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TITIVS HERES ESTO

THE ROLE OF THE LEGAL PRACTICE IN THE LAW-CREATION IN LATE ANTIQUITY*

THE TOPIC OF THIS PAPER IS TESTAMENTARY SUCCESSION in Late Roman law, which began with granting Roman citizenship to the majority of inhabitants of the Empire by Emperor Caracalla in AD 212. On the example of testamentary succession I will attempt to answer a more general question regarding local legislative practice in the process of creating law in Late Antiquity. To address this issue we have to look at the sources created by the practice, that is Roman wills preserved in Egyptian papyri,[1] and compare them with normative sources, such as the Theodosian and Justinian codes.

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[1] The article is based on sources composed in Roman and Byzantine times, the majority of which was written on papyrus, though some were composed on wax tablets and parchment. The language of the documents is Greek, but there are also a few composed in Latin. For the list of Egyptian wills, see R. P. SALOMONS, 'Testamentaria', *ZPE* 56 (2006), pp. 217–241, at pp. 232–236. There are also Coptic wills preserved, but they are excluded from discussion here. L. MACCOULL, *Coptic Legal Documents: Law as Vernacular Text and Experience in Late Antique Egypt*, Tempe 2009.

The second purpose of the paper is to discuss the statement that Roman law before the seventh century was chiefly of persuasive and instrumental character.[2] In other words, the aim of this paper is to illustrate the role which the local legal practice played in the process of creating law and whether local customs influenced enacted law in Late Antiquity. The starting point for the discussion is the constitution on the language of wills issued by Alexander Severus which – if the supposition is correct – was a catalyst for the legal practice to elaborate a new form of wills, as well as a manifestation of the dissolution of legal formalism.

The process of dissolution[3] of law would not have started without *Constitutio Antoniniana.* After the Edict of Caracalla most of the free inhabitants of the Empire became Roman citizens. This had serious consequences in the legal sphere: each legal act performed by them had to be consistent with the rules of Roman law, otherwise it might be defective.

However, in Egypt, as in the entire Roman East, there already were well-established local legal rules and customs, different from the Roman ones, which interfered with the common usage of the new rules. Another, much more serious and urgent problem to be handled was the language, in which a significant part of the legal acts had to be performed according to Roman law. In order to make a valid Roman will, one had to make it in Latin. This rule is expressly stated in the *Gnomon of Idios Logos.*

> *BGU* V 1210 = *Sel. Pap.* II 206 (AD 149–161, Theadelphia), ll. 35–37: *η' ἐὰν Ῥωμαικῇ διακθήκῃ* (l. *διαθήκῃ*) *προσκαίηται* (l. *προσκέηται*) *ὅτι ὅσα δὲ ἐὰν διατά[ξ]ω κατὰ πινακίδας Ἑλληνικὰς κύρια ἔστω, οὐ παραδεκτέα [ἐ]στίν, οὐ γὰρ ἔ[ξ]εστιν Ῥωμαίῳ διαθήκην Ἑλληνικὴν γράψαι.*
>
> 8. If there is (a sentence) added to a Roman will 'this what I dispose in Greek testamentary tablets shall be valid', it will not be accepted, because it is not allowed for a Roman to compose a will in Greek.

[2] See the discussion quoted in B. STOLTE, 'The social function of the law', [in:] J. HALDON (ed.), *Social History of Byzantium,* Oxford 2008, p. 82; J. BEAUCAMP, 'Byzantine Egypt and imperial law', [in:] R. S. BAGNALL (ed.), *Egypt in the Byzantine World 300–700,* Cambridge 2007, pp. 271–287, *passim.*

[3] See P. GARNSEY & C. HUMFRESS, *The Evolution of the Late Antique World,* Cambridge 2001, pp. 58–82.

