

# *Benignior interpretatio*: Origin and Transformation of a Rule of Construction in the Law of Succession

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Abstract — This article discusses the origins and development of the benevolent interpretation of wills. Modern law tends to construe a will, as far as possible, in a way that gives effect to the testator's intention and consequently avoids intestacy. This principle derives from a historical development which traces back to a Roman concept of *benignior interpretatio*, established by Ulpius Marcellus in the second century AD in a case where the testator's intention was unclear and the results of possible interpretations were even contradictory. Marcellus suggested interpreting the testator's behavior with regard to his intention, in so far as it can be ascertained, at least partially, as a hypothetical intention. On the basis of an evaluative judgment Marcellus found a solution which is, as far as possible, in the testator's interest (*benignior*).

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## 1. Introduction

The principle of benevolent interpretation of legally significant statements is probably known to all developed legal systems. In the continental European legal tradition it is commonly traced back to Roman law. Numerous legal rules established in the history of its reception mark the consolidation of this principle in different variations. On closer examination the tradition leading

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to the modern benevolent interpretation turns out to be anything but uninterrupted.<sup>1</sup> Rather more it becomes apparent that the principle has been subject to a transformation in substance. The available sources allow this to be illustrated with the aid of the example of testamentary transactions. Taking modern concepts as a point of departure we will investigate the origins of the Roman *benignior interpretatio* in this doctrinal context.

We will see that the principle of benevolent construction of wills appears with a number of different purposes, since the problems it is supposed to solve are of varying nature. It hardly appears reasonable to try and extract from the diverse findings of the expression *benignior interpretatio* in the Roman sources a certain general concept<sup>2</sup> which would be sufficiently defined to allow further insight within this context. Rather more we will restrict our inquiry to the verifiable “history of effect” of single sources, the *Wirkungsgeschichte* in the sense of Gadamer.<sup>3</sup> We will see that caution is needed when attempting to conclude that a relationship exists between the history of an expression’s use and the history of a concept and its effect.

## 2. Aspects of benevolent construction of wills in modern law

The rules in modern law regarding the interpretation of statements, as the comparatist Erich Schanze once correctly noted, vary significantly on both sides of the channel despite all efforts towards harmonization.<sup>4</sup> With regard to *benignior inter-*

<sup>1</sup> Arguments on the question whether one should speak of a reception of Roman law in Scotland or, more cautiously, of an influence, are not part of the present discussion. On the current controversy see W. D. H. Sellar, “Succession Law in Scotland — a Historical Perspective,” in K. G. C. Reid, M. J. de Waal, and R. Zimmermann, eds., *Exploring the Law of Succession. Studies National, Historical and Comparative* (Edinburgh 2007), 64 (with references). The topic does however encourage contemplation of Scotland’s civil law tradition in the context of an isolated issue, as R. Evans-Jones would wish: “Receptions of Law, Mixed Legal Systems and the Myth of the Genius of Scots Private Law,” *Law Q. Rev.*, 114 (1998), 248.

<sup>2</sup> On the diversity of uses of the expression, and the difficulty in deriving clearly definable uses of it in law, see A. Palma, *Benignior interpretatio. Benignitas nella giurisprudenza e nella normazione da Adriano ai Severi* (Torino 1997).

<sup>3</sup> Cf. H.-G. Gadamer, *Truth and Method*, 3rd ed. (London 2004), 299.

<sup>4</sup> E. Schanze, “Interpretation of Wills — An Essay Critical and Comparative,” in D. L. Carey Miller and D. W. Meyers, eds., *Comparative and Historical Essays in Scots Law. A Tribute to Professor Sir Thomas Smith QC* (Edinburgh 1992), 104.

*pretatio* however we can note remarkable parallels between Scottish and German law.

a. Scottish law

As is well known, Scottish law regarding the construction of wills is traditionally strongly orientated along the lines of the Civil law.<sup>5</sup> This tradition continues to influence developments, albeit latently, where principles originally derived from Roman law have been accepted as Scottish law for a long time.<sup>6</sup> This is the case for example with the presumption that a will should be construed, as far as possible, in a way that makes it effective and consequently avoids intestacy. This principle is of general relevance and, due to its doctrinal importance, is expressed — with certain variations — in textbooks. This becomes particularly apparent from the somewhat dated statement by Murray: “[W]hen the uncertainty affects only part of the will, the part unaffected remains good. Moreover in construing a will the court assumes that the testator intended to confer a benefit, and so an interpretation that sustains the will will be adopted whenever possible.”<sup>7</sup> This means that wherever a legal problem hinders part of what was intended, the part unaffected by such hindrance stays effective. And, when it is doubtful whether or not a benefit was to be conferred, the former is presumed and the transfer upheld as far as possible. This is in accordance with a rule derived from experience which has been recognized for a long time and finds expression in the legal rule: *Testator non praesumitur frustra testari voluisse*.<sup>8</sup>

A more recent example is found in D. R. Macdonald’s brief textbook *Succession*: “If at all possible the will is construed in a sense that avoids intestacy: it is assumed that the testator meant something by it.”<sup>9</sup> Accordingly, as long as there is a will, in cases of doubt the testator will have wanted to convey something mean-

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<sup>5</sup> For early literature see A. McDouall, *An Institute of the Laws of Scotland*, 2 (Edinburgh 1752), 377: “[I]n the interpretation of wills and legacies, we follow, for the most part, the civil law.”

<sup>6</sup> Cf. W. M. Gordon, “Roman Law in Scotland,” in R. Evans-Jones, ed., *The Civil Law Tradition in Scotland* (Edinburgh 1995), 36–37.

<sup>7</sup> C. de B. Murray, *The Law of Wills in Scotland* (Edinburgh 1945), 64; cf. John M’Laren, *The Law of Wills and Succession as Administered in Scotland*, 1, 3rd ed. (Edinburgh 1894), 336 n.617.

<sup>8</sup> Cf. L. De-Mauri, *Regulae Juris*, 11th ed. (Milan 1976), 223.

<sup>9</sup> D. R. Macdonald, *Succession*, 3rd ed. (Edinburgh 2001), § 10.02. Cf. D. M. Walker, *Principles of Scottish Private Law*, 4, 4th ed. (Oxford 1989), 164, with reference to *Ainslie v. Imlach’s Ex’rs*, 1926 S.L.T. 28 (Outer House); *Auld’s Trs. v. Auld’s Trs.*, 1933 Sess. Cas. 176; and *Johnston’s Trs. v. Gray*, 1949 S.L.T. (Notes) 16 (Outer House).

ingful by it.<sup>10</sup> Apparently this is related to the aforementioned: in cases of doubt the disposition is presumed to have been seriously intended. Its purpose is to confer a benefit, the validity of which is to be upheld, as far as possible, by means of interpretation.

