Quidquid ex testamento petunt scriptum heredem convenire debent. Initial Comments on the Inheritance *Transactio* in the *Ius Commune* and the Early Modern Period

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Abstract The legal interest here lies in the procedural and substantive effects of an inheritance settlement (*transactio*). When a decision was to be made between a testamentary heir and legal heir with regard to a dubious will, a serious interpretative problem arose when a private agreement (the *transactio* in this case) that was reached after the *tabulae* had been opened was extended to third parties. This article does not claim to provide a solution to the complexities of creating a satisfactory set of rules to govern inheritance. Rather, in light of recent research studies, it seeks to evaluate the underlying ideology behind extending to third parties the effects of the freedom to dispose of property after death and the limit of that freedom. Creating inheritance rules involves conceptualizing family life. The law selects winners and losers on the basis of those political choices. The transfer of property *mortis causa* is undoubtedly an economic act. However, it is based not on market exchange but on relationship and affection. Inheritance touches both material and sentimental interests and the acquisition of a loved one's property may have a deeper symbolic function for close relatives which impacts on the continuity of relationships, memory and even personal identity. The regulation of inheritance, therefore, involves a conceptual negotiation between the market principle of freedom and the non—market claims of family members. Thus, this article aims to verify whether or not the rights of any third parties who were not part of the *transactio* would be prejudiced, in accordance with a never—forgotten principle of jurisprudence: *quidquid ex testamento petunt scriptum heredem convenire debent.*

1 Preliminary Remarks

The legal interest of this study lies in the procedural and substantive effects of an inheritance settlement (*transactio*)[1], namely when a private agreement between a testamentary heir and a forced heir was reached after the *tabulae* had been opened and an attempt was made to extend the effects of that agreement to third parties. In such cases it was necessary to verify whether or not the rights of third parties would be prejudiced, in accordance with the general principle: «*privatis pactionibus non dubium est non laedi ius ceterorum*»[2].

It is a topic of great relevance, fraught with difficulties and doctrinal disputes[3], as is always the case when dealing with *transactio*[4]. It involves the

[1] Problems regarding the interpretation of wills can be found in the *Corpus Iuris Civilis*, libb. XXX—XXXVI (*Infortiatum*): such issues were a major focus of Roman jurisprudence. More specifically, some important issues were expanded upon during the Severan dynasty, in accordance with new values that were emerging in society at that time (*pietas, benignitas* and *humanitas*). Reconstructing the testator's intent through presumption and conjecture was one of the most prominent aspects examined in the *responsa*. Hermeneutical problems can also be found in the *Codex*, though to a lesser extent (lib. VI) and regarding specific issues (conditions, tacit dispositions and *casus omissus*). For analysis, see Chiodi, Giovanni. 1996. *L'interpretazione del testamento nel pensiero dei Glossatori*. Milano: Giuffrè, 11—82.

[2] D. 2.15.3pr., first fragment in Mommsen, Theodorus. 1870. *Corpus iuris civilis. Digesta* (editio maior), to. I Berolini: apud Weidmannos, 33.

[3] There was a Roman rule that was still fully in force in medieval law, namely that after the testator's death or after the will was sealed, born or unborn children or grandchildren were to be either instituted as heirs *ex re certa*, disinherited, or excluded from the inheritance in accordance with one of the fourteen causes admitted by Roman laws. In any case, these issues were the subject of debate in medieval jurisprudence. Rolandinus de Passageriis provided a treatment of the institution of heirs (Bertram, Martin, *I manoscritti delle opere di Rolandino conservate nelle biblioteche italiane e nella Biblioteca Vaticana*, in *Rolandino 1215—1300: alle origini del notariato moderno*, Bologna 2000, 681—718, 143) in his *Flos testamentorum* (incunabulum, Brixiae 1477 *Flos testamenti*), wherein he developed his analysis through a series of rubrics on the subject's fundamental principles (definition of inheritance, relationship between the institution of an heir and a will, classes of heirs). His writing style was fully in line with that of Roman law. On the other hand, Azo had classified a system of invalid wills in his *Summa* and *Lectura Codicis*. Obviously, the Church had even contributed to the debate, despite the fact that Hostiensis was convinced that canon law was not to be held to the same subtleties of civil law. On all of this, see Henrici Segusio (Cardinalis Hostiensis). 1581/1965. *In tertium Decretalium librum Commentaria*. Venetiis: apud Iuntas, *ad* X.3.26.16 *de testamentis*, c. *Rainutus*, 79r.

complex question of the effects of a *transactio*, which are unique in that they can only be seen *ex nunc*, but it also touches on the core points of succession law as a whole. Indeed, it reflects the general idea whereby the title of heir was pregnant with profound moral and honorific value[5].

Specifically, there are numerous interesting applications of the principle whereby third parties are not to be harmed by the amicable settlements of disputes in the field of testamentary succession, as mentioned above; and the doctrine has certainly examined these cases over the centuries.

Drilling down even further, two passages from Scaevola are worthy of examination. The first, D. 2, 15, 3 pr. – Scaev. Lib. 1 *digestorum*, reads as follows: "*Imperatores Antoninus et Verus ita rescripserunt: Privatis*

On all of this, see Chiodi, Giovanni. 2002. *Rolandino e il testamento*, in *Rolandino e l'Ars notaria da Bologna all'Europa*. Milano: Giuffrè, 516—531. For reference to the glossators' stance, see again Chiodi 1996, 348—350. On *transactio* and effects on third parties, see the following: Dernburg, Arrigo. 1906. *Il diritto delle Pandette*, III. Torino: Fratelli Bocca, § 96; Windscheid, Bernhard. 1904. *Diritto delle Pandette*, To. 2, parte II, Torino: Unione Tipografico Editrice, § 413—414, 202—210; Butera, Antonio. 1925. *Transazione (diritto romano e diritto intermedio),* in *Dig. Ita*, 23, 1666—1816. Torino: Utet; Butera, Antonio. 1933. *La definizione dei rapporti incerti. I. Della transazione*, Torino: Utet, 413; Valsecchi, Emilio. 1986. *Il giuoco e la scommessa. La transazione,* in *Trattato di diritto civile e commerciale*, 37, to. 2, Milano: Giuffrè, 312 et seq.; Carresi, Franco. 1966. *La transazione*. Torino: Unione Tipografico Editrice Torinese, 191. For more recent work that focuses predominantly on succession, see Metzger, Ernest. 1998. *A Companion to Justinian's Institutes*, New York: Cornell University Press, spec. 94; Reid Kenneth G C, de Waal, Marius J and Zimmermann Reinhard (eds). 2007. *Exploring the Law of Succession. Studies National, Historical and Comparative*, in *Edinburgh Studies in law,* Vol. 5, Edinburgh: University of Edinburgh ; *The Law of Succession: Testamentary Freedom: European Perspectives*, M. Anderson, E. Arroyo i Amayuelas (eds.), especially A Fusaro, *Freedom of testation in Italy, The law of succession: testamentary freedom*, 210 et seq.; Reid Kenneth G C, de Waal, Marius J and Zimmermann Reinhard (eds.) 2015. *Comparative succession law. Intestate succession in historical and comparative perspective*. vol. II, Oxford: Oxford University Press, especially Rüfner, Thomas. *Intestate succession in Roman law*, 22—32.