The only exception to this rule was the *fideicommissum*. Thanks to Gaius it is known to have been the only testamentary resolution, which, being drafted in Greek, did not have consequences for the validity of the will or the disposition itself. The jurist says:

> G. 2.281: Item legata Graece scripta non ualent; fideicommissa uero ualent.
>
> Legacies written in the Greek language are not valid; *fideicommissa*, however, are valid.[4]

Each Roman citizen who wanted to draft a will had to compose it in Latin,[5] since it was a formal act. Was this obligation realistic considering with the level of knowledge of Latin? Thanks to the papyri from before 212 we know that written Latin in Egypt was present only in the army, in official correspondence, and in the sphere of Roman law. The number of scribes was also limited.[6] Even the inhabitants of Egypt who became Roman citizens before *Constitutio Antoniana* did not know Latin sufficiently to read and write in it, although some legal acts had to be made in Latin. Even if the originals of wills written for Roman citizens in Egypt were composed in Latin by professional scribes or legally educated *nomikoi*,[7] the copies repeating their content produced at the moment of the official opening of the originals were always written in Greek.[8] As the

[4] According to Ulpian, *fideicommissum* could also be composed in any other language (D. 32.11.pr.).

[5] Except for *testamentum militis*, which was freed from all formalities. See R. Taubenschlag, 'Die kaiserlichen Privilegien im Rechte der Papyri', *ZSS* 70 (1953), pp. 284–285, B. Biondi, *Successione testamentaria e donazioni*, Milano 1956, p. 73; M. Amelotti, *Il testamento romano attraverso la prassi documentale, Le forme classiche di testamento*, Firenze 1966, pp. 81–110.

[6] R. S. Bagnall, *Egypt in Late Antiquity*, Princeton 1996, pp. 231–234.

[7] The practice was common not only in Egypt, but also throughout the Empire: M. Avenarius, 'Formularpraxis römischer Urkundenschreiber und ordo scripturae im Spiegel testamentsrechtlicher Dogmatik', [in:] M. Avenarius, R. Meyer-Pritzl & C. Möller (eds.), *Ars Iuris. Festschrift für Okko Behrends zum 70. Geburtstag. Herausgegeben*, Göttingen 2009, pp. 18–24.

[8] See *BGU* I 326 = *FIRA* III 50 = *M. Chr.*. 316 = *Sel. Pap.* I 85 (AD 194, Arsinoites), *P. Oxy.*

knowledge of Latin was not common, having a Greek copy of a document was much more practical in the legal relations between inhabitants of Egypt. The copy of the will often happened to be the only proof of legal title. This makes us suppose that Greek was the language of the majority of documents of everyday use before *Constitutio Antoniniana,* even if the sides were Roman citizens.

After *Constitutio Antoniniana* the situation became even more dramatic. The number of documents drafted in the language of Roman law shows that the knowledge of written Latin among Roman citizens was uncommon.[9] The majority of the new citizens did not know Latin at all, and the number of scribes was too small to cater to everyone's needs. Under these circumstances the rules governing the language of testaments could not be kept in force. If they had, most of the testaments drafted by the new citizens would have been simply void according to Roman law. A compromise between the old Roman law and the local needs was necessary.

Alexander Severus became the initiator of this compromise by issuing the constitution that validated wills composed in Greek. The constitution has not been preserved to our times, but despite this we can – with high probability – reconstruct its content, which most probably concerned the language of acts but not the rules concerning testamentary dispositions.

It is not certain whether the law was issued specifically for Egypt, for the East in general, or for the whole Empire.[10] With the present state of

XXXVIII 2857 (AD 134, Oxyrhynchos), *P. Select.* 14 (second cent. AD, Arsinoites); *BGU* VII 1655 (AD 169, Philadelphia); *SB* V 7630 (AD 172–175, Alexandria); *P. Hamb.* I 73 (second cent. AD, provenance unknown), *P. Diog.* 9 (AD 186–210, Philadelphia[?]), *P. Oxy.* XXII 2348 (AD 224, Oxyrhynchos); *P. Oxy.* VI 907 = *M. Chr.* 317 = *FIRA* III 51 (AD 276, Oxyrhynchos).

The Greek copies could also have been made at the moment of composition in order to allow the testator to confirm the content of his/her will, *P. Oxy.* XXII 2348: *Α[ὐ]ρήλιος Χαιρήμων Ἡρακλείδου ἀνέγνων τὸ προκείμενον ἑλληνικὸν ἀντίγραφον τῆς διαθήκης μου καὶ συμφωνεῖ μοι πάντα καθὼς ἐγὼ ὑπηγόρευσα* – 'I, Aurelius Chairemon, have read the submitted Greek copy of my will and I acknowledge that everything is as I dictated'.

