

# MATER FAMILIAS

## SCRITTI ROMANISTICI PER MARIA ZABŁOCKA

A CURA DI

**ZUZANNA BENINCASA**  
**JAKUB URBANIK**

CON LA COLLABORAZIONE DI

**PIOTR NICZYPORUK**  
**MARIA NOWAK**

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*Mater Familias*  
*Scritti per Maria Zabłocka*

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**ROMAN PRINCIPLE  
NEMO PRO PARTE TESTATUS  
PRO PARTE INTESTATUS DECEDERE POTES  
AND THE REASONS OF ITS MODERN REJECTION**

I. INTRODUCTION

THE LAW OF SUCCESSION was one of the most important parts of the Roman law.<sup>1</sup> A large number of invented legal constructs and practical solutions are still applicable in the contemporary law first (*e.g.* principles of interpretation of wills, legacies with obligatory or real effect or the rules of responsibility for the legal debts). Furthermore, they were often directly copied by further legislators.

However, some of Roman law principles were not adopted and even directly rejected. It concerns also one of the most important rules of the Roman law of succession – the principle *nemo pro parte testatus pro parte intestatus decedere potest*<sup>2</sup> (hereinafter referred to as *nemo pro parte testatus*).

<sup>1</sup> As a freshman at the Faculty of Law and Administration I attended Professor's ZABŁOCKA course on the comparison between the Roman and the contemporary law of succession, which also dealt with the general principles of the law of succession. My participation in that class was one of the factors that arose my later interest in the law of succession. For this inspiration I would want to express my gratitude to Maria ZABŁOCKA.

<sup>2</sup> Also cited as *nemo ex parte testatus ex parte intestatus decedere potest*. According to F. SCHULTZ, *Classical Roman Law*, Oxford 1951, p. 253, the classical lawyers did not use this maxim.

Almost all contemporary legislations in the world have directly or indirectly rejected it,<sup>3</sup> however, sometimes it could be treated as a mere declaration. The aim of this article is to describe the reasons for that.



## II. THE ROMAN ORIGINS OF THE PRINCIPLE AND ITS MEANING

### 1) *Introduction*

According to the principle *nemo pro parte testatus* nobody could dispose in a will only a part of its property leaving the distribution of the rest to the rules of intestacy. The sole heir or co-heirs have to be appointed in the will to the whole estate. As Cicero stated the effect of the principle was impossibility of simultaneous existence after the death of the testator one heir appointed on the basis of a will, and another appointed by the rules of intestacy.

Cic. *inv.* II 63: Subponatur enim ab heredibus haec ratio: 'Unius enim pecuniae plures dissimilibus de causis heredes esse non possunt, nec umquam factum est, ut eiusdem pecuniae alius testamento, alius lege heres esset'.

The principle *nemo pro parte testatus* was present in numerous legal and non-legal sources dated from the beginning of the ancient Roman law and classical age until the Justinian's codification, what shows its importance for the system of the law of succession.<sup>4</sup>

<sup>3</sup> The only exceptions are Catalonia and San Marino, cf. K. G. C. REID, M. J. DE WAAL & R. ZIMMERMANN, 'Intestate succession in historical and comparative perspective', [in:] IIDEM (eds.), *Comparative succession Law II. Intestate Succession*, Oxford 2015, p. 445.

<sup>4</sup> Giovanna COPPOLA, 'Nascita e declino dell'adagio *nemo pro parte testatus pro parte intestatus decedere potest*', *Teoria e Storia del Diritto Privato* V (2012), pp. 21–23. However, it is stated that this principle 'swayed in the vulgar law' (K. KOLAŃCZYK & J. KODRĘBSKI, *Prawo rzymskie* [Roman Law], Warszawa 2001, p. 468). Identically M. KASER, *Das römische Privatrecht* II, München 1975, pp. 464; 476–477; W. LITEWSKI, *Rzymskie prawo prywatne* [Roman Private

*D. 50.17.7: (Pomp. 3 Sab.):* Ius nostrum non patitur eundem in paganis et testato et intestato decessisse: earumque rerum naturaliter inter se pugna est 'testatus' et 'intestatus'.

*Ijust. 2.14.5:* Hereditas plerumque dividitur in duodecim uncias, quae assis appellatione continentur. ... non autem utique duodecim uncias esse oportet. Nam tot unciae assem efficiunt quot testator voluerit, et si unum tantum quis ex semisse verbi gratia heredem scripserit, totus as in semisse erit: neque enim idem ex parte testatus et ex parte intestatus decedere potest, nisi sit miles, cuius sola voluntas in testando spectatur ...

According to this principle testator could not partially dispose his estate in the will e.g. only half or third of it leaving rest to the heirs appointed by the rules of intestacy.<sup>5</sup> If the testator decided to dispose his property only partially the testament was not void, however, the institution of accretion (*ius accrescendi*) applies, which effect was the acquisition of the entire estate by testamentary heirs.<sup>6</sup>

*Ijust. 2.14.7:* Videamus, si pars aliqua vacet nec tamen quisquam sine parte heres institutus sit, quid iuris sit? veluti si tres ex quartis partibus heredes scripti sunt. et constat, vacantem partem singulis tacite pro hereditaria parte accedere et perinde haberi ac si ex tertiis partibus heredes scripti essent ...

The accretion was a natural and logical consequence<sup>7</sup> of the existence of *nemo pro parte testatus* principle and applied *ex lege*.<sup>8</sup> Those who were

Law], Warsaw 2003, p. 362; F. LONGCHAMPS DE BÉRIER, *Law of succession. Roman legal framework and comparative law perspective*, Warsaw 2011, p. 58.

<sup>5</sup> SCHULTZ, *Classical* (cit. n. 2), p. 254.

<sup>6</sup> M. KASER & R. KNÜTEL, *Römisches Privatrecht*, München 2014, p. 390; T. RÜFNER, 'Testamentary formalities in Roman law', [in:] REID, DE WAAL & ZIMMERMANN (eds.), *Comparative succession Law* (cit. n. 3), pp. 9–10.

<sup>7</sup> A. CICU, 'Successioni per causa di morte. Parte generale: Delazione e acquisto dell'eredità divisione ereditaria', [in:] A. CICU & F. MESSINEO (eds.), *Trattato di diritto civile e commerciale* XLII, Milano 1961, p. 9; W. KRÁLIK, [in:] *Ehrenzweig System des österreichischen allgemeinen Privatrechts* IV. *Das Erbrecht*, Wien 1983, p. 176 ('eine notwendige Konsequenz').

