2-1-1969

An Unprincipled Decision on a Will

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D.28.5.45 (44): AN UNPRINCIPLED DECISION ON A WILL

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David Daube, for 8th February, 1969

D.28.5.45 (44) (Alfenus *5 dig.*) is a text of quite exceptional interest:

> Pater familias testamento duos heredes instituerat: eos monumentum facere iusserat in diebus certis: deinde ita scripserat: 'qui eorum non ita fecerit, omnes exheredes sunto': alter heres hereditatem praetermiserat, reliquus heres consulebat, cum ipse monumentum exstruxisset, numquid minus heres esset ob eam rem, quod coheres eius hereditatem non adisset. respondit neminem ex alterius facto hereditati neque alligari neque exheredari posse, sed uti quisque condicionem implesset, quamvis nemo adisset praeterea, tamen eum heredem esse.

I

Any proper discussion of the text must begin with Pernice's brilliant exegesis (*1*). He pointed to what in his opinion were grave difficulties in the text as we have it: a *modus* was imposed by the testator on the heir but Servius (or Alfenus) treats it as a condition (*2*); again, he says, disinhersion of the *heres scriptus* in the same will was not permitted (*3*); and the express *exheredatio* of an *extraneus* is odd. The text, as Pernice observes, with its *adire* and *praetermittere hereditatem* makes it difficult to think of a *suus heres* (*4*). He suggests that the text would make best sense if the testator had imposed a *cretio*: this would explain the *certi dies*, the *praetermittere*, and the *exheredatio* which must ensue at the *cretio* (*5*). He proposes a wording for the institution something like this: *'Titius et Maevius heredes*

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(*1*) *Labeo*, III.i (reprinted, Aalen, 1963), pp. 43f: followed by Lévy-Bruhl, "Etude sur la *cretio*' *NRHDF* xxxviii (1914) pp. 153ff at pp. 182. Buckland, '*Cretio* and connected topics' *Tijd.* iii (1922) pp. 239ff at pp. 263f; De Sarlo, *Alfeno Varo e i suoi Digesta* (*Milan*, 1940), pp. 13ff; cf. also Schindler, *Justinians Haltung zur Klassik* (Cologne, Graz, 1966), p. 174 n. 29.

(*2*) A *modus* has the same content as a condition but the validity of the provision to which it is attached is not dependent upon it.

(*3*) Pernice refers to D.28.2.13.1 and 28.4.1.4.: op. cit., p. 43 n. 4: but see *infra*.

(*4*) Buckland, op. cit. p. 264 and n. 5 thinks it not impossible that the heirs were *sui heredes*. It should be observed, though, that there is nothing at all in the text to suggest that they were. *Paterfamilias* is often used of a testator with no implication that the heirs are *sui*: cf. e.g., G.2.144 [In three of the four texts in Gaius' *Institutes* where the word *paterfamilias* occurs it is used simply to indicate a person who was *sui iuris* and does not suggest he had persons in his *potestas*—the other texts are: 3.83; 4.77 and 3.154a.]; D.30.6; 30.96pr. 32.102.1.

(*5*) Cf. e.g., G.2.165, 174.

sunto, cerniteque in diebus cc. proximis, in quibus monumentum mihi a vobis fieri iubeo; (si) qui vestrum non ita creverit, omnes exheredes estote.' This would explain, he says, why the talk is always of a condition, and why the emphasis in the decision is not on the duty imposed but on the *adire,* that is the *cretio.* The main reason for the interpolation of the text would be, of course, that *cretio* had disappeared by Justinian's time and references to it had to be excised. This reconstruction looks extremely attractive and prima facie is convincing but nonetheless it must be quite wrong.

To the problem put to the jurist, Servius (or Alfenus), we have the reply, *respondit neminem ex alterius facto hereditati neque alligari neque exheredari posse: sed uti quisque condicionem implesset, quamvis nemo adisset praeterea, tamen eum heredem esse.* Solazzi (6) has suggested an interpolation in this part of the text because a Republican jurist should have written *neque hereditati alligari neque exheredari posse,* and he considers that the possibility of a scribal error should be excluded. But the oddity in the text concerns the sense as much as the grammar and Solazzi does not complain how thse blame for this is to be placed on the compilers and not on the Republican jurist. The oddity in the text as it stands is the tautology of *hereditati exheredari* and the dative depending on *exheredari.* But the solecism does not seem all that great when one takes into account the separation of *hereditati* from *exheredari* by *neque alligari neque* and the fact that *hereditati* is mainly dependent upon *alligari.* Certainly the passage is not written in as exact a form as it should be, but there is not enough to justify holding that it was not so written by Alfenus. But then we have to ask ourselves why Servius (or Alfenus) bothered to say that no one can be bound to an inheritance by the behaviour of another, as well as giving the main decision—for the questioner—that no one can be disinherited by the behaviour of another. There must be some point to *neminem ex alterius facto hereditati . . . alligari . . . posse* and this cannot lie solely in a perverted attempt to have the main decision accepted (7). The *responsum,* after all, was apparently given to the *coheres,* not to a judge or fellow jurist. The only explanation is that Servius (or Alfenus) felt it desirable to observe that the *alter heres* who *hereditatem praetermiserat* did not become heir as a result of the behaviour of the *coheres.* But if formal *cretio* had been demanded from both by the testator in the will no one could ever have wondered whether the *alter heres* was bound to the *hereditas* if the *coheres* had alone made *cretio* (8). The position is different if the sole condition imposed upon the institution was that the two heirs should build a sepulchral monument. Only one single act was

