D.16.3.22 (Marcellus 5 *digestorum*) and the Liability of the Heir in the *Actio Depositi Ex Dolo Suo*

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In this paper we consider the liability of the heir in the *actio depositi ex dolo suo*. The main texts are the following:

> D.16.3.9 (Paul 17 *ed.*) *In depositi actione si ex facto defuncti agatur adversus unum ex pluribus heredibus, pro parte hereditaria agere debeo: si vero ex suo delicto, pro parte non ago: merito, quia aestimatio refertur ad dolum, quem in solidum ipse heres admisit.*

> D.16.3.22 (Marcellus 5 *dig.*) *Si duo heredes rem apud defunctum depositam dolo interverterint, quodam utique casu in partes tenebuntur: nam si diviserint decem milia, quae apud defunctum deposita fuerant, et quina milia abstulerint et uterque solvendo est, in partes obstricti erunt: nec enim amplius actoris interest. Quod si lancem conflaverint aut conflari ab aliquo passi fuerint aliave quae species dolo eorum interversa fuerit, in solidum conveniri poterunt, ac si ipsi servandam suscepissent: nam certe verum est in solidum quemque dolo fecisse et nisi pro solido res non potest restitui. Nec tamen absurde sentiet, qui hoc putaverit plane nisi integrae rei restitutione eum, cum quo actum fuerit, liberari non posse, condemnandum tamen, si res non restituetur, pro qua parte heres exstitit.*

D.16.3.22 tells us that two heirs might be held liable *in partes* for their own *dolus* which, *prima facie,* contradicts Paul's assertion in D.16.3.9 that *ex suo delicto* the heir is liable *in solidum* (*pro parte non ago*). Firstly we must decide whether the part of D.16.3.22 which alleges the liability of the heirs *in partes* is genuine. We should note that it is only in a certain case (*quodam utique casu*) that the heirs are said to be liable *in partes.* This implies that the solidary liability of the heirs referred to in the second part of D.16.3.22 was the normal rule; an inference which is supported by D.16.3.9. The special nature of the situation giving rise to the liability *in partes* suggested by the words *quodam utique casu* argues in favour of the authenticity of this statement in the first part of the text. If, on further examination, this is found to be the case, we must decide, secondly, what were the factors which caused the extent of the heirs' liability *ex dolo suo* to be varied in this way.

In dealing with the first issue, we begin by looking at the objections to D.16.3.22 raised by Guarneri Citati (1). We choose this scholar as representative of the school which regards the first half of the text as having been interpolated with the purpose of expunging the heirs' solidary liability in favour of the liability *in partes* which we now find (2).

The facts of the case, as seen by Guarneri Citati, are that two heirs divide a sum of 10,000 which has been deposited with the deceased and remove 5,000 each. As opposed to the position discussed in the second half of the text where the heirs are said to interfere with a *lanx,* in this instance, *in partes tenebuntur... in partes obstricti erunt.* The reason for the different solution given by Marcellus in each case seems to depend, according to Guarneri Citati, on the different nature of the deposited property which is indivisible in the second example (*lanx*) but divi-

(1) Studi sulle obbligazioni indivisibili nel diritto romano, *Ann. Pal.* 1921, p. 34ff.

(2) Also, esp., Sorrentino, *Sulla responsabilità degli eredi pel dolo del defunto nell' actio depositi nel diritto romano classico* (Rome, 1903) p. 26ff; Rotondi, *Scritti* 2 (Milan, 1922), p. 129 n. 3 and Beseler, Romanistische Studien, *ZSS* 46 (1926) p. 83ff at p. 95.

sible in the first. Thus, since in the latter case the deposit is divided between the two heirs, the *interversio* of each pertains only to one half of the whole which would explain why they are liable *in partes*.