<sup>8</sup> P. MEYLAN, 'Nemo pro parte testatus pro parte intestatus decedere potest', [in:] *Zum Schweizerischen Erbrecht. Festschrift zum 70. Geburtstag von Prof. Dr. Peter Tuor*, Zürich, 1946, p. 195;

appointed as heirs in a will, acquired whole estate and excluded potential rights of statutory heirs.<sup>9</sup>

*D. 29.2.39: (Ulp. 46 ed.): Quam diu potest ex testamento adiri hereditas, ab intestato non defertur.*

Like Ulpian stated as long as appointment on the basis of a will was not declared void, the testamentary heirs had priority in the acquisition of the entire estate.<sup>10</sup> This was applicable as long as one of them was appointed successfully (e.g. had not rejected it). Therefore, it could be stated that this principle confirms primacy of inheritance based on the will over intestacy.<sup>11</sup> However, at the same time it created the exception from freedom of testation and *favor testamenti* rule explicitly expressed in the *Law of the Twelve Tables* (v 5). In this case, the will, in which the testator did not dispose his entire property was not respected and the heirs appointed by him acquired the whole estate according to the institution of *ius accrescendi* and not only a part of it.<sup>12</sup> Moreover, in other archaic legal systems there were no patterns of such principle.<sup>13</sup>

C. FADDA, *Concetti fondamentali del diritto ereditario Romano* 1, Milano 1949, p. 342; SCHULTZ, *Classical* (cit. n. 2), p. 253; 255; P. VOCI, *Istituzioni di diritto romano*, Milano 1954, p. 526; T. GIARO, 'Nießbrauchslegate zugunsten gemeinsamer Sklaven', [in:] J. SONDEL, J. RESZCZYŃSKI & P. ŚCIŚLICKI (eds.), *Roman Law as Formative of Modern Legal Systems: Studies in Honour of Wiesław Litewski* 1, Kraków 2003, p. 101.

<sup>9</sup> The same applies when testament was partially void e.g. it appointed heirs under suspended condition: *D. 28.5.33* (Gai. 2 *de testam. ad ed. pr. ur.*) and *D. 29.2.52.1* (Marcian. 4 *inst.*).

<sup>10</sup> Cf. FADDA, *Concetti fondamentali* (cit. n. 8), pp. 340; 342.

<sup>11</sup> MEYLAN, *nemo pro parte testatus* (cit. n. 8), p. 195–196; S. P. KURSA, 'Vigor reguły *nemo pro parte testatus pro parte intestatus decedere potest* w prawie rzymskim' [The force of the principle *nemo pro parte testatus pro parte intestatus decedere potest* in Roman law], *Studia Prawnoustrojowe* 27 (2015), p. 32.

<sup>12</sup> FADDA, *Concetti fondamentali* (cit. n. 8), p. 340; P. BONFANTE, *Corso di diritto romano. VI. Le successioni – parte generale*, Milano 1974, p. 217.

<sup>13</sup> MEYLAN, 'Nemo pro parte testatus' (cit. n. 8), p. 180.

## 2) *Exceptions from the principle*

In the sources it could be observed that the Roman law established only minor theoretical exceptions from *nemo pro parte testatus* principle; however they had great importance in practice.

a) The first exceptions were (as usually in the Roman law of succession) soldiers (cf. *D.* 50.17.7, Pomp. 3 *ad Sab.*; *Iust.* 2.14.5). In the military will the testator had the possibility to dispose only part of his estate. Therefore, soldiers were the only group of citizens, who could – like Ulpian stated – die ‘partly testate and partly intestate’.

*D.* 29.1.6: (Ulp. 5 *Sab.*): Si miles unum ex fundo heredem scripserit, creditum quantum ad residuum patrimonium intestatus decessisset: miles enim pro parte testatus potest decedere, pro parte intestatus.

As a consequence to the military will did not apply institution of accretion, unless the testator has expressed a contrary intention.

*D.* 29.1.37: (Paul. 7 *quaest.*): Si duobus a milite liberto scriptis heredibus alter omiserit hereditatem, pro ea parte intestatus videbitur defunctus decessisse, quia miles et pro parte testari potest, et competit patrono ab intestato bonorum possessio, nisi si haec voluntas defuncti probata fuerit, ut omittente altero ab alterum vellet totam redire hereditatem.

The reason for the exception’s existence was the lesser formal requirements, which were adopted to this form of wills.<sup>14</sup> The emperors tried to avoid the situation in which the will would be only partially effective because of the soldier’s lack of knowledge about the law.<sup>15</sup>

<sup>14</sup> E. VOLTERRA, *Istituzioni di diritto privato romano*, Roma 1961, p. 747; M. KASER, *Das römische Privatrecht*, München 1971 (2 ed.), pp. 680–681; RÜFNER, ‘Testamentary formalities’ (cit. n. 6), pp. 14–15; LONGCHAMPS DE BÉRIER, *Law of succession* (cit. n. 4), p. 55; J. RUDNICKI, *Testament żołnierski i testamenty wojskowe w europejskiej tradycji prawnej* [Soldiers’ Will and Military Wills in European Legal Tradition], Bielsko-Biała 2015, pp. 42–54.

<sup>15</sup> However, this principle was not applied to veterans but only to the soldiers in the service: *D.* 49.17.19.2 (Tryph. 18 *disput.*).

b) The second exception was the so-called intestate trust (*fideicommissum hereditatis ab intestato*). This institution gave the testator the possibility to dispose parts of his estate in the will in a very flexible way.<sup>16</sup> Theoretically, this was not an exception from the *nemo pro parte testatus* principle, due to the fact that testator usually did not dispose his property in the will, however in practice had the same effect.<sup>17</sup>

c) The third exception was connected with the general rules of the so-called intestate succession *contra tabulas*.<sup>18</sup> If the testator in his will omitted members of his family (wife *in manu*, daughter or grandson) who were *in potestate* (without justified reason and not granting them their forced share) and decided to appoint heirs from his nearest family circle (*sui heredes*), the will would not be void (cf. Gai 2.124; *TUlp.* 22.23.); however, the omitted family members have *querella inofficiosi testamenti* and were granted this part of the estate, which they would have become, in the absence of the will in intestacy.<sup>19</sup> If the appointed heirs were *heredes extranei*, the

<sup>16</sup> For details cf. further F. LONGCHAMPS DE BÉRIER, 'Rzymski fideikomis uniwersalny a zasada prawa spadkowego *nemo pro parte testatus pro parte intestatus decedere potest*' [Roman *fideicommissum hereditatis* and the law of succession principle *nemo pro parte testatus pro parte intestatus decedere potest*], [in:] Grażyna BAŁTRUSZAJTYS (ed.), *Prawo wczoraj i dziś. Studia dedykowane profesor Katarzynie Sójce-Zielińskiej*, Warszawa 2000, pp. 155–172; IDEM, 'Warunki, terminy i fideikomis uniwersalny w rzymskim prawie prywatnym' [The conditions, terms and *fideicommissum hereditatis* in Roman private law], *Studia Iuridica* 37 (1999), p. 118.

<sup>17</sup> LONGCHAMPS DE BÉRIER, *Law of succession* (cit. n. 4), pp. 57–58.

<sup>18</sup> This situation is commonly classified as an exception from *nemo pro parte testatus* principle: H. DERNBURG, *Pandekten. Dritter Band. Familien- und Erbrecht*, Berlin 1892, p. 98; B. WINDSCHEID & T. KIPP, *Lehrbuch des Pandektenrechts* III, Frankfurt am Main 1906, p. 212; SCHULTZ, *Classical* (cit. n. 2), p. 253; R. TAUBENSCHLAG, *Rzymskie prawo prywatne na tle państw antycznych*, [Roman Law and Ancient Laws], Warszawa 1955, p. 280; B. BIONDI, *Istituzioni di diritto romano*, Milano 1956, p. 612; VOLTERRA, *Istituzioni* (cit. n. 14), p. 718; KASER, *Das römische Privatrecht* (cit. n. 14), p. 677; LITEWSKI, *Rzymskie prawo* (cit. n. 8), p. 334; LONGCHAMPS DE BÉRIER, 'Rzymski fideikomis' (cit. n. 16), pp. 169–170; Maria ZABŁOCKA, [in:] W. WOŁODKIEWICZ & Maria ZABŁOCKA, *Prawo rzymskie. Instytucje*, [Roman Law. Institutions], Warszawa 2014 (6 ed.), p. 176; 186; COPPOLA, 'Nascita e declino' (cit. n. 4), pp. 79–95; LONGCHAMPS DE BÉRIER, *Law of succession* (cit. n. 4), pp. 56–57; T. KIPP & H. COING, *Erbrecht. Ein Lehrbuch*, Tübingen 1990, pp. 263–264.