#### b. German law

In German law the benevolent construction of wills has even found its way into the Civil Code (*Bürgerliches Gesetzbuch*, BGB). A variation of the principle, which differs from those mentioned above, is found in § 2084 BGB:

Lässt der Inhalt einer letztwilligen Verfügung verschiedene Auslegungen zu, so ist im Zweifel diejenige Auslegung vorzuziehen, bei welcher die Verfügung Erfolg haben kann.

If the contents of a testamentary disposition permit more than one interpretation, then in case of doubt preference is to be given to the interpretation under which the disposition may be effective.

This principle is also based on the experience that in general the testator is primarily concerned with the economic outcome he purported to achieve by means of the disposition and less with the technical legal instruments he had in mind to achieve his goal. As a rule therefore it is in accordance with the testator's intention to construe his dispositions in such a way that they are effective as far as possible. Accordingly the provision is now entitled: "Interpretation favoring effectiveness" (*Auslegung zugunsten der Wirksamkeit*).

According to its wording § 2084 requires that there is a testamentary disposition and that there are doubts regarding its proper construction. Consequently it is necessary for the testator to have completed a legal act which fulfils the formal requirements. However the general idea behind § 2084 is that the wishes of the testator should be fulfilled. In order for the benevolent construction to achieve its purpose of realizing a certain "success," it is necessary that the intended economic outcome of the disposition has been clearly ascertained.<sup>11</sup> The ambiguity the provision

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<sup>10</sup> Different rules must obviously be applied in cases where the testator has never expressed a final will; see M'Laren (note 7), 1:350 n.637: "[I]t is these cases which fix the limits of the province of construction."

<sup>11</sup> G. Otte, in *Erbrecht §§ 2064-2196 (Testament 1)* [J. v. Staudingers *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und*

is supposed to resolve is therefore in terms of modalities only, for example the purported legal form of the disposition.

### 3. Basic ideas and historical foundation of the current law

The basic idea common to the Scottish and German solutions is that the testator's final wish is to be realized with such an outcome as can be clearly ascertained either from the wording or on the basis of common experience. It is presumed that the testator positively intended a solution other than intestacy, and that his primary concern was the effect of his dispositions rather than the form they took. With the help of this presumption the intended economic outcome can be sustained.

All cases are therefore concerned with the interpretation of behavior through its underlying intention, guided in a certain way by a rule on the resolution of ambiguities. This modern private law rule is known as the "principle of benevolent interpretation." Not infrequently, academic writings even establish a connection to a historical concept through the use of the term *benigna interpretatio*.<sup>12</sup> In these cases *benignus* or "benevolent" in current law is understood with regard to the will of the transferor: one wishes to indulge the transferor such that the aim of his transfer is achieved as far as possible.

#### a. The general rule in the *ius commune* and its origins

The rule that interpretation should always favor, as far as possible, the effectiveness of the transaction, is a general principle of the *ius commune*. It has been formulated many times; the Consiliator Philippus Decius for example phrased it: *In dubio interpretatio debet fieri ut actus valeat*.<sup>13</sup> The fact that, in support of the rule of § 2084, the consultation papers for the BGB note that it was adopted from "all laws in force," is further expression

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*Nebengesetzen*], rev. ed. M. Avenarius and G. Otte (Berlin 2003), § 2084 BGB, No. 2.

<sup>12</sup> Otte (note 11), § 2084 BGB, No. 1; T. Kipp and H. Coing, *Erbrecht*, 14th ed. (Tübingen 1990), 138, 146; H. Lange and K. Kuchinke, *Erbrecht*, 5th ed. (Munich 2001), 778; D. Leipold, *Erbrecht*, 18th ed. (Tübingen 2010), No. 385; A. Staudinger, in R. Hausmann and G. Hohloch, eds., *Handbuch des Erbrechts*, 2nd ed. (Berlin 2010), 794, No. 115; M. Schmoeckel, *Erbrecht*, 2nd ed. (Baden-Baden 2010), § 22, No. 3; Schanze (note 4), 109. For literature on legal history see C. Krampe, *Die Konversion des Rechtsgeschäfts* (Frankfurt am Main 1980), 142–45.

<sup>13</sup> Philippus Decius, *In tit. ff. de Regulis Iuris* (Lyon 1591), 330, regula 132, § 4.

of its widespread recognition.<sup>14</sup> This refers to several laws that were in force in parts of Germany in the nineteenth century, as well as to the *ius commune*, which was not only their historical foundation, but also applied in Germany until the coming into force of the BGB.<sup>15</sup> In the *ius commune* the principle was repeatedly derived from a rule which the classical lawyer Ulpian Marcellus<sup>16</sup> formulated in his *digesta* and which had been integrated in Justinian's Digest under the title *De diversis regulis iuris antiqui* by the compilers:<sup>17</sup>

D.50.17.192.1 (Marcellus 29 *digestorum*). In re dubia benigniorem interpretationem sequi non minus iustius est quam tutius.

In any case which is uncertain, to follow a more benevolent interpretation is no less more just than safer.<sup>18</sup>

<sup>14</sup> See Benno Mugdan, ed., *Erbrecht [Die gesamten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich, 5]* (Berlin 1899), E I § 1778, p. 23.

<sup>15</sup> See Christian Friedrich Mühlenbruch, *Lehrbuch des Pandecten-Rechts*, 3, 4th. ed. (Halle 1844), 288, § 658; Carl Friedrich Ferdinand Sintenis, *Das praktische gemeine Civilrecht*, 3, 3rd ed. (Leipzig 1869), 392, § 171; Heinrich Dernburg, *Pandekten*, 2, 5th ed. (Berlin 1897), 153, § 78.

