Captatio and *crimen*

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I. *Introduction*

For several years now I have been making a study of various aspects of the Roman law of succession that one encounters in the first nine books of the Letters of Pliny the Younger. I hope to complete this work in the foreseeable future. In the course of my studies I have been struck by the fact that some of the letters relate not only to the Roman law of succession but also to Roman Penal Law. Nearly all the cases I am concerned with in these letters relate to the drawing up of a will. Letters VI.31 and VII.6, for instance, deal with the forging of a will. The person responsible is regarded as having committed a misdemeanour (or indictable offence) and is liable to be punished in accordance with the *lex Cornelia de falsis*. However, there are several letters, e.g. II.20 and IV.2, which deal with legacy-hunting: *captatio*. This is another equally reprehensible activity, which is repeatedly criticised not only by Pliny but also by satirical writers such as Juvenal (1) and Martial (2). In most of the cases these authors describe, it is a question of an improper action rather than an illegal one. Showering someone with presents in the hope that he will leave you something in his will is not decent, and 'fishing' for little presents is not very nice either. People who do things like this — I mean legacy-hunting not 'fishing' — are not guilty in the

(1) MARTIAL, *Epigrams* II 40, IV 56, V 39, VI 27, IX 9, IX 48, XI 81, XII 40, XII 90.

(2) JUVENAL, *Satires* XII.

legal sense. Such behaviour is not punishable by law. However, if *captatio* is accompanied by *dolus* or *vis,* i.e. if a person by threats or deception prevents another person from making or altering a will, or, alternatively, forces him to make or alter a will, then it is a different matter.

The point which interests me and which I shall examine in this paper is that in modern Romanistic literature this type of *captatio* is also regarded as a misdemeanour. However, it is not clear what kind of misdemeanour *captatio* is when it is accompanied by *vis* or *dolus* and what law applies. I hope that my comments and arguments will help to clarify the matter.

In the handbooks a case where one person prevents another person by force or by deception from making a will is dealt with under the law of succession in the section on *indignitas*. According to Voci (3) in his handbook on the law of succession, a deed of that kind had three consequences:

1. it was a misdemeanour, and was therefore punished;
2. the *praetor* applied the relevant clause of the edict *"quibus bonorum possessio non competit"* and refused *bonorum possessio* to the person who had incurred the guilt through using force or deception; furthermore, *denegatio actionum* was applied to civil heirs who did not make use of the *petitio* of *bonorum possessio*;
3. the sanction of *indignitas* was passed (a sanction introduced by Hadrian). The result of this was that the *fiscus* could claim the heir's portion.

According to Voci, a case where a person who compels someone else by force or deception to make a will also comes under this ruling.

II. To what extent is this interpretation to be found in the sources ? In the Digest as well as in the Codex the subject is

(3) P. Voci, *Diritto ereditario romano* I, Milan 1967², 470 ff.
The *denegatio actionum*, mentioned sub 2, relates to the *hereditatis petitio* and presumably to the actions the *de cuius* himself had.

dealt with in D.29.6 and C.6.34 under the heading "*si quis aliquem testari prohibuerit vel coegerit*". Both titles are quite short: D.29.6 contains three texts — by Ulpian, Paul and Papinian respectively, C.6.34 contains one constitution of Alexander Severus, two constitutions of Diocletian and one of Zeno. Let us first look at the opening text of D.29.6.

D.29.6.1 pr. Ulpianus libro quadragensimo octavo ad edictum. *Qui dum captat hereditatem legitimam vel ex testamento, prohibuit testamentarium introire volente eo facere testamentum vel mutare, divus Hadrianus constituit denegari ei debere actiones denegatisque ei actionibus fisco locum fore.*

D.29.6.1 pr. Ulpian in the 48th book of his commentary on the edict. With regard to a person who, while trying to lay his hands on an inheritance by virtue of intestacy or a will, prevents the "testamentarius" from entering while the other person (sc. the *de cuius*) wishes to make or change a will, the Divine Hadrian decrees that the said person must be denied the legal actions and thereafter such actions should be taken by the fiscus.