<sup>19</sup> Cf. further, ZABŁOCKA, [in:] WOŁODKIEWICZ & ZABŁOCKA, *Prawo rzymskie* (cit. n. 18), p. 186; F. LONGCHAMPS DE BÉRIER, [in:] W. DĄCZAK, T. GIARO & F. LONGCHAMPS DE



aforementioned members of the family acquired the half of the whole estate. In such a situation the estate splits into two separate parts and as a result was inherited partially based on will and partially based on the rules of intestacy, what is confirmed by Papinian and Ulpian.

*D. 5.2.15.2: (Pap. 14 quaest.): ... verum enim est familiae erciscundae iudicium competere, quia credimus eum legitimum heredem pro parte esse factum: et ideo pars hereditatis in testamento remansit, nec absurdum videtur pro parte intestatum videri.*

*D. 5.2.24: (Ulp. 48 Sab.): Circa inofficiosi querellam evenire plerumque adsolet, ut in una atque eadem causa diversae sententiae proferantur. quid enim si fratre agente heredes scripti diversi iuris fuerunt? quod si fuerit, pro parte testatus, pro parte intestatus decessisse videbitur.*

d) The fourth exception – introduced by Justinian – was the possibility of testamentary heirs to reject part of the estate, which accrued to them due to the fact that was previously rejected by one of the joint-heirs appointed in the same will (*Nov. 1.1*). The effect of that was intestate succession to the rejected part.

The aforementioned second and third situations sometimes in the relevant literature are not classified as exceptions to the *nemo pro parte testatus* principle due to the fact that testator disposed his whole property in the will.<sup>20</sup> Also the last exception is treated by some authors as only an exception from the *ius accrescendi* institution.<sup>21</sup> For rejection of classifying those situation as an exception from *nemo pro parte testatus* principle could weight an argument that other situations in which certain groups of citi-

BÉRIER, *Prawo rzymskie. U podstaw prawa prywatnego* [Roman law. At the Basis of Private Law], Warszawa 2014, p. 256.

<sup>20</sup> The existence in that situation the exception from *nemo pro parte testatus* principle is questioned by B. SCHMIDLIN, 'Sinn, Funktion und Herkunft der Testamentsregeln: *nemo pro parte testatus pro parte intestatus decedere potest – hereditas adimi non potest*', *BIDR* 78 (1975), pp. 72–78; KURSA, 'Vigor reguły' (cit. n. 11), pp. 28–30; IDEM, 'Przedmiot i cel *querela inofficiosi testamenti*' [The object and the purpose of *querela inofficiosi testamenti*], *Themis Polska Nova* 3 (2012), pp. 90–91; 94.

<sup>21</sup> KURSA, 'Vigor reguły' (cit. n. 11), p. 30.

zens (slaves, people limited in freedom of testation) were not allowed to dispose whole estate, were not classified as exceptions from aforementioned principle.<sup>22</sup> However, in situations 2–4 the final effect was contrary to the *nemo pro parte testatus* principle and aforementioned fragments by Papinian and Ulpian suggest that exceptions to this rule were also classified through the effect, which occurred.<sup>23</sup>

### 3) *The origin and construction of the principle*

There are many doubts on the origins of this principle.<sup>24</sup> There is a convenient theory that inception of this principle was connected with the first two forms of the Roman wills – *testamentum in procintu* and *testamentum calatis commitis* (Gai. 2.101).<sup>25</sup> Presumably, in the ancient Roman law – similar as it was in the Greek law – only those people, who did not have any children, were able to dispose their estate.<sup>26</sup> Hence, there was a clear distinction between situations in which there could exist each type of inheritance. The same theoretical argument applied as well as for another form of will – *testamentum per aes et libram*. In this form of a will *man-*

<sup>22</sup> KURSA, 'Vigor reguły' (cit. n. 11), p. 30.

<sup>23</sup> Cf., however, SCHMIDLIN, 'Sinn, Funktion und Herkunft' (cit. n. 20), pp. 77–78.

<sup>24</sup> Cf. e.g. DERNBURG, *Pandekten* (cit. n. 18), p. 98; VOLTERRA, *Istituzioni* (cit. n. 14), pp. 717–718; KASER, *Das römische Privatrecht* (cit. n. 14), p. 677; B. SCHMIDLIN, *Die römischen Rechtsregeln. Versuch einer Typologie*, Köln 1970, pp. 62–66; BONFANTE, *Corso* (cit. n. 12), pp. 217–223; COPPOLA, 'Nascita e declino' (cit. n. 4), pp. 23–38.

<sup>25</sup> MEYLAN, 'Nemo pro parte testatus' (cit. n. 8), pp. 181–182; SCHULTZ, *Classical* (cit. n. 2), p. 254. However it is not convincing to derive origin of the *nemo pro parte testatus* principle from another principle of Roman law – *favor testamenti* (cf. KURSA, 'Vigor reguły' [cit. n. 11], pp. 34–36), since in practice the will of the testator was excluded and the acquisition of the part of the estate happened against it.

<sup>26</sup> R. SÖHM, L. MITTEIS & L. WENGER, *Instytucje, historia i system rzymskiego prawa prywatnego*, [Institutions, History and System of Roman Private Law] (trans. R. TAUBENSCHLAG & W. KOZUBSKI), Warszawa 1925, pp. 596–597; J. ZABŁOCKI, *Kompetencje 'patres familias' i zgromadzeń ludowych w sprawach rodziny w świetle 'Noctes Atticae' Aulusa Gelliusa*, [The Competences of *patres familias* and the Popular Assembly in Family Matters According to *Noctes Atticae* by Aulus Gellius], Warszawa 2000, p. 109; W. KUNKEL & H. HON-

*cipatio* had to involve all of the testator's estate including the right to his family members.<sup>27</sup> Hence, the impossibility of partial *mancipatio* could lead to the creation of *nemo pro parte testatus* principle.<sup>28</sup>

There could be also one additional and even more convenient justification of that principle. It should be stated that despite the existence of exceptions, which were significant in practice, this principle has never been formally rejected. Moreover, Pomponius clearly stated that between succession based on a will and intestacy there is a 'natural contradiction' (*D.* 50.17.7).<sup>29</sup> On the other hand, Papinian stated that simultaneously existence of inheritance based on will and intestacy is generally 'an absurd' (*D.* 5.2.15.2).<sup>30</sup> This leads to the conclusion that the origin of this principle was probably the universal succession.<sup>31</sup> According to this, heir or heirs acquired not only different parts of the deceased's estate but also the right and obligation to take care of the cult of their family predecessors.<sup>32</sup> This broad definition of universal succession can be found in various sources.

SELL, [in:] P. JÖRS, W. KUNKEL, L. WENGER, H. HONSELL, T. MAYER-MALY & W. SELB, *Römisches Recht*, Berlin – Heidelberg – New York 1987, pp. 447–448; COPPOLA, 'Nascita e declino' (cit. n. 4), pp. 21–38.

