

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 *cupida 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.
- 4 H.J. Scheltema, *L’enseignement de droit des antécédents*, Leiden, 1970, 17-21= repr. in his *Opera minora ad iuris historiam pertinentia*, N. van der Wal et al. (eds.), Groningen, 2004, 58-110 and esp. 71-74.
- 5 *De pupillari substitutione*, thus translated by P. Birks and G. McLeod (*Justinian’s Institutes*, London, 1987).

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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 (*uulgaria*), in part a *pupillaria*, so that the whole clause could be termed a *uulgaropupillaria* 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.⁶ 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*.⁷ Its didactic form helps to explain Justinian’s text. (We may remember that Theophilus had cooperated in drafting the Institutes.⁸) 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”.

6 See Scheltema, *Antécresseurs* (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 ἀσώματων 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: Ἀσώματά 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 σωματικὰ τὰ δὲ ἀσώματα (σωματικὸν δὲ ἐστὶν ὃ καὶ ὀνόματι γνωρίζεται καὶ ἀφῆ καὶ θέα ὑποπίπτει, οἷον ἀγρὸς ἐσθῆς οἰκετῆς, ἀσώματων δὲ ἐστὶν ὃ νῶ μόνῳ γνωρίζεται οὔτε δὲ ἀφῆ οὔτε θέα ὑποπίπτει) ...

Translation by Murison (225)

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, οἷον 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 ἀσώματων, 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 Inst. 2,2; it is interesting that he comments on ἀσώματων but kept the translation-by-omission.

10 See, generally, F. Wieacker, ‘Griechische Wurzeln des Institutionensystems’, *ZSSRom* 70 (1953), 93-126 (esp. 103 ff., 111 ff.) with references to older literature; recently G. Falcone, ‘Osservazioni su Gai 2.14 e le *res incorporales*’, *AUPA* 55 (2012), 125-170 (esp. 128-141).

11 For example, P. Voci, *Diritto ereditario romano* I, Milan, 1967², 155 and 161.

12 Diog. Laërt. VII 57-58 (SVF III, Diog. Bab. 21,22), quoted by C.J. de Vogel, *Greek Philosophy III The Hellenistic-Roman Period*, Leiden, 1964, no. 967.

13 Priscianus, Inst. gramm. 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 I, 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 *αἰσθητά* and *νοητά* respectively.¹⁴

Whatever the philosophical antecedents may have been, for Theophilus the *res incorporalis* is known only mentally (*νόῳ μόνῳ γνωρίζεται*, as opposed to *ὀνόματι γνωρίζεται*). This opposition renders the combination *ἀσώματος 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 *ἀσώματος*, 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*:

Inst./Paraphr.	Latin text of Inst.	rendered by Theophilus as
2,1,44	<i>nuda voluntas</i>	γυμνή βούλησις
2,4,1.4	<i>nudae proprietatis</i>	[<i>nudus</i> not expressed]
2,5 pr.-1	<i>nudus usus</i>	[<i>nudus</i> not expressed]
2,14 pr.	<i>nudam proprietatem</i>	γυμνήν PROPRIETARIAN
2,17,8	<i>nuda voce heredis nomen</i>	[ἄγραφον ἔνστασιν]
2,19,7	<i>nuda voluntas</i>	γυμνή βούλησις
4,6,7	<i>nuda conventione</i>	ψιλῶ, συμφώνῳ
4,11,2	<i>nudam promissionem</i>	ψιλὴν ὁμολογίαν

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

14 See K. Praechter, *RE VA*, 1934, 58-68 s.v. Tauros 11 (esp. 61-62, where he confesses to second thoughts on this point after his ‘Nikostratos der Platoniker’ in *Hermes* 57 (1922), 481-517 (esp. 511). Cf. again Wieacker, (n. 10), 110 (“mit genau denselben Worten umschreibt nicht zufällig Theophilus Inst. 2,2,1 das von Justinian wörtlich übernommene *quae tangi non possunt* des Gaius II 14. Die stoische Lehre wird hier der Durchbildung des Redeteils *ὄνομα* (nomen) dienstbar gemacht.”) See below.

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: ἰδοὺ τοῖνον θέμα, ἐν ᾧ τὸ ἀσώματον ἐμπαγὲν τινι τῆς κληρονομίας ὄνομα ἀφίσταται αὐτοῦ: “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] nihilo minus heres permanet*), which Theophilus translates as οὐδεν ἤττον μένει κληρονόμος, but adds by way of explanation ἐπειδὴ 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

Ἀσώματά ἐστιν ἅτινα ἐν δικαίῳ συνίσταται, οἷον κληρονομία. καὶ τί ἐστὶ κληρονομία; δίκαιόν τι φανεροῖς τρόποις συνιστάμενον νῶν καταλαμβάνομενον, ὃ ποιεῖ με τῆς ἐτέρου δεσποτείας ἀθρόον γενέσθαι δεσπότην.

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 ἐστὶ διαδοχὴ 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” (δικαίον) 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”.¹⁶ 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 ἔχοντος ἔτι τὸ ἀσώματον τῆς κληρονομίας, “since he still has the quality of *heres*”, 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:

<p>Κανὼν ἐστὶν ὁ λεγὼν ὅτι τὸ ἀσώματον δικαίον τῆς κληρονομίας ἄπαξ ἐμπαγέ ντιν οὐκ εὐχερῶς μεθίσταται πρὸς ἕτερον. Εἶπε δέ, οὐκ εὐχερῶς, διότι εἰ θέλουσιν ἐκουσίως οἱ ἀγορασταὶ τῆς κληρονομίας ὑπεισέρχεσθαι καὶ ἐνοχλεῖσθαι ὑπερ αὐτῆς, οὐκ ἐνοχλεῖται ἕκτοτε ὁ πρῶτον γενόμενος κληρονόμος.</p>	<p>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.</p>
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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 δικαίον. 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

16 B. Nicholas, *An Introduction to Roman Law*, Oxford, 1972, 98.

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.