[9] R. CRIBIORE, 'Higher education in early Byzantine Egypt: Rhetoric, Latin, and the law', [in:] *Egypt in Byzantine World* (cit. n. 2), p. 58.

[10] About the constitution, see R. ROCHETTE, 'La langue des testaments dans l'Égypte du IIIe s. ap. J.-C', *RIDA* 47 (2000), pp. 449–461. Kaser claimed that the constitution was

sources we cannot establish the exact date of issuing the constitution.[11] Its content was repeated around 200 years later by a Theodosian Novel.

> *N. Th.* 16.8: Illud etiam huic legi perspicimus inserendum, ut, quoniam Graece iam testari concessum est, legata quoque ac directas libertates, tutores etiam Graecis verbis liceat in testamentis relinquere, ut ita vel legata relicta vel libertates directae tutoresve dati videantur, ac si legitimis verbis ea testator dari fieri observarique iussisset, Florenti, parens carissime atque amantissime.
>
> We perceive that this provision also must be inserted in this law, namely, that since it has already granted that testaments can be made in Greek, it shall be permitted to leave in testaments written in Greek words legacies also and direct grants of freedom and even tutors. Thus it shall appear that the legacies have been left and the direct grants of freedom or the tutors have been given, as if the testator has ordered in the statutory words that these things should be given, done, and observed, O Florentinus, dearest and most beloved Father (tr. C. Pharr).[12]

There is no exact indicator which constitution the novel repeats, but a very probable guess is Alexander's constitution on the language of wills or at least its later renewal. The text of the novel cannot serve as proof of the exact content of the mentioned constitution; the papyri, however, show that the law issued by Alexander Severus regulated solely linguistic

enforced only in Egypt, M. Kaser, *Das römische Privatrecht*, vol. I, München 1971, p. 687 n. 14. However, the proof that it might have been issued for at least the East Empire is a will of Gregory of Nazianzus, which was composed fully in Greek around 381. About the will, its chronology and authenticity, see R. Van Dam, 'Self-representation in the will of Gregory of Nazianzus', *Journal of Theological Studies* 46.1 (1995), pp. 118–148; J. Beaucamp, *Femmes, patrimoines normes à Byzance*, Paris 2010, chapter 'Le testament de Grégoire de Nazianze', pp. 183–264. To be sure, the constitution might have initially been issued only for Egypt and its later renewal might have extended it either to the East or to the whole Empire.

[11] The *terminus post quem* is the beginning of Alexander Severus' reign, the *terminus ante quem* – the year 235, when the first document quoting it was composed (*SB* I 5294) and Alexander Severus died.

[12] *The Theodosian Code and Novels and the Sirmondian Constitutions*, C. Pharr (tr.), Princeton 1952.

matters. The constitution is quoted in five documents, four of which were collected by Bruno Rochette.[13]

SB I 5294, with *BL* V, p. 143 and VIII, p. 462 (AD 235, Herakleopolites), ll. 12–14: *τὴν διαθήκην ἐποίησα γράμμασιν Ἑλληνικοῖς ἀκο[λού]θως τῇ θείᾳ κ[ελε]ύσ[ει [τοῦ κυρίου ἡμῶν Αὐτοκράτορος Μάρκου Αὐρηλίου] Σεουήρου Ἀλεξάνδρ[ο]υ Εὐσεβοῦς Εὐ[τ]υχ[οῦς Σεβαστοῦ.*

I have made the will in the Greek letters in accordance with the ordered constitution of our lord, Emperor Marcus Aurelius Severus Alexander Pius Fortunate August.[14]

P. Oxy. VI 907 (AD 276, Oxyrhynchos), ll. 1–2: *[Αὐρή]λιος Ἑρμογένης ὁ καὶ E[ὐ]δαίμων ἐξηγητὴς βουλευτὴς [καὶ π]ρ[ύτανις τῆς λαμπ]ρᾶς καὶ λαμπροτά[της Ὀξυρυγχιτῶν πόλεως τόδε τὸ βούλημα] Ἑλληνικοῖς γράμμασι κατὰ τὰ συνκεχωρημένα ὑπηγόρευσεν.*