<sup>27</sup> MEYLAN, 'Nemo pro parte testatus' (cit. n. 8), pp. 183–184 and the authors cited there and SCHMIDLIN, *Die römischen Rechtsregeln* (cit. n. 24), pp. 64–66.

<sup>28</sup> Cf. SCHMIDLIN, *Die römischen Rechtsregeln* (cit. n. 24), pp. 64–66; IDEM, 'Sinn, Funktion und Herkunft' (cit. n. 20), pp. 80–83.

<sup>29</sup> BIONDI, *Istituzioni* (cit. n. 18), p. 612; BONFANTE, *Corso* (cit. n. 12), p. 217; A. GUARINO, *Diritto privato romano*, Napoli 1992, p. 439: 'una ingenua spiegazione del principio.'

<sup>30</sup> Cf. T. GIARO, 'Papinian und die Reduction ad absurdum', [in:] J. D. HARKE (ed.), *Argumenta Papiniani. Studien zur Geschichte und Dogmatik des Privatrechts*, Berlin – Heidelberg 2013, pp. 42–43.

<sup>31</sup> FADDA, *Concetti fondamentali* (cit. n. 8), p. 341; cf. COPPOLA, 'Nascita e declino' (cit. n. 4), pp. 23–38, and the authors cited there.

<sup>32</sup> MEYLAN, 'Nemo pro parte testatus' (cit. n. 8), pp. 184–186; KASER, *Das römische Privatrecht* (cit. n. 14), pp. 92; 98; KUNKEL & HONSELL, [in:] *Römisches Recht* (cit. n. 26), pp. 434–435; ZABŁOCKA, [in:] WOŁODKIEWICZ & ZABŁOCKA, *Prawo rzymskie* (cit. n. 18), p. 175; LONGCHAMPS DE BÉRIER, [in:] DAJCZAK, GIARO & LONGCHAMPS DE BÉRIER, *Prawo rzymskie* (cit. n. 19), pp. 248–249; P. DE PLESSIS, *Borkowski's Textbook on Roman Law*, Oxford 2010, p. 205.

*D. 50.17.62: (Iul. 6 dig.): Hereditas nihil aliud est, quam successio in universum ius quod defunctus habuerit.*

*D. 50.16.24: (Gai. 6 ed. prov.): Nihil est aliud 'hereditas' quam successio in universum ius quod defunctus habuit.*

*D. 50.17.59: (Ulp. 3 disp.): Heredem eiusdem potestatis iurisque esse, cuius fuit defunctus, constat.*

*D. 50.17.128: (Paul. 21 ed.): Hi, qui in universum ius succedunt, heredis loco habentur.*

However, this argument does not explain precisely why *nemo pro parte testatus* principle was adopted. In his will, the testator could appoint to estate more than one heir. In such a situation the right and obligation to take care of the cult of the family predecessors were divided between two or more heirs.

The solution to that problem can be found among the attributes of the universal succession.<sup>33</sup> For Roman jurists, a subject of the inheritance was always 'one estate' (one immaterial thing – *res incorporales*). Therefore, the inheritance of that one estate, according to the universal succession, had to be also based on one ground ('una causa unica'): the will or the intestacy.<sup>34</sup> The existence of one cause excluded another.<sup>35</sup> Therefore, the concept of division of this estate partially through the will and partially through the intestacy was for Roman jurists contradictory to the concept of universal succession.

This argumentation can be derived also from the rules of acquisition of the estate. In Roman law it was not possible to divide the estate by its partial acceptance or rejection by the testamentary heirs.

<sup>33</sup> Cf. also W. OSUCHOWSKI, *Zarys rzymskiego prawa prywatnego*, [The Outline of Roman Private Law], Warszawa 1962, p. 454; BONFANTE, *Corso* (cit. n. 12), p. 219; LONGCHAMPS DE BÉRIER, [in:] DAJCZAK, GIARO & LONGCHAMPS DE BÉRIER, *Prawo rzymskie* (cit. n. 19), pp. 255; 313.

<sup>34</sup> FADDA, *Concetti fondamentali* (cit. n. 8), pp. 340–341. Cf. also TAUBENSCHLAG, *Rzymskie* (cit. n. 18), p. 279.

<sup>35</sup> OSUCHOWSKI, *Zarys* (cit. n. 33), p. 454; FADDA, *Concetti fondamentali* (cit. n. 8), pp. 340–341.

*D. 29.2.1: (Paul 2 Sab.): Qui totam hereditatem adquirere potest, is pro parte eam scindendo adire non potest.*

*D. 29.2.2: (Ulp. 4 Sab.): Sed et si quis ex pluribus partibus in eiusdem hereditate institutus sit, non potest quasdam partes repudiare, quasdam agnoscere.*

*D. 29.2.10: (Ulp. 7 Sab.): Si ex asse heres destinaverit partem habere hereditatis, videtur in assem pro herede gessisse.*

This also shows that the inheritance had to have one ground and the following decisions of the testamentary heirs could not change it.



### III. THE SOLUTIONS ADOPTED BY CONTEMPORARY LAW

In the law of the Holy Roman Empire it was doubtful whether *nemo pro parte testatus* principle was adopted and if yes then to what extent.<sup>36</sup> The same doubt was in the French 'written law' (*droit écrit*) before the revolution,<sup>37</sup> however this rule was rejected in other parts of France (mainly customary law) and in the Netherlands.<sup>38</sup> This rule was not adopted also in the canon

<sup>36</sup> H. COING, *Europäisches Privatrecht* 1. *Älteres Gemeines Recht* (1500–1800), München 1985, p. 543; U. FLOSSMANN, *Österreichische Privatrechtsgeschichte*, Wien 2007, p. 350. However E. WEISS, [in:] H. KLING (ed.), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* III, §§ 531–858, Wien 1952, p. 58 stated that: 'Im gemeinen Recht stand es keineswegs außer Zweifel, ob die Regel *nemo pro parte* etc. wirklich rezipiert worden sei'. Cf. also WINDSCHEID & KIPP, *Lehrbuch des Pandektenrechts* (cit. n. 18), pp. 210–212; J. BINDER, *Die Rechtsstellung des Erben nach dem deutschen bürgerlichen Gesetzbuch* 1, Leipzig 1901, p. 62.

<sup>37</sup> M. BLONDEL, *La transmission a cause de mort des droits extrapatrimoniaux et des droits patrimoniaux a caractère personnel*, Paris 1969, p. 15; H. SOUM, *La transmission de la succession testamentaire*, Paris 1957, p. 42, who stated that this rule was applied in practice but could be easily evade by the institution of trust (*fideicomissum*).

