The Origin of "*quando minus scriptum, plus nuncupatum videtur*" used by Diocletian in C. 6.23.7

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I. — The subject of my paper is the phrase « *quando minus scriptum, plus nuncupatum videtur* » as it appears in the constitution C. 6.23.7 of the emperor Diocletian. The phrase, which comes from the law of succession upon testament, implies that there is a difference between what a testator really intended and what he has stated in the written deed. This paper will be my contribution to the theme of this conference: *verba* and *voluntas*.

The Diocletian constitution in question runs as follows: C. 6.23.7

Impp. Diocletianus et Maximianus AA. Rufinae. *Errore scribentis testamentum iuris sollemnitas mutilari nequaquam potest, quando minus scriptum, plus nuncupatum videtur. Et ideo recte testamento facto, quamquam desit "heres esto", consequens est existente herede legata sive fideicommissa iuxta voluntatem testatoris oportere dari.* (290)

The emperors Diocletian and Maximian AA. to Rufina. The rules of law cannot be violated as a result of an error made by the writer of the will, because it is thought that less has been written down than was nuncupated. And if the will is drawn up correctly, even although the words "must be heir" do not appear, the legacies should be passed on or the fideicommissa should be execu-

ted in accordance with the will of the testator as and when the appointed heir presents himself.

The following case was put to the emperor. A testator had pronounced his last will to a scribe who proceeded to compose a deed from it. When the deed was opened upon the death of the testator it turned out that the institution of the heir had not been formulated in the prescribed manner: the words "*heres esto*", "must be heir" were missing. From the last sentence of the rescript one can conclude that the person instituted as heir in the will considered the will to be invalid, and refused to pay over the legacies or execute the *fideicommissa* which the will required him to do. Since the words "*heres esto*" refer to only one person and the validity of the will depends on the validity of this one *heredis institutio* it follows that only one person must have been appointed as heir. One concludes from the fact that the testamentary heir is keen to prove the invalidity of the will that that person was also entitled to be heir on the death of the testator. The question was whether this will was in fact invalid because of the missing words. In their reply the jurists of the chancery assumed from the outset that in other respects the will had been drawn up in the correct manner (1).

What could the interest of the addressee, Rufina, have been in this case? Perhaps she was entitled to receive a legacy or a *fideicommissum* (2) and for this reason was interested in the validity of the will. Possibly, however, she was instituted as heir in the will and wanted to prove that the will was invalid in order to avoid having to pay over the legacies. The rescript does not say whether Rufina was involved as a legatee or as a testamentary heir.

(1) In my opinion this can be inferred from the words "*recte testamento facto*".

(2) Apparently there was no codicillary clause in the will. If there had been such a clause, the invalidity of the will would not have rendered the *fideicommissum* invalid and the legacy would have been converted into a valid *fideicommissum*.

What kind of will are we dealing with here? The reference to the *nuncupatio* leads us to conclude that the will was a mancipatory will (3). How did this will come into being? Voci (4) holds the view that since there had been an abstract *nuncupatio* there must also have been a *mancipatio familiae*. To me this conclusion does not seem justified: at the end of the third century the *mancipatio familiae* had fallen into disuse (5); about 325 Constantine adapted the law to this state of affairs by declaring that the *mancipatio familiae* was no longer necessary for the making of a will (6). Several other romanists (7) have expressed the view that this will was formulated entirely orally, in other words all dispositions had been included in the *nuncupatio*, and that the deed served simply as proof. Amelotti (8) believes that it was still common at that time for a testator to dictate his last will to a scribe and that the testator then submitted the deed to the assembled witnesses for sealing while he made a short declaration, the *nuncupatio*, that the deed contained his will.

(3) The will in question cannot have been a so-called praetorian will. The jurists regard the incorrect institution of the heir as valid by virtue of the *nuncupatio*. They could not have used this argument if the will had been drawn up and validated by being sealed in the presence of seven witnesses.

(4) P. Voci, *Diritto ereditario romano* II, Milan 1963², 126.

(5) According to M. Amelotti in *Il testamento romano*, Florence 1966, 217 ff.

(6) It is still a matter of dispute whether this rule stems from Constantine or from his son, Constantius II. M. Amelotti in *Il testamento romano*, Florence 1966, 246, argues on the basis of information given by Eusebius in *De Vita Constantini*, IV 26, that Constantine already stated that only the cooperation of seven trustworthy witnesses was required for the drawing up of a valid will.