This apparent reason for distinguishing between the two cases is regarded as unsatisfactory by Guarneri Citati. He expresses surprise at the justification given by Marcellus for the individual heir's liability *in partem*: *nec enim amplius actoris interest*; and at the fact that this liability *in partem* is subordinated to the consideration that both heirs be solvent: *et uterque solvendo est*. It has been suggested that *et uterque solvendo est* is an addition (3), but Guarneri Citati argues that the phrase cannot be treated in isolation because the condition of the heirs' solvency is closely tied up with the justification *nec enim amplius actoris interest*. The reasoning behind the justification in the text as it stands, based as it is on the fact that the property has been divided, is that the pursuer has no greater interest with regard to his claim against each individual heir than the part which the latter has in his possession, provided, that is, that both heirs are solvent. To excise *et uterque solvendo est* by itself would mean that the liability *in partes* was dependent simply on the pursuer's interest *per se*, irrespective of whether each heir was solvent or not. Yet, argues Guarneri Citati, the pursuer's interest was never a factor which determined whether in classical law his action lay *in partem* or not. Furthermore, with this excision the text would state the contrary of what was the position in fact because the pursuer did have an interest in having an action *in solidum* rather than claims *in partes* against the heirs in order to avoid by this means the danger that one of the debtors might be insolvent. Therefore, if Marcellus were simply to say that the action lies *in partes* because the pursuer's interest is no greater, it would not be a true representation of the position in fact. So, as far as Guarneri Citati is concerned, not only is the first half of the text unsatisfactory in

(3) See LITEWSKI, *Studien zur Verwahrung im römischen Recht* (Warsaw/Krakov, 1978) p. 14 and the literature he cites.

its present form, but also the limited solution of an excision of *et uterque solvendo est* is to be rejected. Because he thinks that the two phrases with which we have been dealing are complementary, and yet because he also sees them as unauthentic, Guarneri Citati's solution to this part of D.16.3.22 is to reject them both. He suggests that originally the co-heirs were said to be liable *in solidum* notwithstanding the fact that the property was divisible and that the *interversio* (i.e. the *dolus*) of each heir was in relation only to a part of it. The particular emendations which he suggests are as follows: in place of *in partes* stood *in solidum,* while in place of *quodam utique casu* there was perhaps *etiam hoc casu,* and it was in fact Justinian, he argues, who introduced the idea of liability *in partes* subject to the condition that both heirs be solvent.

The second part of the text where the heirs' solidary liability is affirmed is seen by Guarneri Citati as forming a parallel with the first. Thus, he believes the text as a whole said that in the case of the divided money the heirs were liable *in solidum* just as in the case of the *lanx*. The discussion as it relates to the *lanx* he treats as essentially genuine. Suspect, however, in the sentence *nam certe verum... non potest restitui,* is the term *in solidum* appearing in the phrase *in solidum dolo facere.* Finally, the concluding sentence of the text, *nec tamen absurde... pro qua parte heres exstitit,* he also dismisses as an addition.

Besides the fact we believe that Guarneri Citati misunderstands the significance of the statement that the heirs *in partes obstricti erunt,* the form of the text speaks against his thesis. Normally the heir *ex dolo suo* was liable *in solidum* (4); therefore, where consideration is given to a special case (*quodam utique casu*) we might reasonably find that this degree of liability is varied, as is the case on the present reading of the text. Guarneri Citati suggests that the words *etiam hoc casu* stood in the place of *quodam utique casu.* If this emendation is accepted the facts of the first part of D.16.3.22 are presented, not so much as a special case resulting in the variation of the heirs' liability,

(4) See LITEWSKI, *op. cit.*, p. 13ff.

but as special facts notwithstanding which the solidary liability of the heirs is affirmed. However, there are no good grounds to suggest that the text was altered in this way. Furthermore, the Italian scholar believes that the distinction between divisible and indivisible property was only of relevance in the time of Justinian. Yet, his interpretation of the text means that there must at least have been some difficulty in classical times concerning the position of heirs where deposited property was divided in the manner discussed, otherwise there would have been no need for Marcellus to underline, as Guarneri Citati argues he did, that even in the case of the divided 10,000 the heirs' liability was solidary.