<sup>38</sup> COING, *Europäisches Privatrecht* (cit. n. 36), p. 543.

law.<sup>39</sup> To solve this dispute some of the seventeenth and eighteenth century German codifications clearly expressed this principle in the statutory provisions.<sup>40</sup> This rule was adopted in the Part III title XI § 16 of the *Code of Württemberg* from 1610 (*Das württembergische Landrecht*) and in part III, title 3, § 9 No. 4 of *Codex Maximilianeus bavaricus civilis* from 1756. However, the General State Laws for the Prussian States (*Allgemeines Landrecht für die Preußischen Staaten*) rejected clearly this rule in part I, title XII, section I, § 45.<sup>41</sup>

To clarify the matter, most of the modern codifications adopted the regulations, whose aim was direct rejection of the *nemo pro parte testatus* principle.<sup>42</sup> A perfect example of that tendency is the Austrian law. According to § 534 ABGB in connection with § 533 ABGB<sup>43</sup> three grounds of the right to inheritance (so-called 'Erbrecht') *i.e.* the will, the contract of inheritance, and the intestacy can exist simultaneously, so that a proportional part of the estate may be due to one heir based upon a will, to another based upon a contract, and to a third based upon the law (which is called in Austrian law 'gemischte Erbfolge').<sup>44</sup> Every ground of inheritance has the same virtue.<sup>45</sup> Moreover, similar provisions can be found in the thirteenth chapter of ABGB concerning rules on intestacy. If the deceased has not disposed in his will the whole of his property or if he has not properly observed the will requirements or if the appointed

<sup>39</sup> COING, *Europäisches Privatrecht* (cit. n. 36), p. 573.

<sup>40</sup> And so did some Swiss cantons: MEYLAN, 'Nemo pro parte testatus' (cit. n. 8), pp. 198–200.

<sup>41</sup> This paragraph stated: 'Er kann auch nur über einen Theil seines Nachlasses verordnen, und es in Ansehung des Ueberrestes bey der gesetzlichen Erbfolge lassen'.

<sup>42</sup> H. COING, *Europäisches Privatrecht* II. 19. Jahrhundert, München 1989, p. 609.

<sup>43</sup> This paragraph stated: 'Das Erbrecht gründet sich auf den nach gesetzlicher Vorschrift erklärten Willen des Erblassers; auf einen nach dem Gesetze zulässigen Erbvertrag (§ 602), oder auf das Gesetz'.

<sup>44</sup> For the situation in which 'gemischte Erbfolge' exist, *cf.* further, R. WELSER, [in:] P. RUMMEL (ed.) *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* I, §§ 1–1174 ABGB, Wien 2000, p. 811, no 2; B. ECCHER, *Bürgerliches Recht* VI. Erbrecht, Wien – New York 2008, p. 12; p. 101.

<sup>45</sup> As it is stated in the literature: 'Dies bedeutet, das alle Berufungsgründe gleichwertig nebeneinander stehen' – *cf.* WEISS, [in:] *Kommentar* (cit. n. 36), p. 62.

heirs cannot or will not accept the inheritance, then intestacy can take place in the whole or in a part of the estate (§ 727 ABGB) and the intestate heirs receive that part of the estate which is not bequeathed (§ 728 ABGB). Consequently, it can be stated that Austrian legislator formally rejected principle *nemo pro parte testatus* in two different places. This is due to the express will of the codification commission and its chairman Franz von Zeiller, who wanted clearly underline the rejection of this principle in ABGB.<sup>46</sup> This view is indisputable in the literature.<sup>47</sup>

The same aim was the *ratio legis* of § 2088 BGB regulation.<sup>48</sup> According to this paragraph if the testator has appointed only one heir and has restricted the appointment to a fraction of the inheritance, the remainder of the inheritance passes under the rules of intestate succession. The same applies if the testator has appointed more than one heir, restricting each of them to a fraction, and the fractions do not exhaust the whole. Both of those rules apply to the contracts of inheritance. Therefore, in German literature it is beyond a doubt that the rejection of the *nemo pro parte testatus* principle was intentional.<sup>49</sup> The lack of the reasons that can

<sup>46</sup> The works of codification commission are described by WEISS, [in:] *Kommentar* (cit. n. 36), p. 58.

<sup>47</sup> J. KRAINZ & L. PFAFF, *System des österreichischen Allgemeinen Privatrechts* II. *Das Obligationen, Familien- und Erbrecht*, Wien 1894, p. 489; WEISS, [in:] *Kommentar* (cit. n. 36), pp. 58; 62; KRALIK, [in:] *Ehrenzweig System* (cit. n. 7), p. 176; F. GSCHNITZER & C. FEISTENBERGER, *Österreichisches Erbrecht*, Wien – New York 1983, pp. 12; 75; R. WELSER, *Grundriss des bürgerlichen Rechts* II. *Schuldrecht Allgemeiner Teil, Schuldrecht Besonderer Teil, Erbrecht*, Wien 2007, pp. 454; 465; G. KNECHTEL, [in:] A. KLETEČKA & M. SCHAUER (eds.), *ABGB-ON. Kommentar*, Wien 2010, p. 1088.

<sup>48</sup> The official translation may be found at <[http://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p7057](http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p7057)>.

<sup>49</sup> BINDER, *Die Rechtsstellung* (cit. n. 36), pp. 62–62; 110–111 (with references to the works of the codification commission); U. VON LÜBTOW, *Erbrecht. Eine systematische Darstellung* I, Berlin 1971, p. 356; U. VON LÜBTOW, *Erbrecht. Eine systematische Darstellung* II, Berlin 1971, p. 640; KIPP & COING, *Erbrecht* (cit. n. 18), pp. 15 and 263–264; C. T. EBENROTH, *Erbrecht*, München 1992, p. 53; P. WINDEL, *Über die Modi der Nachfolge in das Vermögen einer natürlichen Person beim Todesfall*, Heidelberg 1998, p. 197; H. LANGE & K. KUCHINKE, *Erbrecht. Ein Lehrbuch*, München 2001, pp. 555–556; K. MUSCHELER, *Universalsukzession und Vonselbsterwerb*, Tübingen 2002, p. 39; W. SCHLÜTER, *Erbrecht*, München 2007, p. 145; K. G. LORITZ, [in:] J. DAMRAU (ed.), *Soergel Kommentar zum Bürgerlichen Gesetzbuch*. XXII. *Erbrecht*

argue for the maintenance of that principle is clearly emphasized also in the literature.<sup>50</sup>

Also Swiss legislator decided to explicitly reject *nemo pro parte testatus* principle what is unanimously accepted in literature.<sup>51</sup> According to article 481 ZGB within the limits of the right to dispose of his or her property, the testator may dispose of it in part or in full by will or by contract of succession and any property in respect of which no testamentary disposition has been made passes to the statutory heirs.<sup>52</sup> The purpose of that provision and the rejection of the Roman principle was the freedom of testation.<sup>53</sup>

In the Polish law the relation between testamentary and intestate succession is regulated in article 926 section 3 according to which, with the exceptions provided for by the statutory provisions, intestate succession to part of the estate exist if the deceased did not appointed an heir for that part of the estate, or if any of the several heirs appointed by him to inherit to the entire estate does not want to or may not become an heir.<sup>54</sup> Moreover, according to article 959 CC a testator may appoint one or several heirs to succeed to part of the estate. Therefore, the testator will decide whether testamentary heir or heirs inherit the whole estate or only

2, §§ 2064–2273, Stuttgart 2003, p. 141, nr. 1; G. OTTE, [in:] G. OTTE (ed.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einföhrungsgesetz und Nebengesetzen v. Erbrecht*: §§ 2064–2196 (Testament 1), Berlin 2003, p. 242, § 2088, nr. 1; R. ZIMMERMANN, 'Intestate succession in Germany', [in:] REID, DE WAAL & ZIMMERMANN (eds.), *Comparative succession Law* (cit. n. 3), p. 182.