This text comes from the 48th book of Ulpian's commentary on the edict. It concerns the edict XXVc entitled "*de bonorum possessionibus : de clausulis generalibus*", paragraph 163: "*quibus bonorum possessio non competit*" (4). This is one of the few texts in which *captatio* is actually mentioned by name (5). It should be noted that this text clearly points to the existence of the second and third consequences of *captatio* mentioned by Voci, namely the *denegatio actionum* and confiscation, but there is no allusion to the first consequence, i.e. that *captatio* is a misdemeanour. Nothing is said about the first consequence in the following cases presented by Ulpian either, or in the text by Paul on the same subject. But there does seem to be an allusion to it in the fragment by Papinian.

(4) O. Lenel, *Das Edictum Perpetuum*, Leipzig 1927³, 360.

(5) The "disposizioni captatorie" are a related phenomenon; see in this connection P. Voci, *Diritto ereditario romano* II, Milan 1963², 795.

D.29.6.3. Papinianus libro quinto decimo responsorum. *Virum, qui non per vim nec dolum, quo minus uxor, contra eum mutata voluntate, codicillos faceret, intercesserat, sed ut fieri adsolet, offensam aegrae mulieris maritali sermone placaverat, in crimen non incidisse respondi, nec ei quod testamento fuerat datum auferendum.*

D.29.6.3. Papinian in the 15th book of his Responsa. With regard to the man who prevented his wife, not by force or trickery, from making a codicil because she had changed her attitude towards him to this disadvantage but who, as normally happens, had calmed the anger of the sick woman in a matrimonial discussion, I have given my opinion that he has not committed a *crimen* and that he must not be deprived of the amount left to him in the will.

The first constitution of C.6.34 also seems to allude to the punishable offence.

C.6.34.1. Imp. Alexander A. Severae. *Civili disceptationi crimen adiungitur si testator non sua sponte testamentum fecit, sed compulsus ab eo qui heres est institutus vel quoslibet alios quos noluerit scripserit.*

C.6.34.1. Emperor Alexander A. to Severa. A *crimen* is added to a civil suit if a testator has made a will, not on the basis of his own personal wishes but compelled by the person who was instituted as heir, or if he has included others in his will whom he did not wish to include.

The second constitution of Diocletian and Maximian on this subject seems to allude to the punishable offence as well.

C.6.34.3. Impp. Diocletianus et Maximianus AA. et CC. Eutychidi. *Iudicium uxoris postremum in se provocare maritali sermone non est criminosum.*

C.6.34.3. The Emperors Diocletian and Maximian to Eutychis. Making the wife write her last will to his advantage in a matrimonial discussion is not *criminosum*.

In the fourth constitution on this subject, the constitution of Zeno, *captatio* perpetrated by force or deception *is* declared to be a punishable offence. The type of punishment mentioned

is confiscation of the whole property and exile. For the classical period (and Pliny lived during that period) this survey must lead us to following conclusions:

a. Zeno's constitution must be ignored in connection with this period;

b. There seem to be three cases where *captatio* is said to be a "*crimen*", but in fact there are only two, since, D.29.6.3 and C.6.34.3 deal with the same case. The only difference between them is that D.29.6.3 deals with preventing someone from making or altering a will, whereas C.6.34.3 deals with compelling someone to make or alter a will;

c. Not one of the three texts in question gives detailed information about the supposed *crimen*.

III. The handbooks by Bonfante (6), Biondi (7) and Voci (8) do not give much information about this *crimen* either. They do say that compelling a person to draw up a will or preventing a person from drawing one up is punishable, but they do not go into the matter further. In Kaser's handbook this *crimen* is not mentioned at all (9).

Nardi (10) in his monography "I casi di indegnità" makes a brief reference to the question in the light of D.29.6.3. According to Nardi, the text should be interpreted as follows. According to the *inscriptio*, the text comes from the 15th book of Papinian's Responsa, which concerned *iudicia publica*. According to Nardi, Lenel should not have put this text in his Palingenesia under the heading "*Ad legem Corneliam de falsis et SC. Libonianum*". The connection between the case described in D.29.6.3 and the ruling on forgery is not clear to him. He takes the view that the link is solely with penal law in

(6) P. Bonfante, *Corso di diritto romano VI, Le Successioni*, Milan 1974,[2] 419.