<sup>16</sup> On Ulpian Marcellus' life and work (born ca. 110–115) see J. Rastätter, *Marcelli Notae ad Iuliani Digesta* (Freiburg im Breisgau 1981), 1–16 (on which see the criticism by D. Liebs, *IURA*, 32 (1981), 282); T. Mayer-Maly, *Ulpian 4*, in *Paulys Realencyclopädie der classischen Altertumswissenschaft*, 9A/1 (Stuttgart 1961), cols. 570–571; W. Kunkel, *Herkunft und soziale Stellung der römischen Juristen*, 2nd ed. (Weimar 1967; repr. 2001), 213–14; E. Osaba, *Ulpian Marcelo*, in R. Domingo, ed., *Juristas Universales*, 1 (Barcelona 2004), 184–86; H. Ankum, "Ulpian Marcellus (ca. 125 – ca. 185 na Chr.): een fijnzinnig en kritisch Romeins jurist," in *J. L. P. Cahen-Bundel* (Deventer 1997), 23–46; id., "Le juriste romain classique Ulpian Marcellus: sa vie et ses oeuvres," in R. Ruedin, ed., *Mélanges en l'honneur de Carlo Augusto Cannata* (Basel 1999), 125–36; and D. Liebs, "Jurisprudenz," in R. Herzog and P. L. Schmidt, eds., *Handbuch der lateinischen Literatur der Antike*, 4 (Munich 1997), § 415.4.

<sup>17</sup> See Friedrich Carl von Savigny, *System des heutigen römischen Rechts*, 1 (Berlin 1840), 230; Johann Friedrich Ludwig Göschen, *Vorlesungen über das gemeine Civilrecht*, 3/2 (Göttingen 1840), 123, n.8, § 824; and Ludwig Arndts, *Pandekten*, 1, 7th. ed. (Stuttgart 1870), 103, § 75, who base the principle of the "lenient interpretation" on D.50.17.192.1 among other sources. Kipp and Coing (note 12), 138, trace § 2084 BGB back to D.50.17.192 and D.28.4.3 without further elaboration.

<sup>18</sup> The translations of Roman sources are — with minor modifications — based on A. Watson, ed., *The Digest of Justinian* [revised English-language edition] (Philadelphia 1998).

With regard to the continued effect of brocards and maxims with powerful formulae in Scottish law, Rodger has rightly noted that they have often been taken from a certain context and refashioned with a different substantive meaning.<sup>19</sup> The *benignior interpretatio* in the *ius commune* tradition shows similar traits, which can be demonstrated with the help of a single legal rule's history of effect<sup>20</sup> as an example. As a preliminary point we shall justify this restriction in two respects.

Firstly, some literature uses the term *favor testamenti* as equivalent to *benignior interpretatio*.<sup>21</sup> Since this term is not Roman however it would not make sense to consider the underlying concept in its own right at this point.

Secondly, we need to define the relationship of this source to another text by Marcellus, in which the lawyer equally speaks of *benigne interpretari* in the context of succession law, and which is even found in the same work, namely the 11th volume of his *digesta*:

D.34.5.24 (Marcellus 11 *digestorum*). Cum in testamento ambiguae aut etiam perperam scriptum est, benigne interpretari et secundum id, quod credible est cogitatum, credendum est.

Where a testamentary provision is either ambiguous or incorrectly drafted, it should be interpreted in a benevolent manner, and any credible intention on the testator's part should be credited.

Occasionally in the academic literature the attempt has even been made to understand this text as the source of § 2084.<sup>22</sup> This view however is not supported by any compelling arguments or evidence from the history of its drafting. This view is particularly unconvincing, since this passage deals with the determination of the true intention in cases of ambiguous phrasing. Apparently the purpose of this passage is to allow consideration of clues to the testator's thoughts, or rather motives, gleaned from outside the

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<sup>19</sup> A. Rodger, "The Use of the Civil Law in Scottish Courts," in D. L. Carey Miller and R. Zimmermann, eds., *The Civilian Tradition and Scots Law* (Berlin 1997), 234–35.

<sup>20</sup> See above, note 3 and accompanying text.

<sup>21</sup> M. Kaser, *Das römische Privatrecht*, 1, 2nd ed. (Munich 1971), 240 n.37.

<sup>22</sup> Schmoeckel (note 12), § 22, No. 3; see Lange and Kuchinke (note 12), 771; for examples in earlier literature see also Friedrich Endemann, *Einführung in das Studium des Bürgerlichen Gesetzbuchs*, 3, 3rd–5th ed. (Berlin 1899), 106.

written document. It concerns the dictate of natural construction based on true intention. This however has as little to do with the modern concept of “benevolence” as with sustaining the transaction. According to this understanding *benigna interpretatio* would only allow for a sustaining construction in so far as *perperam* expresses an illegal transaction and even then only under certain circumstances. But that is not the essence of the rule.

Whereas it is thus hardly possible to interpret D.34.5.24 in a way which would support an interpretation upholding the validity of testamentary dispositions, the general version of the principle in D.50.17.192.1 would easily accommodate such an interpretation. The expression is recorded twice, however. Its short and *regelhaft* version in D.50.17.192.1 was made independent of its original context by Justinian’s compilers and rose to general importance in the history of reception.<sup>23</sup> That version conveys little meaning however, since it does not inform us what is meant by *benignior interpretatio*. Nevertheless the original context of Marcellus’ observation can be determined. The rule which is given here in a generalized form comes from testamentary law. It is taken from the 29th volume of Marcellus’ *digesta* (D.28.4.3 pr.), a text covering the inheritance law provisions of Augustus’ marriage statutes.<sup>24</sup>

On examination of the text we will see that there the term *benignior interpretatio* refers to a rule on implied terms, which intervenes in precisely those cases where all possibilities of interpretation have been exhausted without result. Its proposed application is where neither a factual nor a hypothetical final will can be determined.

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<sup>23</sup> As Ankum observed correctly, it was the compilers who isolated the rule for a second recording and generalized it in the process. See H. Ankum, “Quelques observations sur la méthode et les opinions juridiques d’Ulpian Marcellus,” in M. Zabłocka, J. Krzynówek, J. Urbanik, and Z. Służewska, eds., *Au-delà des frontières. Mélanges de droit romain offerts à Witold Wołodkiewicz*, 1 (Warsaw 2000), 17–32.

<sup>24</sup> Otto Lenel, *Palingenesia iuris civilis*, 1 (Leipzig 1889), cols. 631–632. For an extensive interpretation of Marcellus’ text, see M. Avenarius, “Marc Aurel und die Dogmatik des römischen Privatrechts. Kaiserliche Rechtspflege im System der Rechtsquellen und die Ausfüllung von Gestaltungsspielräumen in einer Übergangszeit der Rechtsentwicklung,” in D. Boschung, M. van Ackeren, and J. Opsomer, eds., *Selbstbetrachtungen und Selbstdarstellungen. Der Philosoph und Kaiser Marc Aurel im interdisziplinären Licht* (Wiesbaden 2010) (forthcoming).