(7) According to, for instance, H. Siber, *Römisches Privatrecht*, Berlin 1928, 347 note 1; M. David in *Studien zur heredis institutio ex re certa im klassischen römischen und Justinianischen Recht*, Leipzig 1930, 7 note 7, and C. Sanfilippo in *Studi sull' hereditas* I, Ann. Pal. 17 (1937), 147, are of the opinion that the heirs had been named orally prior to the drawing up of the will. These opinions are rightly challenged by G. Dulckeit in *Plus nuncupatum, minus scriptum*, SZ. 70 (1957) 198 ff.

(8) M. Amelotti, *Il testamento romano*, Florence 1966, 168.

Which of the last two theories is the correct one? If one assumes that the will was formulated entirely orally, then the missing words in the subsequent deed could never be a reason for doubting the validity of the will; this theory is therefore untenable. If one assumes that the testator submitted the deed, which had been drawn up previously, to the assembled witnesses for sealing, while he made a short declaration that the deed contained his will, then invalidity of the institution of the heir in the deed would mean that the will was invalid, since there was obviously only one heir. Therefore it would seem that this will came into being in the way described by Amelotti.

The jurists of the chancery regarded the will as valid by assuming ("*videtur*") that the entire contents of the will were expressed in the *nuncupatio* and that the words that were missing from the deed had in fact been uttered. This conclusion is in itself understandable; probably only one name was mentioned in the deed in the place where normally the heirs are listed, so it could be deduced that the testator intended to institute that person as heir. The phrase "*plus nuncupatum, minus scriptum videtur*" is particularly striking in that it is pithy and includes the notion of the *nuncupatio* in its original meaning of a public oral proclamation of the entire last will and testament.

II. — The members of Diocletian's chancery were not the first to use the phrase "*quando minus scriptum, plus nuncupatum videtur*". It occurs in the works of classical jurists. In romanist literature one comes across a great variety of views concerning the origin of this argument. Some people think that it was first formulated by the jurist Sabinus in the early classical period; others say it stems from the classical jurist Celsus; others again think that it stems from the time of Justinian. Personally I do not find any of these views entirely convincing because in my opinion most of them depend on incorrect interpretations of various texts.

The texts in question are as follows; the phrase *quando minus scriptum, plus nuncupatum videtur* first occurs with slightly

different wording in a passage from Ulpian's commentary *ad Sabinum* namely in D. 28.5.1.5. Furthermore, the argument also occurs twice in another passage from Ulpian's commentary on Sabinus, namely in D. 28.5.9.2 and 5. In these passages Ulpian quotes the views of Celsus and Marcellus respectively.

Finally, it appears from a text of Papinian, D. 31.67.9, that he too was familiar with this argument (9). This seems to be a good moment to look more closely at these three texts by Ulpian and by Papinian.

III. — The phrase "*quando minus scriptum, plus nuncupatum videtur*" is used in D. 28.5.1.5 in the following way:

D. 28.5.1.5

Ulpianus libro primo ad Sabinum. *Si autem sic scribat: "Lucius heres", licet non adiecerit "esto", credimus plus nuncupatum, minus scriptum; et si ita: "Lucius esto", tantundem dicimus; ergo et si ita: "Lucius" solummodo. Marcellus non insuptiliter non putat hodie hoc procedere. Divus autem Pius, cum quidam portiones inter heredes distribuisset ita: "ille ex parte tota, ille ex tota" nec adiecisset "heres esto", rescripsit valere institutionem: quod et Iulianus scripsit.*

Ulpian in the first book of his commentary on Sabinus. But when he writes: "Lucius heir", we assume that even if he has not added "must be", more has been nuncupated and less has been written down; and when he writes "Lucius must be", we are of the same opinion, even if he writes only the word "Lucius". In rather a subtle way Marcellus does not consider that things are done like this today. But the divine Pius has decreed that, although someone had distributed the testamentary shares among the heirs as follows: "this one so much, that one so much", and had not added the words

(9) According to P. Voci in *Diritto ereditario romano* II, Milan 1963², 904-5 and 908, Papinian used this argument also in the case of D. 35.1.102; since this case is a somewhat deviant one I shall not discuss it here.

"must be heir", the institution is valid and this is in fact what Julian wrote.