(7) B. Biondi, *Successione testamentaria e donazioni*, Milan 1955[2], 528.

(8) P. Voci, *Diritto ereditario romano* I, Milan 1967[2], 470.

(9) M. Kaser, *Das römische Privatrecht* I, Munich 1971[2], 719 note 6: 726 note 43.

(10) E. Nardi, *I casi di indegnità*, Milan 1937, 207.

general. Nardi does not consider what kind of legal liability is involved here.

In IURA, Avonzo [11] wrote an article about the penal consequences of "violenza testamentaria" in the light of C.6.34.1, the constitution of Alexander Severus, dating from 229. According to Avonzo, this text points to consequences for civil and penal law, although these could not yet be defined in detail. With regard to the penal aspect, Avonzo comes to the conclusion that Lenel's view, namely that this fragment had been headed "*Ad legem Corneliam de falsis et SC. Libonianum*", is not satisfactory and that the fragment must have related to the *crimen* of *vis*. The *leges Iuliae de vi* should not really have been applied to this case, but during the period that followed, all kinds of cases of extortion gradually came under these laws, as did this special case. Avonzo is quite certain that at the time of Severus forcing someone to make a will was regarded as a *crimen* of *vis*.

Finally, Hartkamp [12], in his book on *metus*, supported Avonzo's view — namely that a special penal sanction was introduced which in the late classical period came under the *lex Iulia de vi privata*.

The opinions just mentioned are not very convincing. Because of the section in which D.29.6.3. was placed, Nardi supposes that Lenel considered *captatio* perpetrated by force or deception to be a misdemeanour of forgery, although he himself found this interpretation very unlikely. I agree with Nardi, however I doubt whether Lenel took the conclusion on forgery himself. Possibly the Roman lawyers just put it there because it had something to do with the making of a testament without thinking of forgery. Avonzo's hypothesis, also taken over by Hartkamp, that the case here was one which in the late classical period came under the *Lex Iulia de vi*

(11) F. Avonzo, *La repressione penale della violenza testamentaria*, IURA 6 (1955) 120 ff.; in a similar vein see earlier work by E. Nardi, *La violenza testamentaria*, SDHI 2 (1936) 123.

(12) A.S. Hartkamp, *Der Zwang im römischen Privatrecht*, Amsterdam 1971, 145 ff. 161.

privata, is not convincing either. Why is this not mentioned anywhere in the sources ? And how is a law on criminal offences to be applied by analogy ? Why did Zeno have to make it an indictable offence again ? What then does *civili disceptationi* mean in C.6.34.1 ? (13) How could *captatio* by means of *dolus* come under this law ? To find an answer to these questions I think I shall have to approach the matter from a different angle.

IV. What is the meaning of *crimen* in the juridical sources ? The word *crimen* was definitely used to denote a misdemeanour and could lead to prosecution. Albertario (14) thought that Roman lawyers used the term *crimen* solely in relation to public, penal law. Also with regard to other terms, he was of the opinion that Roman lawyers used a very dogmatic and rigid terminology. Lauria (15) and Segrè (16) are two authors who disagreed with this view. They doubted whether Roman lawyers always used the term *crimen* to denote a misdemeanour according to public law, and they contrasted it with a *delictum* in private law. Kaser (17) also made a brief contribution to this discussion recently: he stated that he was very doubtful whether Gaius in his Institutions used the word *crimen* only for a misdemeanour which was punishable in public law.

Longo (18) in his monography "Delictum e crimen" examines the use of the word *crimen* in the sources and comes to the following conclusion. Albertario's view given above is too much

(13) O. LENEL, *Das erzwungene Testament*, SZ 10 (1889) 81 also leaves this question open.

(14) E. ALBERTARIO, *Delictum e crimen*, Studi di diritto romano, Milan 1936, 175.

(15) M. LAURIA, *Contractus, delictum, obligatio*, SDHI 4 (1938) 188.