<sup>50</sup> OTTE, [in:] *J. von Staudingers Kommentar* (cit. n. 49), p. 242, § 2088, nr. 1.

<sup>51</sup> P. PIOTET, *Schweizerisches Privatrecht IV. Das Erbrecht 1*, Basel – Stuttgart 1978, p. 94; P. WEIMAR, *Berner Kommentar. Schweizerisches Zivilgesetzbuch. Das Erbrecht III 1. Die Erben 1: Die gesetzlichen Erben / Die Verfügungen von Todes wegen. 1. Teil. Die Verfügungsfähigkeit / Die Verfügungsfreiheit / Die Verfügungsarten / Die Verfügungsformen. Art. 457–516 ZGB*, Bern 2000, p. 123; P. TUOR, B. SCHNYDER & A. RUMO-JUNGO, [in:] IDEM & J. SCHMID, *Das Schweizerische Zivilgesetzbuch*, Zürich – Genf – Basel 2009, p. 616, § 12.

<sup>52</sup> The official translation is available at <<<https://www.admin.ch/opc/en/classified-compilation/19070042/201407010000/210.pdf>>>.

<sup>53</sup> WEIMAR, *Berner Kommentar* (cit. n. 51), p. 123.

<sup>54</sup> The same rule was explicitly stated in article 15 § 2–3 of 1946 Decree: *Law of Succession*, cf. J. GWIAZDOMORSKI, *Prawo spadkowe*, [The Law of Succession], Warszawa 1959, p. 52.



the part of it.<sup>55</sup> Interpretation of those two articles clearly establishes that Polish legal system rejects *nemo pro parte testatus* principle.<sup>56</sup> This can be also confirmed by the article 1022 CC according to which, an heir appointed to estate both by a will and by the intestacy may reject the estate as a testamentary heir and accept it as a statutory heir.

In the Italian law, the rejection of *nemo pro parte testatus* principle can be derived from article 457 section 2, which stated that intestacy can only arise when the will does not cover estate in whole or in part ('in tutto o in parte').<sup>57</sup> Moreover, in the Italian law the rejection of this principle can also be derived from a general article which defines the notion of the will and its content (art. 587 § 1) due to the fact that it gives the testator possibility to dispose only a fraction of his estate.<sup>58</sup> The *nemo pro parte testatus* principle did not apply also in Greece (art. 1801)<sup>59</sup> and Argentina (art. 3607).<sup>60</sup>

<sup>55</sup> For the examples in which testamentary succession and intestacy can exist in the same time in spite of the testators will cf. further, J. St. PIĄTOWSKI, A. KAWAŁKO & H. WITCZAK, [in:] B. KORDASIEWICZ (ed.), *System prawa prywatnego x. Prawo spadkowe* [The System of the Polish Private Law x. The Law of Successions], Warszawa 2015, p. 162.

<sup>56</sup> Cf. in literature: W. CHOJNOWSKI, 'Niektóre zagadnienia prawa spadkowego', [Some questions of the law of succession], *Palestra* 7-8 (1966), p. 42; A. OLESZKO, 'Umowy dotyczące spadku w praktyce notarialnej', [The contracts concerning estate in the notarial practice], *Nowe Prawo* 6 (1977), p. 845; J. GWIAZDOMORSKI & A. MACZYŃSKI, *Prawo spadkowe w zarysie*, [The Outline of the Law of Succession], Warszawa 1990, p. 58; M. PAZDAN, [in:] K. PIETRZYKOWSKI (ed.), *Kodeks cywilny II. Komentarz do artykułów 450-1088*, [Civil Code II. Commentary to the Articles 450-1088], Warszawa 2013, p. 866; PIĄTOWSKI, KAWAŁKO & WITCZAK, [in:] *System prawa prywatnego* (cit. n. 55), p. 162; S. WÓJCIK & F. ZOLL, *ibidem*, p. 426; K. OSAJDA, [in:] IDEM (ed.), *Kodeks cywilny. Komentarz III. Spadki (art. 922-1088 KC)* [Civil Code. Commentary III. Successions (Articles 922-1088)], Warszawa 2013, p. 95, 97-98; 436. Cf. also the judgments of the Polish Supreme Court of 20.02.1965 (III CR 381/64, OSNCP 12/1965, item 216), and of 8.08.1975 (III CRN 218/75, OSNC 9/1976, item 200).

<sup>57</sup> COPPOLA, 'Nascita e declino' (cit. n. 4), pp. 151; 169; G. CAPOZZI, *Successioni e donazioni* I (revised by A. FERUCCI & C. FERRENTINO), Milano 2009, p. 21; F. E. STADLER, 'Italien', [in:] M. FERID, K. FIRSCHING, H. DÖNER & R. HAUSMANN (eds.) *Internationales Erbrecht*, München (as of 1995), p. 21a, nr. 40.

<sup>58</sup> In the original version: 'Il testamento è un atto revocabile con il quale taluno dispone, per il tempo in cui avrà cessato di vivere, di tutte le proprie sostanze o di parte di esse'.

<sup>59</sup> A. GEORGIADIS & A. PAPADIMITROPOULOS, 'Griechenland', [in:] *Internationales Erbrecht* (as of 2002) (cit. n. 57), p. 24, nr. 47.

<sup>60</sup> Inés WEINBERG, 'Argentinien', [in:] *Internationales Erbrecht* (as of 1996) (cit. n. 57), p. 9, nr. 45.

It is important to observe that *nemo pro parte testatus* principle is also rejected in the mix legal systems.<sup>61</sup> The good example of that is the South Africa although this principle was obsolete already in Roman-Dutch law.<sup>62</sup> In literature it is assumed that ‘while there is a presumption that a will is intended to cover the whole of the testator’s estate, this presumption is rebuttable. Where it is clear that the deceased has disposed in his will a part of his estate only, the rest will devolve in accordance with the rules of intestate succession’.<sup>63</sup> Moreover, this view was accepted by jurisprudence.<sup>64</sup> In *ex parte Stephens’ Estate Case* the testator disposed his estate in terms of fractions, but only provided for nine tenths of the estate. It was argued that the rest of it should be divided among the beneficiaries. The court held that the Roman legal rule *nemo pro parte testatus* did not apply in South Africa, therefore, the estate was to be divided partly testate and partly intestate and the remaining one tenth was to be devolved in terms of the law of intestate succession.

Finally there should be presented the French law regulation due to the fact that in practice this law is the closest to the Roman law. In the French law, the rejection of *nemo pro parte testatus* principle can be derived from article 895 of the *Civil Code* according to which: ‘A testament is an act by which the testator disposes, for the time when he will no longer exist, of all or part of his assets or his rights (‘de tout ou partie de ses biens ou de ses droits’), and that he may revoke’<sup>65</sup> – the article which defines the

<sup>61</sup> Neither does the principle exist in *common law*, cf. R. KERRIDGE & A. H. R. BRIERLEY, *Parry and Kerridge: The Law of Succession*, London 2009, pp. 21–22). However, it should be noted that this system is not based on the Roman law and not accepted the principle of universal succession: I. KROPFENBERG, ‘Erbfolge’, [in:] J. BASEDOW, K. J. HOPT & R. ZIMMERMANN (eds.), *Handwörterbuch des Europäischen Privatrechts* 1, Tübingen 2009, p. 409.