[4] In—depth analysis of *transactio*, including the usual difficulties it presented, can be found in the works of Bartolus de Saxoferrato. 1590. *Commentaria super prima Codicis partem*, Venetiis: apud Iuntas, *ad* C.2.4, *De transactionibus*, l. *neque pactio*, 50ra ("Hic est titulus subtilis difficilis et utilis magis, quam aliquis de tioto Codice [...] Et hec lex est difficillima") as well as Valeron Roman Emanuel. 1664. *Tractatus de transactionibus. In quo integra transactionum materia theorice, ac practice, ingenti studio, et iusta methodo collecta, et exposita*. Lugduni: *sumpt.* Philippi Borde, Laurentii Arnaud, Petri Bonde et Guill. Barbier, 15, n. 1 ("Huius quaestionibus resolutio difficilis redditur propter varias Iurisconsultorum locutiones") and lastly, Orceoli Giuseppe. 1686. *Tractatus de transactionibus*, Coloniae Allobrogum: sumptibus Samuelis de Tournes, *Exordium seu praefatio*, 1, n. 1.

[5]Accursii. 1488/1968. *Glossa in Digestum Infortiatum*, Venetiis: per Baptisam de Tortis, *ad* D. 37.5.5.6, *De legatis praestandis contra tabulas bonorum possessione petita*, gl. *pleniore, l. Filium quis § sed et si portio*, 224vb.

pactionibus non dubium est non laedi ius ceterorum Quare transactione, quae inter erede et matrem defuncti facta est, neque testamentum rescissum videri posse neque manumissis vel legatariis actiones suae ademptae. Quare quidquid ex testamento petunt, scriptum heredem convenire debent: qui in transactione hereditatis aut cavit sibi pro oneribus hereditatis, aut si non cavit non debet neglegentiam suam ad alienam iniuriam referre"[6]; and the second, D.2.15.14,[7] taken from *Libri Responsorum*, *De testamentis*, reads as follows: "*controversia inter legitimum et scriptum heredem orta est eaque transactione facta certa lege finita est: quaero creditores quem convenire possunt? Respondit si idem creditores essent, qui transactionem fecissent, id observandum de aere alieno, quod inter eos convenisset: si alii creditores essent, propter incertum successionis pro parte hereditatis quam uterque in transactione expresserit, utilibus actionibus coveniendus est*". These two excerpts clearly demonstrate the existence of an open debate over the effects of settlements reached between heirs in dispute, especially when such settlements prejudiced the rights of legatees and creditors.

In reality, the above—mentioned passages raise a number of further issues, including the suitability of a *transactio* as a way of effectively putting an end to a dispute when reached by heirs alone, whereas a trial might have also involved creditors and legatees as litigants; the nature of a will and *transactio*, the former undoubtedly *mortis causa*, the latter just as undoubtedly *inter vivos*; and the question of the irrevocability of provisions

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[6] D. 2.15.3pr., second and third fragment of the *principium*: Odofredus. 1550/1967. *Matura, diligentissimeque repetita interpretatio, in undecim primos pandectarum libros*, Lugduni: ex Pet. Compater et Blasius Guido, *De transactionibus Rubrica*, l. *qui transigit*, nn. 1—3, 93rab; Accursii. 1488/1969. *Glossa in Digestum Vetus*, gl. *referre* ad D. 2.15.14 *de transactionibus,* 47; Albericus de Rosate. 1585/1974. *In Primam Digesti Veteris Partem Commentarij*. *ad* D. 2.15.3, l. *Imperatores*, 179v; Bartolus de Saxoferrato. 1590. *In primam Digesti Veteris partem Commentaria*, Venetiis: apud Iuntas, *De transactionibus*, l. *Imperatores*, 93va; Baldus de Ubaldis, 1599. *In primam Digesti Veteris partem Commentaria*, Venetiis: apud Iuntas, *De transactionibus,* l. *Imperatores*, 153rab.

[7] Following the opening of the *tabulae*, when it was necessary to decide what kind of action a creditor was to take with regard to an inheritance in the event that the will associated with said inheritance had been the subject of a *transactio*: see Accursii. 1488/1969, gl. *Convenisset* ad D. 2.15.14 *de transactionibus,* l. *controversia*, 47vb; Albericus de Rosate. 1585/1974. *In Primam Digesti Veteris Partem Commentarij*. *ad* D. 2.15.3, l. *controversia*, 182v—183r; Bartolus de Saxoferrato. 1590. *De transactionibus*, l. *controversia*, 102r—103v.

contained within a *transactio*, when such a settlement had been reached in a valid manner.

Indeed, the fragments from the Digest (D.2.15.1)[8] and the *Codex* (C.2.4.38)[9] – which for centuries were considered as forming the basis of the

[8] The writing in D. 2.15.1 poses relevant philological questions. The passage reads as follows: (*Ulpianus libro quinquagesimo ad edictum*). *Qui transigit, quasi de re dubia et lite incerta neque finita transigit. qui vero paciscitur donationis causa rem certam et indubitatam liberalitate remittit*. The hermeneutical difficulties deriving from the repetition of the verb *transigere* in l. *qui transigit* led medieval interpreters – and contemporary historians for that matter – to debate the meaning of this lexical inconsistency, as the sentence should have served as a definition. For a critical analysis of the sources up to the *Codex Florentinus*, as well as their relationships with the *littera bononiensis*, see Pescani, Pietro. 1962. *De Dygestorum archetypo*. In *Studi in onore di Emilio Betti*, III, Milano: Giuffrè, 587—628; Pescani, Pietro. 1981. *Studi sul* Digestum vetus. *Bullettino dell'Istituto di Diritto Romano* 84: 159—250 and Pescani, Pietro. 1985. *La scoperta del* Bononiensis. *Bullettino dell'Istituto di Diritto Romano* 88: 383—396; on the other hand, for more specific reference to *transactio*, see: Bertolini, Cesare. 1900. *Della transazione secondo il diritto romano*. Torino: Unione Tipografico Editrice, 79; Peterlongo, Maria Emilia. 1936. *La transazione nel diritto romano*. Milano: Giuffrè, 11; Schiavone, Aldo. 1971. *Studi sulle logiche dei giuristi romani:* nova negotia *e* transactio *da Labeone ad Ulpiano*. Napoli: Jovene, 172, nt. 4; Melillo, Generoso. 1994. Contrahere, pacisci, transigere, *contributi allo studio del negozio bilaterale romano*. Napoli: Liguori, 276 et seq.; Gallo, Filippo. 1995. Synallagma *e* conventio *nel contratto*, *ricerca degli archetipi della categoria contrattuale e spunti per la revisione di impostazioni moderne*. Torino: Giappichelli, 248—249 and lastly, Fino, Michele. 2004. *L'origine della* transactio: *pluralità di prospettive nella riflessione dei giuristi antoniniani*. Milano: Giuffrè, 28—74. Finally, for a photographic reproduction of the manuscript, see the anastatic reprint of the "Littera Florentina", in *Justiniani Augusti Pandectarum. Codex florentinus*. 1988. (Corbino Alessandro – Santalucia Bernardo edt.), Firenze: Olschki, I, 52v.