(6) *IURA* iii (1952), p. 26.
(7) But see *infra.*
(8) And certainly it would be rather absurd for the jurist to say this to the heir who had made *cretio.*

involved—not two separate acts as would be the case for two *cretiones*—so one might wonder about the position of the *alter heres* if the *coheres* performed that act all alone. Thus, despite Pernice, the will could not have demanded *cretio* from the two *heredes scripti*. This brings us also to the first important conclusion from the text. The idea that the *alter heres* might actually be heir as the result of the monument being built could never have occurred—however slightly—to the jurist if something more than the performance of the condition imposed in the will was demanded for that result. Hence at that time, in order to become entitled to the *hereditas* there can have been no need for an actual *cretio*, and it must have been enough that one acted as if one were heir. Thus, as early as Servius (or Alfenus) *pro herede gestio* was recognised. There seems no other evidence for its existence before the Empire (*9*).

We are thus forced to reconsider Pernice's arguments for the alteration of the substance of the text. His reconstruction seems totally unnecessary. If *'Titius et Maevius heredes sunto, cernitique in diebus cc. proximis, in quibus monumentum mihi a vobis fieri iubeo; (si) qui vestrum non ita creverit, omnes exheredes estote'* would escape the difficulties listed by him then so would: *'Titius et Maevius heredes sunto, eosque in diebus cc. proximis monumentum mihi facere iubeo; (si) qui eorum non ita fecerit omnes exheredes sunto'*. If the former involves a *conditio* and not a *modus*, then so does the latter: if in the former there is no later *exheredatio* in the same will of the *heredes*, then neither is there in the latter (*10*). And this is surely the right approach (*11*). That we are told that the *alter heres hereditatem praetermiserat* and *hereditatem non adisset* should not be taken

(*9*) Cf. Buckland, *A Textbook of Roman Law*, 3rd edition by Stein (Cambridge, 1963), p. 313: "In the Empire *cretio* was not necessary unless expressly required by the will, but it probably was in the time of Cicero." In support he observes (n. 3) that "Cicero never mentions *pro herede gestio*." Cf. also his *'Cretio* and connected topics' *Tijd.* cit., pp. 249f.

(*10*) Though I do not wish to lay too much stress on this, the texts cited by Pernice (see *supra*) in this connexion for the proposition that an *heres scriptus* could not be disinherited in the same will do not seem to bear the weight which he has to put upon them. Neither has anything to do with disinheritance upon condition. They do show that, if in the same will, you have a clause which purports to deprive him of the inheritance, the second clause will be rejected. This may simply be a rule for solving contradictions, and be due to *favor testamenti*. It is noticeable that it is applied less rigorously if there is a substitute who takes if the institution fails.

(*11*) Cf. e.g. G. 2.174: *Interdum duos pluresve gradus heredum facimus, hoc modo: L. Titius heres esto cernitoque in diebus centum proximis quibus scies poterisque. Quodni ita creveris. exheres esto. Tum mevius heres esto cernitoque in diebus centum et reliqua, et deinceps in quantum velimus substituere possumus*: cf. G.2.165. That the condition and the *exheredatio* attached to the institution occur in the sentence immediately following the institution is obviously not considered objectionable. Basically I can see no difference between this formulation and that in D.28.5.45(44) and do not understand why some writers [e.g., Fein-Glück, *Commentario alle Pandette, libro* xxix, *parte secunda* (Milan, 1909), p. 75 and n. 98] regard our text as the only one which allows legal effect to the disinhersion of the heir in the same will: cf. Buckland, *Tijd.*, cit., p.264 n.5.

where the heirs are *extranei* if it is attached to a failure of the condition to imply that the duty of making *cretio* was imposed: the phrases are perfectly consistent with the idea that he simply took no steps to have himself established in the *hereditas*. And the express clause of *exheredatio* if the condition is not fulfilled is wholly reasonable even on the *institutio* (*12, 13*).

It is quite natural for the stress in the text as we have it to be that the *alter heres* did not want the *hereditas* rather than that he did not fulfil the condition. The heir who did perform would put his question to the jurist in the way he did to express his indignation and disgust that he might forfeit his inheritance because the *alter heres* did not want to be heir. It is more forceful to say "Surely I am not less the heir because the other heir passed over the inheritance?" than to have "Surely I am not less the heir because the other heir did not help to fulfil the condition?" The stress once established in the question would remain in the decision. Again, to say he passed over the inheritance implies in fact that he did not fulfil the condition, and it is at the same time much more indicative of the frame of mind of this *alter heres*. It even simplifies the discussion since one can ignore the possible situation that the *alter heres* did not get round to fulfilling the condition and yet does not want to forfeit the inheritance: what would the situation be in such a case, especially if he were prepared to contribute to the cost of the monument?

