legetur et, quoad praestetur, in singulos annos certum aliquid velut usuras iusserit testator praestari, legatum valet: sed in usuris hactenus debet valere, quatenus modum probabilem usurarum non excedit[7]. / Where a legacy, for instance of thirty aurei, is left to me payable in one, two, and three years, ten aurei will be due each year, even though the words "in equal payments" were not added. 1. Hence, if the words "in payments" were employed, even though "equal" was not added, it must be said that equal payments must be made, just as if the word "equal" was written, and the word "payments" had not been added. 2. But if the words, "In unequal payments," are added, unequal payments must be made. But let us consider in what way they ought to be made. I think that they ought to be made in accordance with the judgment of a good citizen (unless the testator expressly left it to the choice of the heir), dependent upon the means of the deceased, and the place where his estate is situated. 3. If, however, it was stated that payment should be made in accordance with the judgment of a good citizen, we infer from this that it must be made with reference to the situation of the estate, and without any trouble or annoyance to the heir. 4. But if the testator directed that payment should be made in the way that the legatee might select; let us see whether the entire amount can be demanded at once. I think that this cannot be done, just as in the case of the choice of the heir; for the testator intended that several payments should be made, and that the amounts of the same should depend upon the judgment of the heir, or of the legatee. 5. Where, however, a legacy has been bequeathed as follows, "Let my heir pay Titius ten aurei in three years," will the amount be payable in three annual instalments, or at the expiration of three years? I think that this should be understood as if the testator had intended the payments to be made in one, two, and three years. 6. Where a certain sum of money is bequeathed to anyone, and it is stated that, until it is paid, something shall be given to the legatee every year, as, for example, interest, the legacy will be valid; but in order to make the payment of the interest valid, the sum to be paid annually must not exceed the ordinary rate of interest.

The jurist tries to honour the testator's will by construing the legacy within reasonable limits. It was for a good reason, too, that the testator stipulated unequal payments. On the other hand, had the testator himself provided that the payments should be determined through *viri boni arbitratu*, the pay-out, in Ulpian's opinion, should be commensurate with the situation of the estate and with no detriment to the heir (*sine vexatione et incommodo heredis*). It was also possible to allow the successor to choose the method of determining the amount of payments. In this case, however, the performance was specific, allowing the heir some flexibility in fulfilling his obligation.

7. The rigid regulations adopted in the Republic's twilight period, culminating in the principle legatum in *heredis potestate poni non potest*, were counterbalanced by the emergent institution of *fideicommissum*. Initially, the institution was based solely on trust. As it became contestable under *cognitio extra ordinem*, it started evolving gradually allowing more interpretative leeway to judges ruling on its validity. The sources quote the clause *si volueris, si iustum putaveris, si aestimaveris, si comprobaveris.*

> D. 30.75 pr. **(**Ulpianus *libro quinto disputationum*): *Si sic legatum vel fidei commissum [fideicommissum] sit relictum "si aestimaverit heres" "si comprobaverit" "si iustum putaverit", et legatum et fideicommissum debebitur, quoniam quasi viro potius bono ei commissum est, non in meram voluntatem heredis collatum*[8]. / Where a legacy or a trust is left as follows: "If my heir should deem it proper, if he should approve of it, if he should consider it just;" the legacy or the trust will be due; since it was entrusted to him as to a man of character, and the validity of the bequest was not dependent upon the mere consent of the heir.

Ulpian reports that if a legacy or *fideicommissum* was made with the condition: „if the heir thinks it proper, if the heir approves it, if the heir thinks it right," the legacy and *fideicommisus* would stand, for they were granted to the heir as an honest person rather than give free rein to his unrestrained will. Perhaps, the original passage referred, as postulated by Beseler and Grosso, to legacies and the solution was negative – *legatum non debebitur*, while the final fragment was added by compilers who wanted to unify regulations on legacies and *fideicommissum*.