D.28.4.3 pr. (Marcellus 29 *digestorum*). Proxime in cognitione principis cum quidam heredum nomina induxisset et bona eius ut caduca a fisco vindicarentur, diu de legatis dubitatum est et maxime de his legatis, quae adscripta erant his, quorum institutio fuerat inducta.

plerique etiam legatarios excludendos existimabant. quod sane sequendum aiebam, si omnem scripturam testamenti cancellasset:<sup>25</sup> nonnullos opinari id iure ipso peremi quod inductum sit, cetera omnia valitura. quid ergo? non et illud interdum credi potest eum, qui heredum nomina induxerat, satis se consecuturum putasse, ut intestati exitum faceret? sed in re dubia benigniorem interpretationem sequi non minus iustius est quam tutius.

Sententia imperatoris Antonini Augusti Pudente et Pollione consulibus. “Cum Valerius Nepos mutata voluntate et inciderit testamentum suam et heredum nomina induxerit, hereditas eius secundum divi patris mei constitutionem ad eos qui scripti fuerint pertinere non videtur.” et advocatis fisci dixit: “Vos habetis iudices vestros.” Vibius Zeno dixit: “Rogo, domine imperator, audias me patienter: de legatis quid statues?” Antoninus Caesar dixit: “Videtur tibi voluisse testamentum valere, qui nomina heredum induxit?” Cornelius Priscianus advocatus Leonis dixit: “Nomina heredum tantum induxit.” Calpurnius Longinus advocatus fisci dixit: “Non potest ullum testamentum valere, quod heredem non habet.” Priscianus dixit: “Manumisit quosdam et legata dedit.” Antoninus Caesar remotis omnibus cum deliberasset et admitti rursus eodem iussisset, dixit: “Causa praesens admittere videtur humaniorem interpretationem, ut ea dumtaxat existimemus Nepotem irrita esse voluisse, quae induxit.”

Very recently in a *cognitio* held by the emperor, when someone had erased the names of his heirs and his property was being claimed as caducary by the imperial treasury, there was a long discussion about the legacies and especially about those legacies which had been assigned to those whose institution had been erased.

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<sup>25</sup> It is unclear what the following *accusativus cum infinitivo* refers to. This, and the deletion of the entire wording covered beforehand, point towards parts of the original text having been deleted. A supplement suggested by Mommsen reads: *et si non omnem cancellasset* (see Theodor Mommsen, ed., *Digesta Iustiniani Augusti*, 1 (Berlin 1870), h. 1.). It has been favored particularly in interpolationist writings; see note 40 with references.

The majority thought that the legatees also should be excluded. Which, indeed, should follow, I said, if he had canceled all the writing in the will; some think that by operation of law what has been erased is removed but all the rest will stand. What then? Is it not sometimes credible that someone who had erased the names of his heirs had thought that he would have done enough to bring about an intestacy? But, in a doubtful matter, to follow a more benevolent interpretation is no less more just than safer.

The judgment of the Emperor Antoninus Augustus [i.e. Marcus Aurelius], in the consulship of Pudens and Pollio: "As Valerius Nepos, having changed his mind, both cut open his will and erased the names of his heirs, in accordance with a *constitutio* of my deified father, his inheritance is not regarded as belonging to those who were appointed [heirs]." And he said to the advocates of the imperial treasury: "You have got your judges." Vibius Zeno said: "I ask you, lord emperor, to hear me patiently: What do you decide with regard to the legacies?" The Emperor Antoninus said: "Does it seem to you that someone who erased the names of his heirs intended his will to stand?" Cornelius Priscianus, advocate of [the legatee] Leo, said: "He erased only the names of the heirs." Calpurnius Longinus, advocate of the imperial treasury, said: "It is not possible for any will to stand, which does not have an heir." Priscianus said: "He manumitted certain [slaves] and gave legacies." The Emperor Antoninus, having sent everyone away, when he had considered the matter and had ordered [them] to be admitted once more, said: "The present case seems to admit of a more humane interpretation, in that we think that Nepos intended that only those provisions which he erased should be ineffectual."

After completing his will, the testator opened the deed containing his will, which he had previously sealed, and erased the names of his designated heirs. The estate was claimed, to the extent that it had become "vacant" as a consequence, by the *fiscus* by way of a *cognitio extraordinaria*. The *fiscus* was party to the proceedings before the imperial court of Marcus Aurelius in the same way as several private individuals.<sup>26</sup> The latter were involved in the

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<sup>26</sup> See M. Avon, *Les avocats du fisc dans le monde romain* (Aix-en-Provence 1972), 123; A. Agudo Ruiz, *El advocatus fisci en derecho romano* (Madrid 2006), 104; G. Provera, *La vindictio caducorum. Contributo allo studio del processo fiscale romano* (Torino 1964), 116 n.14.

proceedings because the estate was burdened with legacies (*legata*, more precisely pre-legacies, *praelegata*, benefitting those whose institution as heirs had been erased), legacies to the benefit of third parties,<sup>27</sup> and finally instructions for manumission of slaves. The testator had not erased the legacies and instructions for manumission.

At first Marcellus describes the consultation with the counsellors (*consiliiarii*) about the legal status of the legacies. This is followed by a report of the decision by the emperor, which preliminarily — necessarily prior — determines who holds title to the parts of the estate. According to the *ius civile* the transfer of the titles was initially valid; however the intention to grant the interest had later ceased. Under this condition, as shall only be briefly noted here, they fell to the *fiscus* as *caduca*, due to a constitution of Antoninus Pius.<sup>28</sup> Subsequently Marcellus gives an account of the proceedings regarding the legal assessment of the legacies, outlines the presented legal opinions, and reports Marcus Aurelius' judgment on the matter.