The alternative to Guarneri Citati's approach to D.16.3.22 is to regard it in its essentials as genuine. We shall now look at the arguments of a group of scholars who, in one way, or another, all trace the heirs' liability *in partes* to the division of the 10,000.

BINDER (5) presents D.16.3.22, which discusses the liability of heirs, as part of his thesis concerning the liability of a plurality of depositees (and commodatees). According to him, the rule that these parties were liable *in solidum* was not an absolute one (6), but one contingent on the particular nature of the obligation to restore the property. Where the obligation was indivisible liability was solidary but where it was divisible liability was *in partes*. The obligation to restore was divisible and divided between the debtors where the actual property deposited was divisible. Binder believes he can utilize D.16.3.22 to support this thesis because, although the text merely discusses the position of a plurality of heirs, they themselves were guilty of *dolus* with the result, according to Marcellus, that they are treated as if they were the original depositees (*ac si ipsi servandum suscepissent*).

(5) *Die Korrealobligationen im römischen und im heutigen Recht* (Leipzig, 1899) p. 98ff.

(6) See D.45.2.9*pr.* and D.16.3.1.43.

Marcellus discusses two cases in D.16.3.22: the 10,000 considered in the first part of the text Binder thinks was divided between the heirs before the embezzlement. In such a case, as a general rule, each heir, he maintains, was liable only for the part of the deposit which he had received. Therefore where, as in D.16.3.22, the heirs took 5,000 from the 10,000, each was liable only for the amount embezzled from his share of the original deposit. Solidarity is excluded in this case because restitution of the monies was divisible.

The contrast between this case and the one which follows, Binder believes, turns on the fact that the property referred to in the second part of D.16.3.22 was indivisible; return of part only was impossible and the liability of the heirs as a consequence was solidary. Marcellus expressly states this as the basis of the solidary liability in the sentence, *nam verum est in solidum quemque dolo fecisse, et nisi pro solido res non potest restitui.*

Levy (7) disputes both Binder's thesis that solidarity in the *actiones depositi* (and *commodati*) arose as a result of an indivisible obligation to restore the property and the idea that this is supported by D.16.3.22. As regards the first case discussed in the text Levy believes that the heirs divided the 10,000 and removed 5,000 each. The special nature of this case (*quodam utique casu*) and the reason why the heirs are only liable in part, he argues, depends upon the relation between *dolus* and the object deposited. Where the object is divisible and is divided, the liability of each heir is limited to what he took because it is only with respect to this that he was guilty of *dolus*. However, *dolus* in respect of a part of the *lanx* is impossible, hence in the second of the cases discussed by Marcellus liability is solidary.

Litewski (8) also believes that in the first example given in D.16.3.22 the discussion concerns a sum of 10,000 deposited with the deceased of which the two heirs embezzle 5,000 each (9). He

(7) *Die Konkurrenz der Aktionen und Personen im klassischen römischen Recht* (Berlin, 1918), p. 213 n. 3.

(8) *Op. cit.*, p. 13.

(9) But cfr Binder, *op. cit.*, p. 100.

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takes as genuine the rule that in this case the heirs are liable only *in partes* but concedes, as is shown by the second example discussed and the fact that the first is a special case, that even here the heirs' liability *ex dolo suo* was normally solidary. However, a tendency can be seen, he suggests, towards a limitation of solidarity in favour of division as early as classical law where the property embezzled had been divided between the heirs. In contrast, the second part of the text concerns the embezzlement of an indivisible object (*lanæ*) where the normal rule of solidary liability continued to be applied.

