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## THE SUBSTITUTION OF HEIRS IN WILLS FROM ROMAN EGYPT

The aim of this paper is to demonstrate a legal phenomenon of the substitution of heirs present in testaments composed for non-Romans in Roman Egypt. The paper also seeks to analyse the possible influence of the local substitution of heirs on the one in Roman wills.

Before discussing the phenomenon of the substitution of heirs in the law of papyri<sup>1</sup>, the *cretio* clause preserved in Roman wills mostly from Egypt needs to be examined. According to Gaius, the proper *cretio* clause should be composed as follows.

G. 2,165: Cum ergo ita scriptum sit HERES TITIUS ESTO, adicere debemus CERNITOQUE IN CENTUM DIEBUS PROXIMIS QUIBUS SCIES POTERISQUE. QUODNI ITA CREVERIS, EXHERES ESTO.

After the sentence ‘Titius shall be my heir’, we must add ‘he shall accept (the inheritance) within one hundred days beginning as soon as you are aware and able to do so. But if you do not accept, you win shall be disinherited’.

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<sup>1</sup> By which term I understand law applied by non-Roman inhabitants of Roman Egypt.

A very similar phrase is well attested in papyri; it was based on the repetitive pattern: *Cernitioque hereditatem meam in diebus centum proximis quibus sciet poteritque testari se mihi heredem esse* ἀποφηνάσθω τε τὴν κληρονομίαν μου ἐν ἡμέραις ρ ταῖς ἔνγιστα αἰς γνώσεται δυνήσεται τε μαρτύρεσθαι ἑαυτὸν μου κληρονόμον εἶναι<sup>2</sup> – ‘He shall accept my inheritance within one hundred days beginning as soon as he is aware and able to testify that he is my heir’. The clause is present in both the copies of wills<sup>3</sup> and three original wills preserved on tablets; one document belonging to the latter group comes from Wales<sup>4</sup>, which shows that the *cretio* clause was the standard element of Roman wills.

The aim of the *cretio* clause in Roman law was to force an appointed heir to decide about accepting the inheritance within the speci-

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<sup>2</sup> There is no doubt that before Alexander Severus’ constitution on the language of wills Roman testaments as formal acts could be composed and written solely in Latin. The only exception to this rule was *fideicommissum* (G. 2,181; *Tit. Ulp.* 25,9 D. 32,11 pr). About the language of wills and the constitution of Alexander Severus, see J. BEAUCAMP, *Tester en grec a Byzance*, [in:] *Eupsychia: Mélanges offerts à Hélène Ahrweiler*, eds. M. BALARD et alii, Paris 1998, pp. 97-107; B. ROCHETTE, *La langue des testaments dans l’Egypte du IIIe s. ap. J.-C.*, «Revue internationale des droits de l’antiquité» 47/2000, pp. 449-461; M. NOWAK, ‘*Titius heres esto*’. *The Role of the Legal Practice in the Law-Creation in Late Antiquity*, «Journal of Juristic Papyrology» (JJurP) 40/2010, pp. 161-184. Since copies composed after the opening of wills served less formal purposes they were frequently written in Greek. *P. Oxy.* XXXVIII 2857 (AD 134, Oxyrhynchos), *BGU VII* 1655 (AD 169, Philadelphia), *PSI XIII* 1325 (AD 172-175, Alexandria), *BGU I* 326 (AD 194, Karanis), *P. Select.* 14 (2nd c. AD, Arsinoe), *P. Hamb.* I 73 (2nd c. AD, provenance unknown), *P. Diog.* 9 (AD 186-210, Philadelphia), *P. Oxy.* XXII 2348 (AD 224, Oxyrhynchos). See M. AMELOTTI, *Il testamento romano attraverso la prassi documentale. I: Le forme classiche di testamento* [= *Studi e testi di papirologia*, I], Firenze 1966, pp. 188-189

<sup>3</sup> *P. Oxy.* XXXVIII 2857, *P. Select.* 14, *P. Oxy.* LII 3692 (2nd c. AD, Oxyrhynchos), *P. Diog.* 9, *P. Diog.* 10 (AD 211, Ptolemais Euergetis), *BGU VII* 1696 (2nd c. AD, Philadelphia).