Aurelius Hermogenes, also called Eudaimon, *exegetes*, councillor and *prytanis* of the illustrious and most illustrious city Oxyrhynchos dictated this will in the Greek letters in accordance with the permission.[15]

P. Lips. I 29 = *M. Chr.* 318 (AD 295, Hermopolis), ll. 16–17: *τὸ Ἑλληνικὸν [βούλημα κύρι]ον ὃ καὶ δισσόν σοι π[ροηκ]άμην, ὡς ἐν δημοσίῳ ἀρχείῳ κατακείμενον, καὶ ἐπε[ρωτ]ηθ(εῖσα) νοοῦσα καὶ φρονοῦσα ὡμολό(γησα).*

This Greek will which I sent you in two copies is valid, as it was deposited in public archive, and when I was asked I agreed being sane and in my right mind.[16]

[13] ROCHETTE, 'La langue des testaments' (cit. n. 10), pp. 454–456.

[14] The will was drafted according to the local testamentary model, therefore its author did not follow the Roman rules relating to the model of the Roman will, but applied the pattern known in the local practice. At the same time, he was convinced that the testament he had composed was the Roman one. See J. F. OATES, 'The formulae of the Petrie wills', *JJurP* 23 (1993), pp. 125–132; L. MIGLIARDI ZINGALE, 'Dal testamento ellenistico al testamento romano nella prassi documentale egiziana: censura o continuità?', *Symposion* 1995, pp. 306–309.

[15] The text repeats phraseology known from *testamenta per aes et libram*, F. KRAUS, *Die Formeln des griechischen Testaments*, Borna – Leipzig 1915, pp. 86–90.

[16] The form of this will cannot be matched to any other local pattern known from Egypt,

P. Stras. IV 277 (second half of the third cent. AD, Arsinoe), ll. 1–3: [*M*]*ᾶρκος Αὐρ*[*ήλιος* – ca. 50 – *ἀπὸ κώμης*] [*Σ*]*εκνεπτύν*[*εως ca.* ?] [..]*αι ἐν χάρτῃ Ἑλ*[*ληνικοῖς γράμμασι διαθήκην ἐποίησεν γραφησόμενην τε ὑπηγόρευσεν*].

Marcus Aurelius (...) from the village Sekneptynis (...) has made the will with the Greek letters on the papyrus chart, and he has dictated the one which was written.

P. Oxy. VI 990, with *BL* VII, p. 133 (AD 331, Oxyrhynchos), ll. 2–4: *Αὐρηλία Ἀϊᾶς θυγάτηρ Ἀγα*[*θ*]*οῦ Δαίμονος Κεκιλίου ἄρξ*(*αντος*) *γενομ*[*ένου βουλευτοῦ*] *τῆς λαμπ*(*ρᾶς*) *καὶ λαμπ*(*ροτάτης*) *Ὀξυρυγχειτῶν πόλεως τόδε τὸ βούλη*[*μα* ....] *ἐποίησα νοοῦσα καὶ φρονοῦσα ἐπινόσως ἔχουσα γραφ*[*ὲν* ....] *Ἑ*[*λ*]*ληνικοῖς γράμμασιν κατὰ τὰ συνκεχωρημένα* (...)

I, Aurelia Aïas, daughter of Agathodaimon Kekilios, the ruler and former *bouleutes* of the illustrious and most illustrious city of Oxyrhynchos, being sane and in my right mind, made this will in the Greek letters in accordance with the permission, because I am sick.

The constitution, although it concerned the language of the wills, became the first step on the way to dissolution of testamentary law or at least the formalities connected to the testamentary dispositions.[17] After its issuing the number of testaments composed according to the classical Roman law, referred to as *testamentum per aes et libram*,[18] started decreasing drasti-

although it contains elements of both local and Roman patterns. Initially scholars though that the document was a codicil, not a will. However, the fact that it contains the institution of an heir disproves such a statement. There is also no doubt that the testatrix was convinced that she had dictated a proper will, see AMELOTTI, *Il testamento* (cit. n. 5), pp. 63–64.