The main interest of the text, though, lies in the decision which is completely unexpected. How could the jurist decide that the *heres scriptus* who built the monument was entitled to the *hereditas* when the will expressly stated that if any one did not build both were to be disinherited? But first the kind of provision in the will must be distinguished from two other kinds of provision with which it is sometimes linked. To begin with, it is not the same (*14*) as a condition which requires for its fulfilment the co-operation of a third party who refuses: for instance, "if you adopt Titius", and Titius refuses to be

(*12*) Buckland, who was concerned with the *exheredatio* clause attached to the requirement for *cretio* in wills says: "The application of the notion of *exheredatio* (*exheres esto*) to one who is not a *suus heres*, indeed is not a *heres* at all, but only a potential *heres*, looks anomalous. It has been explained in many ways. In the absence of evidence nothing more than conjecture is possible. The most probable view seems to be that it is part of the illogical juggling by which a true testamentary *heres* was constructed under the *mancipatio familiae*. As we know, the logic of the early lawyers was more ingenious than convincing": *Tijd.* cit. p. 252.

(*13*) Pernice's reconstruction would also to some extent have involved us in a possible difficulty which is now avoided. There could be no *aditio* while a condition was outstanding: cf. Buckland, *Textbook* cit. pp. 298f, and see the texts he cites, p. 299 n. 1. How then could one heir alone make *cretio* if the will expressly declared that neither could be heir unless both were? Any difficulty disappears if the need for *cretio* did not exist. There could be *pro herede gestio* by one who later asks if the condition had been satisfied.

(*14*) *Pace* Gothofredus referring to C.6.46.6(7).

adopted (*15*). Apart from anything else, in conditions such as these the third party's failure to co-operate is not envisaged or at least is not expressly provided for, so that there is greater scope for interpreting the intention, or the presumed intention, of the testator. In D.28.5.45(44) the testator expressly provided that if one of the *heredes scripti* failed to build the monument neither could be heir. Again this provision is not the same as those which simply impose a duty *coniunctim* and state that if it is not performed the provision is to fail: for instance, "if they build a monument" (*16, 17*). The problem in these is whether if one person has performed (his part) the condition is to be accepted as satisfied by him even though the other has not performed. Again apart even from other considerations, there is considerable scope for interpreting the testator's intention. But in D.28.5.45(44) the testator expressly states that both must perform the condition or neither will be heir. So far as I am aware, in fact, there is no other text with a provision parallel to that in D.28.5.45(44), and modern jurists do not seem to have paid much attention to the decision.

A glance at a different text will show just how extreme Servius' or Alfenus' decision is.

> D.28.5.29 (Pomponius 5 ad Sab.). Hoc articulo 'quisque' omnes significantur: et ideo Labeo scribit, si ita scriptum sit: 'Titius et Seius quanta quisque eorum ex parte heredem me habuerit scriptum, heres mihi esto', nisi omnes habeant scriptum heredem testatorem, neutrum heredem esse posse, quoniam ad omnium factum sermo refertur: in quo puto testatoris mentem respiciendam. sed humanius est eum quidem, qui testatorem suum heredem scripserit, in tantam partem ei heredem fore, qui autem eum non scripserit nec ad hereditatem eius admitti.

The extent to which the text is interpolated or is not interpolated need not concern us. The significant thing is that the decision which seemed obvious to the jurists was that neither was to be heir unless both were. That one alone might be heir was accepted only because it was *humanius*. Yet in that institution there was more room for argument since there was no express *exheredatio* of both if one failed to institute the testator as heir. That text also shows how inexact is the reply of D.28.5.45(44) that no person can be disinherited by the

(*15*) Cf., e.g., D.28.7.3 (Paul *1 ad Sab.*); 28.7.11 (Iulianus *29 dig.*) 35.1.14 Pomponius *8 ad Sab*).

(*16*) Though Schindler seems to ignore the distinction: op cit., pp. 167ff and p. 174 n. 29.

(*17*) Cf., e.g., D.35.1.112pr., 2 (Pomponius *12 epist.*); 40.4.13.2 (Ulpian *5 disp.*); 40.7.13.2 (Iulianus *43 dig.*). See also D.28.5.29 (Pomponius *5 ad Sab.*), quoted *infra*, and D. 40.4.13. pr. (Ulpian *5 disp.*). If in this last text *nisi aliud expresserit testator* is an interpolation the clause would have been added only for the sake of completeness and not because Ulpian—who was concerned with the situation where there was no relevant express clause—was of a different opinion: contra, De Sarlo, op. cit., p. 17.

behaviour of another. So far as we know there never was a time when it was even argued that a condition on an institution of an *heres extraneus* was valid only if it were in the power of the *heres scriptus* to perform: certainly, D.28.1.25 (Iavolenus *5 post. Labeonis*) would seem to show that neither Servius nor Alfenus would subscribe to such a view (*18*).

But the *responsum* of D.28.5.45(44), inexact though it is, is highly significant. Its very general and abstract nature shows that the respondent is not arguing from the intention or presumed intention of the testator. This must mean that he cannot. Also, it shows that there was nothing particular in the situation which would on legal grounds justify the decision there but not in general. Again, it indicates that the respondent did not feel that his opinion would carry weight if he declared it to be an exception based on the equity of the situation. And further, since he does not expressly say anything about the *omnes exheredes sunto* clause—which is the overwhelming obstacle to his view—he is in effect tacitly admitting that the validity of that clause cannot be attacked.