Therefore, we see that each of the three above-mentioned scholars explains the heirs' liability *in partes* by reference to the fact that the 10,000 was divisible. Binder argues that such a case gives rise to a divided obligation to return. Levy traces the limited liability, where the 10,000 was actually divided between the heirs, not to conceptions such as the obligation to restore, but to the relation between the individual heir's *dolus* and the deposited property. Lastly, Litewski believes that the liability *in partes* was an innovation where previously solidarity had applied. So, at one time, even where the heirs had divided the money they were each liable for the full 10,000. Clearly Litewski does not trace their liability, as Levy does, directly to the relation between *dolus* and the property deposited. However, once it was decided that the heirs should merely be liable *in partes*, they could only be sued in respect of the property which they actually held; i.e. for the 5,000 which was the amount in respect of which each was guilty of *dolus* (10).

While this group of scholars accept as genuinely representative of classical law the contrast between the heirs' liability *in partes* and *in solidum*, they nevertheless regard the text as having been altered in some important respects.

(10) LITEWSKI does not make clear what the motivating factor for the creation of liability *in partes* was. That is, did the innovation originate in an appreciation that each heir was guilty of *dolus* only in respect of 5000, or, alternatively, was the basis for the limited liability the mere fact of division itself?

In the first half of D.16.3.22 attention is focused on the two phrases *et uterque solvendo est* and *nec enim amplius actoris interest*. Litewski, after some equivocation in respect of the latter phrase, for reasons similar to those advanced by Guarneri Citati, regards both as interpolated. That both heirs be solvent was not a factor known to classical law in determining the extent of their liability. But the removal of these words in turn creates problems in respect of the second phrase. As the text then stands we are told that each heir is only liable *in partem* because the pursuer has no greater interest. But, once the solvency condition is removed, the pursuer's true interest is in fact to have a claim *in solidum* against each heir. Therefore *nec enim amplius actoris interest* must itself also be an addition.

Et uterque solvendo est is generally regarded as an addition, being seen to represent an unsuccessful application of the *beneficium divisionis* to this case of deposit (11). The *beneficium divisionis* was a procedural device introduced by Hadrian whereby a *fideiussor* could require that he be made liable for no more than the amount of the debt divided by the number of sureties who were solvent at the time the proceedings were brought. This device has to be viewed against the background that a *fideiussor* was held to be correally liable; that is, he could be sued for the full amount of the debt and had no right in law against his co-sureties. *Et uterque solvendo est* is regarded as a spurious application of this device to D.16.3.22 because the heirs to whom it applied were only liable *in partes* from the very start. They were not liable *in solidum*, as was the *fideiussor*, and hence had no need of the concession embodied in the *beneficium divisionis*.

In respect of the second half of D.16.3.22 objections are raised against its concluding part *et nisi pro solido... fin.* However, a consideration of these we shall postpone until later.

We are now in the position to offer a different explanation of the text, and, in the light of this explanation, assess the interpretations of the scholars to whom we have referred.

(11) See LITEWSKI, *op. cit.*, p. 14 and the literature he cites. Cfr BINDER, *op. cit.*, p. 100f.

The normal position of the heir of a deceased depositee was that his liability was divided (12). D.16.3.7.1 (13), D.16.3.9 and effectively the first sentence of D.44.2.22 (14) state that the heir *ex dolo defuncti* was liable *pro parte hereditaria*. In addition, D.16.3.9 tells us that the divided liability of the heir *ex dolo defuncti* is to be distinguished from his solidary liability *ex dolo suo* (*pro parte non ago*). Notice, however, that the purpose of this text was to contrast the position of an individual heir who is sued *ex dolo defuncti*, where liability is *pro parte hereditaria*, with the liability of an individual heir *ex suo delicto*. In the latter case an action lies only against the heir who has actually been guilty of *dolus*. D.16.3.10 (15) tells us that no action lies against his innocent co-heirs. Therefore, the dishonest heir referred to in D.16.3.9 must necessarily have been liable *in solidum* (for the full amount) as he is the only person against whom an action could be brought. What D.16.3.9 does not tell us is the position where two heirs of a deceased depositee were guilty of *dolus* and it is precisely the answer to this question which D.16.3.22 provides.