[9] Theoretically the fragment C. 2.4.38 (l. *transactio*) is clear, and as such it is normally used to support the argument that such an agreement gives rise to certain obligations; however, Roman law studies have recently re—examined its interpretation in light of the precept contained in C. 6.31.3 (l. *suus heres*), which once again puts forward the same principle, but at the same time opens up a series of questions deriving from the use of the verb tenses. Hermeneutic tradition tends to believe that *datum vel promissum* refers to that which the counterparty must give/do vis—à—vis the party that is renouncing his right to act, if the *transactio* is to be considered effective. On the contrary, the *retentum* would seem to refer to the possibility for the renouncing party to keep a part of the *res de qua transigit* in lieu of consideration, as long as it is already at his disposal. See Parini, Sara. 2011. Transactionis causa: *studi sulla transazione civile dal tardo diritto comune ai codici. Parte prima: La dottrina dei secoli 15 e 16*. Milano: Giuffrè, 73—78. On the interpretation of the source, which is often open to criticism and not by any means unanimous, see Fino 2004 21—97. For a medieval interpretation: Placentinus. 1536/1962. *Summa Codicis*, *In Codicis do. Justiniani sacratissimi principis ex repetita praelectione libros IX summa.* Maguntiae: In officina Ivonis Schoeffer, *De transactionibus*, tit. IIII, 48; Accursii. 1488/1968. *Glossa in Codicem*, Venetiis: per Baptisam de Tortis, gl. *nullo ad* C. 2.4.38, *de transactionibus*, l. *transactio*, 43rb. On the identification of a partial and mutual fulfillment of claims made *hincinde* by the parties in their reciprocal exchange as *datio* and *retentio*, see (Baldus de Ubaldis. 1585. *In Primum, Secundum et Tertium Codicis libros commentaria*, Lugduni: ex typographia Michaelis Goy, *ad* C. 2.4.38 *de transactionibus*, l. *transactio*, 127; Comm. *ad* C. 2.4.38, *de transactionibus*, l. *transactio*, 140r): "Transactio est contractus reciprocus, quo debet aliquid hincinde intervenire".

concepts of *transigere* and *transactio* – reveal that such means were not limited to simply resolving and/or preventing dubious or contentious situations.

On the contrary, in keeping with the cultural climate of the time, the *oratio divi Marci*[10] provides information that demonstrates a much more complex use of *transigere* and *transactio*[11]: namely, one that did not necessarily resolve a litigious relationship, but rather a relationship that was simply characterized by uncertainty[12]. This would become the typical form of

[10] The reference is to the *oratio marciana* on the topic of alimony (D.2.15.8); to the Sc. Orfiziano (178 AD), wherein it is ruled that the new rules on succession contained therein need not be enforced in matters '*rata transacta finitave'*; and to the rescript issued by Marcus Aurelius and Lucius Verus between 161 and 169, mentioned above (on all of this, see Fino 2004 189, nt. 59). In any case, it seems opportune to take a closer look at the case put forward by the latter. According to the rescript, it does not seem possible or justifiable for a *transactio* to resolve uncertainty. Indeed, Marcus Aurelius was worried that weak creditors – for example, a party receiving alimony – might hastily renounce their claims, perhaps by coming to terms on a lump—sum payment (a single *solutio*) in order to settle a relationship that otherwise would have supported them day after day. In reality, however, it does not seem that the *res dubia* was the subject of the *transactio*. The agreement by which a party renounced claims to alimony did not concern the length of alimony payments – which was indeed uncertain in cases of that sort – but rather the amount of payment, which in itself was different from one day to another. Every day there was a new claim to sustenance to be fulfilled, and it was affected by general market conditions and variations based on the time period. Thus, an uncertain *modus* was introduced unintentionally, just as the condition in C. 2.4.11 was also uncertain.

[11] Over the course of the second century AD, jurists such as Gaius, Pomponius and Scaevola, as well as the imperial chancery, began to use both *transactio* and *transigere* with a technical meaning that was previously unknown (Gualandi, Giovanni. 1963. *Legislazione imperiale e giurisprudenza*, I, Milano: Giuffrè, 105). The polysemic nature of *transigere* and the fluctuation of the term's meaning – between renouncing a claim on one hand or finalizing (or preventing) a disputed legal relation on the other – seem to be present (either individually or all together) in the observations of all the masters from the age of Marcus Aurelius. Indeed, therein one can see the roots of the future development of the meaning of *transigere* and its eventual specialization. As is well known, the definition of *transactio* as gleaned from the titles that go by the same name in Justinian's Code and Digest supports a broad use of the instrument: namely, it can refer to both disputed and uncertain relationships. The passage l. *qui transigit* (D. 2.15.1) constitutes the basis of this dual textual interpretation, as it lays out the essential requirements for both the *res dubia* and the *lis incerta*.

[12] As in the cases of *incertum condicionis* highlighted in l. *fideicommisso* (C. 2.4.11); or the fideicommissary dispositions established by the brothers Licinius and Filinus (C. 2.3.1) in each other's favor; or lastly, Marcus Aurelius' speech at the Senate on the subject of *alimenta relicta* in l. *cum hi* (D. 2.15.8). In particular, the latter is an important text in reconstructing the meaning of *transigere* and *transactio* in the second half of the second century AD, and it was commented on extensively by Ulp. 5 *de omn. trib.* D. 2.15.8; in addition, however, and above all, it represents a little—known imperial speech on the subject of procedural law that actually played a crucial role in introducing the term *transactio* into legal language. See Scherillo, Gaetano. 1960. *Lezioni sul processo. Introduzione alla* 'cognitio extra ordinem', Milano: La Goliardica, 239 et seq., especially 249 et seq.

such a settlement in subsequent periods, though not – or at least, not always – for the *ius commune*[13].