In the context of preliminary deliberations on the legal assessment of the legacies, Marcellus raises the question whether the testator might have refrained from erasing the other dispositions and only limited himself to deleting the heirs' institution, because he believed he had done enough by way of this act for the heirs on intestacy to inherit. The question is geared towards the interpretation of the testator's behavior and could alternatively be phrased: Does erasing the institution of the designated heirs lead to the conclusion that there was an intention to eliminate the entire will, i.e. including the legacies, and thus trigger intestacy (*ut intestati exitum faceret*)? In this

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<sup>27</sup> Vibius Zeno, who raised the question of the validity of the legacies, was probably a legatee himself. Since Cornelius Priscianus evidently appears for a legatee, who is named only as Leo, it has been presumed that they are the same person, and that instead of "Leonis" one should rather read: "Zenonis." This suggested correction, which goes back to Grotius and was transmitted via the Brenkmann Papers (see Albert Kriegel and Moritz Kriegel, eds., *Corpus iuris civilis*, 4th ed. (Leipzig 1848), h. l.), is partially followed, for example in the Digest edition of D'Ors: A. D'Ors, F. Hernandez-Tejero, P. Fuenteseca, M. Garcia-Garrido, and J. Burillo, eds., *El Digesto de Justiniano*, 2 (Pamplona 1972), 313. See J. Garcia Sanchez, "A proposito de D. 28,4,3,1, Marcelo, libro 29 digestorum," in *Studi in onore di Cesare Sanfilippo*, 3 (Milan 1983), 305 n.14. This does not however affect the assessment of the case.

<sup>28</sup> Antoninus Pius had evidently introduced a new provision in caducary law, according to which the title to any part of the estate was lost if the testator's will to grant it had ceased at the time of inheritance.

case the will would not have been revoked according to the *ius civile*; nonetheless the intention to confer a benefit would be lacking for the legacies as well, with the result that these too would fall to the *fiscus*. The problem is that this question cannot be resolved through interpretation.<sup>29</sup> For this case of irresolvable doubt (*in re dubia*) Marcellus suggests a rule of construction: he is of the opinion that it would be both more just and safer (*non minus iustus est quam tutius*) to follow a “benevolent” interpretation (*benigniore interpretationem sequi*).<sup>30</sup>

We can conclude that Marcellus’ doubts do not concern the applicable laws but rather the content of the testator’s final will: although the intention to create the legacies was present at least at the time of the will’s drafting, it remained unresolved whether that intention lapsed at a later point. At the same time we see that the attempt to understand the concept underlying *benignior interpretatio* with reference to Marcellus’ other text, D.34.5.24, is futile: in that instance what is demanded is precisely a construction based on the testator’s true intention. Here, on the other hand, it is beyond dispute that it cannot be determined whether the testator’s initial intention was in accordance with his final will.

#### b. Marcellus’ solution

The solution developed by Marcellus is based on the particular facts of the case, namely, that in considering the testator’s behavior he interprets not simply one act but rather two successive acts: the creation of the legacies and their potential later cancellation. For “in a doubtful matter” means that the possibility of an intention to cancel is conceded.

Rules derived from experience, which determine what would presumably have been intended, can only be applied to concrete behavior. If two incidents point towards respectively different intentions, the rules need to be applied to each separate incident. In the case at hand this raises no problems as far as the first step is concerned. The creation of the legacies was formally valid.

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<sup>29</sup> See now T. Finkenauer, *Die Rechtssetzung Mark Aurels zur Sklaverei* (Mainz 2010), 20.

<sup>30</sup> In interpolationist literature the phrase *sed . . . tutius* is frequently identified as non-classical. See the references in note 40. Since the interpolationist approach to the sources has been replaced today by a more conservative point of view, we will consider the phrase as part of Marcellus’ original text.

The intended outcome of the second act is unclear however, since, as we have seen, the purpose of erasing the heirs' institution while simultaneously refraining from erasing the legacies at the same time cannot be determined. Whereas the civil inheritance law (like modern law) utilizes formal requirements to resolve these issues, and requires that the intention be expressed in a certain form, Marcellus' particular case cannot be solved in this way, since it is located between civil and caduciary law. Caduciary law permits legal consequences, specifically forfeiture, to be triggered even by an informally uttered intention in cases where the intention to confer a benefit has lapsed. Only with this in mind can Marcellus' question about a possible intention to revoke be properly understood.

Marcellus solves the problem by focusing on the "safe" intention. The remark that his method is *tutius* illustrates this. Faced with the impossibility of determining the "final will," in cases of doubt he gives preference to the positive disposition (and not the possible cancellation thereof). This means that the validity of the disposition, which was not explicitly revoked, i.e. not evidently erased with the intention to revoke it, is to be effected. The justification for Marcellus' approach apparently lies in the notion that taking into account an intention which was definitely given at an earlier stage would be in the testator's hypothetical interest, even when faced with the uncertainty whether this intention was in fact his "final will."

In the following sections we will elaborate this idea in three steps. In the first step (4.) we will show that despite Marcellus' concessions to the uncertainty of the "final will," he is mainly concerned with the testator's intentions. Then (5.) we will explain how the notion that the "safe" — being the clear and formally expressed — intention should be decisive, points towards an elevation of form which favors the underlying intention. Finally (6.) we will consider why Marcellus calls his method *benignior interpretatio*.

#### 4. Intention as the core of legally significant statements

As is commonly known, *interpretatio* in Roman law texts does not necessarily mean that the intention, which a statement was supposed to express, is ascertained. It was not uncommon for the meaning given to a statement to be ascertained rather more with the help of objective criteria. Marcellus' *benignior interpretatio* however is clearly orientated towards the testator's intention. In

this sense his version of a *benignior interpretatio* anticipates, among other things, Marcus Aurelius' judgment in the case.

A coherent justification for this approach of Marcellus can be found in the doctrine's development. The orientation towards the disposition's underlying intention, for which our text examines a single case, was the consequence of an important doctrinal development which took place in the second century AD under the influence of Salvius Julianus. In terms of scientific history, this period is characterized by the repercussions of the fundamental methodical antagonism between the two law schools of the classical period, the Sabinians and the Proculians. Whilst the Proculians understood law as a system of institutions comprising regular [*regelmäßig*] features, the Sabinians supported a natural law concept, according to which law is governed by rational principles.<sup>31</sup> Julian worked towards a mitigation of this antagonism, a process which took place in the course of the second century. He is commonly known as one of the most outstanding lawyers of the classical period.<sup>32</sup> It was Julian, commissioned by the emperor Hadrian, who was responsible for the final redaction of the Praetor's edict around 130 AD. During this process he effected the reception of institutional thinking into his Sabinian school from the Proculians. The consequence was a convergence of the two law schools.<sup>33</sup> Justinian later believed him to be the