If the foregoing is correct the text takes on special significance. Servius or Alfenus is caught giving a decision which is contrary to legal principle and which cannot be defended, juridically, as an exception to the rule. There are no reasons for thinking he has just made a mistake, and we have evidence that the state of the law was known to him. At the same time the jurist must feel that there are no factors which would persuade enough other people to reach his decision on grounds of equity. No argument can convincingly be produced to show that the jurist decided the way he did because of personal ties with the questioner.

The situation and the decision must be re-examined in the light of this conclusion. A testator institutes two *extranei* as his heirs and he orders them to build a sepulchral monument for him within a certain time: if either fails to build both are to be disinherited. The wording of the provision is unambiguous and the testator's intention is certain. One of the *heredes scripti* omits the *hereditas*, the other builds the monument by himself. Clearly now the law of wills demands that neither be heir. But there are equitable reasons for allowing the person who built to take the hereditas. He more than fulfilled the condition put upon him—he also performed the obligation put on the other *heres scriptus*. Servius (or Alfenus) wishes him to be heir and gives his decision accordingly. He can only have been swayed by the equity of the situation (*19*), but he is not prepared to argue on that: a strong indication that here *aequitas* could not be expected to prevail over *ius*. He has to argue, therefore, from principle but one which does not

(*18*) For a full discussion of this whole point see *infra*.
(*19*) A desire to find that the will could operate, *favore testamenti*, would never have been enough to explain, or justify, the decision.

exist and so he replies in a manner which is not altogether straightforward. First, what is really the argument for the decision—no one can be bound to an inheritance or disinherited by the behaviour of another—is presented not as an argument but as the decision. Secondly, the main part of the decision—no one can be disinherited by another's behaviour—is preceded by a different point—no one can be bound to an inheritance by another's behaviour—which has relevance to the situation but none whatsoever to the main decision. Its real function is to appear to be the converse of the main decision: if it is true, which it is, that no one can be bound to an inheritance by another's behaviour, then it is also true, which it is not, that no one can be disinherited by another's behaviour. It is, to that extent, a red herring. Thirdly, the main part of the decision is expressed as a very general proposition of law. This makes it more difficult to display its inaccuracy. Contrary cases might be treated as exceptions which were perhaps not thought of as falling within the principle. Cases which seem to accord with the principle can be treated as proving its existence. It is not surprising that, as mentioned earlier, the situation in D.28.5.45 (44) is at times linked with situations which are basically different. Indeed, the last part of the text, *sed uti quisque condicionem implesset, quamvis nemo adisset praeterea tamen eum heredem esse,* is probably intended to make one think of situations such as those which occur in D.35.1.112 pr. (*20*) where presumably Servius (or Alfenus) would hold that the one who performed would always become heir. Fourthly, this categorical and extremely wide mode of giving the decision makes it less obvious that the jurist is concealing the real obstacle to his view, the *omnes exheredes sunto clause.* It is precisely the disingenuous nature of the *responsum* which best shows the difficulties in the decision.

D.28.5.45(44) is not the only text in which Servius—assuming that the *responsum* goes back to him—gives a decision contrary to the intention of the testator. He does the same in D.35.1.40.3 (Iavolenus *2 ex post. Labeonis*).

> Dominus servo aureos quinque legaverat: 'heres meus Sticho servo meo, quem testamento liberum esse iussi, aureos quinque, quos in tabulis debeo, dato'. nihil servo legatum esse Namusa Servium respondisse scribit, quia dominus servo nihil debere potuisset: ego puto secundum mentem testatoris naturale magis quam civile debitum spectandum esse, et eo iure utimur.

A master freed a slave by will and left him a legacy of "the five *aurei* which I owe him according to my account books". Servius held that no legacy was given to the slave because a master can owe his slave nothing. But, of course, there could be no doubt as to the testator's intention, and Servius' decision was completely contrary to it. Still in this case Servius was in a stronger position because he

(*20*) Cf. *supra.*

could rely strictly on the wording of the will, which he obviously could not do in D.28.5.45(44). The two texts taken together are very instructive for Servius' social and moral outlook. Clearly he was unsympathetic to the slave in D.35.1.40.3 being given the legacy, and so he interpreted the will against the testator's intention (*21*). Equally clearly in D.28.5.45(44) he wanted the *heres scriptus* who had done what he could to fulfil the condition and had no doubt spent money in the process to be heir and so, for a very different reason, he interpreted the will against the testator's intention (*22*).

II

Up to this point I have excluded from the discussion Buckland's theory of the early history of conditional institution which is, however, also important for D.28.5.45(44). I think Buckland's view can be shown to be implausible but a more detailed examination is required than would have been appropriate in the first part of this note.