Furthermore, the amicable settlement of disputes has historically straddled substantive law and procedural law, and as such it has always been the source of much debate regarding its theoretical applications. Though it has since become a definitive part of contract law – thus falling under the current regulatory framework that this branch of law has in place – this debate has not shown signs of abating. Indeed, with sentence n. 1057 of March 1957, the Court of Cassation, ruling on a case that was quite analogous to that set forth in Scaevola's *principium*, believed it was appropriate to reaffirm the principles mentioned in the two passages above.[14]

Such shall suffice to give an idea of the volatile nature of this subject, which is a typical feature of *transactio*, and which is precisely why simply comparing and contrasting historical models of the use of *transigere* comes off as too simplistic an approach. Moreover, it is clear that modern ideas surrounding the contractual settlement of disputes continue to evolve, in a process that is not without its fair share of difficulties.

2 Subjective limitations

It is widely believed that the subjective limitations of *transactio* are inextricably linked to the effect the agreement has on third parties – a problem with no easy solution, as a *transactio* can take on a wide variety of

[13] In this dialectical context, the broad scope of *incertitudinis genus* proved decisive in defining *transactio*, becoming accepted doctrine up until legal Humanism. Indeed, Cujas wrote: "transactio etiam nullius momenti est quia qui discedit a lite transigendi animo si nihil ei datur, vel promittatur vel se ipse nihil retineat ex bonis, de quibus transigit, transactio nulla est et qui ita transigit nihil agit. Nam transactio gratuita nulla est". On all of this, see Cujas, Jean. 1658. *Codex Iustinianus… recitationes solemnes*, in *Opera omnia in decem tomos*, Lutetiae Parisiorum: impensis societatis typographicae liberorum officii ecclesiastici, To. V, *ad* Tit. XXXI, *De repudianda vel abstinenda hereditate,* IX, 1188.

[14] *Foro italiano. Raccolta generale di giurisprudenza*, vol. LXXXI, (1958), 326, col. b.

different forms, be it a simple contract, a *privata pactio*, or a stipulation of facts (*negozio di accertamento*).[15]

The strength, value and indeed main characteristic of *transactio* as a settlement agreement has always been its inviolability and unassailability, such that these qualities are dogmatically held to be inherent in *transactio* itself, its effects thus lasting forever. This view of *transactio* has had an influence on its status over the centuries, during which it has in fact oscillated between the realms of the judicial system and private law; furthermore, it demonstrates how the interests in such a settlement are not necessarily limited to the parties involved[16].

In the classical period of Roman law, the main effect of a *transactio* was that of settling a disputed legal relation in a conciliatory manner. In the event of a *transactio* that was formally "drawn up", the relation was extinguished *ipso iure*, whereas a *transactio* that was "simply agreed upon" would extinguish it only *ope exceptionis*.[17]

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[15] Giuliana D'Amelio observes that there was a tendency to reduce the gap between stipulation and settlement (*transactio*) in the Middle Ages. In that regard, she refers to the institution of *transactio* as increasingly acting as a 'bridge' between legal transactions and legal proceedings (D'Amelio, Giuliana. 1972. *Indagini sulla transazione nella dottrina intermedia : con un'appendice sulla scuola di Napoli*. Milano: Giuffrè, 1.)

[16] At this point it is already evident that a defining characteristic of a settlement agreement (that which is called *transactio* in the sources) was its irrevocability (subsequently reaffirmed in C. 2.4.6.1). In my opinion, this is the determining factor in being able to speak about its individuality. The irrevocable nature of *transactio* made it the only one of the *pactiones privatae* to have preclusive effects on par with a sentence. Furthermore, it did not ascertain the truth of facts in any given case: the fact that it was irrevocable meant that any party that willingly gave up a right as part of the agreement would not be able to reclaim that right ever again. There was no need for an ongoing dispute: it was enough for parties to renounce, in whole or in part, an aleatory claim (meaning that the chances of that claim coming to pass depended on factors that were impossible to know at the moment the agreement was reached). The subject of reciprocal concessions was less defined, though it would come to be seen as an inalienable part of *transactio* during the Middle Ages. On this point, see Izzo, Alessandro. 2000. "Instaurari decisam litem prohibent iura", *in tema di inadempimento della* transactio *dai Severi a Diocleziano*. *Labeo* 46, 461—477. Parini Sara. 2006. *La dinamica della conflittualità civile: processi e transazioni fra antico regime ed età dei codici*. In Di Renzo Villata, Gigliola (cur.), *L'arte del difendere: allegazioni, avvocati e storie di vita a Milano tra Sette e Ottocento*. Milano: Giuffrè, 601—667.

[17] There has actually been much debate over Ulpian's diairetic technique, above all when the argument is made that the only specific difference between *transigere* and *pacere donationis causa* was the subject of the *remittere*. On this point, see Parini Vincenti, Sara. 2012. *La transazione nello* ius hollandicum. *Historia et jus*, 2, paper 5. There are also those who believed that the entire fragment in question had been interpolated (Peterlongo 1936 11). In any case, though this article may not be the ideal context in which to assess the authenticity of the text, it

In any case, it was self—evident that such an agreement would put a definitive end to the legal relation in question only as it pertained to the parties involved, as it could not prejudice or benefit third parties.

In dealing with questions surrounding the essence of *transigere* in their legal experience, the glossators and (later) the commentators of the so—called classical *ius commune* period operated on the erroneous conviction that the first two fragments of *de transactionibus* (D.15) could provide an exhaustive definition of the foundation and limits of the entire semantic range of *transigere*.

Such an approach led Placentinus[18], Azo[19] and then Accursius[20] to believe that *qui transigit* "non adimplet contractum ex sua parte",[21] "as that which might be conceded today could be demanded tomorrow". [22]

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seems opportune to specify the following: according to Lenel's reconstruction, D. 2.15.1 is located in the second position in the title *Testamenta Quaemadmodum aperiantur inspiciantur et describantur*, based on the fact that first the will must be opened, and then, if need be, one proceeds to *transigere sine iudice*, that is, *apud iudicem exquiri veritas de his controversiis quae ex testamento proficiscerentur*. That said, and for that very reason, the fragment does not seem immune to criticism, as it is stylistically and syntactically irrelevant to the text that precedes it (D. 29.3.2pr) as well as that which follows it (D.29.3.1—4). See (Lenel, Otto. 1889/2000. *Palingenesia iuris civilis,* Lipsiae: ex Officina B. Tauchnitz, 728; more recently, Melillo 1994 277).