<sup>4</sup> R. TOMLIN, *A Roman will from North Wales*, «Archaeologia Cambrensis» 150/2001, pp. 143-156. Two others are *FIRA III* 47 (AD 142, Alexandria), *P. Mich.* VII 437 (2nd c. AD, provenance unknown).

fied period of time (usually a hundred days<sup>5</sup>) and to appoint another heir, if the first one did not accept it<sup>6</sup>. Indeed, some testaments from Egypt contain this clause in exactly the same function. Such an example is *P. Oxy.* XXXVIII 2857 (AD 134, Oxyrhynchos), where the *cretio* formula is followed by the disinheritance clause, l. 9: ἐὰν [δὲ] μὴ ἀποφήνη[τα]! μῆτ[ε μ]αρτύρητ(αι), ἀποκληρόνομο(ς) ἔστω – ‘but if she does not accept and testify (that she is my heir), she shall be disinherited’. The next sentence expressed the appointment of a substitute, ll. 10-11: Τιβ[έριος] Κλαύδιος Π[τολεμαί]ο[ς] ὁ ταύτης υἱὸς δευτέρω τόπῳ [ἐμοὶ κληρ[ον]όμος ἔστω – ‘Tiberius Claudius Ptolemaios, her son, shall be my heir in the second degree’<sup>7</sup>.

However, not all wills containing the substitution clause follow the described pattern. For instance, in the will of Gaius Longinus Castor the formula is slightly different than the one quoted above.<sup>8</sup>

*BGU* I 326 (AD 194, Karanis), col. I, ll. 7-13: προσε[ρ]-  
χέσ[θ]ωσαν οὖν τῇ κληρονομί[α] μου<sup>9</sup> ἐκάστη ὑπὲρ τοῦ ἰδίου  
μέρους ὁπότ[α]ν [γνώ και δύνηται μα]ρ[τ]ύ[ρ]ασθαι<sup>10</sup> ἑαυτήν  
ἐμοῦ κλ[η]ρονόμον εἶναι, μὴ ἐξί[να]<sup>11</sup> δ]ε π[ι]π[ρ]άσκιν<sup>12</sup> μηδὲ  
ὑποτίθεσθαι. ἀλλ’ εἴ τι ἐὰν ἀν[θ]ρώπιν[ο]ν π[α]θή[θ]η Μαρκελλά[α]

<sup>5</sup> The period of sixty days appeared in *P. Mich.* VII 437. See V. ARANGIO RUIZ, A. M. COLOMBO, *Documenti testamentari latini della collezione di Michigan*, «JJurP» 4/1950, pp. 117-123, at p. 117.

<sup>6</sup> M. AMELOTI, *op. cit.*, p. 126.

<sup>7</sup> A similar pattern is visible in *FIRA* III 47, and perhaps in both *P. Mich.* VII 437 and *P. Oxy.* LII 3692.

<sup>8</sup> Some scholars used to name the clause present in the will of Gaius Longinus Castos ‘cretio clause’, however, such expression might be misleading, for the clause does not follow the pattern of proper ‘cretio clause’ quoted in the first part of this article. Cf. AMELOTI, *op. cit.*, p. 127 n. 3; L. MIGLIARDI ZINGALE, *I testamenti romani nei papiri e nelle tavolette d’Egitto. Silloge di documenti dal I al IV secolo d.C.*, Torino 1988, p. 46

<sup>9</sup> BL cf. 1.435: [- ca.14 -]μου prev. ed.

<sup>10</sup> BL cf. 3.11: [- ca.17 -]. ασθαι prev. ed.

<sup>11</sup> Lege ἐξεί[να].

<sup>12</sup> Lege πιπράσκειν.

ἡ προγεγραμμένη, τότε τὸ μέρος τῆς κληρονομίας ἑαυτῆς [πρ]ὸς Σαραπίωνα καὶ Σωκράτην καὶ Λόγγον καταντῆσαι θέλω. ὁμοίως [Κλε]οπάτραν τὸ μέρος αὐτῆς πρὸς Νεῖλον καταντῆσαι θέλω.

They (the heirs) shall accept my inheritance, each (shall accept) her part as soon as she is aware and able to testify that she is my heir and that it is not allowed (for them) either to sell or to pledge. But if the above-written Marcella suffers human fate, I want her part of my inheritance to fall to Sarapion, Sokrates, and Longos. The same concerns Cleopatra, I want her part to fall to Neilos.