The first book of Ulpian's commentary on Sabinus is devoted to the law of succession upon testament, and particularly to the words with which the heirs were to be instituted in the will (10). In the text in question Ulpian deals with a case in which the testator has not incorporated a complete *heredis institutio* in that he had omitted either the word "*heres*", or the word "*esto*" or both. Ulpian maintains that the missing words should be regarded as having been nuncupated. Ulpian states that Marcellus (11) in rather a subtle way does not consider that things are done like this. Ulpian then refers to a rescript of Antoninus Pius in which it is stated that a defective institution of that kind is valid and he quotes the opinion of Salvius Iulianus who is in agreement with his reasoning; it is not very clear what Ulpian means when he says that Marcellus in rather a subtle way does not agree with his reasoning. I shall return to this topic later (12).

Many romanists especially in the past considered D. 28.5.1.5 to have been interpolated. Particularly Albertario (13), Beseler (14) and Grosso (15) too considered that there was clear evidence here of alterations introduced by Justinian's compilers. According to Dulckeit (16) the phrase "*credimus plus nuncupatum, minus scriptum*" may have been incorporated in the text by a post-

(10) *Palingenesia*, Ulp. 2431.

(11) B. Biondi in *Successione testamentaria e donazione*, Milan 1955², 218, makes the mistake of mentioning Marcellus among the jurists who readily agree to regard as valid a *heredis institutio* from which the words "*heres esto*" are missing.

(12) See page 328.

(13) E. Albertario, "*Alcune osservazioni sulla legislazione di Constantino*", *Studi di diritto romano* V, Milan 1937, 264.

(14) G. von Beseler, *Beiträge zur Kritik der römischen Rechtsquellen* II, Tübingen 1911, 100.

(15) G. Grosso, *In tema di divergenza fra volontà e dichiarazione nel testamento*, St. Riccobono III, Palermo 1936, 169 note 10.

(16) G. Dulckeit, *Plus nuncupatum, minus scriptum*, SZ. 70 (1957) 198.

classical reviser. Voci ([17]) on the other hand assumes, without giving further explanation, that D. 28.5.1.5 is on the whole reliable. To me it also seems probable that this text is in the original version, because there is no compelling reason here why the text should have been interpolated.

Schulz ([18]), who also assumes that this text is genuine, believes that the argument "*credimus plus nuncupatum, minus scriptum*" stems from the jurist Sabinus. Following Lenel in his Palingenesia he is of the opinion that in his commentary on Sabinus Ulpian alternately quotes Sabinus and gives his own commentary on this quotation. In the text in question he thinks that the first part, in which the argument "*credimus plus nuncupatum, minus scriptum*" occurs, comes from Sabinus, whereas Ulpian's commentary does not begin until the second part with the opinion of Marcellus. This view has been supported recently by Voci ([19]) in his handbook on the Roman law of succession. Voci supports his contention with two arguments: a) Ulpian's commentary cannot begin until the opinion of Marcellus, and b) the word "*hodie*" is used to draw a distinction between Marcellus' time and the time of Sabinus.

I am not convinced by those who maintain that the first sentence of this text and therefore also the phrase "*credimus plus nuncupatum, minus scriptum*" should be ascribed to Sabinus. It is possible that now and then Ulpian quotes Sabinus at the beginning of a fragment, but this does not necessarily mean that he does this at the beginning of every paragraph. The way in which Schulz and Voci indicate which of the two jurists is speaking seems rather arbitrary. Neither Schulz nor Voci, for instance, says who is speaking in the paragraphs two and four which precede the text under discussion ([20]). A second objection

(17) P. Voci, *Diritto ereditario romano* II, Milan 1963², 125.

(18) F. Schulz, *Sabinus-fragmente in Ulpians Sabinus-commentar*, Halle 1906, 14.

(19) P. Voci, *Diritto ereditario romano* II, Milan 1963², 125, note 9.