[18] "transactio inquam (ut dictum est) cum sit nudum pactum neque contractus est, neque quasi contractus: immo ut certiorem rationem sequamur, magis proprie distractus est, nec enim qui transigit dissimilis est ei qui solvit" (Placentinus. 1536/1962. *De transactionibus*, tit. IIII, 50)

[19] "transactio est de re dubia et lite incerta neque finita non gratuita pactio" (Azo. 1506/1966. II, *De transactionibus,* 26).

[20] Accursius made a clear distinction between a contractual agreement and a settlement agreement: the former creates obligations, the latter is a means to terminate them. Indeed, he wrote: "negotii contrahendi, obligationis constituendae; vel transigendae obligationis tollendae. Sed hoc est pactum" (Accursii. 1488/1969. *Glossa in Digestum Vetus*, gl. *contrahendi transigendique* ad D. 2.14.1.3 *de pactis, l. huius edicti,* § *conventionis*, 37a).

[21] Haenel, Gustav. 1834/1964. *Dissensiones dominorum, sive Controversiae veterum iuris Romani interpretum qui Glossatores vocantur*. Leipzig: Sumtibus I.C. Hinrichsii, l. *sive apud acta*, 263—264.

[22] Thus, they subjected it to the same regime in place for the observance of pacts: performance was guaranteed by *fides*, *arbitrium* and *auctoritas*. It was not considered actionable in any way ("dicimus neque civilem praescriptis verbis, neque pretoriam de dolo oriri debere"); legal protection was only provided in exceptional cases, if there were no external factors that could help enforce the settlement agreement ("his rationibus cessantibus, ex pacto transactionis dabitur exceptio"). The reason (*est ratio quia*) for this could be found in the fact that normally "actori superest vetus actio ad quam redire potest" (Azo. 1506/1966. II, *De transactionibus,* 27a); see also Odofredus. 1550/1967. *De transactionibus Rubrica*, l. *qui transigit*, nn. 1—4, 92vb—93rb. On all of this, see Parini. 2011. cap. I, 22 et seq. and 271—272, which is the source of the citation.

In the early modern period, *transactio* «begins to take on the form that will come to define it in codification. It distances itself from the multiple meanings of the abstract verb form (*transigere*); it frees itself from the complex interdicts that were typical of the medieval tradition. It can finally enjoy increasing autonomy as a type of contract with its own legal dignity",[23] although it still belonged to the realm of innominate contracts.

In short, once issues relating to the two possible ways of reaching a settlement agreement were dealt with (namely, *pactum* or *aquiliana stipulatio*), the focus shifted in the sixteenth century. From that period onward, attention would be turned to the reason behind reaching the agreement – the *ratio concordiae* that at once justified and imposed compulsoriness, such that the agreement was to last forever.

Thus, we can now turn our attention to the fragments cited in the preliminary remarks above, and in particular to the important principle contained therein – a principle that touches on the most delicate points of this issue. It seems opportune to begin with an examination of the three paragraphs that make up D. 2.15.3 – the *principium* of which represents a real turning point in the historiographical interpretation of *transactio* as an institution[24] – and then to move on to the second provision contained in D. 2.15.14.

It might be helpful to reconstruct the case set forth in the *principium* and use it as a general guide in our analysis, keeping with the structure of the passage as closely as possible so as to highlight the peculiarities of Scaevola's writing.

[23] Ivi, 270, which is the source of the citation.

[24] Title 2.15 of the *Digesta* seems to be a concentration of structural anomalies when compared to the five books that make up the Πρωτα. On all of this, see Bluhme, Friedrich. 1838/1960. *Die Ordnung der Fragmente in den Pandektentiteln*, Pisa: Fratelli Nistri but subsequently reprinted in *Labeo* VI, 50 et seq. For more on this point, see also Mantovani, Dario. 1987. *Digesto e masse bluhmiane* Milano: Giuffrè, 109 et seq.

3 Scaevola's passages

Indeed, it is quite remarkable to observe how Scaevola used *transigere* and *transactio*, not only because he was the first jurist to do so[25], but also because the fact that he was using such terms could only be linked to new developments in procedural law introduced by Marcus Aurelius – as is well known, Scaevola was an influential *assessor* to the emperor. [26]

A fundamental part of Scaevola's work is the *oratio divi Marci*, wherein the title *de transactionibus* provides an extensive treatment of both *alimenta relicta* and *privatae pactiones*[27]. According to some, the amicable settlement of disputes could be included in the latter.

Nonetheless, there is still no clear evidence that an archetypal structure of the *transactio* was emerging in that period (the 160s). In terms of the function

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[25] Of the seven works by Scaevola that we know of, repeated uses of *transigere* and *transactio* occur in two collections of *Responsa*, namely *Digestorum Libri XL* and *Responsorum libri VI* (Schulz, Fritz. 1968. *Storia della giurisprudenza romana*, Firenze: Sansoni, 294 et seq. and Frezza, Paolo. 1977. 'Responsa' *e* 'quaestiones'. *Studio e politica del diritto dagli Antonini ai Severi*. *Studia et documenta Historia et iuris*, 53, 212 et seq.). In these two collections, which covered a span of about thirty years during which he served as a legal advisor to Marcus Aurelius, Commodus and Septimius Severus, Scaevola was able to capture the emergence of the technical use of *transigere*. Nonetheless, he never defined it as *contractus* (Schiavone 1971 171, nt. 10bis; Gallo 1995 251, nt.23; Burdese, Alberto. 1997—1998 *Tra causa e tipo negoziale dal diritto classico al postclassico in tema di transazione*, in *Seminarios Conplutenses de Derecho Romano,* 9—10, 43 et seq.).

[26] In addition to the two passages cited in this article, the other passages in Scaevola concerning the issue – and which were subsequently interpreted by the doctrine – include the well—known *oratio* on alimony, D.2.15.8 l. *cum hi*, and D. 2.15.3. § 2. For bibliographical references, see Sturm, Fritz. 1983. *La condictio ob transactionem*. In *Studi in onore di C. Sanfilippo*, III, Milano: Giuffrè, 649 et seq.; Kruger, Antje. 1993. *Die Drittwirkung Des Vergleichs Im Klassischen Roemischen Recht*. Frankfurt am Main: Lang, 25 et seq.; BURDESE, *Tra causa e tipo negoziale*, cit., 45—62; Schiavone 1971 168 et seq.; Fino 2004 273 et seq., in addition to *supra* nt. 13.