<sup>62</sup> H. M. M. CORBETT, H. R. HAHLO & G. HOFMEYR, *The Law of Succession in South Africa*, Capetown – Welton – Johannesburg 1980, p. 1; H. J. ERASMUS & M. J. DE WAAL, *The South African Law of Succession*, Durban – Johannesburg – Pretoria – Cape Town 1989, p. 21.

<sup>63</sup> CORBETT, HAHLO & HOFMEYR, *The Law of Succession* (cit. n. 62), p. 1. This presumption was adopted in case *Brunsdon’s Estate v. Brunsdon’s Estate* 1920 CPD 159, and is accepted by other authors, cf. ERASMUS & DE WAAL, *The South African Law* (cit. n. 62), p. 21, § 37.

<sup>64</sup> *Ex parte Stephens Estate* 1943 CPD 397.

<sup>65</sup> The official translation is available at <<<https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>>>.

notion of the will and its content.<sup>66</sup> However in literature, the rejection of this principle is also derived indirectly from the article 1002 CC, which provides for different types of legacies and from the works of codification commission.<sup>67</sup> This is unanimously accepted in literature, which clearly refers to this principle,<sup>68</sup> however does not usually justify further its rejection.<sup>69</sup>

It should be however noticed that the rejection of *nemo pro parte testatus* principle is not so obvious from comparative and factual point of view.<sup>70</sup> As Murad Ferid and Hans Jürgen Sonnenberger observed in French law *nemo pro parte testatus* principle applies in this meaning that testamentary succession cannot co-exist at the same time with intestacy, when there are members of the family (determined by law) entitled to the forced share.<sup>71</sup> It is due to the fact that according to the French law only statutory heirs are treated as heirs and appointment in a will is treated as legacy, thus testamentary successors are generally only beneficiaries ('*légataire universel*' or '*légataire à titre universel*').<sup>72</sup> Therefore, for

<sup>66</sup> The same rule exists in the civil codes of Belgium (Art. 895) and Luxembourg (Art. 895).

<sup>67</sup> M. PLANIOL, G. RIPERT, J. MAURY & H. VIALLETON, *Traité pratique de droit civil français* IV. *Successions*, Paris 1956, p. 294; SOUM, *La transmission* (cit. n. 37), pp. 86; 278, who stated that the aim of codification commission was totally abolishment of all Roman law rules connected to the appointment of heirs ('tous les effets particulièrement attachés par les lois romaines au titre d'héritier sont entièrement détruits').

<sup>68</sup> Described as 'an old principle', cf. PLANIOL, RIPERT, MAURY & VIALLETON, *Traité pratique* (cit. n. 67), p. 294, or 'le principe formaliste romain', cf. SOUM, *La transmission* (cit. n. 37), p. 278.

<sup>69</sup> A. COLIN, H. CAPITANT & L. JULLIOT DE LA MORANDIÈRE, *Cours élémentaire de droit civil français* III, Paris 1950, p. 907: 'Aujourd'hui, au contraire, cette règle n'existe plus'; M. PLANIOL, G. RIPERT & J. BOULANGER, *Traité de Droit Civil* IV. *Régimes Matrimoniaux – Successions – Libéralités*, Paris 1959, p. 659: '[c]ette règle a disparu'.

<sup>70</sup> M. FERID & H. J. SONNENBERGER, *Das französische Zivilrecht* III. *Familienrecht, Erbrecht*, Heidelberg 1987, p. 487, who stated: 'Der Satz: *nemo pro parte testatus, nemo pro parte intestatus decedere potest* ist an sich dem französischen Rechte nicht eigen, kommt aber insofern noch zu tatsächlicher Geltung, als gesetzliche und gewillkürte Erben niemals nebeneinander zur Erbfolgeberufen sind'.

<sup>71</sup> FERID & SONNENBERGER, *Das französische Zivilrecht* (cit. n. 70), pp. 487–488.

<sup>72</sup> In the French law such testamentary dispositions are treated as '*legs universel*' (*de facto* appointment to the whole estate – art 1003 in connection with article 1002 CC) or '*legs à titre universel*' (*de facto quasi*-appointment to the part of the estate – art. 1010 in connection with art. 1002 CC) – cf. M. PLANIOL, G. RIPERT, A. TRASBOT & Y. LOUSSOUARN,

those authors the common opinion of the French literature cannot be accepted.<sup>73</sup>

The only important in practice<sup>74</sup> legal system which nowadays adopts *nemo pro parte testatus* principle is the Catalan law.<sup>75</sup> According to the article 411-3 of the *Catalonian Civil Code* the testamentary succession and intestacy cannot exist at the same time.<sup>76</sup> The same applies to the inheritance based on an agreement.<sup>77</sup> The reason for that is not a mere limitation of testator's will, but the theoretical structure of its interpretation and acquisition of an estate by the necessary heirs.



#### IV. THE GROUNDS FOR REJECTION

Comparative legal analysis presented several reasons for the rejection of the *nemo pro parte testatus* principle. The main argument supporting it

*Traité pratique de droit civil français v. Donations et Testaments*, Paris 1957, pp. 765–777; H., L., J. MAZEAUD, L. LEVENEUR & S. MAZEAUD-LEVENEUR, *Leçons de droit civil* IV 2, Paris 1999, pp. 342–344; P. MALAURIE & C. BRENNER, *Les successions. Les libéralités*, Paris 2014, pp. 293–299. This solution was created on the basis of the former customary law (droit de coutumes); cf. COING, *Europäisches Privatrecht* (cit. n. 36), p. 573.

<sup>73</sup> FERID & SONNENBERGER, *Das Französische Zivilrecht* (cit. n. 70), pp. 487–488.

<sup>74</sup> S. CÁMARA LAPUENTE, 'Intestate succession in Spain', [in:] REID, DE WAAL & ZIMMERMANN (eds.), *Comparative succession Law* (cit. n. 3), p. 97, stated that according to Decree 8 of 1990 the aforementioned principle apply also in Mallorca and Menorca.

<sup>75</sup> E. ARROYO, I. AMAYUELAS & M. ANDERSON, 'Between tradition and modernisation: A general overview of the Catalan Succession law reform', [in:] IDEM (eds.), *The Law of Succession: Testamentary Freedom. European Perspectives. European Studies of Private Law* 5 (2011), pp. 51–52.

<sup>76</sup> L. MARQUES, 'Erbrecht in Katalonien', [in:] R. SÜß (ed.), *Erbrecht in Europa*, Bonn 2008, p. 908; A. GÓMEZ RÓDENAS, 'El principio *nemo pro parte testatus pro parte intestatus decedere potest*: estudio sobre el origen, evolución y trascendencia en el ordenamiento jurídico actual', *La Revista de Derecho de la UNED* 17 (2015), pp. 858–863. Cf. also P. DOMÍNGUEZ-TRISTÁN, 'El principio de incompatibilidad entre sucesión testada e intestada: algunas consideraciones sobre su presencia en el derecho civil catalán', [in:] P. RESINA-SOLA (ed.), *Fundamenta Iuris. Terminología, Principios e Interpretatio*, Almería 2012, pp. 299–307.