(20) This failure to say who is speaking in paragraph 4 may be linked with the fact that older romanists assumed that Justinian's compilers had taken this paragraph from another context and had introduced it

is that if this procedure were followed Ulpian's text would contain only one quotation from Sabinus and would reproduce the opinions of Marcellus, Antoninus Pius and Salvius Iulianus, but Ulpian's own views would not be expressed at all. To me this seems improbable. Thirdly, Voci's argument that "*hodie*" is used to draw a contrast between Marcellus' times and the times of Sabinus is attractive by its very simplicity but is not a compelling one. It is conceivable that "*hodie*" refers to the time of Marcellus without that time being contrasted with some other time. It is possible, as Wieling (21) thinks, that Marcellus is pointing out that in his day the specific dispositions of a will were no longer stated in the *nuncupatio*; in this context this seems unlikely. It is also possible that, on the whole, Marcellus believes that a defective institution of this kind should nevertheless be regarded as invalid. Furthermore, it would be strange if Marcellus disagreed with an opinion of Sabinus which had been known one and a half centuries earlier and had been followed by Antoninus Pius and Salvius Iulianus. In my view the point is that there was a difference of opinion between Marcellus and Julian, and Antoninus Pius and Ulpian sided with Julian.

In my opinion the whole of the fragment of D. 28.5.1.5 stems from Ulpian himself. In it he continues his argument about the formulation of the *heredis institutio* which he began in paragraph three and which goes on to the end of the text. In paragraph three Ulpian begins to talk about the words which can be used in a *heredis institutio* and says which words are superfluous. In paragraph four he says that if someone is instituted as sole heir to a piece of land this disposition is valid in that the words referring to that piece of land are ignored; a *heredis institutio ex re certa* would in itself be invalid. In paragraph five Ulpian goes a step further by stipulating that even if one

into Ulpian's text; cf. M. David, *Studien zur heredis institutio ex re certa im klassischen römischen und Justinianischen Recht*, Leipzig 1930, 5 note 7. More recent romanists no longer support this view, as can be seen, for instance, from P. Voci, *Diritto ereditario romano* II, Milan 1963², 145.

(21) H.J. Wieling, *Testamentsauslegung im römischen Recht*, Munich 1972, 127.

or two essential words have been omitted from a *heredis institutio* it should still be regarded as valid. In paragraph six Ulpian mentions another rescript by Antoninus Pius in which an institution that includes the words *"illa uxor mea esto"* but omits the word *"heres"* is nevertheless regarded as valid (22). Ulpian ends paragraph seven with an example which Salvius Iulianus gives of an irregular institution in which the verb *"iubeo"* was missing from the phrase *"illum heredem esse"*; according to Julian the will was valid, the missing words being assumed present. The main theme in Ulpian's argument is the problem that arises when certain words appear in a will and a decision has to be made as to whether they constitute a valid institution of the heir. It is still not clear why Schulz and Voci have both omitted paragraph four in their reproduction of and commentary on this text, for the paragraph fits in very well with the context.

In my opinion one cannot conclude from D. 28.5.1.5 that the first part of this paragraph stems from Sabinus. I believe that the whole of this paragraph comes from Ulpian, in other words it is Ulpian himself who is using the argument *"credimus plus nuncupatum, minus scriptum"*.

IV. — The second text in which the phrase *"quando minus scriptum, plus nuncupatum videtur"* occurs is D. 28.5.9.2:

D. 28.5.9.2

Ulpianus libro quinto ad Sabinum. *Sed si non in corpore erravit, sed in parte, puta si, cum dictasset ex semisse aliquem scribi, ex quadrante sit scriptus, Celsus libro duodeci-*

Ulpian in the fifth book of his commentary on Sabinus. But if he has not made a mistake about the object but only a mistake about the share, e.g. if he dictated that a person

(22) The decision of Antoninus Pius to regard the institution of the heir nevertheless as valid is not as far-reaching as Ulpian's decision; both in this case where the will starts with the words *"illa uxor mea"* and in the case where the words *"ille ex parte tota, ille ex tota"* are used, these words can refer only to the institution of heirs and not to disinheritance. In the case described by Ulpian the possibility of disinheritance is not excluded.

mo quaestionum, digestorum undecimo (23) *posse defendi ait ex semisse heredem fore, quasi plus nuncupatum sit, minus scriptum: quae sententia rescriptis adiuvatur generalibus. Idemque est et si ipse testator minus scribat, cum plus vellet adscribere.*

should be instituted for half a share but he has been written down for a quarter, then, Celsus says in the twelfth book of the *Quaestiones* and the eleventh book of his Digests, it can be argued that that person will be heir to a half, as if more has been nuncupated and less has been written down; and this view is supported by general rescripts. And the same holds even if the testator himself institutes an heir for a smaller portion, although he wants to grant more.