The above discussion shows that the principal factor affecting the extent of the individual heir's liability was *dolus*. On account of the *dolus* of the deceased his liability was *pro parte hereditaria*, but where he was himself dishonest he was liable *in solidum*. But in the case of a plurality of dolose heirs we know from D.16.3.22 that the position was more complex because their liability might be *in partes* or *in solidum*. It is helpful,

(12) See LEVY, *op. cit.*, p. 213 n. 3.

(13) D.16.3.7.1 (Ulp. 30 *ed.*) *Datur actio depositi in heredem ex dolo defuncti in solidum: quamquam enim alias ex dolo defuncti non solemus teneri nisi pro ea parte quae ad nos pervenit, tamen hic dolus ex contractu reique persecutione descendit ideoque in solidum unus heres tenetur, plures vero pro ea parte qua quisque heres est.*

(14) D.44.2.22 (Paul. 31 *ed.*) *Si cum uno herede depositi actum sit, tamen et cum ceteris heredibus recte agetur nec exceptio rei iudicatae eis proderit... tamen personarum mutatio, cum quibus singulis suo nomine agitur...* See LEVY, *op. cit.*, p. 213 n. 3.

(15) D.16.3.10 (Iulian. 2 *ex Minicio.*) *Nec adversus coheredes eius, qui dolo carent, depositi actio competit.*

first of all, to look at the latter case because the heirs solidary liability was *ac si ipsi servandum suscepissent*. What factors determined the solidary liability of a plurality of depositees and how does their position differ from or correspond to that of the two heirs discussed in D.16.3.22?

D.16.3.1.43 (16) and D.45.2.9*pr* (17) show that solidarity was a natural consequence of a deposit made jointly with a plurality of depositees (18). Furthermore, Levy (19) has pointed out that there is no reason to suppose that the solidary liability in these cases depended on the property not having been divided between the depositees. Therefore if 10,000 is entrusted to them jointly, which they divide, and then they subsequently refuse to return their respective shares each will be liable for the full 10,000, even although they had divided it between themselves and each subsequently acted independently of the other in embezzling his share. The reason is that the deposit was originally made with them jointly which was the crucial factor determining their individual liability for the full 10,000.

However, the first part of D.16.3.22 tells us that where two heirs divided 10,000 entrusted to the deceased they were only liable *in partes*. Firstly, we should note that this liability was not inherited from the deceased, the latter never having been guilty of *dolus*. Secondly, even although they may have been aware that the money did not belong to the deceased when they divided it, though this is not certain, the heirs do not fall within

(16) D.16.3.1.43 (Ulp. 30 *ed.*) *Si apud duos sit deposita res, adversus unumquemque eorum agi poterit nec liberabitur alter, si cum altero agatur: non enim electione, sed solutione liberantur. Proinde si ambo dolo fecerunt et alter quod interest praestiterit, alter non convenietur exemplo duorum tutorum: quod si alter vel nihil vel minus facere possit, ad alium pervenietur: idemque et si alter dolo non fecerit et idcirco sit absolutus, nam ad alium pervenietur.*

(17) D.45.2.9*pr*. (Papinian. 27 *quaest.*) *Eandem rem apud duos pariter deposui utriusque fidem in solidum secutus, vel eandem rem duobus similiter commodavi: fiunt duo rei promittendi...*

(18) The texts have given rise to an extensive literature; see LITEWSKI, *op. cit.*, p. 5f.

(19) *Op. cit.*, p. 213 n. 3.

the terms of the *actio depositi* until *dolo malo* they fail to return the money (20). When an action is brought against them the reason why they are only liable *in partes* (21), it is submitted, is that the heirs were never deemed to hold the 10,000 jointly. As we shall see, on this assumption certain parts of the text become explicable which in the past have been regarded as corrupt. On the other hand, Marcellus in the second half of D.16.3.22 states that where the property entrusted to the deceased was indivisible the heirs were liable *in solidum*. In this case precisely because the property was indivisible the heirs were deemed to hold it jointly with the result that each was liable for the full amount originally entrusted to the depositee.