<sup>77</sup> MARQUES, *Erbrecht in Katalonien* (cit. n. 76), p. 908.

stems from one of the most important principles of testamentary succession – freedom of testation.<sup>78</sup> The restriction of the testator's freedom and impossibility to dispose only part of the estate ('all or nothing rule') without any doubts is contrary to this principle and there are no convincing arguments for such a broad violation of it.<sup>79</sup> In the jurisdictions, which include contracts of inheritance, the similar argument can be derived from the freedom of contracts.<sup>80</sup> As additional argument it can be stated that all of the grounds of inheritance have nowadays the same virtue and the position of statutory heirs is usually the same as the position of testamentary heirs.<sup>81</sup>

It is also commonly accepted that the application of the institution of accretion should be a subject to the free will of the testator.<sup>82</sup> Nowadays, this institution is commonly accepted as an expression of the presumed will of the testator and a part of the rules which are relating to the interpretation of will.<sup>83</sup> Simple adoption of the Roman law *ius accrescedi* construction would also change the clear intention of testator.<sup>84</sup>

<sup>78</sup> Cf. e.g., E. WEISS, [in:] *Kommentar* (cit. n. 36), p. 58; KRALIK, [in:] *Ehrenzweig System* (cit. n. 7), p. 176; WEIMAR, *Berner Kommentar* (cit. n. 51), p. 123; WÓJCIK & ZOLL, [in:] *System prawa prywatnego* (cit. n. 55), p. 426.

<sup>79</sup> WINDSCHEID & KIPP, *Lehrbuch des Pandektenrechts* (cit. n. 18), pp. 211–212; MEYLAN, 'Nemo pro parte testatus' (cit. n. 8), pp. 179–180: '[d]ans nos idées modernes, la règle *nemo pro parte* ne se justifie évidemment à aucun regard'; OTTE, [in:] *J. von Staudingers Kommentar* (cit. n. 49), p. 242, § 2088, nr. 1.

<sup>80</sup> BINDER, *Die Rechtsstellung* (cit. n. 36), p. 62.

<sup>81</sup> WEISS, [in:] *Kommentar* (cit. n. 36), p. 58; PIOTET, *Schweizerisches Privatrecht* (cit. n. 51), p. 94.

<sup>82</sup> VON LÜBTOW, *Erbrecht I* (cit. n. 49), p. 356; SCHLÜTER, *Erbrecht* (cit. n. 49), p. 145, no 429; OSAJDA, [in:] *Kodeks cywilny* (cit. n. 56), p. 98. As KRALIK, [in:] *Ehrenzweig System* (cit. n. 7), p. 176 stated 'Die Anwachsung beruht daher nicht mehr auf dem Gesetz, sondern auf dem vermuteten Willen des Testators, und die gesetzlichen Vorschriften über sie sind Auslegungsregeln, die dem wie immer bewiesenen anderen Willen des Testators weichen'.

<sup>83</sup> KRALIK, [in:] *Ehrenzweig System* (cit. n. 7), p. 176: 'diese Regeln aber nicht mehr dazu dienen, eine gemischte Erbfolge zu verhindern, haben sie notwendig einen anderen Zweck und daher auch eine andere Rechtsnatur bekommen'; WÓJCIK & ZOLL, [in:] *System prawa prywatnego* (cit. n. 55), p. 445.

<sup>84</sup> That was the basis for reasoning in South African case *Ex parte Stephens' Estate* 1943 CPD 397.

The reason for the rejection of this principle in civil law countries is also a different understanding of the universal succession. Nowadays, the idea of transmissibility of the personality of the deceased after his death is rejected.<sup>85</sup> Inheritance is just passing the rights and obligations of the deceased. As in the Roman law one of the attributes of universal succession is unity of the estate,<sup>86</sup> however, the *causa* of the universal succession is understood in a different way. One *causa* of universal succession does not mean that this is either a will either a statute.<sup>87</sup> The estate as a whole, as well as all rights and obligations, passes on the same legal basis, resulting from the occurrence of one of the facts set out in law.<sup>88</sup> The *causa* for the acquisition of the estate by heirs is therefore the fact of the testator's death, combined with the fact that the statutory provisions relate with this transfer of rights and obligations at his heirs. Therefore, appointment to the estate could be based on many different titles.<sup>89</sup> Consequently, when the testator disposed only part of his estate, the heirs, which are appointed to the estate both on will and intestacy have the right to reject the part of estate, which they receive on the basis of one of those titles.



<sup>85</sup> WINDEL, *Über die Modi* (cit. n. 49), pp. 195–205; MUSCHELER, *Universalsukzession* (cit. n. 49), pp. 45–46; W. BORYSIK, *Dziedziczenie – konstrukcja prawna i ochrona* [Legal Construction and Protection of Inheritance], Warszawa 2013, pp. 165–168.

<sup>86</sup> Cf. further BORYSIK, *Dziedziczenie* (cit. n. 85), pp. 209–240.

<sup>87</sup> MUSCHELER, *Universalsukzession* (cit. n. 49), p. 39: 'Einheitlichkeit der Übergangscassa bedeutet nicht, dass die Erbfolge insgesamt entweder durch Gesetz oder durch Verfügung von Todes wegen geregelt sein müsste'.

<sup>88</sup> BORYSIK, *Dziedziczenie* (cit. n. 85), pp. 244–250.

<sup>89</sup> MUSCHELER, *Universalsukzession* (cit. n. 49), p. 40: 'Auch wenn die Erbenstellung auf mehrere Berufungsgründe zurückgeht, beruht der Übergang jedes einzelnen Vermögensgegenstandes auf ein und derselben causa. Die mehreren Berufungsgründe wirken zusammen, um eine einheitliche Erbenstellung zu kreieren'. To the understanding of *causa*, cf. BORYSIK, *Dziedziczenie* (cit. n. 85), pp. 244–250.

## V. SUMMARY

Finally, it should be noticed that in literature there was expressed the view according to which the *nemo pro parte testatus* principle had some practical advantages. Fryderyk Zoll stated that the current solution of the *Polish Civil Code* regulating accretion does not necessarily ensure the testator's will.<sup>90</sup> The author gives an example in which testator, who had two sons, appointed only one of them for the half of the estate. According to Fryderyk Zoll it is not certain or even more likely that his intention was to restrict appointment of the first son only to the half of his property leaving the rest to intestacy. In addition, he stated that it would be interesting to conduct sociological research, if such a consequence is obvious for potential testators.<sup>91</sup> For this reason, the aforementioned disposition in many cases 'may be the result of an error'. Therefore, for Fryderyk Zoll *nemo pro parte testatus* principle had its value and its functional justification in the fact that it 'is not without reason even today', since it maintains integrity of the estate and protects its economic functionality.<sup>92</sup> Against the aforementioned view it can be stated, that the testator in his will can each time divide his entire estate and exclude the integrity and economic functionality of the estate. Moreover, another interpretation would be frequently contrary to his express will and freedom of testation.

*Witold Borysiak*

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Department of European Legal Tradition  
Institute of History of Law  
Faculty of Law and Administration  
University of Warsaw  
Krakowskie Przedmieście 26/28  
00-927 Warsaw 64  
POLAND  
e-mail: [w.borysiak@wpia.uw.edu.pl](mailto:w.borysiak@wpia.uw.edu.pl)

<sup>90</sup> WÓJCIK & ZOLL, [in:] *System prawa prywatnego* (cit. n. 55), p. 426-427 (this part was written solely by F. ZOLL).

<sup>91</sup> For similar example in Roman law, cf. SCHULTZ, *Classical* (cit. n. 2), p. 255.

<sup>92</sup> WÓJCIK & ZOLL, [in:] *System prawa prywatnego* (cit. n. 55), p. 426, § 7.