<sup>31</sup> See M. Avenarius, "Roman Law: Historiography," in S. N. Katz, ed., *The Oxford International Encyclopedia of Legal History*, 5 (New York 2009), 157–64; id., "Law Schools," in R. Bagnall, K. Brodersen, et al., eds., *Encyclopedia of Ancient History* (forthcoming). An extensive and foundational account is given by O. Behrends, *Die Wissenschaftslehre im Zivilrecht des Q. Mucius Scaevola pontifex* (Göttingen 1976); id., "Les 'veteres' et la nouvelle jurisprudence à la fin de la République," *RHDFE*, 55 (1977), 7–23; id., "Institutionelles und prinzipielles Denken im römischen Privatrecht" [1978], in O. Behrends, *Institut und Prinzip. Siedlungsgeschichtliche Grundlagen, philosophische Einflüsse und das Fortwirken der beiden republikanischen Konzeptionen in den kaiserzeitlichen Rechtsschulen. Ausgewählte Aufsätze*, 1, ed. M. Avenarius, R. Meyer-Pritzl, and C. Möller (Göttingen 2004), 15–50; id., "Le due giurisdienze romane e le forme delle loro argomentazioni," *Index*, 12 (1983/84), 189–225.

<sup>32</sup> See especially Otto Karlowa, *Römische Rechtsgeschichte*, 1 (Leipzig 1885), 707, and F. Wieacker, *Römische Rechtsgeschichte*, 2 (Munich 2006), 99.

<sup>33</sup> M. Avenarius, *Der pseudo-ulpianische liber singularis regularum* (Göttingen 2005), 91. On the great convergence of the schools see O. Behrends, "Der Kommentar in der römischen Rechtsliteratur" [1995], in Behrends, *Institut und Prinzip* (note 31), 1:246–62.

most important lawyer of the classical period.<sup>34</sup> His formal closeness to the *divi fratres* is reported by Ulpian in the words *amicus noster clarissimus vir*.<sup>35</sup>

In his function as head of the Sabinian school Julian developed a theory of intent (*Willenstheorie*) which he then established within the law in force.<sup>36</sup> It favored the view in the law of succession which forms the context of our first text, that the *voluntas* was central to the will and decisive for its legal consequences.<sup>37</sup>

Due to Julian's immediate advisory function in the imperial *consilium*, his theories were without doubt very influential to legal developments. In Marcus Aurelius' era the *consilium*'s panel in principle still varied with its current advisory needs.<sup>38</sup> We do not know if Julian was involved in the *cognitio* proceedings Marcellus is reporting, because our source is silent on that

<sup>34</sup> C.4.5.10.1 (AD 530): *Salvium Iulianum summae auctoritatis hominem et praetorii edicti ordinatorem*; const. Dedöken 18: ὁ πάντων τῶν ἐν νομοθέταις εὐδοκιμηκότων σοφώτατος Ἰουλιανός. See also C.3.33.15.1 (AD 530). The post-classical "Julian's myth" noted by Wieacker is without doubt based on Julian's elevated status among the lawyers of the classical period. See F. Wieacker, *Textstufen klassischer Juristen* (Göttingen 1960), 170.

<sup>35</sup> D.37.14.17 pr. (Ulpian 11 *ad legem Iuliam et Papianam*).

<sup>36</sup> The theory forms the foundation of different doctrinal views, which were established in the high classical law under the influence of Julian. Among them is the famous theory of customary law (D.1.3.32.1 (84 *digestorum*)); see O. Behrends, "Die Gewohnheit des Rechts und das Gewohnheitsrecht. Die geistigen Grundlagen des klassischen römischen Rechts mit einem vergleichenden Blick auf die Gewohnheitsrechtslehre der Historischen Rechtsschule und der Gegenwart," in D. Willoweit, ed., *Die Begründung des Rechts als historisches Problem* (Munich 2000), 95–99.

<sup>37</sup> See M. Avenarius, "Formularpraxis römischer Urkundenschreiber und ordo scripturae im Spiegel testamentrechtlicher Dogmatik," in M. Avenarius, R. Meyer-Pritzl, and C. Möller, eds., *Ars Iuris. Festschrift für Okko Behrends zum 70. Geburtstag* (Göttingen 2009), 39–40; and id., "Inhalt, Entstehungszusammenhang und Gestalt der Breviarhandschrift Cod. Vat. Reg. Lat. 1128," in K. Böse and S. Wittekind, eds., *Ausbildung des Rechts — Systematisierung und Vermittlung von Wissen in mittelalterlichen Rechtshandschriften* (Frankfurt am Main 2009), 56.

<sup>38</sup> At least since Crook it is generally assumed that it was not a permanent council, but that select groups of counsellors were summoned for specific tasks. See J. Crook, *Consilium Principis. Imperial Councils and Counsellors from Augustus to Diocletian* (Cambridge 1955), 26, 56, 104; W. Eck, [Review of Amarelli, *Consilia principum* (1983)], *ZSS (RA)*, 107 (1990), 491–93; and F. Arcaria, "Commissioni senatorie e 'consilia principum' nella dinamica dei rapporti tra senato e principe," *Index*, 19 (1991), 269–318.

matter.<sup>39</sup> If Julian had been involved, it can be expected that Marcellus' report would contain such information; however any indication that Julian might have made less notable individual contributions to these particular proceedings could later have been lost, because apparently only an abridged version of Marcellus text has been passed on.<sup>40</sup>

Regardless of these matters the Julian theory was probably represented independently by Marcellus here. His legal reasoning developed at a time when the contrast between the scientific methods of the two law schools of the classical period was already significantly mitigated. Hence there are, moreover, no clear references in Marcellus' work to the specific method of either school. For good reason it has been reckoned by some that the lawyer had close ties to the Sabinian school.<sup>41</sup> Nevertheless we need to assume that Marcellus, at least, did not view himself as a

<sup>39</sup> At the time of judgment Julian was still alive; in the administrative year AD 167/68 he was appointed proconsul for Africa. See G. Alföldy, *Konsulat und Senatorenstand unter den Antoninen* (Bonn 1977), 209.