The fifth book of Ulpian's commentary on Sabinus deals with the law of succession upon testament and is subtitled "*de institutionibus vitiosis*" (24).

In this fragment Ulpian deals with the following case. A testator dictating his last will to someone declared that a certain person was to be heir to half his inheritance; a mistake was made in the writing down of the will and the person in question was instituted as heir to one quarter of the inheritance instead of one half. When the testator died and his will was opened it was discovered that the testator had not disposed of his entire inheritance but only three quarters of it. Obviously there were other testamentary heirs, otherwise the appointed heir would have received everything. The problem was a difficult one to solve in view of the fact that the testator was expected to dispose of his entire estate. According to Celsus it could be argued that the heir in question was entitled to claim one half of the inheritance because it had been assumed that more had been nuncupated than had been written down.

(23) According to O. LENEL, *Palingenesia iuris civilis* II, Leipzig 1889, 1029 note 4, this should be "*sexto decimo*".

(24) *Palingenesia*, Ulp. 2460.

Many romanists, including Beseler (25) and Flume (26), and originally Voci (27) too considered that D. 28.5.9.2 had been interpolated; Grosso (28) also thinks that this text was altered by the compilers. These views have since been superseded and do not need to be taken into account here.

Dulckeit and Voci give two different but related interpretations of this text. According to Dulckeit (29) Celsus uses the phrase "*plus nuncupatum, minus scriptum*" metaphorically. The reason Dulckeit gives is that "eben nichts als nunkupiert erscheinen konnte, was nicht geschrieben war", whereas here something which has not been written down is assumed to have been nuncupated. In my opinion Dulckeit argues too dogmatically and therefore has failed to grasp the essential meaning of the *responsum* of Celsus. The reason for this is that he fails to understand the significance of the word "*dictasset*".

Voci (30) on the other hand thinks that Celsus did make an

(25) G. BESELER, *Beiträge zur Kritik der römischen Rechtsquellen* II, Tübingen 1911, 23; IV 141.

(26) W. FLUME, *Irrtum und Rechtsgeschäft im römischen Recht*, Festschrift Schulz I, Weimar 1951, 213.

(27) P. VOCI, *L'errore nel diritto romano*, Milan 1937, 108; in his *Diritto ereditario romano* II, Milan 1963², 830 note 23, VOCI considers this text to be original.

(28) G. GROSSO, *In tema di divergenza fra volontà e dichiarazione nel testamento*, St. Riccobono III, Palermo 1936, 170. In GROSSO's view the opinion of Celsus, which Ulpian quotes, is in fact the opinion of Celsus himself. GROSSO thinks that the compilers must have scrapped a remark of Ulpian, which would have been between the first and the second paragraph of this text. Ulpian probably stipulated here that if the testator had written down a smaller share that he intended, then it was the smaller share which was the rightful and valid one. According to GROSSO, Ulpian then quotes Celsus' deviant opinion that in such cases the heir was entitled to claim the larger share according to the intent of the testator. GROSSO thinks that it was the intervention of the compilers which upset the logical structure and balance of this text. I do not understand why this text is structurally unbalanced and I cannot find any indication in the sources to support GROSSO's view concerning the above-mentioned remark of Ulpian.

(29) G. DULCKEIT, *Plus nuncupatum, minus scriptum*, SZ. 70 (1957), 207 ff.

(30) P. VOCI, *Diritto ereditario romano* II, Milan 1963², 829 ff., 907 ff.

assumption, in fact a double assumption: firstly he thinks that Celsus assumes that the will has been formulated entirely orally, and secondly that in this way it reflects the true will of the testator. In my view Voci argues dogmatically too; he supposes that much more has been assumed than Celsus intended.

What kind of case is Celsus describing here? An abstract *nuncupatio* has been pronounced and there is a testamentary deed which does not entirely reflect the will of the testator: someone is instituted to receive only one quarter instead of one half of a share of an inheritance. In addition, the testator has previously made a declaration to the scribe who wrote the will; this declaration did in fact reflect the will of the testator entirely. Celsus begins his analysis thus: he compares the *dictare* with the *nuncupare*. There is a difference between these two procedures — a difference in the words used and a difference in the person or persons addressed; in the *nuncupatio* the testator addresses the witnesses, in the *dictare* he addresses the scribe writing the will. Celsus assumes that what has been dictated has been nuncupated. Therefore he is not making two assumptions, as Voci thinks, but only one; furthermore, he is doing precisely what Dulckeit considers not to be permissible: he is assuming that something which has not been written down has in fact been nuncupated.