Buckland thought that the early history of conditional institution was obscure, and he says: "The most probable story seems to be that it was unknown to the Comitial will, and, for long, to the Mancipatory will, appearing first, by a somewhat uncertain mode of evolution, about the close of the Republic. The first conditions, or quasi conditions, would be such as must necessarily be satisfied by the time when the will operated. The next would be those depending only on the will of the *heres*, such as could be satisfied at once, involving no delay in *aditio*. These seem to have been admitted in or shortly after, the time of Cicero. Those involving delay were not admitted, or, at any rate, were not treated as conditions till the Empire, and then became common. It is clear that conditions were earlier and more prominent in legacy" (*23*). Later he summed up the theoretical arguments: "It is not clear how they (i.e., conditions on institution) came to be allowed at all in what must have been a typical *actus legitimus*. The fact that the Praetor's remission produced civil effects suggests that the Praetor may have been the first agent in introducing them" (*24*). If Buckland is right, then the *responsum* in D.28.5.45(44) may be perfectly straightforward, and it may indeed have been the

(*21*) Cf. most recently on the text, Watson, 'Morality, Slavery and the Jurists in the Later Roman Republic' *Tulane Law Review* xlii (1968), pp. 289ff at pp. 295f. The writer observes that, of the 139 texts on legacies which go back to Republican decisions, D.35.1.40.3 is the only one which shows a decision contrary to the testator's clear intention. The very different reason for the decision in D.28.4.45(44) is added support for the writer's main proposition that D.35.1.40.3 shows Servius acting unfairly towards a slave. [The *aureos* of the text is, of course, an interpolation for some other monetary unit.]

(*22*) From D.33.10.7.2 (Celsus *19 dig.*) we know that Servius was of the opinion that in interpreting a will the testator's intention should be taken into account: cf. Watson, op. cit, p. 296.

(*23*) *Tijd.*, cit., p. 257.

(*24*) *Textbook*, cit., p. 299.

law at the time that a person could not be disinherited by the behaviour of another.

The arguments for and against Buckland's position will be considered in two stages: first the main theoretical arguments; secondly arguments from the texts.

(i) Let us first look at the arguments about *institutio heredis* being an *actus legitimus*. "That *institutio heredis*" he says, "was thought of as an *actus legitimus* is shown by the strict rules surviving in classical law, as to the forms admissible. '*Heres esto*' was the proper form, though '*heredem esse iubeo*' was allowed." But in the first place, *legatum per vindicationem* and *legatum per damnationem* had just as strict rules about the proper form (25) and Buckland at the very least would admit that conditions on legacies were earlier than the period we are concerned with. So even if at one time conditions were not possible on an *institutio* this in itself would be a rather weak argument for holding that the position was basically unchanged as late as the first century B.C. Again, *substitutio* seems to be nothing other than a *conditional institutio* where the condition is outside the power of this subsequent heir. Indeed, in *substitutio vulgaris* where the *institutus* is an *extraneus* who eventually accepts the inheritance, the subsequent heir is excluded by the *factum* of another. Even Buckland does not seem to deny that *substitutio* is ancient (26), and he tries to circumvent this obstacle in another way. He says (27): "But *substitutio*, however ancient, is not essentially a conditional *institutio*. The objection to a condition in *institutio* is that it suspends by an express provision the operation of an *actus legitimus*. *Substitutio* does not do this: there is no moment, so far as the document is concerned, in which it is not open for an heir to enter at once. The entry is not held up. The language of the texts does not suggest that it was regarded as a condition." But this looks very much like special pleading. *Substitutio* quite clearly is conditional *institutio*, and that *institutio* is definitely suspended by the condition. Moreover, even if one can regard *substitutio* as differing from some other conditional *institutiones*, if it remains a suspensive condition at all, it still takes away all the force (28) from the argument about *institutio* being an *actus legitimus* and hence, of necessity, unconditional. On the ordinary understanding of *actus legitimus*, no proper conditions of any kind should be possible. Also, I am not sure that it is meaningful to say

(25) G.2.199, 201. On the use of these forms see my forthcoming *The Law of Succession in the Later Roman Republic*, Chapter 9.

(26) Cf. e.g., for *substitutio vulgaris*: D 28.1.25 (Iavolenus *5 ex post. Labeonis*), referring to Servius; 28.6.39.2 (Iavolenus *1 ex post.* Labeonis) referring to Ofilius and Cascellius. For *substitutio pupillaris* it is enough to refer to the famous *causa Curiana* of 93-91 B.C.: cf. e.g., Cicero, *Brutus*, 52-53.194-198; *de orat.* 1.39.180; *de inven.* 2.42.122. Presumably this case is also proof of the existence at the time of *substitutio vulgaris*.

(27) *Tijd.* cit., p. 244.

(28) After the recognition of *substituto*.

"The objection to a condition in *institutio* is that it suspends by an express provision the operation of an *actus legtimus.*" The idea that an *actus legitimus* cannot have a condition seems to be that when it is 'made' it must take effect fully and at once (*29*). But when is the *institutio* 'made' in this sense? If it is an *actus legitimus* and like the others, it cannot be 'made' when the will is written since none of the provisions can take effect before the testator dies, nor can it be when the testator dies since an *heres extraneus* does not become heir until he accepts. Thus, if *institutio heredis* is an *actus legitimus* and is like the others, then it is 'made' only when the heir accepts. Hence, even if *institutio heredis* is an *actus legitimus* this is no reason for refusing to allow conditions which have to be fulfilled before the *institutio* is 'made'. Buckland, indeed, has to say that *institutio* "differed fundamentally" from other *actus legitimi* in that it does not operate at once. "This state of affairs", he declares, "is one of the factors facilitating the introduction of ordinary conditions (*30*). But how are we to reconcile this with his later statement that *institutio* "must have been a typical *actus legitimus*" (*31*)?