<sup>40</sup> Marcellus reports having been involved in the proceedings and we can assume that he wrote the text down promptly. His *digesta* were written during the government of the *divi fratres*, hence before the death of L. Verus in the year AD 169. Both because of the apparent abbreviations and with regard to the wording, the text has often been subject to interpolatory presumptions in the older literature. See C. Sanfilippo, "Studi sull'hereditas," *Annali del Seminario Giuridico della Regia Università di Palermo*, 17 (1937), 88–91, 170–74; G. Beseler, "Miscellanea critica," *ZSS (RA)*, 43 (1922), 418–19; and references in E. Levy and E. Rabel, eds., *Index Interpolationum quae in Iustiniani Digestis inesse dicuntur*, 2 (Weimar 1931), col. 187; extensively on interpolatory presumptions: B. Reimundo, *La sistematización de la indignidad para suceder segun el derecho romano clásico*, 1 (Oviedo 1983), 47–50. Since these are unfounded in substance, but stem from outdated methodical principles, we can ignore the related literature here as well as such interpretations of our text whose main aim is to rebut the criticism; for this see the one-sided account of A. Berger, "In dubiis benigniora (D. 50,17,56). Considerazioni interpolazionistiche," in G. Moschetti, ed., *Atti del congresso internazionale di diritto romano e di storia del diritto (1948)*, 2 (Verona 1951), 194–202. With regard to *benignus*, see F. Wubbe, "Benignus redivivus" [1968], in F. Wubbe, *Ius vigilantibus scriptum* (Freiburg Schweiz 2003), 397; and id., "Benigna interpretatio als Entscheidungskriterium" [1972], in F. Wubbe, *Ius vigilantibus scriptum* (Freiburg Schweiz 2003), 432.

<sup>41</sup> O. Behrends, "Institutionelles und prinzipielles Denken im römischen Privatrecht" [1978], in O. Behrends, *Institut und Prinzip* (note 31), 1:31–32. W. Waldstein and J. M. Rainer, *Römische Rechtsgeschichte*, 10th ed. (Munich 2005), 264, also associate him with the Sabinian tradition.



Sabinian. In this respect we detect a certain tension prompted by the convergence of the law schools. Thus Marcellus once acknowledged a point that “the Sabinians” had been representing: *Idem* [scil. Marcellus] *ait: placuisse scio Sabinianis . . .*<sup>42</sup> On the one hand this shows that he does not take this knowledge for granted; on the other it shows the perspective of someone who does not — or at least not any longer — see himself as belonging to that circle. At any rate we know of a specific link closely relating him to Julian.<sup>43</sup> His *digesta*, on which Marcellus wrote critical *notae*, were the point of reference for Marcellus’ own work of the same title. Under the conditions of what Behrends fittingly describes as the “unsettled” Sabinian tradition following its re-orientation through Julian,<sup>44</sup> Marcellus turned out to be not in the least a dependent follower like Gaius, but rather a self-reliant and productive fellow. Karlowa even regards Marcellus himself as “one of the most important Roman lawyers.”<sup>45</sup> With the reservations mentioned above we can therefore classify Marcellus at least as a pupil of Julian’s, and agree with Honoré insofar as he identifies Marcellus as a member of “Julian’s circle” on the basis of an examination of the material utilized by Marcellus and his style of quotation.<sup>46</sup>

Whilst he, as mentioned, deviated from several of Julian’s teachings and even commented critically on some of them, he was apparently open to Julian’s concept of a theory of intent.<sup>47</sup> We can assume that Marcellus represented this theory in our case.

<sup>42</sup> D.24.1.11.3 (Ulpian 32 *ad Sabinum*); see Rastätter (note 16), 14. To infer an affinity to the Proculians from this remark (see Liebs, *Jurisprudenz* (note 16), 109, § 415.4), however, is not appropriate in particular since the end of the radical antagonism between the schools.

<sup>43</sup> Behrends, “Institutionelles und prinzipielles Denken” (note 41), 30–31.

<sup>44</sup> Behrends, “Der Kommentar” (note 33), 262.

<sup>45</sup> Karlowa (note 32), 731.

<sup>46</sup> A. M. Honoré, “Julian’s Circle,” *TRG*, 32 (1964), 24–31, 42–43. A special “circle of students” of Julian (surviving the convergence of the schools), whose members were connected to their teacher through literary collaboration and their work for the imperial service, is also identified by Wieacker (note 32), 2:101.

<sup>47</sup> An example of Marcellus’ readiness to elevate the status of the intent underlying a legal transaction from a different context which is equally characterized by strict formalities is produced by R. Knütel, “Zur Auslegung und Entwicklung der Stipulation im klassischen römischen Recht,” in M. Avenarius, R. Meyer-Pritzl, and C. Möller, eds., *Ars Iuris* (note 37), 243, where he points out that Marcellus wants to rely on the intention of the parties in order to resolve an ambiguity in the wording of a stipulation (D.45.1.95 (Marcellus 5 *digestorum*)).

Therefore there might be something to the suggestion in Marcellus' report that he himself led the emperor to his decision to regard the testator's intention as decisive.

The close links between "Julian's circle" and the imperial *consilium* reveal our text as evidence of one of several instances in which the theory of intent, having been developed as a doctrine in academic literature, has been adopted by the applied law. It is Marcus Aurelius who — twice even — raises the question what the testator actually intended. To support his judgment he uses the notion that ultimately the *voluntas* is the decisive element in a legal transaction.

For this reason the question of intention is raised again with regard to the legacies. Julian's theory of intent appears to have prompted Marcellus to give special consideration to informal revocation. In doing so he once again proves to be, in the words of Honoré, "Julian's literary executor."<sup>48</sup>

##### 5. Using formal means to give effect to the earlier intention

According to Marcellus' report the testator had initially expressed his intention to confer a benefit clearly and in the correct form; then, later, he unclearly and informally created the impression that he might no longer have this initial intention. In accordance with Julian's *voluntas*-theory Marcellus focuses on the formally expressed intention to confer a benefit.

The German law of succession with its formal requirements for testamentary dispositions<sup>49</sup> would have no problem with regarding the earlier, formally expressed intention as the final will, because a potentially deviating intention formed later would not, in any event, have been expressed effectively. Marcellus cannot follow this line of argument however, because in caducuary law legal consequences could be triggered even by an informal revocation. As we have seen, it causes the forfeiture of assets which had initially been transferred effectively, should the underlying intention lapse at a later stage.

Since Marcellus assumes the intention behind the legal transaction to be decisive, his approach has to deal with the problem that the testator's legally significant behavior creates a perplexed overall picture. Moreover what was possibly last

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<sup>48</sup> Honoré (note 46), 29.