If we accept that the liability of the heirs *in partes* is to be explained by the fact that they were not treated as having held the 10,000 jointly we should look more closely at the contrast which D.16.3.22 presents between this liability and liability *in solidum*. In the case of the 10,000, effectively the two heirs are treated as if they were holding two separate deposits. Therefore, in relation to the share which each heir takes from the original sum left with the deceased he is in fact liable *in solidum* (for the full amount). The point is that his share is treated like a separate deposit with regard to which he is liable for the whole amount he has embezzled (22). The expression *in partes tenebun-*

(20) Assuming liability to the action *in factum* is under discussion; see Gaius *Inst.*, 4.47.

(21) BINDER, *op. cit.*, p. 100 says, 'mehrere Erben des Depositars, welche das *depositum* unterschlagen haben sollen nach der 22, ... nur *pro parte* haften'. The term *pro parte* is also used by LITEWSKI, *op. cit.*, p. 14. This expression denotes more directly the heirs' liability *pro parte hereditaria* which, in the *actio depositi*, arises *ex dolo defuncti* and normally stands in contrast to his solidary liability *ex dolo suo* (D.16.3.9). In D.16.3.22 Marcellus does not use the term *pro parte* but refers to the liability of the heirs as being *in partes* (*in partes tenebuntur ... in partes obstricti erunt*). What this signifies is a liability of each heir for what he himself embezzled from the original 10,000 (*in partem*). As a conception this is different from liability *pro parte hereditaria*.

(22) There are possible complications concerning *et uterque solvendo est*; see *post*.

tur is not used in the text to denote a special category of liability separate from solidarity (23) but simply means that each heir is liable only for a part of the original sum left with the deceased. Support for this particular point and for our argument which distinguishes the two halves of D.16.3.22 by looking to whether or not the heirs were treated as holding the property jointly is found in the clause *nec enim amplius actoris interest* for which, to date, no scholar has found a convincing explanation with the result that it is generally dismissed as an interpolation. However, if each of the heirs is regarded as holding a separate deposit the statement makes perfect sense because the interest of the pursuer can be no greater than that part which is held by the heir whom he is suing.

Next we turn to the statement *in solidum conveniri poterunt, ac si ipsi servandum suscepissent* found in the second half of the text. The term *in solidum* means simply that a defender is liable for the full amount. This is illustrated most clearly by D.16.3.7.1 where Ulpian says, *datur actio depositi in heredem ex dolo defuncti in solidum.* The heir is being sued *ex dolo defuncti* so in principle his liability is *pro parte hereditaria.* However, because he is the only heir of the deceased the action lies against him for the full amount (*in solidum*), his share being the whole inheritance. It is therefore significant that Marcellus in the second part of D.16.3.22 says not merely that the action lies *in solidum* against the two heirs but that it lies *in solidum* 'as if they themselves had undertaken the deposit'. The words *ac si ipsi servandum suscepissent* should be taken to denote a quality of solidary liability (whether correality or simple solidarity) which stands in contrast to the solidary liability of a quite different sort applied in the first part of the text. In addition, the assimilation of the position of the heirs who hold the *lanx* to that of original depositees suggests that they were liable *in solidum* precisely because they were deemed to hold a single deposit jointly. On the other hand the heirs in the case of the

(23) The emendations suggested by GUARNERI CITATI are therefore to be rejected.

divided property, while they could be sued for the full amount of their share (*in solidum*) were not individually liable for the full 10,000 (*in partes tenebuntur*) because they were never deemed to have held this sum jointly as a single deposit. Rather, they hold two separate deposits of 5,000.

We will now assess the theories of the scholars to whom we have referred in the light of this analysis of the text.