(16) G. SEGRÈ, *Obligatio, obligare, obligari nei testi*, St. Bonfante III, Milan 1930, 501 with literature references; for a discussion see too E. LEVY, rec. E. ALBERTARIO, *Maleficium*, St. Perozzi, Palermo 1925, 221 in SZ 46 (1926) 415 ff.

(17) M. KASER, *Gaius und die Klassiker*, SZ 70 (1953) 170 ff.

(18) G. LONGO, *Delictum e crimen*, Milan 1976, 174 ff. Surprisingly LONGO does not mention these texts at all.

of a generalisation to be tenable, although we do know with certainty that a number of texts containing the word *crimen* used in the non-traditional sense have been altered in the course of time. Albertario fails to take into account the fact that as the Roman penal system developed, the use of the word *crimen* in a strictly technical and unchanging sense is unrealistic and is not in agreement with what the sources tell us. No one will deny that the Romans made a distinction between the so-called public delicts which were dealt with in public proceedings and *delicta* (or *maleficia*) which were dealt with in private proceedings. However, according to Longo, one of the developments during the Principate was that the *cognitio extra ordinem* replaced other types of procedures and was used to deal with *delicta* and all other forms of unlawful behaviour. With this development it became impossible to continue to use the word *crimen* in its strict, technical sense. This was certainly the case with the so-called *crimina extraordinaria,* in other words *crimina* which were not based on the *leges* but on imperial constitutions. I find Longo's opinion on the use of the word *crimen* very convincing.

Now what are the implications of Longo's theory for the interpretation of the texts dealing with deeds which led to *indignitas* in general and to *captatio* in particular ? Was *crimen* used in a non-technical sense here too ? The following text gives a clear explanation.

C.6.35.6. Imp. Alexander A. Venusto et Clementino. *Minoribus quinque et viginti annis heredibus non obesse crimen inultae mortis placuit. Cum autem vos etiam accusationem pertulisse et quosdam ex reis punitos proponatis, licet is qui mandasse caedem dicitur provocaverit, vereri non debetis, ne quam hereditatis paternae a fisco meo quaestionem patiamini. Convenit enim pietati vestrae respondere causam ap-*

C.6.35.6. Emperor Alexander A. to Venust and Clementine. Heirs who have not yet reached the age of 25 cannot be accused of the *crimen* of not avenging death. Now since you state that you have persisted with the charge and some of the accused have been punished and even if the man who was said to have given the order to murder has appealed, you need not be afraid that you will be asked by my *fiscus* to relin-

pellationis reddenti. Quod si maioris aetatis fuissetis, etiam ex necessitate provocationis certamen implere deberetis, ut possitis adire hereditatem (229).

quish your paternal share. It is in keeping with your filial duty that you take action against someone who makes a charge of this kind. If you had been older you would have been obliged to complete the procedure in order to enter upon the inheritance.

This constitution of Alexander Severus comes from the title C.6.35: "*De his quibus ut indignis auferuntur et ad senatus consultum Silanianum*". Here we have a case of *indignitas* not arising from *captatio*. The text tells of a testator who had not died a natural death. The heirs have a moral duty to bring a complaint against the perpetrators and to see to it that they are sentenced. If the heirs fail to take this step, then they are regarded as *indigni* and their share of the inheritance is claimed by the fiscus. It is only heirs over the age of 25 who have this moral obligation.

According to current opinion (19), it is inconceivable that there should ever have been a legal obligation to take revenge; in a primitive society one normally took one's revenge by a vendetta. As soon as laws were invented this custom came to an end. Romanists however do not seem to have thought about what *crimen* really means here, and whether in addition to the legal consequences of confiscation there were not other consequences of a legal nature.

In my view *crimen* is used here to denote a failure to do something; this failure (or neglect) is regarded as so improper that it is punished by confiscation of the inheritance. In this text, C.6.35.6, we see *crimen* in a non-technical sense.

In my opinion *crimen* is used in the same way in the texts dealing with *captatio*.

(19) B. Biondi, *Successione testamentaria e donazioni*, Milan 1955², 160 note 2; P. Voci, *Diritto ereditario romano* I, Milan 1967², 57 ff, 468; E. Nardi, *I casi di indegnità*, Milan 1937, 168 note 2.