[17] The so-called 'praetorian will' may not be understood as a step on the way to dissolution of the formality of testamentary law, because it was a way of keeping valid a will failing some very formal requirements regarding the very act of the composition of a will or its author, but not the form of dispositions.

[18] In the documents composed before Alexander Severus' constitution, the mancipatory clause appears often, but we cannot be sure if the presence of such clauses in wills was paralleled with the performance of the real action during the acts of the wills' composition. The clause started disappearing after the issue of the constitution. The last example of it known to me is *P. NYU* II 39 (AD 335, Karanis), see L. COHEN, 'Heredis institutio ex re certa', *TAPhA* 68 (1937), pp. 343–356.

cally and disappeared completely in the end of third century. However, wills drafted according to the local models known from the Hellenistic times and used before *Constitutio Antoniniana* by the non-Roman population appeared more often. At the same time, local patterns adopted certain elements of the Roman wills drafted between the first century and the thirties of the third century.

CLASSICAL RULES

The point of reference for further observation will be the *heredis institutio,* because it is representative of the changes that affected the whole pattern of the wills. This clause is a very good starting point for chronological comparison because it is probably the most important testamentary disposition and at the same time it is distinguished by the highest number of restrictions.[19] Gaius says: in G. 2.116:

> G. 2.116: <Sed> ante omnia requirendum est, an institutio heredis sollemni more facta sit; nam aliter facta institutione nihil proficit familiam testatoris ita venire testesque ita adhibere et ita nuncupare testamentum, ut supra diximus.
>
> But before everything else it must be ascertained whether there has been an institution of an heir made in solemn form; for if an institution has been made otherwise, it is unavailing that the sale of the *familia*, the employment of witnesses, and the utterance of the nuncupation have been made in the manner we have mentioned (tr. F. de Zulueta).[20]

A very crucial aspect of the institution of an heir was the wording of the disposition itself. Only the prescribed verbal form of *heredis institutio* was recognised by classical Roman law. Gaius says that to institute an heir one can use not only the traditional TITIUS HERES ESTO, but also TITIUM HEREDEM ESSE IUBEO. However, a testator was still prohibited from using the expressions TITIUM HEREDEM ESSE VOLO and TITIUM

[19] P. Voci, *Diritto ereditario romano. Parte speciale*, Milano 1963, p. 111.

[20] *The Institutes of Gaius*, F. de Zulueta (tr.), Oxford 1958.

HEREDEM INSTITUO (G. 2.115–117). We find a very similar statement in *Regulae Ulpiani*.[21]

What Gaius says clearly proves that there was controversy concerning the admittance of different verbal forms of *heredis institutio* (*ibidem*, 117)[22] sed et illa iam conprobata uidetur: TITIVM HEREDEM ESSE IVBEO; at illa non est conprobata: TITIVM HEREDEM ESSE VOLO; sed et illae a plerisque inprobatae sunt: TITIVM HEREDEM INSTITVTO, item: HEREDEM FACIO. The adverbial *iam* indicates that before Gaius composed his *Institutes* the wording TITIVM HEREDEM ESSE IVBEO was not recognised as a proper phrase for *heredis institutio*. The fact that the jurist mentioned all three phrases indicates that the discussion on the form of institution was in progress, as Carlo Maschi rightly observed.[23]

According to another rule concerning *heredis institutio*, any heir had to be instituted either to the entire inheritance or to its part. Until the end of the classical period of Roman law *heredis institutio ex quota* is the general rule, but there were many exceptions. Initially, Roman law allowed *heredis institution ex re certa* as an exception. Roman jurists elaborated several rules that applied to situations when a testator instituted an heir *ex re certa*.[24] These rules allowed to keep such a will valid. First of all, the rules established in the classical period were based on the fiction that such an institution was never included and an heir was instituted to the entire inheritance or to its part.[25] The application of such a method depended on how many heirs were instituted.[26]

Second, they treated an heir instituted *ex re certa* as a legatee, but liable for debts. This solution was based on the concepts of both *heredis institu-*

[21] *Ulp. Reg.* 21.1. C. A. Maschi, 'La solennità della «heredis institutio» nel diritto romano', *Aegyptus* 17 (1937), p. 198.