[27] For specific literature on this subject, see the following: Scherillo 1960 249; Fernandez Barbeiro, Alejandrino. 1988. *Legislacion senatorial de Marco Aurelio sobre procedimento civil*. In *Estudios homenaje al prof. J. Iglesias*, II, Madrid: Artes graficas Benzal, 717 et seq. and Fernandez Barbeiro, Alejandrino. 1999. *Estudios de derecho procesal civil romano*, Corûna: Univesidade da Corûna, 491; Fino 2004 302—303; Fino, Michele. 2005. *Ancora a proposito di 'transigere''transactio', transigere e transazione*, in Diritto@storia, IV, 17 et seq. (http://www.dirittoestoria.it/4/note&rassegn/Fino—Ancora—su—transigere—e—transazione.htm).

(*causa*) of putting an end to a legal relationship through a *transactio*, such a structure seems to have taken shape in the Justinian age.

But let us start with the *incipit* of D. 2.15.3pr, and specifically by examining the brocard put forward by the jurist: the effects of a *transactio* cannot be extended to any third parties who are not part of the *transactio* itself.[28] In other words, the *transactio* could neither prejudice nor influence the legal position of any party who did not take part in the agreement at the moment of its creation, or who was not involved in the relationship between the two parties who elected to change said relationship through an amicable settlement.[29]

This was followed by a description of the *casus*, and then, to conclude, the solution and the reasoning behind the *responsum*, which itself was divided into two parts. Let us take a closer look at everything,

A *transactio* between the mother of the deceased and the written heir could not invalidate the dispositions contained in the will, nor could it nullify actions to be taken in favor of legatees and/or those who were manumitted through the will. The use of *quare* would seem to provide a clear explanation of the direct and indirect consequences of a *transactio*.

Indeed, there was absolutely no doubt on the part of the *divi fratres*, Marcus Aurelius Antoninus and Lucius Verus, that *transactio* was to be treated as a *privata pactio*. As such, it could neither prejudice nor influence

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[28] Evidence of the fact that Scaevola is employing general logic before introducing the case in question can be traced mainly to the verb forms that he uses: *est* and *non laedi*. By contrasting the conjugations of the verbs in the third person and infinitive, respectively, the opening of the fragment is connoted by a predominantly scholastic tone. Indeed, it was always interpreted thusly by medieval doctrine. On all of this, see Bartolus de Saxoferrato. 1590. *De transactionibus*, l. *Imperatores*, 93va; Baldus de Ubaldis, 1599. *De transactionibus,* l. *Imperatores*, 153rab.

[29] For example, a guarantor might be freed from his obligation if a settlement (*transactio*) was reached to extinguish the debt. Naturally, he would not be subject to any *aliquid dato vel retento seu promisso*, despite the fact that Diocletian's rescripts (contained in C.2.4.38 and 6.31.3, and considered condition precedent in a *transactio* for the entire Middle Ages) would have required it. For a general overview, see: Alciato, Andrea 1571 *Commentaria in Codicem Iustiniani*. In *Opera*, t. III, Basileae: per Thomam Guarinus, 456, n. 8; Connan, François. 1562. *Commentarium juris civilis libri X…numero atque ordine in margine annotatis, per Clariss. D. Franciscum Hotomanum exornati*. Lib. *De pactis, Transactionibus et donationibus,* Basilae: apud Nicolaum Episcopium iuniorem, Cap. VI, n. 10, 352b; Loriot, Pierre. 1555. *De iuris apicibus Tractatus VIII*, Lugduni: Sebastianus Gryphius excudebat, axx. LXXVIII, LXXIX, LXXX, coll. 460—461; Doneau, Hugues. 1572. *Commentarii ad titulos Codicis De pactis et de Transactionibus*, Biturigibus: apud Petrum Bouchierium, sub Scuto Basiliensi, 285.

the legal status of any party who did not take part in the agreement at the moment of its creation, or who was not involved in the relationship between the two parties who elected to change said relationship through such an agreement.[30]

This is where the issue became more complex.

The *transactio facta inter heredem et matrem defuncti* could not invalidate the dispositions contained in the will (the will would not be *rescissum*), nor could it nullify actions (*actiones ademptae*) to be taken in favor of legatees and/or those who were manumitted through the will.

As stated at the beginning of D. 2.15.3pr: "*privatis pactionibus non dubium est non laedi ius ceterorum*".

If there were creditors who would have to make claims against the heir (due to dispositions in the will), then a *transactio* could not act against them. In other words, should an inheritance impose burdens upon the heir, then the latter certainly would not be able to repudiate creditors' claims because of an agreement he might reach with other parties (whereby, for example, his title as heir might be contested). Thus, when reaching any agreement, the heir would have to take appropriate measures – namely, by transferring any liabilities to the counterparty. Failing that, he might be forced to respond to creditors himself.

Drilling down even further, we know that in order to determine whether a the due share (the reserved portion) of a rightful heir had been harmed, it was necessary to determine the net value of the estate.

Indeed, the non—disposable part of the inheritance could be considered legally "harmed" when undue generosity on the part of the deceased prevented persons entitled from receiving their reserved portion. A trial would be needed in order to move past such an impasse, but as the issue actually concerned the disposable portion of the estate – and thus a portion which beneficiaries could freely dispose of – any legal determination in a court of law could have easily been replaced by an agreement between the

[30] As mentioned above, the classic example is that of a guarantor. Further explanation of this, with reference to well—established medieval doctrine, can be found in Domat, Jean. 1697. *Le Loix civiles dans leur ordre naturel,* to. I, Paris: Pierre Auboüin, Pierre Emery, Charles Clouzier, on C.2.4.38, 111.

forced heirs and the beneficiaries. Such an agreement – which might be a stipulation of facts or a settlement – was not of a hereditary nature. In fact, it was an act *inter vivos* that did not fall within the realm of succession, as it did not change the number of persons entitled to the inheritance, nor did it affect the rights of heirs. On the contrary, it was merely an apportionment of the estate that occurred only after succession had been opened.

In this case, a *transactio* would put an end to what was simply a *potential* dispute, thereby avoiding a petition for reapportionment on the part of the forced heir entering into the *transactio* (the mother), as she would have no interest in doing so. Indeed, the compromise agreement would alter the rights of both contracting parties: the forced heir would partially waive her rights in order to avoid dispute, while the written heir would partially waive his claim on that which had been bequeathed to him *ad intestato* through legacies or by will.

By drawing up such a contract, the parties aimed to retroactively eliminate a situation of uncertainty regarding their actual legal relationship to the deceased once the succession was opened. In other words, the forced heirs, together with third parties who were named testamentary beneficiaries such that the forced heirs would be harmed, mutually agreed on the terms of their relationship to the deceased in order to avoid future disputes.

This is where the significance of the fragment begins to emerge, and it is worth delving into.

It is in fact impossible to deny the similarity between Scaevola's reconstruction and today's approach to what has been defined as 'long—term latent' damage, namely damage that by its very nature presents itself after a considerable amount of time has passed.