V. In D.29.6.3 *crimen* obviously refers to the last words of the text *"nec ei quod testamento fuerat datum auferendum"* Papinian's advice in this case is that a husband who in a matrimonial discussion calms the anger of his wife and prevents her from altering her will to his disadvantage by adding a codicil is not acting contrary to the law. *Crimen* therefore does not refer to a particular misdemeanour in the original sence, but to improper conduct which, since Hadrian's constitution, leads to confiscation.

C.6.34.1 now becomes clear too. By analogy with D.29.6.1 *crimen* here relates to improper conduct which leads to confiscation; the *civilis disceptatio* relates to the procedure concerning succession, i.e. *hereditatis petitio* ; the only difference between these texts is that D.29.6.1 deals with the *formula* procedure while C.6.34.1 deals with the *cognitio extra ordinem* (20).

In C.6.34.3 the word *"criminosum"* by analogy with D.29.6.3, also refers to confiscation.

It follows that the titles D.29.6 and C.6.34 begin by telling us both in D.29.6.1 pr. and C.6.34.1 respectively, that a person who prevents another person by force or deception from making or altering his will, or who compels him to make it or alter it, cannot claim his inheritance, but the inheritance can be claimed by the fiscus. The other cases are simply variations of this notion. Only C.6.34.4 differs to a certain extent; there Zeno makes *captatio* perpetrated by force or deception a punishable offence.

VI. *Conclusion.*

According to current opinion, *captatio* by means of *vis* or *dolus* had three consequences : 1) it was a misdemeanour, 2) the praetor would refuse to allow *bonorum possessio* or there was *denegatio actionum,* 3) there would be confiscation (a measure introduced by Hadrian). In my opinion, however, 1) is not

(20) Cf. C.3.8.3; for further texts and literature see M. KASER, *Das römische Zivilprozessrecht*, Munich 1966, 348.

clear (what would the penal consequence be ?) and further the structure of D.29.6 and C.6.34 and the meaning of some parts of the wording are not very clear either. As far as the penal aspect is concerned, the common interpretation is based on the accepted, but not unchallenged view that the Roman lawyers used the term *crimen* strictly in the pure technical penal sense.

I think that the word *crimen* in D.29.6 and C.6.34 is not used in the strict technical sense. We are dealing here with a *crimen extraordinarium*, an action which was simply regarded as being improper, until Hadrian decreed that the perpetrator should be declared *indignus*. There were not three consequences, but only two — those mentioned sub 2) and 3). The other one was non-existent. This view is certainly not a new one: it was more or less supported by great scholars of the past such as Azo (21), Accursius (22), Cuiacius (23) and Voet (24).

(21) Azo, *Lectura super codicem* ad C.6.34 thinks that *"civilis disceptatio"* was connected with the *hereditatis petitio* and that *"crimen"* referred to confiscation on the grounds of *indignitas*.

(22) Accursius, *Glossa ordinaria* ad D.29.6 and C.6.34 calls the *crimen* here a *crimen extraordinarium*. He thinks that *"civilis disceptatio"* in C.6.34 relates to the *hereditatis petitio*. Avonzo says that Accursius calls it a *crimen extraneum* ! This seems to me to be incorrect.

(23) Cuiacius, *Opera Omnia* VII, Paris 1685, 829 believes, as does Accursius, that the punishment for the *crimen* in D.29.6 and C.6.34 is simply the claim by the fiscus to the share of the *captator*. Unlike Accursius, Cuiacius thinks that « *civilis disceptatio* » in C.6.34.1 does not relate to the *hereditatis petitio* by the *captator* but to the *actio de dolo* by the heir who has been treated unfairly. The latter seems to me to be incorrect. This would mean that there were two different types of *captatio*: *captatio* by *vis* would then be a public *crimen* that would come under the *lex Iulia*, and *captatio* by *dolus* would be a private praetorian delict. I think we are dealing here with one *crimen extraordinarium*.

(24) J. Voet, *Commentarius ad Pandectas* II, The Hague 1716, 385. For further literature see E. Nardi, *I casi di indegnità*, Milan 1937, 213[4].