THEOPHILUS AND THE “INCORPOREAL” HEIR

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Those who are interested in the readership of Justinian’s Institutes in sixth-century Constantinople could do worse than to read the so-called Paraphrasis Institutionum of Theophilus.1 In this text, which is the only directly transmitted report of an elementary2 course given in the law school of Constantinople, we get a glimpse of the way Justinian’s prima legum cunabula were explained to the cupid a legum iuventus of the time.3

It is not necessary to elaborate on the nature and value of the Paraphrasis here. By far the greater part of the Paraphrasis is a translation into Greek of the Institutiones, but there are many passages in which the antecessor inserts explanations of the text.4 These explanations give an idea of what apparently was considered helpful for a better understanding of the text. They often occur at the beginning of a title, in order to introduce the transition from one subject to another. One such case has drawn my attention and has given rise to this note.

Titles 15 and 16 of Book II of the Institutes deal with testamentary clauses containing provisions for cases in which the intended heir will not be able or will not wish to accept the inheritance: if this comes to pass, the clause calls a “substitute” heir to the inheritance. Title 15 concerns “ordinary substitutions”, title 16 the special case of “substitutes for children”.5 The text of the Institutes is fairly concise, and Theophilus must have felt that

1 References are to J.H.A. Lokin, R. Meijering, B.H. Stolte and N. Van der Wal (eds.), Theophili Antecessoris Paraphrasis Institutionum. With a translation by A.F. Murison, Groningen, 2010. For the title Paraphrasis see the Prolegomena, p. ix n. 1. References below are to the lines of Theoph. 2,16 pr. of the Greek text in this edition (pp. 354 and 356), elsewhere they refer to its page and lines. Translations are Murison’s unless indicated otherwise.

2 The Epitome Iuliani is another such “course report”, but teaching Justinian’s Novels was not an elementary course. See W. Kaiser, Die Epitome Iuliani. Beiträge zum römischen Recht im frühen Mittelalter und zum byzantinischen Rechtsunterricht, Frankfurt, 2004, and n. 4 below.

3 The expressions occur in the introductory constitution Imperatoriam, rubr. and § 3.


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his audience stood in need of a few explanatory words. The result is a principium of this title that differs considerably from the Institutes. Theophilus puts a stronger emphasis on the difference between ordinary and pupillary substitutions. If the heir is an extraneus, ordinary substitutions are possible in many cases, of which he gives examples, but if the heir is a child of the testator, such an ordinary substitution is possible “in one case only” (8), namely, if the son in potestate dies before his father. This is explained by positing the opposite situation: suppose the father dies before the son, no substitution is possible, for the son becomes at once heir to his father, “not even on abstention losing the incorporeal name. For the incorporeal name of inheritance, once attached to a man, passes with difficulty to another” (12-14; we shall return to these words in a moment). For this particular case another substitution has been created, the pupillary one, “which is applicable in the case of children of our own, and not only in the case of children, but also of persons subject to our power, and not only of persons subject to our power, but also of sui under puberty” (thus Murison’s translation at 15-17, but see below).

Having thus narrowed down the circumstances in which a pupillary substitution would take effect, Theophilus gives the standard form of the pupillary substitution: “Let my son be heir; but, if he become heir and die under puberty, let So-and-so be his heir” (18-19). He thereupon paraphrases the words of the Institutes, but again intercalating explanations when he translates Inst. 2,16, pr., lines 6-10, pointing out that these words are in part an ordinary substitution (ulgaria), in part a pupillaria, so that the whole clause could be termed a ulgaropupillaria one (22).

Of course these are not the only additions to the Justinianic text. Already, a few paragraphs further down, for example, we read a protheoria, a preliminary remark. The beginning of title 16 of book II, however, seems particularly illustrative of Theophilus’ method when approaching a new subject. Two points seem worth making. One concerns substance, the other terminology.

First, nowhere else, not even in Gaius, do we find so accessible an explanation of the pupillaris substitutio. Its didactic form helps to explain Justinian’s text. (We may remember that Theophilus had cooperated in drafting the Institutes.) Reading again our edited version of Murison’s translation (at 355, lines 18-20) it appears that we should perhaps have clarified his words at this point. As they stand, they could be taken to suggest that the repetition of οὐ μόνον ... ἀλλὰ καὶ ... widens the concept παῖς. This is not what is meant: on the contrary, these qualifications define the concept by adding requirements a παῖς must meet before coming within the scope of the clause. I would now propose to continue after “which is applicable in the case of children of our own” with “who are not only our children, but also subject to our power, and not only subject to our power, but also sui under puberty”.