Let us take a look at another passage by Ulpian, taken from the second book on *fideicommisus*:

> D. 32.11.7-8 (Ulpianus *libro secundo fideicommissorum*): *Quamquam autem fideicommissum ita relictum non debeatur "si volueris", tamen si ita adscriptum fuerit: "si fueris arbitratus" "si putaveris" "si aestimaveris" "si utile tibi fuerit visum" vel "videbitur", debebitur: non enim plenum arbitrium voluntatis heredi dedit, sed quasi viro bono commissum relictum. 8. Proinde si ita sit fideicommissum relictum: "illi, si te meruerit", omnimodo fideicommissum debebitur, si modo meritum quasi apud virum bonum collocare fideicommissarius potuit: et si ita sit "si te non offenderit", aeque debebitur: nec poterit heres causari non esse meritum, si alius vir bonus et non infestus meritum potuit admittere*[9]. / Although a trust which is left in the following manner is not valid, namely, "If he should

> be willing," it is, nevertheless, valid if expressed as follows: "If you should judge it advisable; if you think it ought to be done, if you should deem it expedient; if it seems, or should seem to you to be advantageous;" for the will does not confer full discretion upon the heir, but the trust is left, as it were, to the judgment of a good citizen. 8. Hence, where a trust is left as follows, "If he should render some service to him," it will undoubtedly be valid, if the beneficiary has been able to render the heir any service of which a good citizen would approve. It will likewise be valid if left as follows, "Provided that he does not offend you," and the heir cannot allege that the beneficiary does not deserve it, if some other good citizen who is not prejudiced, will admit that the party is deserving of the benefit.

The clause *si volueris – if you would* invalidated a *fideicommissum*, although the addition of phrases such as if you think, if you deem, if you decide, etc. was acceptable. The first phrase made the *fideicommissum* dependent on the successor's unrestrained will – this could not be construed as an obligation. The evaluative part of the phrase made it possible to verify compliance with the request based on a criterion that a model *vir bonus* would approve of. Similarly, if a *fideicommissum* was subject to the clause: "if you shall find him worthy", the successor may not claim that the beneficiary of that *fideicommissum* would be found worthy by an impartial and honest person.

The fact that jurists analysed these phrases in detail means that they tried to find out if the issue in dispute was to fulfill the deceased person's wishes. *Fideicommissum* was that institution which, in a way, allowed – in the words of Franciszek Longchamps[10] – intervening in the future in ways that were not possible under any other legal institution.

1. D. 33.6.7 pr. Javolenus, On the Last Works of Labeo, Book II. **2.** Tr. by S. P. Scott, Cincinnati, 1932. **3.** *Maschi C. A.* Studi sull`interpretazine dei legati. Verba e voluntas, Milano 1938, s. 57–59; *Frezza P.* Ius gentium, RIDA2, 1949, s. 288–308**;** *Grosso G.* Obbligazioni. Contenuto e requisiti della prestazione. Obbligazioni alternative e generiche, Torino 1955, s. 110–111; *Horak F.* Rationes decidendi: Entscheidungsbegründungen bei den älteren römischen Juristen bis Labeo, I. Band, s. 96; *Wieling H. J.* Testamentsauslegung im Römischen Recht, München 1972, s. 24. **4.** D. 32.43. Celsus, Digest, Book XV. **5.** *Nicotri M. T.* De dote quantitate. A proposito di Cels. D. 23.3.60 e 32.43, Teoria e storia del diritto privato, 4 2011; *Gianozzi E.* L'emploi des standards en droit romain, Fundamina (Pretoria) vol. 22 n.2, Pretoria 2016, s. 221–222; *Cristaldi S. A.* Sulla clausola "quanti Tiius rem aestivaverit" nella riflessione dei giuristi romani, RIDA 58, 2011, s. 134; *Betancourt F.* Sobre una pretendida "actio arbitraria" contra el usufructuario, en AHDE. 45 (1975), s. 370–371; *Wojtczak M.* Arbitation and Settlement of Claims in Late Antiquity, Warsaw – Donostia – San Sebastian 2016, p. 63 n. 52. **6.** D. 33.1.13.1 Scaevola, Opinions, Book IV. **7.** D. 31.3 Ulpianus, On Sabinus, Book XXIV. **8.** D. 30.75 pr. Ulpianus, Disputations, Book V. **9.** D. 32.11.7-8 Ulpianus Trusts, Book II. **10.** *F. Longchamps de Bérier.* O elastyczność prawa spadkowego, Warszawa 2006, s 184.