To what extent is this *responsum* of Celsus in keeping with the accepted views on such matters at the time? In the classical period up to the time of Celsus any problem arising from the fact that a testator had not disposed of his entire inheritance in his will was solved purely by the interpretation of the testamentary deed (31). None considered the possibility that the testator's intentions might have been slightly different. It was assumed that the testator had disposed of his entire inheritance and that the shares set out in his will were to be regarded as percentages of the whole estate. In the case in question this would mean that the heir concerned would receive additionally

(31) Cf. Ulp. D. 28.5.13.1-3; Car. C. 6.21.3.1; see too P. Voci, *Diritto ereditario romano* I, Milan 1967², 690.

one quarter of the hitherto undivided fourth portion (i.e. one sixteenth). Celsus was the first person to single out a case where a testator had not disposed of his entire estate and it was known that this was not his intention: the testator had dictated that a certain heir was to receive one half of the estate and according to Celsus that heir should definitely receive that amount.

When it was not known whether the testator had had different intentions, it was the general rule in Justinian's day too that the remaining share was divided proportionally between the appointed heirs (32). At the time of Justinian the case singled out by Celsus was also probably solved in the way he suggested. In the last lines of D. 28.5.9.2 Ulpian comments that Celsus' view is supported in "rescripts of general purport". He may mean, as Voci thinks he does, that there were imperial constitutions which stipulated that fractions of shares should be corrected in this way; no examples of such constitutions have been handed down to us (33).

In the last sentence of this paragraph Ulpian declares that the same holds in cases where the testator has written the testamentary deed himself. It is not quite clear whether the word "*idemque*" relates to the solution proposed by Celsus ("*heredem fore*") or to the argument he puts forward ("*quasi - scriptum*"); it probably refers to both. It seems reasonable to assume that Ulpian gives a broader interpretation of the solution proposed by Celsus. Ulpian does not and cannot assume here that dictating by the testator is similar to nuncupating, because the testator has written the deed himself (34). Just as in the case of the defective institution of the heir in D. 28.5.1.5 Ulpian is assuming that there has been a complete and entire *nuncupatio*

(32) Just. Inst. 2.14.5-7.

(33) According to P. Voci in *Diritto ereditario romano* II, Milan 1963², 830 as well as in note 23.

(34) Another explanation might be that when the testator wrote his will he declared aloud what he was writing down. According to some literary sources such as Petronius' *Satyricon* 75 and Augustinus' *Confessiones* 6.3.3 and 8.12.29, it appears that it was quite normal for a Roman to say aloud what he was writing down; this may have happened here, since it is a will that is involved!

in which the testator has expressed himself in accordance with his genuine intentions.

It can therefore be concluded from text D. 28.5.9.2 that Celsus was the first person to use the argument "*quasi plus nuncupatum minus scriptum*" to supplement a testament in which the whole inheritance was not disposed of; he did this by pretending that the testator had nuncupated what he had in fact dictated. This differs considerably from the interpretation that Ulpian put forward later.

V. — In the third text, D. 28.5.9.5 the argument "*quando minus scriptum, plus nuncupatum videtur*" occurs in the reverse form.

D. 28.5.9.5

Ulpianus libro quinto ad Sabinum. *Tantundem Marcellus tractat et in eo, qui condicionem destinans inserere non addidit: nam et hunc pro non instituto putat: sed si condicionem addidit dum nollet, detracta ea heredem futurum nec nuncupatum videri quod contra voluntatem scriptum est: quam sententiam et ipse et nos probamus.*

Ulpian in the fifth book of his commentary on Sabinus. Likewise Marcellus is also concerned about the person who intends to include a condition but has not done so: for he regards this person as not having been instituted; but that if he has added a condition which he did not want, he will be heir after that condition has been removed, and that what has been written contrary to the intent (of the testator) does not seem to have been nuncupated: and he himself confirmed this opinion and so do we.