Moreover we are nowhere told in the sources that *institutio heredis* was an an *actus legitimus.* Actually, the meaning of that term is not itself clear. It occurs only in one text, D.50.17.77 (Papinian *28 quaest.*) and its use may not be technical: in the context the term may mean no more than 'a legal institution which cannot be made subject to a condition' and have no wider significance (*32*).

Secondly, Buckland's argument, "The fact that the Praetor's remission produced civil effects suggests that the Praetor may have been the first agent in introducing them [i.e. conditions]" (*33*), is not convincing. The remission in question (*34*) is the remission of the *condicio iurisiurandi.* Elsewhere he expands; "It has been shown by Pernice that the praetor's *remissio* of *condicio iurisiurandi* had full civil law effect. The introduction of this *remissio* seems to coincide roughly in time with the recognition of ordinary conditions and it is not easy to see how the *remissio* should have had this effect if conditions were fully valid at civil law" (*35*). But in D.28.7.28 (Papinian *13 quaest.*) we find Servius concerned with an ordinary condition (*36*) and this is earlier than the edict *de condicione iurisiurandi* (*37*).

(*29*) Thus, D.50.17.77 (Papinian *28 quaest.*) describes *tutoris datio* as an *actus legitimus* but a testator could appoint a tutor conditionally by will: D.26.2.8.2 (Ulpian *24 ad Sab.*); cf. Buckland, *Textbook* cit., p. 144. What is meant is that no one can be tutor under a condition.
(*30*) *Tijd.*, cit., p. 256.
(*31*) *Textbook*, cit., p. 299.
(*32*) Cf. Watson, 'The form and nature of *acceptilatio* in classical Roman Law', *RIDA* viii (1961), p. 391ff at p. 405. *Legitimi* in D.50.17.77 may also be an interpolation: cf. *Index Itp.*
(*33*) *Textbook*, cit., p. 299.
(*34*) See the *Textbook*, loc. cit., and the cross-reference in n. 12 to n. 6.
(*35*) *Tijd.*, cit., p. 267.
(*36*) Cf. *infra.*

Buckland's arguments raise very sharply—and do not resolve—the problem of how conditions, if they were introduced by the praetor, came to have civil law effect. He himself admits "*Condicio* in *institutio*, as we know it, is a civil law institution. It is discussed mainly in treatises on the civil law" (*38*). The difficulty, created by his theory, is even greater than the problem he is trying to solve.

Accordingly, it seems that the theoretical justifications for Buckland's view are not persuasive.

(ii) The texts, or lack of texts, do not really provide Buckland with more support (*39*).

Plautus, he observes, has nothing about conditional *institutio* (*40*). But this is not significant. Plautus, in fact, has very few texts on succession at all. For instance, there seems to be only one of any kind on legacy (*41*).

More importance is attached by Buckland to Cicero: "The writings of Cicero are full of allusions to *hereditas*, but few have any significance for the present question and they seem to show that he did not know of ordinary conditions on institutions" (*42*). Buckland seems to have two points in mind here: first, the texts show situations in which conditional institution would have been appropriate but in which some other method of achieving the object was employed; secondly, no text actually shows a conditional institution. It would appear that he attaches most importance to *de off.* 3.24. 93.

> Quid? si qui sapiens rogatus sit ab eo, qui eum heredem faciat, cum ei testamento sestertium milies relinquatur, ut, ante quam hereditatem adeat, luce palam in foro saltet, idque se facturum promiserit, quod aliter heredem eum scripturus ille non esset, faciat, quod promiserit, necne? Promisisse nollem et id arbitror fuisse gravitatis; quoniam promisit, si saltare in foro turpe ducet, honestius mentietur, si ex hereditate nihil ceperit, quam si ceperit, nisi forte eam pecuniam in rei publicae magnum aliquod tempus contulerit, ut vel saltare, cum patriae consulturus sit, turpe non sit.

He rightly points out that no condition is involved in the will and states: "The passage shows how at that time, testators secured that their *heredes* should do something in the future, not by a condition

(*37*) Cf. Pernice, op. cit., pp. 50f. A condition might be remitted by the praetor before the introduction of the edict: cf. Cicero, *in Verrem* 2.1.47.123, 124; and *infra*. But it is not known whether this had a civil law effect.
(*38*) *Tijd.* cit., p. 267.
(*39*) It must be observed, in fairness to Buckland, that he did not hold that the texts proved the evolution suggested by him, only that they "unquestionably give strong support": *Tijd.* cit., p. 258.
(*40*) *Tijd.*, cit., p. 261 n. 6.
(*41*) *As.* 306.
(*42*) *Tijd.*, cit., pp. 258*f*.

involving suspension of *aditio*" (43). But this rather wide claim is not justified by the text. What Cicero was concerned with here, as 3.24.92 and 3.25.94 show, was situations in which it might be questioned whether a promise should be kept. Hence §93 could not reasonably have concerned a conditional institution (44). Moreover the situation described is particularly suitable for Cicero's purpose. A bad promise has been made and the promisor will receive a reward on account of it whether he actually fulfils it or not. What ought he to do? A neater situation for the point is hard to envisage. The promisee has to be dead—or a more complicated situation has to be invented—to allow the promisor to be in the situation where he has not yet received the reward for his performance, yet able to get it without actually performing. The example could have been chosen even if it was quite unreal in practice. At the very least, the example can not be generalised as showing how testators secured that their heirs do something in the future.