The quoted passage differs significantly from the scheme. First, it does not specify when the heirs should accept the inheritance. Second, it does not contain the disinheritance formula, but Sarapion, Sokrates, Longos, and Neilos are to inherit Gaius Longinus Castor's property, if Marcella or Cleopatra die. The clause is very unclear. Such a disposition is quite similar to *substitutio pupilaris*, which allowed the testator to appoint an heir for his own underage heir. Of course, such an explanation must be excluded, since both slave women were adults, which is expressly stated in the first disposition<sup>13</sup>.

On the other hand, if an heir in the first degree died before testator's death, *substitutio vulgaris* was in effect. Such an interpretation of the clause seems quite imaginable, especially that the heirs, Marcella and Cleopatra, were Gaius Longinus Castor's slaves, hence they were *heredes necessarii*, who could not dismiss inheritance. However, a few reservations must be made. Rafał Taubenschlag observed that 'the *substitutio vulgaris*, however, shows in the will of Gaius Longinus Castor a full departure from the imperative words prescribed by Roman rules and a strong attachment to Hellenistic forms'<sup>14</sup>. According to Taubenschlag, not only the words were not 'Roman' but also the idea

<sup>13</sup> About underlining slave's age in this will, see J.G. KEENAN, *The will of Gaius Longinus Castor*, «The Bulletin of the American Society of Papyrologists» 31/1994, pp. 101-107, at 102.

<sup>14</sup> R. TAUBENSCHLAG, *The Law of Greco-Roman Egypt in the Light of the Papyri, 332 B.C.-640 A.D.*, Warszawa 1955, p. 146.

of substituting an heir to other person's share opposed the Roman substitution<sup>15</sup>. This observation is to the point, for in Roman law the substitution was *heredis institutio* in the second degree, which is expressed by Gaius (2.174)<sup>16</sup>.

The discussed passage is not a unique example of such a clause (PSI XIII 1325 [AD 172-175, Alexandria], *P. Oxy.* LII 3692 [2nd c. AD, Oxyrhynchos]). According to Mario Amelotti such a construction can be interpreted as 'una clausola di stile', hence a phrase of no legal importance. His interpretation is based on a very limited number of attestations of *cretio* actually performed<sup>17</sup>. The conclusion is unsurprising, because *cretio* was not necessary, as an heir could accept the inheritance not only by *pro herede gestio*, but also *nuda voluntate* (G. 2.167)<sup>18</sup>. Therefore, the clause present in Gaius Longinus Castor's will could be interpreted either as *substitutio vulgaris*, appointing heirs in the second degree in case of their death preceding testator's passing away, or as 'una clausola di stile'.

However, also a third explanation of the quoted passage could be proposed. In wills composed for non-Romans we find a clause of substitution that is very different from the Roman one. The clause aims at appointing successors in case of the death of heirs in the first degree.

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<sup>15</sup> *Ibidem*.

<sup>16</sup> G. 2.174: *Interdum duos pluresve gradus heredum facimus, hoc modo L. TITIVS HERES ESTO CERNITOQUE IN DIEBUS <CENTUM> PROXIMIS QUIBUS SCIES POTERISQUE. QUODNI ITA CREVERIS, EXHERES ESTO. TUM MAEVIUS HERES ESTO CERNITOQUE IN DIEBUS CENTUM et reliqua. Et deinceps in quantum velimus substituere possumus. Sometimes we appoint heirs in the second or further degree in this way: 'Lucius Titius shall be the heir and he shall accept (the inheritance) within one hundred days beginning as soon as you are aware and able to do so. But if you do not accept, he shall be disinherited. Then Maevius shall be the heir and he shall accept (the inheritance) within one hundred days', and so on. And afterwards we can substitute as many heirs as we want to.*

<sup>17</sup> About their character, number, and dating, see H.J. WOLFF, *Some observations on pre-Antonian Roman Law in Egypt*, [in:], *Studies in Roman Law: In Memory of A. Arthur Schiller [=Columbia Studies in the Classical Tradition XIII]*, eds. R. BAGNALL, W. HARRIS, Leiden 1986, pp. 165-166.

<sup>18</sup> M. AMELOTI, *op. cit.*, p. 129.