[22] Maschi, 'La solennità' (cit. n. 21), p. 199.

[23] Maschi, 'La solennità' (cit. n. 21), p. 199.

[24] Voci, *Diritto ereditario* (cit. n. 19), p. 147.

[25] P. Ciapessoni, „Sul Senatoconsulto Neroniano", [in:] *Studi Bonfante*, vol. III, Milano 1930, pp. 652–727, at p. 722.

[26] See M. D'Orta, *«Sterilis beneficii conscientia». Dalla «praeceptio» al «legatum per praeceptionem»*, Torino 2005, pp. 25–26; B. Biondi, *Successione testamentaria* (cit. n. 5), pp. 229–231, Voci, *Diritto ereditario* (cit. n. 19). pp. 143–147.

tio and *quasi praeceptio,* thus a person instituted to a certain thing was considered an heir instituted to the entire inheritance or its part, but during the division of the inheritance he received particular things allocated to him in the will. He was fully liable for debts and entitled to *actio familiae exerciscundae* and *quarta falcidiana.* On the other hand, he was also restricted by the Falcidian part.[27] The briefly illustrated exceptions demonstrate that already in the classical period of Roman law the rules concerning *heredis institutio* were probably incomprehensible to the common people.

PAPYRI

In Roman wills preserved in Egyptian papyri from the period before the constitution on the language of wills we do not find any other expressions than those mentioned by the jurists, despite the fact that the testators were provincials (*P. Hamb.* I 72 [second–third cent. AD, provenance unknown], *P. Oxy.* XXXVIII 2857; *CPL* 221 = *FIRA* III 47 [AD 142, Alexandria); *P. Select.* 14, *SB* V 7630, *BGU* I 326, *BGU* VII 1696 [second cent. AD, Philadelphia], *P. Mich.* VII 437 [second cent. AD, provenance unknown], *P. Oxy.* LII 3692 [second cent. AD, Oxyrhynchos], *ChLA* X 427; *P. Diog.* 10 [AD 211, Ptolemais Euergetis]). The successors were individualised[28] and appointed using an imperative expression or the verb 'to be' in the imperative – *mihi heres esto, mihi heredes sunto*; in Greek copies – *ἐμοῦ κληρονόμοι ἔστωσαν, ἐμοὶ κληρονόμος ἔστω* – using a verb expressing command, eg. *iubeo*, in Greek copies – *κελεύω*. The institution preceded all other dispositions, except for emancipation of the testator's slave appointed as heir and appointment of a tutor.[29] It is impossible to distin-

[27] M. David, *Studien zur heredis institutio ex re certa im klassischen römischen und justinianischen Recht*, Leipzig 1970. pp. 19–35, Voci, *Diritto ereditario* (cit. n. 19), pp. 147–158.

[28] About instituting non-individualised entities see: Amelotti, *Il testamento romano* (cit. n. 5), pp. 121–122.

[29] Moreover, *heredis institutio* could be preceded by *fideicomissum*, according to Sabinians also by *tutoris datio*, and from the time of Trajan's constitution, also by disinheritance, Voci, *Diritto ereditario* (cit. n. 19), p. 111. On the modifications of *ordo scripturae* see: Avenarius, 'Formularpraxis' (cit. n. 7), pp. 25–28.

guish any local traits in the documents and even in their particular formulae. The similarity of these documents is to be explained by the fact that they were drafted according to clearly stated and strict rules of Roman law.

However, starting from the third century the formulae are far from the strict imperative and lack the words required by doctrinal sources. In the passages quoted below we find the following:

SB I 5294, with *BL* II 2, p. 159 (AD 235, Herakleopolites), ll. 7–9: *ἐὰν δὲ ὅ μὴ εἴοιτο ἀνθρώπινόν τι πάθω [κληρονόμον ἀπολείπω - - - -] ἐκ παιδόθεν ὡ[μο]γνήσιον* (l. *ὁμογνήσιον*) *υἱὸν Αὐρηλί[ου - - - - ἀπὸ τῆς] αὐτῆς πόλεως ε[ὐ]νοίας καὶ φιλοστοργί[ας ἕνεκα - - -]*

If I suffer the human fate, I leave as my heir a son born to me, Aurelius ..., from the same city ... because of good-will and love ...