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6 See Scheltema, Antécesseurs (n. 4), 18 = 72.
7 Our modern manuals essentially explain the pupillary substitution in the same terms: see M. Kaser, Das römische Privatrecht I, München, 1971, 689-690; and vol II, München, 1975, 493.
8 Const Imperatoriam § 3: ... Theophilo et Dorotheo viris illustribus antecessoribus ...
Second, the terminology is unusual, to say the least. The expression ἀσώματον ὄνομα τῆς κληρονομίας is, as far as I know, unique to Theophilus; nevertheless it does not seem to have attracted much comment.9

The adjective ἀσώματος is standard for incorporalis. A hereditas is a res incorporalis, as Theophilus had explained at Inst. 2,2,2: Ἀσώματα ἐστιν ἅτινα ἐν δικαίῳ συνίσταται, οἷον κληρονομία. This should not be read without referring to § 1, where the distinction between incorporalis and corporalis is made:

Theophilus 2,2,1

Ἐπειδὴ δὲ τῶν πραγμάτων τὰ μὲν ἐστὶ σωματικά τὰ δὲ ἀσώματα (σωματικόν δὲ ἐστὶν ὁ καὶ ὄνοματι γνωρίζεται καὶ ἀφὴ καὶ θεά ὑποπίπτει) ... Things, then, are either corporeal or incorporeal. (A corporeal thing is a thing that is known by a name and is also capable of being touched and seen, as land, a house, clothing, a slave. An incorporeal thing is a thing that is known only mentally and is not capable of being touched or seen.)

On the one hand, Theophilus echoes the well-known distinction also drawn in Gaius II 14, with which he was of course familiar, both from having taught Gaius’ textbook and from incorporating that passage into Justinian’s Institutes. Much has been written on the roots of the distinction in Greek philosophy, which I am not going to review here.10

On the other hand, Theophilus’ own contribution to the definition of res corporalis is that it is not only capable of being touched, as in the Institutes, but also “known by name”. Theophilus’ words have not passed entirely unnoticed,11 but have received little attention. The emphasis on ὄνομα smacks of the Stoic theory of language, where ὄνομα is that part of a phrase that indicates a special quality (ἰδίαν ποιότητα, ὡς Διογένης, Σωκράτης, as we read with Diogenes Laërtius).12 The early sixth-century grammarian Priscian, who taught Latin in Constantinople and whom Theophilus may have known, comes close when distinguishing nomina denoting a communis qualitas and those indicating a propria qualitas, but says nothing about (in)corporalis.13 Another possible

9 Not even in the humanist editions. Curtius (1536) simply ignored ἀσώματον, translating heredis nomen, which was adopted by Gothofredus (1587) and Fabrot (1638). Reitz (1751) did better with incorporale hereditatis nomen, while Ferrini (1884) wrote incorporale nomen heredis. The only note devoted to the expression stems from Gothofredus, but is no more than a reference to a translation-by-omission.


11 For example, P. Voci, Diritto ereditario romano I, Milan, 1967, 155 and 161.


13 Priscianus, Inst. grmm. II 22. Cf. Wieacker, (n. 10) 104 n. 28, without mentioning Theophilus. See on Priscian R. Helm, RE XXII.2 (1954), 2328-2346 s.v. Priscianus 1, who points out that Priscian is more dependent on Greek grammarians than other Latin grammarians (2335).
source could be the Athenian philosopher L. Calvenus Taurus, contemporary and friend ("noster Taurus") of Gellius, who is on record as having written a Περὶ σωμάτων καὶ ἀσωμάτων, which would have corresponded with αἰσθήτα and νοητά respectively.\(^{14}\)

Whatever the philosophical antecedents may have been, for Theophilus the res incorporalis is known only mentally (νῷ μόνῳ γνωρίζεται, as opposed to ονόματι γνωρίζεται). This opposition renders the combination ἀσωμάτων ὄνομα all the more surprising. Murison translates it as "incorporeal name", a literal translation that employs two words, for which combination there is no parallel expression such as incorporale nomen in Latin legal language, let alone together with hereditatis. The literal translation, therefore, does not solve the problem of what Theophilus means, or rather, why Theophilus uses these words to express a phenomenon that is known in secondary literature as nudum nomen heredis, dating, if I am not mistaken, from the end of the sixteenth century.\(^{15}\) It indicates the quality of being heir only in name, for example when someone sells an inheritance, or when a suus heres refuses the inheritance. In both cases the original heir remains heres, but does not benefit, and is protected against any liabilities, from the estate.