> *in Verrem* 2.1.47.123. Superbia vero quae fuerit, quis ignorat? quem ad modum iste tenuissimum quemque contempserit, despexerit, liberum esse numquam duxerit? P. Trebonius viros bonos et honestos conplures fecit heredes; in iis fecit suum libertum. Is A. Trebonium fratrem habuerat proscriptum. Ei cum cautum vellet, scripsit, ut heredes iurarent se curaturos, ut ex sua cuiusque parte ne minus dimidium ad A. Trebonium illum proscriptum perveniret. Libertus iurat; ceteri heredes adeunt ad Verrem, docent non oportere se id iurare facturos esse, quod contra legem Corneliam esset, quae proscriptum iuvari vetaret; inpetrant, ut ne iurent; dat his possessionem. Id ego non reprehendo; etenim erat iniquum homini proscripto egenti de fraternis bonis quicquam dari. Libertus, nisi ex testamento patroni iurasset, scelus se facturum arbitrabatur; 124 itaque ei Verres possessionem hereditatis negat se daturum, ne posset patronum suum proscriptum iuvare, simul ut esset poena, quod alterius patroni testamento optemperasset. Das possessionem ei, qui non iuravit; concedo; praetorium est. Adimis tu ei, qui iuravit; quo exemplo? Proscriptum iuvat; lex est, poena est. Quid ad eum, qui ius dicit? utrum reprehendis, quod patronum iuvabat eum, qui [tum] in miseriis erat, an quod alterius patroni mortui voluntatem conservabat, a quo summum beneficium acceperat? utrum horum reprehendis? Et hoc tum de sella vir optimus dixit: dixit: 'Equiti Romano tam locupleti libertinus homo sit heres?' O modestum ordinem, quod illinc vivus surrexit!

Buckland comments: "The merits of the case do not concern us. So far as appears this was not *condicio* but direct *iussum*, perhaps

(43) *Tijd.*, cit., p. 259.
(44) Nor even a *iussum* in the will! Cf. *infra*.

independent of the *institutio* and enforceable in one of the several ways applied to such things. Probably it was one of the requirements of the *cretio* clause operating as a condition. The form *'iussit'* does not exclude a true condition, and it may have been: *'T. heres esto si juraverit se curaturum (etc.) cernitoque in diebus'* (etc.). This is less probable, but if it is the true interpretation then this earliest type of condition which is quite potestative and involves no delay was recognised in Cicero's time as it certainly was not long after" (45). But there is no *"iussum" or "iussit"* mentioned in the text, and no reason to assume *iussum* rather than conditional *institutio* (46). Incidentally, most of the several ways referred to by Buckland of enforcing the *iussum* seem to date from the Empire (47).

*Ad Att.*7.8.3. does talk about *iuberi* but Buckland himself does not exclude the possibility of a condition on the *institutio* (48).

Thus, these Ciceronian texts do not convincingly show that where conditional institution would have been appropriate, some other method of achieving the object was used. Indeed, even if it could be proved that conditional *institutio* did not appear in any text of Cicero, the fact would have doubtful significance. A number of Ciceronian texts concerns legacies but none shows a conditional legacy, though conditions on legacies were certainly admitted long before Cicero. Actually, it would not be surprising if *iussum* frequently appeared in place of a condition on an *institutio* even if the latter was possible. There are various reasons—such as *sacra, usucapio lucrativa*—why in practice a testator would not wish *aditio* to be long delayed.

The remaining texts are from the Digest. The important ones for us, apart from D.28.5.45(44) itself, are D.35.1.6.1 (Pomponius *3 ad Sab.*) and 28.7.28 (Papinian *13 quaest.*).

In D.35.1.6.1. we have: *sed Servius respondit, cum ita esset scriptum 'si filia et mater mea vivent' altera iam mortua, non defici condicione* (49). For Buckland (50), and indeed other modern scholars (51), this situation does not involve a true condition since it does not depend upon a future and uncertain event: the *institutio* is valid or not according to a situation existing when the will was opened. The distinction between the two kinds of case is real and important but it should be noticed that Servius appears to treat the situation in D.35.1.6.1 as involving a *condicio* of some kind. And

(45) *Tijd.*, cit., p. 260.
(46) Certainly not from the separation in the text of the *institutio* and the direction to make the *iusiurandum.* This is due to the need to tell us about the proscribed brother. The construction of the passage is very neat.
(47) *cf.* Pernice op. cit. pp. 36ff, whom Buckland himself cites.
(48) *Tijd.*, op. cit., p. 261. Buckland also refers to other texts which are not really instructive either for his proposition or the contrary one: *ad Att.* 11.15.4; *in Verrem* 2.2.14.36; 2.1.10.27; 2.2.8.22.
(49) Cf. D.28.5.46(45) (Alfenus *2 dig. a Paulo epit.*).
(50) *Tijd.*, cit., p. 262; *Textbook*, cit., p. 297.
(51) Cf. e.g.., Kaser, *Das römische Privatrecht* I (Munich, 1955), p. 219.

moreover, Roman jurists who draw a distinction between the two kinds of case (52) nonetheless call both *condiciones*. Thus in what is the most important text, D.28.3.16 (Pomponius *2 ad Quintum Mucium*) Pomponius can write: *multum autem interest, qualis condicio posita fuerit: nam aut in praeteritum concepta ponitur aut in praesens aut in futurum*. How clearly different kinds of *condicio* were distinguished in early law is unknown. One might hesitate, therefore, to say that though in the time of Servius, an institution '*si filia et mater mea vivent*', was valid this is no indication that 'true' conditions were possible.