If we return to a more literal reading of the text, there are two aspects that emerge as useful in interpreting the case proposed to us, and which indeed correspond to how the case was interpreted by the *ius commune*.

First of all, the *transactio* to which the *divi fratres* referred was an act that could extinguish any given right of the parties involved if the settlement had that right as its subject matter. As mentioned above, such an idea was foreign to medieval law, whereas it was a given in early modern law. However, the fact that this kind of *transactio* was an inheritance settlement did not mean

that the settlement transformed from an act *inter vivos* to one *mortis causa* in order to subject it to testamentary law.

In our examination of *transactio*, this is precisely where the contribution provided by the *principium* of D. 2.15.3pr becomes more far—reaching.[31]

According to the *praefectus vigilium* Marcus Aurelius[32], parties that amicably settled a dispute operated on perfectly equal terms: they reached a *privata pactio* concerning the inheritance without any ongoing disputes or any other uncertainties to resolve.

What characterized this type of settlement was the fact that it precluded any potential claims that might arise from the inheritance, though only insofar as the parties to the agreement were concerned.

In other words, the rescript described *transactio* as an act that would eliminate the possibility to make any claims that the contracting parties might otherwise have been able to make had no agreement been in place. In this case, the mother and the heir reached an agreement such that the inheritance would be apportioned in a way that differed from what had been established by the deceased.

In any case, it is important to remember that such an agreement would not invalidate the deceased's will, nor would it prevent slaves that had been appointed heirs and manumitted from obtaining their freedom.

Though the conclusions presented up to this point might seem obvious, that is in fact not the case – the language used by Scaevola documents how the lexicon of law came to include a noun that could represent the outcome of activity mentioned with the verb *transigere*. As stated in the introduction, this gave rise to a concept of *transactio* as a kind of contract that enjoyed autonomous legal dignity and remarkable individuality. From some points of view, the doctrine of early jurists had difficulty recognizing all of the intricacies of *transactio*, which on the contrary have been highlighted in the present article.

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[31] *Supra*, nt. 7.

[32] Kunkel, Wolfgang. 1967[2]/2001 *Herkunft und soziale Stellung der römischen Juristen* 2, Graz—Wien—Köln: Böhlau, 217—219; Schulz 1968.

4 A case of disputed inheritance

Now that we have examined Scaevola's references to *transigere* and *transactio* on matters of inheritance in the *Digesta*, let us now turn our attention to a passage contained in the *libri responsorum*[33], namely D. 2.15.14,[34] which is located among the last of the *sedes materiae*.

The issue was as follows: it was reported that a dispute had arisen between a forced heir and a testamentary heir, and that the dispute had been settled[35] through a *transactio*; Scaevola was asked to determine which of the two parties to the *transactio* could be summoned to court by the deceased's creditors. The jurist decided to provide a detailed response.

To begin with, he distinguished between a case in which the creditors were part of the *transactio* (*qui transactionem fecissent*) and one in which they were not involved in any way whatsoever.

In the first case, reference would obviously have to be made to the settlement agreement and what was agreed upon therein (*quod inter eos convenisset*)[36]. On the other hand, in the second case, given that the

[33] This is considered one of the most interpolated passages, *infra* nt. 42.

[34] This excerpt is not directly related to the rules on interpreting a will (*contra*, Lenel 1889/2000 col. 297, n. 256), as it refers to a moment after the opening of the *tabulae*, when it has already been decided how to interpret a dubious will which had led to a dispute, and it is thus necessary to evaluate the possible remedies available to creditors of the inheritance. Our interest in this passage derives from the fact that it concentrates on the substantive and procedural effects of the *transactio* cited therein.

[35] On the use of the verb *finire*, which is frequently connected to the term *transactio*, see *Thesaurus Linguae Latinae In IV Tomos Divisus*, IV, Lipsiae: in aedibus B.G. Teubneri, 1900, sub. v. *finio*, col. 786, or more recently, Nappi, Sergio. 1997. Ius finitum, *Labeo*, 43, 53 and nt. 59.

[36] This seems to be a situation that is as obvious as it is rare. Indeed, practically speaking, if an agreement is reached to put an end to or prevent a dispute, that same agreement generally addresses all potential litigious situations, such as (and especially) inherited debts.

entitlement to the inheritance was uncertain,[37] both parties would need to be summoned through the introduction of *actiones utiles*,[38] which would concern the portion of inheritance that was the subject of the *transactio* (*pro parte hereditatis quam uterque in transactione expresserint*).

Let us leave aside any philological analysis concerning the authenticity of this fragment, which has already been dealt with in specific studies[39]. It appears that the starting point was a *controversia*,[40] while the *ratio* of Scaevola's response seems to be a refusal to extend the resolutory effects of a *transactio* to any parties that did not participate in the agreement.

In this regard, the glossators[41] believed they were in a position to affirm that creditors were justified in summoning individual heirs – which certainly included legatees – because they were not part of the *transactio*, and that they could make claims in proportion to the amount of inheritance that was left in each heir's possession (*debent heredes convenire pro portione hereditatis, quam quisque possidet*).[42] On the other hand, the glossators did not seem to consider in any way the possibility of extending the content of a *transactio* to

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[37] Gluck, Christian Friedrich. 1895. *Commentario alle Pandette*, II, Milano: Vallardi, 989.

[38] Though it is by no means complete, a classification of such actions can be found in Emilio Valino. 1974. *'Actiones utiles'*, Pamplona: Universidad de Navarra, especially 90 et seq., and Selb, Walter. 1982. *Formulare Analogien in 'Actiones utiles'* und '*Actiones in factum' am Beispiel Julians*, in *Studi Biscardi*, II, Milano: Giuffrè and Selb, Walter. 1984. *Formulare Analogien in 'Actiones utiles'* und '*Actiones in factum' von Julian*, in *Studi in onore di C. Sanfilippo* cit., V, Milano: Giuffrè, 729 et seq.

[39] Again Fino 2004 303—304, ntt. 158—159 and Spina, Alessia. 2012. *Ricerche sulla successione testamentaria nei* responsa *di Cervidio Scevola*. Milano: Giuffrè, 141—144.