This paragraph is part of the fragment to which Celsus' quotation just discussed belongs. Ulpian continues his argument about defective institutions of heirs. Here he describes the case of someone who writes his own will but forgets to include a

condition which he wanted to add to the *heredis institutio*. According to Ulpian Marcellus concludes that the *heredis institutio* is then automatically invalid (35). He contrasts this with a case in which someone who writes his own will adds to the institution of the heir a condition which he does not really want at all. Then, according to Marcellus, the institution itself is valid but without the added condition. The argument that he puts forward is that anything that is written contrary to the will of the testator cannot be considered to have been nuncupated. According to the last line this was probably Ulpian's view as well (36).

How does this statement by Marcellus as quoted by Ulpian compare with Celsus' theory which has just been discussed? Celsus pretended that what had been dictated had also been nuncupated. In the first case discussed by Marcellus a condition which the testator had wished to add was missing from the *heredis institutio*. Marcellus did not want to add this condition to the institution and regarded the entire institution as invalid; this is comprehensible: it would have been much more drastic to add a condition to the institution than to increase a share that was too small as did Celsus. The second case dealt with by Marcellus concerned a conditional *heredis institutio* in which the testator obviously did not want a particular condition. Here Marcellus wanted to keep the institution by pretending that the undesired condition had not been nuncupated. Marcellus does not pretend, as did Celsus, that what has been dictated has been

(35) In Marcellus' opinion the same reasoning applies if a *testamentarius* has omitted or altered a condition added to the *heredis institutio*, cf. D. 28.5.9.6 (*Ulpianus libro quinto ad Sabinum*): *Idem tractat et si testamentarius contra voluntatem testatoris condicionem detraxit vel mutavit, heredem non futurum, sed pro non instituto habendum*. He also thinks that even if the writer of a will omits or changes a condition, contrary to the intent of the testator, the person instituted will not be heir and must be regarded as not instituted.

(36) The current view is that the words "*quam sententiam et ipse et nos probamus*" were added by the compilers; cf. also P. Voci, *Diritto ereditario romano* II, Milan 1963², 831 note 27. In my view these words may well have come from Ulpian himself.

nuncupated, but he pretends that the *nuncupatio* whereby the testator validates the deed does not relate to the condition which was not desired by the testator.

So although Marcellus uses the argument in the opposite way to Celsus, basically his views probably correspond to those of Celsus; whereas Celsus increased a share of an inheritance which was too small with the help of another declaration by the testator, Marcellus did not want to add a condition to the *heredis institutio* without a declaration of this kind — this would be a much more drastic operation. But he did want to omit something which had been written down unintentionally.

Now perhaps I can explain Ulpian's remark in D. 28.5.1.5 that *Marcellus non insuptiliter non putat hodie hoc procedere*: Marcellus thinks that a defective institution cannot be supplemented by the use of the argument "*credimus plus nuncupatum, minus scriptum*" (37).

VI. — Reference is made to the argument "*quando minus scriptum, plus nuncupatum videtur*" by Papinian is his text

D. 31.67.9:

Papinianus libro nono decimo quaestionum. *Si omissa fideicommissi verba sint et cetera quae leguntur cum his, quae scribi debuerunt, congruant, recte datum et minus scriptum exemplo institutionis legatorumque intellegetur: quam sententiam optimus quoque imperator noster Severus secutus est.*

Papinian in the 19th book of his *Quaestiones*. If words are omitted from the *fideicommissum* and the rest of the text is in accordance with what had to be written down, then the *fideicommissum* will be deemed to have been given in accordance with the law, and following the example of the institution and the legacies it will be deemed that less has been

(37) From D. 34.5.24 it would seem that Marcellus is prepared to give the benefit of the doubt ("*benigne interpretari*") in dubious cases, but the words must then be interpreted in a credible manner: *secundum id, quod credibile est cogitatum, credendum est.*

> written down. And this is also the opinion of our illustrious emperor Severus.

This text is taken from the 19th book of Papinian's *Quaestiones*, part of which deals with legacies and part with *fideicommissa* (38). Papinian here describes a case where someone has formulated a *fideicommissum* but has omitted several words. According to Papinian it can be deduced from the text as a whole what should have been written down, and here, therefore, the *fideicommissum* is regarded as legally valid, by analogy with the phrase "*quando minus scriptum, plus nuncupatum videtur*" which has been used with reference to the institution of heirs and legacies (39).