<sup>49</sup> Since the Requirements of Writing Act 1995, Scottish law has had less stringent formal requirements. Cf. Macdonald (note 9), § 6.58; M. Avenarius, in H. Prütting, G. Wegen, and G. Weinreich, eds., *BGB. Kommentar*, 5th ed. (Cologne 2010), § 2247, No. 27.

intended is irreconcilable with the earlier intention. Since either the grant of a legacy or its revocation was intended, we are faced with two mutually exclusive testamentary dispositions. Strictly speaking it is neither possible here to detect the actual intention, nor to act in a manner “benevolent” to the testator by partially, meaning “more or less,” sustaining the validity of what was intended.

The solution suggested by Marcellus relies on a differentiation between the two acts of volition. He surmounts the perplexity of the contrast between the earlier, definite and the later, potential intention by preferring the definite final will to the doubtful “very last will.” The relevance of the testator’s intention for Marcellus’ solution manifests itself in his favoring — within the framework of caducuary law — the earlier (i.e. at the time of the will’s drafting), clearly given intention, whereas the later, unclear intention is given inferior importance. By promising to realize the clearly ascertainable intention, Marcellus says his solution is not only generally *iustus*, but also *tutius*, i.e. safer. Because the clearly ascertainable, earlier intention supports the grant of the legacies, they are upheld on the basis of Marcellus’ solution.

To enable him to decide between the testator’s clearly ascertainable intention and an outcome which the testator merely possibly intended, Marcellus relies on the certainty with which one can infer the declared intention from a formal declaration. Similarly one of the purposes of modern German testamentary law’s provisions on form is to force a person, who is declaring a deliberate intention, to record it in a form which enables easy verification. In this respect the form is not an end in itself, but helps protect the individual’s private autonomy by ensuring that within the legal sphere individuals are only bound by serious declarations of intent to a self-determined extent and not otherwise. Rudolf von Jhering expressed this in the famous words: Form is “freedom’s twin sister.”<sup>50</sup> It is no coincidence that the same idea established itself in classical law. Rather more it is a consequence which followed from the Proculian and classical understanding of the law as a system of regular [*regelhaft*] legal institutions (*institutiones*). Gaius’ *Institutes* show that this understanding was established under Julian’s influence in the Sabinian school as well: only those situations were regulated by

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<sup>50</sup> Rudolph von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, part 2, section 2, 8th ed. [= 4th ed. (Leipzig 1883)] (Basel 1954), 471.

law as were covered by regularly framed, legally defined norms. This understanding, which favors the freedom and personal autonomy of the individual, is founded upon a logic like Marcellus': a serious intention must be expressed according to form. It is in accordance with this logic that for Marcellus, too, the form guarantees the realization of the testator's intention. Though initially merely a precondition for the existence of a civil law will, it is now put in the service of the testator's intention.

#### 6. The perception of the solution as "benignior"

Last, the question presents itself why Marcellus describes his solution as *benignior interpretatio*, literally "benevolent interpretation." As in the short version of the rule (D.50.17.192.1), so in the extensive text (D.28.4.3), Marcellus does not explain what he means by a *benignior interpretatio*. Now he contemplates the possibility of rendering all testamentary dispositions ineffective, but then offers the "benevolent interpretation" by way of contrast ("sed"), and this has led to the assumption, often held in legal-historical literature, that the view is not benevolent because it favors the legatee, but because it enables the testator's initial instructions to be treated as at least partially valid.<sup>51</sup> If we look only at the result, this seems to be a convincing explanation, but the concept behind it is unsatisfying. Hausmaninger, who shares this point of view, has proven, with the help of several examples of the use of the term *benignitas*, that the perception of the *interpretatio* as "benevolent" is clearly oriented towards the testator's intention. Crystallized to a more general formula, this would mean that *benignior interpretatio* would be the construction which would guarantee the validity of the disposition in the interest of the testator's intention as far as possible.

As we have seen, it is indeed true that Marcellus focuses on intention. The suggested explanation however is possibly too modern a concept. It is possibly the history of effect which misleads one to understand the *benignior interpretatio* as an interpretation upholding the validity of a disposition, which in turn is understood in the sense that a declared intention is to be upheld despite legal obstacles. This view is met in particular by the objection that Marcellus' suggestion, as demonstrated, is

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<sup>51</sup> H. Hausmaninger, "Benevolent' and 'Humane' Opinions of Classical Roman Jurists," *B.U. L. Rev.*, 61 (1981), 1148. That *benignior interpretatio* serves the purpose of sustaining the validity of the testator's presumed intention is also assumed by C. Zülch, *Der liber singularis responsorum des Ulpianus Marcellus* (Berlin 2001), 59.

supposed to apply to cases of doubt between two mutually exclusive motivations. While a “validity-sustaining” interpretation in cases of doubt is supposed to allow testamentary dispositions to achieve an economic outcome which has been recognized as intended, though the purported legal means of achieving that outcome are ineffective, the problem in our case is of a different nature: *benignior interpretatio* is offered as a solution when intention is unclear. Marcellus’ doubts concern not the applicable law, but the testator’s final wishes.

Notwithstanding this unclearness, it emerges that Marcellus would interpret the testator’s behavior by considering his intention as hypothetical intention, to whatever degree this is ascertainable. That is how Marcellus would bring about a solution that is, so far as possible, in the testator’s interest. Moreover, the comparative form *benignior*, attested in numerous sources, can be explained by the fact that we are dealing with a legal concept — benevolence — that needs to be supplemented with some kind of evaluative judgment. After all, an interpretation that is not particularly “benevolent” in the way intended, but instead let us say “indifferent,” is not necessarily entirely “malevolent.” This is therefore emphatically not the place for an all-or-nothing rule. Instead, the concept denoted by *benignus* is supplemented by certain evaluative judgments: a given circumstance can be more, or less, *benignus*.

In Marcellus’ case it is in the testator’s interest for the court to focus on the positive disposition because it leads to the legal consequences that the testator at least intended at an earlier stage. The result would be different should the potential later revocation be regarded as decisive: caduciary law does in fact react to the lapsed intention as well. However it does so only partially with the testator’s interest in mind: for the legacies are taken from those initially benefitted, even though their forfeiture was surely not intended by him. By preferring the validity of the legacies and therefore the realization of an intention (clearly manifested initially and possibly even sustained to the end) over the latter solution, which was surely not intended in this case, Marcellus’ *interpretatio* justifies its description as *benignior*.

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