[40] "Quamvis id ipsum quod petitur plerumque certum sit, tamen an te dare vel restituere oporteat incertum est. Incertum dico lite non iure. Nam ius fere semper certum est utrum oporteat dare vel non [...] et si nulla fuisset questio de iure, tamen res fuerat dubia lite. Ei ido valet transactio" (Rogerius. 1913. *Summa Codicis.* In *Scripta Anedocta Glossatorum*, I, Bologna: ex aedibus Angeli Gandolphi, *De transactionibus*, n.2, 67ab). Similar stances were also expressed by Azo and Albericus; here specific reference is being made to the latter. See Azo. 1506/1966. *De transactionibus*, 26; Albericus de Rosate. 1585/1974. *ad* D. 2.15.1, l. *qui transigit*, 179v. On the importance of the *res litigiosa* and the evolution of this requirement leading up to modern codification, might I refer to my Transactionis Causa 76—108 and Parini, Sara. 2003. *La* res dubia *nella transazione dal Diritto comune ai codici: un problema aperto*. In Padoa Schioppa, Antonio, di Renzo Villata, Gigliola, Massetto, Gian Paolo (edt.). Amicitiae Pignus: *studi in ricordo di Adriano Cavanna*. Milano: Giuffrè, 1745—1793.

[41] Accursii, 1488/1969, gl. *Si alii* a D.2.15.14, *de transactionibus*, l. *controversia*, 47vb.

[42] *Ibidem*, 46vab, gl. *Convenisset*: "si ex tali conventione potest agi: quia est vestita. Sed quid si agi non potest ex ea, vel etiam nulla fuisset convenio? Respon. Azo. Qui eorum erit creditor, aget contra reliquum pro rata hereditatis, quae apud eum remansit".

third parties if they were not participants in the agreement (*de aere alieno*) – not only because the passage at issue (*id observandum… convenisset*) was missing from the *Codex Florentinus*[43], but also because such an assumption would end up going against that which Scaevola had asserted in multiple other *responsa* regarding matters of *transactio*, above all D.2.15.3pr.

The solution set forth actually offered some advantages for the parties to a *transactio*: indeed, each had agreed to be treated as an heir to only a part of the inheritance (namely that which was bequeathed to him), and as such he would only be liable for that amount. It seemed to be an equitable solution, supported by the use of the term *possunt* instead of the stronger *debent*. It also reaffirmed the principle that the effects of a *transactio* were limited to the *id de quo agitur* precisely because such effects were inviolable, and thus of great importance. Furthermore, it is worth noting that the word *lex* was used in reference to the settlement agreement (the *transactio* in this case) – a highly evocative term that is rich in meaning.[44]

If a party agreed not to take legal action in order to seek his claims, he was compensated with the *praedia*[45] that he obtained by settling out of court. After all, as stated at the beginning of the present article, a *transactio* is a form of contract, and as such it could produce effects on property. On the contrary, it could not influence who was entitled to inheritance, as this fell under a completely different realm of law and could not be subject to dispositive provisions. Indeed, only the benefits (and burdens) of such entitlement could be disposed of in such cases.

For this reason, the *actiones* to be taken were different as well: to that end, Scaevola made sure to point out that *actiones utiles* were to be carried out, and not *actiones directae*.

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[43] *Supra*, nt. 9.

[44] Facciolati, Jacopo, Forcellini, Egidio, Giuseppe Furlanetto. 1805. *Totius Latinitatis Lexicon*, II, Patavii: apud Thomam Bettinelli, sub. v. *lex*, 701—702.

[45] This expression belongs to Fino 2004. 307 and Fino 2005, 3 et seq.

5 Some Concluding Remarks

Legal development is often marked by the eternal return of the same. This may be even truer for areas such as the law of succession, which deals with the most basics aspect of human life: every society has to come to terms with the question of what should happen to a person's property after death. The Roman rules of intestacy may be the starting point to understand the progress in this area of law. In Roman society testacy was the rule and intestacy rare. The importance of the rules of intestacy was obvious: the rules were applicable not only if there was no will, but also if the will was invalid or if it failed because the heir appointed in the will was unwilling or unable to accept the inheritance.

An examination of Scaevola's passages on the interpretation of testamentary provisions confirms the prominent role that the doctrine attributed to the deceased's final intent.[46] There is no doubt that the *ratio animi* was to serve as a guide when resolving such cases, and that in fact it was to be the interpreter's primary objective. A difficult balancing act thus arose between staying true to the words of the deceased and seeking to carry them out in the best way possible. The *ius commune* doctrine accomplished this by recognizing the provisions in accordance with aims that had been made clear by the testator. Sometimes reference was made to the will, other times a similar outcome was achieved by taking account of circumstantial events.

In safeguarding the testator's wishes, the true moral and legal compass remained the deceased's *voluntas*. There was in fact the risk that those who had a claim to the inheritance might somehow undermine the testator's intent.

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[46] The early Bologna jurists vehemently emphasized that the testator's intent was to be respected, if not exalted, in cases of *ambiguitas verborum*; they made reference to a rule set forth by Marcian (D.50.17.96) for cases of *oratio ambigua*. See Chiodi 1996, especially "*Voluntas defunti est servanda*", 156—166.

This is precisely where the issue intersects with dispositions set forth in favor of third parties and legatees.

In its *modus operandi*, it was clear that the doctrine reaffirmed its strong support of legacies by particular title, and that it indeed saw the testator's true spirit in those very dispositions. For that reason, were a dispute to arise with an heir, the doctrine was much more inclined to defend the rights expressed in the testator's dispositions.

There were a number of safeguards in place to achieve this, but let us limit ourselves to the cases examined in the present article. Indeed, it is impossible not to notice how the preferred solution of both medieval and classical doctrine was always that which would legally and most appropriately defend a testator's dispositions in favor of third parties; and that as different institutions came to light (in this case, that of *transactio*), the doctrine took appropriate action to ensure that third parties named in wills would not be prejudiced.

Though we must certainly be careful when using modern legal language, it follows that the view of *transigere* proposed herein is that of a bilateral act (the effects of which do not depend on the *conventio* itself, but rather on the fact that by reaching the agreement, the parties imply that they will not take legal action). What's more, it is a bilateral act that annuls the legal relationship between forced heirs and testamentary heirs.

As a result, the forced heirs renounce their right to legal protection in favor of a more immediate – albeit not always complete – fulfillment of their claim (in this regard, it should be noted that Scaevola's interpretations in the passages examined above show just how much he was ahead of his time[47]). In any case, no matter whether the fulfillment is partial or complete, the settlement agreement cannot prejudice the rights (as bequeathed) of a testamentary heir in favor of a forced heir who was left out of the will.

All the more so, such an agreement cannot include the abandonment of rights on the part of any third parties that might be prejudiced – and thus harmed – by the new succession arrangement. A *transactio* gives rise to obligatory relationships that only have effects on the contracting parties; such

[47] Such that even in modern times, the Supreme Court deemed it necessary to reaffirm his principles.

effects cannot be extended to any other concerned parties that were not involved in reaching the agreement, though such parties have the possibility of joining the agreement at a later time if it should benefit them.

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