An example of such a practice is attested in a Hellenistic will reedited as *P. Petr* I<sup>2</sup> 25 (226-225 BC, Krokodilonpolis). A testator determined that after his wife's passing away her part of the inheritance should be divided among their common children. Her part should be shared between children of both sexes, if the daughters were unmarried at the moment of her death. If the female descendants were married, however, the portion of their mother should be acquired by the sons.

The substitution of successors appears also in the local testaments from the Roman period; it was constructed in the following way: after the phrase 'καταλείπω κληρονόμους' names of successors were listed, then the phrase 'ἐὰν ζῆ, εἰ δὲ μὴ', and the description of inheriting persons<sup>19</sup>. This solution seems very similar to the one appearing in the will of Gaius Longinus Castor, hence it could be interpreted as similar to *substitutio vulgaris*, although only a few texts give more evidence on the substitution of heirs in local wills<sup>20</sup>.

*P. Wisc.* I 13 (Oksyrynchos, II wiek), l. 7-8: [‘Εάν τις αὐτῶν μεταλλάξῃ ἄτεκνος καὶ ἀδιάθετος, ἔστω τὸ τοῦτου μέρος] ἐν κληρονομίας μου τοῦ ἑτέρου αὐτῶν, ἐὰν δὲ καὶ ὁ ἕτερος ἐπιμεταλλάξῃ, ὃ [μὴ] εἶῃ, ἄτεκνος καὶ ἀδιάθετος, ἔστω δὲ τιν’ ἀπολιπεῖν τῶν ἐγγιστά μου γένους ὄντων].

Should one of them die without children and without a will, his portion of my estate shall belong to the other; should the other one, which God forbid, also die without children and without a will, it shall not be contested that one of my next of kin shall benefit<sup>21</sup>.

<sup>19</sup> Cf. *P. Oxy.* I 104 (AD 96, Oxyrhynchos), *P. Oxy.* I 105 (AD 118-138, Oxyrhynchos), *P. Sijp.* 43 (AD 119-120, Oxyrhynchos), *P. Oxy.* III 490 (AD 124, Oxyrhynchos), *P. Oxy.* III 491 (AD 126, Oxyrhynchos), *P. Oxy.* III 492 (AD 130, Oxyrhynchos), *P. Köln* II 100 (AD 133, Oxyrhynchos), *PSI* XII 1623 (AD 166-167, Oxyrhynchos), *P. Wisc.* I 13 (2nd c. AD, Oxyrhynchos), *P. Ryl.* II 153 (2nd c. AD, Oxyrhynchos), *P. Lips.* II 149 (2nd c. AD, Oxyrhynchos).

<sup>20</sup> See *P. Oxy.* I 105 (AD 118-138, Oxyrhynchos), *P. Oxy.* III 490 (AD 124, Oxyrhynchos), *P. Oxy.* III 491 (AD 126, Oxyrhynchos).

<sup>21</sup> Translated by P. J. SHPESTEIN (*P. Wisc.* I 13).

There cannot be any doubt that the quoted phrase is the substitution of heirs in case of their death after accepting the inheritance, thus appointing heirs for heirs. This phenomenon is very close to *substitutio pupilaris*, except that the heirs in the first degree are not minors, and even if they are minors as in case of two out of three heirs in the will of Eudaemon (*P. Oxy.* III 491 [AD 126, Oxyrhynchos]), it does not change the meaning of dispositions. The persons appointed heirs in the second degree are to acquire the property regardless of the age of the heirs in the first degree at the moment of their death. Thus, it is not comparable to the Roman substitution<sup>22</sup>. The discussed papyri could offer the explanation to the substitution clause in Gaius Longinus Castor's will, especially that we find almost identical disposition in one of local wills, *P. Oxy.* III 491, l. 10: ἐὰν δέ τινας τῶν τριῶν υἱῶν συμβῆ ἀτέκνως τελευτῆσαι ἔστω τὸ το[ύ]του μέρος τῶν περιόντων αὐτοῦ ἀδελφῶν ἐξ ἴσου - 'If any of the three sons dies childless, his portion shall fall to his surviving brothers in equal parts'. The clause in Gaius Longinus Castor's will was probably composed under the influence of the local legal practice, but based on the Roman pattern.

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<sup>22</sup> Vincenzo ARANGIO RUIZ interpreted the substitution clause in local wills as similar to *substitutio pupilaris*. See V. ARANGIO RUIZ, *La successione testamentaria secondo i papiri grecoegizii*, Napoli 1906, pp. 90-94.