P.S.I IX 1040 = *FIRA* III 10 (third cent. AD, Oxyrhynchos), ll. 6–11: *κληρονόμον ποιοῦ[μαι] τὸν υἱὸν Αὐρήλιον Θεόδωρον ἐκ τῆς γενο(μένης) καὶ μετηλλαχυίης* (l. *μετηλλαχυίας*) *γυναικὸς Διογενίδος ἀπὸ τῆς α(ὐτῆς) πόλ(εως).*

I make my son Aurelius Theodoros born to me by my late wife Diogenis, from the same city, my heir.

P. Lips. I 29 = *M.Chr.* 318 (AD 295, Hermopolis), ll. 5–6: *ἐὰν δέ, ὅ μὴ εἴη, συμβαίη τ[ί] μοι ἀνθρώπινον, ὅπερ ἀπεύχ[ο]μαι, κληρονόμον σε μ[ό]ν[η]ν κατὰ πάντας τοὺς ν[ό]μους καθίστημι, [ὥστε [αὐ]τεξούσ]ιόν σε εἶναι, ὅπου δαν* (l. *δὲ ἐὰν*) *βουληθῇς, πορεύεσθαι, ἅτε δὴ τῆς ἐννόμου ἡλικίας γεγενη[ένην.*

If I suffer the human fate, which I pray not to happen, I appoint you my sole heir to all rights, to let you act as you wish as soon as you achieve the legal age.

The above examples illustrate the linguistic freedom in the institution of an heir, common to all the later Roman wills. Some clauses, especially in the third century, repeat the language pattern known from wills by bronze and scale (*P. Princ.* II 38 [AD 264, Hermopolis Magna], *P. Oxy.* VI 907, *P.S.I* VI 696 [third cent. AD, Arsinoe], *P. NYU* II 39), which does not

change the fact that the practice frees *heredis institutio* from the strict rules of verbal formalism.

If we turn to the documents of legal practice from both the Hellenistic and Roman periods, we may observe that the wording of the institution of an heir is very similar to the one known from wills composed after Alexander Severus' constitution. *P. Petr.* (2) I 3 (238/7 BC, Krokodilopolis), ll. 17–19: *ἐὰν δέ τι ἀν[θ]ρώπι[νον πάσχω], τὰ μὲν ὑπάρχοντα ἃ ἔχουσιν οἱ υἱοὶ καὶ ἡ γυνή μου ἐχέτω[σαν, τὰ δὲ λοι]πὰ καταλιμπάνω εἰς ταφὴν ἐμαυτοῦ*, 'if I suffer mortal fate, my wife and sons shall keep the possession they hold; the rest I leave for my funeral'; *P. Dryton* 4 (126 BC, Pathyris), ll. 2–4: *ἐὰν δέ τι ἀνθρώπινον πάθω, καταλείπω καὶ [δίδωμι τὰ ὑπάρχοντά μοι (...) Ἐσθλάδαι*, 'if I suffer human fate, I leave and I give this what belongs to me (...) to Esthlades'; *P. Oxy.* I 105 = *MChr.* 303 (AD 118–138, Oxyrhynchos): *ἐὰν δὲ ἐπὶ ταύτῃ τελευτήσω τῇ διαθήκῃ, κληρονόμον ἀπολείπω τὴν θυγατέρα μου Ἀμμωνοῦν κτλ.*, 'if I die with this will, I leave my daughter Ammonous as my heir, etc.' The similarity between local and late Roman expressions illustrates the influence of the local legal practice on the patterns of *heredis institutio*.

The first attempt to regulate the wording of *heredis institutio* was the constitution issued by Diocletian and Maximian in 290 (C. 6.23.7). It solely concerned the cases in which the testator forgot to add the expression 'Let him be my heir', but only if it was said aloud.[30] The constitution also states that the stringency of law should not prevail over the testator's intention.[31] The next issued constitution concerned the freedom of bequeathing and abolished the wording restrictions altogether. Subsequently, Emperor Constantine issued the law.