Binder's general thesis that the solidary liability of a plurality of depositees (and commodatees) depended on the indivisible nature of the obligation to restore the deposit (24) and — as shown by D.16.3.22 — that where the obligation, because the property, was divisible their liability was '*pro parte*', is untenable. One cannot argue from the case of dishonest heirs considered in D.16.3.22 generally to that of dishonest depositees (25). Depositees receive the property jointly from the depositor whereas the heirs, at least where the property is divided between them, do not. Also, even where the property was divided the liability of the heirs was still solidary but in respect of their share which was effectively treated as a separate deposit.

Litewski believes that the liability *in partes* was an innovatory move by Marcellus who wished to do away with the defenders normal solidary liability in cases where the deposited property had been divided between them. However, the term *in partes* does not refer to a category of liability distinct from solidarity. It means simply that the individual heir is liable only for a part of the original 10,000. Certainly had the heirs been deemed to hold the 10,000 jointly each would have been individually liable for the whole sum irrespective of whether it had been divided between them or not.

(24) In this context LEVY points out that neither Ulpian nor Celsus in D.13.6.5.15 give the least consideration to the idea of an indivisible obligation to restore when discussing the solidary liability of commodatees. Similarly nothing is said about such a conception by Papinian in D.45.2. 9*pr.* nor Ulpian in D.16.3.1.43. LEVY correctly represents the approach of these jurists when he says that the *res* referred to in the texts does not signify indivisible property.

(25) See further, LEVY, *op. cit.*, p. 213 n. 3.

Levy traces the heirs' liability *in partes* to the relation between the individual's *dolus* and the deposit; each heir is guilty of *dolus* only with respect to his share of the original 10,000. Support for Levy can be drawn from the statement *nam certe verum est in solidum quemque dolo fecisse* because it suggest that the solidary liability depends upon the question of *dolus,* the expression *dolus in solidum* being used because the dishonest conduct related to the whole property (26). There is arguably a clear inference to be drawn from this to the first case that the liability *in partes* turns on the fact that the individual heir's *dolus* relates only to a part of the property. One objection to the idea that the *nam certe... fecisse* clause shows that the two cases turned on the question of *dolus* alone is that it is joined to the statement *et nisi pro solido res non potest restitui* which imports a further factor distinguishing the cases. However, those who view this latter statement as interpolated are probably correct (27). Levy's suggestion that the two cases in D.16.3.22 are to be distinguished on the question of *dolus* therefore still stands. But we must ask whether the heirs' liability *in partes* is to be explained fundamentally by the fact that *dolus* relates only to a part of the property or whether the decision turned on other grounds? In this context a comparison with the case of two depositees is instructive. If they receive property jointly, each of them can be sued for the full amount even although his *dolus* relates only to a part of the deposit. This case is therefore to be distinguished from that of the two heirs who divide the 10,000 because they are only liable *in partes*. It is not on the question of *dolus* that these cases differ but on the fact that once the heirs have divided the money they are not thought to hold jointly the whole amount originally deposited. Levy identifies the fact that the *dolus* of the heirs relates only to their share of the divided money but not the reason why this results in their liability being *in partes*.

(26) Cfr GUARNERI CITATI, *op. cit.*, p. 40ff whose view that the term *in solidum* has been added should be rejected.

(27) See GUARNERI CITATI, *op. cit.*, p. 35 n. 2 and the scholars whom he cites. Also, LITEWSKI, *op. cit.*, p. 15.

We have seen that the phrase *et uterque solvendo est* has long been regarded as a misconceived attempt to apply the *beneficium divisionis* to this case of deposit. However there is a better explanation which relates it to a certain difficulty associated with the approach which we have been advocating. The two heirs in the first part of D.16.3.22 can only be sued for the amount of the original deposit which they separately hold. If this is the case the problem is that it is open to the heirs unilaterally to change the incidence of liability under the contract by dividing the original deposit. Suppose that after an unequal division one heir embezzles 1,000 and the other 9,000 and the latter then becomes insolvent. Does this mean that the depositor can recover only 1,000? The requirement *et uterque solvendo est* should be seen as a simple solution to this problem, to be distinguished from the *beneficium divisionis* in so far as that was a concession to the *fideiussores* while this was a concession to the depositor. Thus, if there were two heirs and one was insolvent, he could sue the other for the full amount originally deposited (28).