But nudum is not ἀσωμάτων, and heres is not κληρονομία; nomen is not always ὄνομα, but let us leave that for the moment. First nudum. In legal usage, nudus indicates that something is missing, which normally one would expect to be present. Theophilus elsewhere uses the standard translations for nudus, which are γυμνός and ψιλός:

<table>
<thead>
<tr>
<th>Inst./Paraphr.</th>
<th>Latin text of Inst.</th>
<th>rendered by Theophilus as</th>
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<tbody>
<tr>
<td>2,1,44</td>
<td>nuda voluntas</td>
<td>γυμνή βούλησις</td>
</tr>
<tr>
<td>2,4,1,4</td>
<td>nudae proprietatis</td>
<td>[nudus not expressed]</td>
</tr>
<tr>
<td>2,5 pr.-1</td>
<td>nudus usus</td>
<td>[nudus not expressed]</td>
</tr>
<tr>
<td>2,14 pr.</td>
<td>nudam proprietatem</td>
<td>γυμνὴ PROPRIETARIAN</td>
</tr>
<tr>
<td>2,17,8</td>
<td>nuda voce heredis nomen</td>
<td>[ἀγραφον ἐνστατιν]</td>
</tr>
<tr>
<td>2,19,7</td>
<td>nuda voluntas</td>
<td>γυμνὴ βούλησις</td>
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<tr>
<td>4,6,7</td>
<td>nuda conventione</td>
<td>ψιλὸ, συμφώνο</td>
</tr>
<tr>
<td>4,11,2</td>
<td>nudam promissionem</td>
<td>ψιλὴν ὀμολογίαν</td>
</tr>
</tbody>
</table>

Ψιλός is probably more generally found in legal language. In Inst. 2,16 pr., however, Theophilus does not use either because here he is not trying to point out that the heir is not a real heir but an heir in name only, without the positive and negative economic implications.

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\(^{15}\) Examples may be found, e.g., in Cuiacius, Hotman and Favre. I have not found the ipsissima verba in the Digest. The nearest is D. 38,17,2,8 with nudum nomen sui heredis; cf. D. 38,2,6,2 quamvis nomine sit heres. But we note especially that Theophilus is speaking about hereditas, not heres.
consequences of that position. Rather, he emphasises that the mere quality of being heres is difficult to discard in the case of a child in potestate who is suus heres. It is this same aspect of a suus heres that he discusses elsewhere, too:

- At Inst. 2,19,5 (388, 10-11) Theophilus repeats virtually the same words, although the text of the Institutes does not use a similar expression: again he uses the expression to elucidate the text.

- Inst. 3,1,5 treats the case of a paterfamilias who has been condemned for perduellio after his death: he then is unable to have a suus heres, since he is succeeded by the fiscus. The text ends with sed potest dici ipso iure esse suum heredem, sed desinere. Here Theophilus (490, 10-12) is able to point this out as an exception to the rule: ἵδιοι τοῖνον θέμα, ἐν ὧν τὸ ἀσώματον ἐμπαγέτιν τὴν τῆς κληρονομίας ἄνομα ἀφίσταται αὐτοῖ: “Here, then, is a case in which the incorporeal name of the inheritance first attaches to a man and then passes away from him” (491).

- An abbreviated version, and therefore a less clear example, is Inst. 2,23,3 (456, 3). It notes that (is qui restituit [hereditatem]) nihil minus heres permanet, which Theophilus translates as οὐδεν ἡττον μένει κληρονόμος, but adds by way of explanation ἐπεὶ τὸ ἀσώματον αὐτῷ προσεπάγη: “nevertheless he remains heir, because the incorporeal right is vested in him” (457). Theophilus uses here τὸ ἀσώματον without ὄνομα τῆς κληρονομίας, but undoubtedly means the same.

Common to these cases is the ὄνομα τῆς κληρονομίας. What is a κληρονομία? Let us return to Theophilus’ own definition, where he is not just translating:

Theoph. 2,2,2

Ἄσώματα ἔστιν ἄτινα ἐν δικαίῳ συνιστάται, οἷον κληρονομία. καὶ τί ἐστι κληρονομία; δικαίον τι φανεροῖς τρόποις συνιστάμενον νῦν καταλαμβανόμενον, ὃ πω̣ς μὲ τῆς ἐτέρου δικαιοσυνῆς ἀθρόον γενέσθαι δισπότην.