Voci (40) is of the view that in this case there is no *fideicommissum*, but that such a disposition can be deduced from all the other dispositions of the will. According to Voci, Papinian has assumed here that something which has not been written down but can only be deduced has in fact been stipulated explicitly. Voci goes on to refer to the case of the *error in parte* dealt with by Celsus; in that case Celsus permitted the assumed but unwritten intent of the testator to prevail over what had been actually written down in the deed.

It is not clear how Voci really envisages the problem in the case in question; nor is it clear what grounds Voci has for believing that the deceased in this case has made a will. In my opinion a more likely explanation is as follows. Papinian says that words have been omitted from the *fideicommissum*, whereas the other words correspond with what should have been written down. In my view these other words refer to the same *fideicommissum* as that from which the words in question have been omitted. The problem here is strongly reminiscent of the case dealt with by Ulpian, in which the words "*heres esto*" had been

(38) *Palingenesia*, Pap. 281.

(39) We do not know of any case where this argument has been used in connection with legacies. Possibly it could have applied to a legacy from which the words "*damnas esto*" or "*do lego*" had been omitted.

(40) P. Voci, *Diritto ereditario romano* II, Milan 1963², 901 ff.

omitted from the institution of the heir. In the case under discussion words such a "*fidei committo*", "*rogo*" or similar expressions may have been omitted, but the disposition is nevertheless regarded as being a valid *fideicommissum* by analogy with the argument used by Ulpian: "*quasi plus nuncupatum, minus scriptum*".

Secondly it is not clear what grounds Voci has for believing that the deceased in this case has made a will. This is not stated in so many words in the text. Moreover, Papinian supports his judgement referring *per analogiam* to the argument "*quasi plus nuncupatum, minus scriptum*" by using the words "*et minus scriptum exemplo institutionis legatorumque intellegetur*". If Papinian here were referring to a *fideicommissum* in a will, a *nuncupatio* would probably have been pronounced as the will was being drawn up, in which case Papinian would have been able to refer to this *nuncupatio* in his argument. Since Papinian did not do this, it can be concluded that in this case the deceased had merely formulated a codicil containing a *fideicommissum*.

However one chooses to interpret this text by Papinian it certainly looks as if the jurist concerned was familiar with the argument "*quasi plus nuncupatum, minus scriptum*". In my opinion he has applied this argument to a case which resembles the one discussed by Ulpian in D. 28.5.1.5.

VII. — Let us return to the question which we posed at the beginning of this paper: what is the origin of the phrase "*quando minus scriptum, plus nuncupatum videtur*" used in Diocletian's rescript to Rufina? We have seen that Ulpian deals with a problem similar to the one in C. 6. 23. 7 and solves it in the same way. We have also ascertained that Ulpian was not the first person to use the argument "*quasi plus nuncupatum, minus scriptum*" but that it probably originated with the jurist Celsus.

The phrase "*quando minus scriptum, plus nuncupatum videtur*" is not applied in the same manner in all cases. Celsus used it to increase a share which was in the deed but did not accord with the intent of the testator although he had dictated correctly; Celsus did this by pretending that what had been dictated

had been nuncupated. Marcellus used the argument in reverse to omit a condition which had been added to the institution but which had not been desired by the testator; he did this by pretending that the *nuncupatio* by which the testator legitimised the testamentary deed had no bearing on the condition which the testator had not desired. Finally Ulpian goes much further than Celsus and Marcellus: he adds words that were missing from the institution of the heir. Following Ulpian Papinian adds some words that are missing from a *fideicommissum*; as the document in question is not a will but a codicil, he can apply the argument "*quasi plus nuncupatum, minus scriptum*" solely by analogy.

On the one hand Diocletian's constitution is closer to the case dealt with by Celsus, because it involves a mistake made by the writer of the will, but on the other hand it more closely resembles Ulpian's text, because the problem is that the words "*heres esto*" have been omitted. Therefore, in the case C. 6. 23. 7, Diocletian used an argument which stems from the classical period but he applies it in a way which is in keeping with developments in the late classical period.

Finally, we can draw the rather general conclusion that a testament at the time of Diocletian was still regarded as being essentially an oral procedure: the deed itself was not the essential element. If the testator's intention as expressed in the deed was not in keeping with his true intention, then the argument "*quando minus scriptum, plus nuncupatum videtur*" was used to add more weight to the intention of the testator than to the words which he had written or which had been written on his behalf.