To identify a rationale for *et uterque solvendo est* within the text does not, of course, mean that it is necessarily classical in origin. The approach of a classical jurist to a case where the defenders were effectively regarded as holding as two separate deposits a sum which had been entrusted to the deceased may have been that the pursuer could only proceed against each separately... *nec enim amplius actoris interest.* However, we can be reasonably sure that if it is interpolated *et uterque solvendo est* is unlikely to have been introduced by the same hand as the corrupt end section of the text, *et nisi pro solido... fin.* This section introduces the idea that a factor determining the heirs' solidary liability was that they could return the property only as a whole. Litewski has shown that such a consideration was foreign to classical law (29). But we are then told in the section *nec tamen... heres exstitit* that in the event of the property not being returned

(28) We are not told what the position would be if there were three heirs and one was insolvent.

(29) *Op cit.*, p. 15 and the literature he cites.

as a whole the heir who was sued should only be condemned *pro qua parte heres exstitit*! This not only contradicts the earlier declaration of solidary liability ([30]) (*in solidum conveniri poterunt*) but introduces, where it is quite inappropriate, the idea of liability *pro parte hereditaria,* which in classical law arose *ex dolo defuncti,* into a discussion of the heirs' liability *ex dolo suo.* Such a clumsy editor is most unlikely to have been the author of *et uterque solvendo est.*

In the preceding discussion we have been concerned to explain the basis of the distinction found in D.16.3.22 between the heirs' liability for their own *dolus, quodam utique casu in partes* and their liability *in solidum.* We conclude, 1) that the text is genuine except for the concluding part *et nisi... heres exstitit*; and 2) that its two halves are to be distinguished on the grounds that in the first the heirs were not seen to hold the 10,000 jointly because it had been divided between them, while in the second, they were regarded as necessarily holding jointly property which was indivisible. There is no reason to assume that heirs of a depositee necessarily held jointly the property entrusted to the deceased, nor, because their liability in this case is *ex dolo suo* and not *ex dolo defuncti,* that liability in respect of the deposit was *ipso iure* divided between them.

The above conclusions allow us to identify more clearly the factors governing the liability of heirs of a depositee. Firstly and most importantly is the question: who was guilty of *dolus,* the heir himself or the deceased? *Ex dolo defuncti* the heir was liable *pro parte hereditaria* (D.16.3.7.1; 9) but *ex dolo suo* he was liable *in solidum* (D.16.3.9; 10; 22). Secondly, liability was affected by the number of heirs. Thus the individual heir sued *ex dolo defuncti* in principle was only liable *pro parte hereditaria* but as he took the complete inheritance he was responsible for the whole debt incurred by the deceased (*in solidum:* D.16.3.7.1).

(30) While the *intentio* would be formulated *in solidum* the *condemnatio* would be *pro parte.* This is generally thought to be a Byzantine innovation; see ROTONDI, *Scritti* 2 (Milan, 1922), p. 129 n. 3. On this section, see also LITEWSKI, *op. cit.*, p. 15 and the literature he cites.

Alternatively if there were two heirs who took equal shares in the inheritance each could be sued only for a half of the deceased's debt. Where two heirs were sued *ex dolo suo*, on the basis of D.16.3.22 we know that if the property was divided between them they were liable *in partes* in relation to the whole amount originally deposited but *in solidum* in relation to their share and that where they held the property jointly each was liable for the full amount of the original deposit (*in solidum conveniri poterunt, ac si ipsi servandum suscepissent*). (*)

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