Trans. Murison (p. 225)

Now, rights are incorporeal things; for instance, an inheritance. What, then, is an inheritance? A right created in certain modes, apprehended only mentally, and constituting me universal owner of another man’s estate.

This is not the definition we read in D. 50,16,24 (Gaius 6 ad ed. prov.) and its version in Bas. 2,2,22:

Nihil est aliud hereditas quam successio in universum ius quod defunctus habuit.

Κληρονομία ἐστί διαδοχή εἰς ὀλόκληρον δικαίον, ὅπερ ὁ τελευτήσας εἶχεν.

There can be no doubt that Theophilus was familiar with this definition. If we compare the two, Theophilus is emphasising the quality of being heir, whereas Gaius is speaking about its consequence, the succession. In the case under discussion, where the suus heres, while remaining heir, nonetheless is not entitled to nor liable in the estate of the deceased paterfamilias, he still has the quality of heres (κληρονομία), but does not receive the estate, hereditas (κληρονομία). To express the difference between the two meanings of κληρονομία, Theophilus defines the former as τὸ ἀσώματον ὄνομα τῆς κληρονομίας, the “name” or quality of heres, which is ἀσώματον, literally “without a body”, “abstract”.

It is appropriate that it should qualify κληρονομία and not κληρονόμος. For Theophilus κληρονομία here is not the hereditas as a res incorporalis, but the quality of being heres, its consequence normally – but not in this case – being succession, and thus the acquisition of a res incorporalis, the hereditas (κληρονομία). In my view, Theophilus deliberately avoids the term “right” (δίκαιον) for the quality of being heres. I would propose to translate τὸ ἀσώματον ὄνομα τῆς κληρονομίας as “the abstract quality of heir”, which fits the context of what Theophilus discusses at Inst. 2,16 pr., for which the translation “incorporeal” is less suitable. One might of course object that incorporeal and abstract are the same, namely without a body (corpus, σῶμα); so why not maintain “incorporeal”? My answer would be that it helps to do justice to Theophilus’ distinction between κληρονομία as a quality and as a res incorporalis. A res incorporalis is still a res, that is an “asset of economic value, and it is in this wide sense that Gaius and Justinian speak of the law of things”. That is precisely what Theophilus did not mean at Inst. 2,16 pr.

For the wider context of Theophilus’ words we must, of course, look at contemporary Byzantine sources. This is not the place for a full exploration of the semantic field of ἀσώματον, but one case is too interesting not to mention. In Bas. 11,1,63 we find a rather extensive paraphrase of C. 2,3,2, a rescript of Severus and Caracalla of 202. If the vendor of a hereditas is able to prove that the buyers have undertaken voluntarily to defend actions on the part of creditors of the hereditas, that vendor will enjoy the protection of a tacit pactum. In the text of the Basilica the possible liability of the vendor is motivated by the words ὡς ἔχοντο ἐτι τὸ ἀσώματον τῆς κληρονομίας, “since he still has the quality of heir”, an explanation not explicitly given in the Codex. The manuscript Coislinianus gr. 152 contains a scholion (no. 7 = BS 310,6) in explanation of ἀσώματον and quotes:

There is a rule that says that the “incorporeal right of inheritance” passes only with difficulty to another. He said, “only with difficulty”, because, if the buyers of the inheritance of their own free will wish to enter upon the inheritance and let themselves be troubled for its sake, from that moment the person who has first become the heir no longer can be troubled.

The scholion has been written in the margin of other scholia and is not inscribed with a name, but obviously has been taken from Theophilus. Theoretically, both could have drawn on a common source, but in my view that is extremely unlikely. The text uses τὸ ἀσώματον, turning the adjective into a noun, and the scholion has τὸ ἀσώματον δίκαιον. In other places in the Basilica and their scholia the same variety may be observed, though an independent τὸ ἀσώματον is more frequent. It is my impression that the sharp distinction drawn by Theophilus was lost in later ages, and is perhaps unique to him.

even in the sixth century. In any case, Theophilus’ phrase remains an isolated example in Byzantine legal texts.

To sum up, we may distinguish three meanings of κληρονομία in Theophilus: the quality of being heir, the succession, and the estate. The first of these is not found in the Latin equivalent hereditas, and it is this that is meant in the expression τὸ ἀσώματον ὄνομα τῆς κληρονομίας.

Abstract
In his paraphrase of Inst. 2,16 pr. Theophilus explains pupillaris substitutio and the phenomenon of the heres who is heir in name only. He describes the latter as τὸ ἀσώματον ὄνομα τῆς κληρονομίας, an expression that seems to be unique to him and does not draw on comparable Latin terminology.