D.28.7.28 tells us: *argumentoque est, quod apud Servium quoque relatum est: quendam enim refert ita heredem institutum, si in Capitolium ascenderit, quod si non ascendisset, legatum ei datum, eumque antequam ascenderet mortem obisse: de quo respondit Servius condicionem morte defecisse ideoque moriente eo legati diem cessisse.* Buckland comments: "This seems to express a true condition, but it is one which can be performed at once, dependent only on the will of the *heres*. On that view it is the earliest recorded instance of such a condition but it is at least possible since it comes from a jurist as late as Papinian, that Servius is translated into the language of another age" (53). And we should remember his: "The first conditions, or quasi-conditions, would be such as must necessarily be satisfied by the time when the will operated. The next would be those depending only on the will of the *heres*, such as could be satisfied at once, involving no delay in *aditio*. These seem to have been admitted in or shortly after, the time of Cicero. Those involving delay were not admitted, or, at any rate, were not treated as conditions till the Empire, and then became common" (54). This time Buckland is really too narrow. The significant thing about D.28.7.28 is surely that the condition certainly need not be performed at once and that delay is permitted. Note that the text has *antequam ascenderet*, not *antequam ascendere posset*.

Buckland does not make much of D.28.5.45(44) where he follows Pernice's reconstruction (55).

The absence of Digest texts for the Republic and even rather later showing a conditional institution dependent upon a future event outside the power of the heir cannot in itself be treated as significant. There are numerous other, even more important, aspects of law which

(52) And between their effects.
(53) *Tijd.*, cit., pp. 262f.
(54) *Tijd.*, cit., p. 257.
(55) *Tijd.*, cit., pp. 263ff. Buckland refers to a number of other texts but these do not seem very significant for either point of view: D.35.1.80 (*Scaevola 8 quaest.*); 35.1.27 (Alfenus Varus *5 dig.*); 50.16.202 (Alfenus Varus *2 dig.*); 28.5.70 (Proculus *2 epist.*);)28.6.39pr (Iavolenus *1 ex post. Labeonis*) [The procedure suggested by the jurists in this text is the neatest possible and certainly preferable to a conditional *institutio* of the *extraneus*]; 28.7.20pr., 1 (Labeo *2 post. a Iavoleno epit.*); 35.1.39.1 (Iavolenus *1 ex post. Labeonis*); 50.16.217. pr. (Iavolenus *1 ex post Labeonis*).

are not evidenced in the Digest for the Republic yet whose existence is undeniable (56). Nor is it strange that earlier evidence exists for what Buckland considers to be not true conditions and also for true conditions dependent solely upon the heir. These are in practice much commoner situations. A quick glance at Digest Title 35.1 will confirm this. True statistical accuracy cannot be expected but if all the texts in the Title which quote the actual words of a condition, whether it is valid or not, and whether it is on *institutio,* legacy or manumission, are analysed, the following picture seems to emerge: there are 51 certain and 4 possible cases involving a true condition dependent upon the beneficiary; 13 certain and 8 possible cases involving what for Buckland and others is not a true condition; only 6 certain and 6 possible cases involving a true condition independent of the behaviour of the beneficiary. Hence this last situation is relatively uncommon. Buckland seems to have drawn legal conclusions from his observations without noticing that the picture in the texts reflects social behaviour, rather than any necessary or even plausible existing state of the law.

Thus, if we leave aside D.28.5.45.(44) for the moment, it seems that Buckland's view of the early history of conditional institution receives no practical support from the sources and is not confirmed by his theoretical arguments. Indeed, the early existence of *substitutio* would seem to provide very strong evidence that Buckland's thesis cannot stand.

D.28.4.45(44) which at first sight seems in line with Buckland's theory is too fragile to support by itself the weight of that theory. The *responsum* would still be too wide: *neminem ex alterius facto . . . exheredari posse* would still not be accurate because an *extraneus institutus* would exclude the *substitutus* from the *hereditas.* But if the text does not prove Buckland's theory then in the circumstances it follows that the theory cannot be used to explain the text. We are forced back to the conclusions reached in the first part of the note (56).

(56) For instance, no Digest text mentions for the Republic the edict *de bonorum possessione secundum tabulas* but its extreme importance is brought out in the lay sources, e.g., Cicero, *in Verrem,* 2.1.44.114; *top.*4.18.

I am grateful to a number of friends for their criticism; especially to Mr. John L. Barton, Mr. Robin Seager, Professor Reuven Yaron, Dr. A. M. Honoré and Dr. Geoffrey MacCormack.