> C. 6.23.15: Quoniam indignum est ob inanem observationem irritas fieri tabulas et iudicia mortuorum, placuit ademptis his, quorum imaginarius usus est, institutioni heredis verborum non esse necessariam observantiam, utrum imperativis et directis verbis fiat an inflexa. Nec enim interest, si dicatur 'heredem facio' vel 'instituo' vel 'volo' vel 'mando' vel 'cupio' vel 'esto' vel 'erit', sed quibuslibet confecta sententiis, quolibet loquendi genere

[30] M. KASER, *Das Römische Privatrecht*, vol. 2, München 1975, p. 489.

[31] See O. E. TELLEGEN-COUPERUS, 'The origin of *quando minus scriptum, plus nuncupatum videtur* used by Diocletian in C. 6.23.7', *RIDA* 27 (1980), pp. 313–331.

formata institutio valeat, si modo per eam liquebit voluntatis intentio, nec necessaria sint momenta verborum, quae forte seminecis et balbutiens lingua profudit.

For the reason that it is unworthy that the testaments and judgements of the dead should become void because of the failure to observe a vain pedantry, it has been decided that those formalities shall be abandoned which *use is only imaginary*, and that, in the appointment of an heir a particular form of words is not to be observed, whether this is done by imperative and direct expressions, or by indefinite ones. It makes no difference whether it is said 'I make you my heir,' or 'I institute' or 'I wish,' or 'I desire,' or 'shall be' or 'will be'; but it is valid no matter in what sentences or grammatical mood, provided the intention of the testator is clearly shown by the language used. Nor are the words which a dying and stammering tongue pours forth necessarily of importance.

If we examine the object of the institution of an heir, the conclusions are similar as in the case of its verbal form. At the time when Roman citizens were a minority amongst the inhabitants of the Empire, *heredis institutio* was based on the following scheme:

P. Hamb. I 72 (2nd–3rd cent., prov. unknown), ll. 1–4:[32] [Quicunque mihi ex ea quae uxor mea est tempore] mortis mea natus nataue erit mihi here[s] (...) esto suntoue quod si unus unaue ex his quicunque (...) natus nataue erit eruntue moriatur erogat[io - - -] hereditatis [p]ro portione maior esto.

Whoever will be born to me of my wife at the time of my death shall be my heir or heirs. If one of these who will be born to me dies, the division of the inheritance shall be increased proportionally.

P. Diog. 9 with *BL* X, p. 63 (AD 186–210[?], Philadelphia): [*Μᾶρκος Λουκρήτιος . . . . .*] *καὶ Μᾶρκος Λ̣[υ]κρή[τ]ι̣ος Δι̣ογένης καὶ Λ̣ουκρητία Ὀκταυί[α καὶ Λουκρητία* [ca. 5] *τὰ γλυ]κύτατα παι̣[δ]ί̣α̣ μ̣ο̣υ̣ τῶν̣ ὑ̣παρχόντων μ̣ο̣ι̣* [..]ο[...]. [ca. 12 *μετὰ*] *τ̣ὴν̣ τ̣ελ̣ε̣υ̣τ̣ή̣ν̣ μ̣[ου] ἐ̣ξ̣ ἴ̣σ̣ο̣υ̣ μ̣έ̣ρ̣ο̣υ̣ς̣ ἐ̣μ̣ο̣ῦ̣ κληρονόμοι* [*ἔ̣σ̣τ̣ω̣σ̣α̣ν̣*].

Marcus Lucretius [...] and Marcus Lucretius Diogenes and Lucretia Octavia

[32] This document I quote as the first one, because it is an example of the form based on which scribes composed wills for their clients.

and Lucretia [...], my sweetest children, shall be my heirs in equal parts to anything which belongs to me.

BGU I 326, with *BL* VIII, p. 23, ll. 4–7: [ἐλευθέρας εἶναι κελεύω] Μαρκέλλαν δού[λη]ν μ[ο]υ μίζονα (*l.* μείζονα) ἐ[τ]ῶν [τριάκοντα καὶ Κλεοπάτραν] δούλην μου μ[είζονα] ἐτῶν τριάκ[οντ]α [ca. 23]ομο[. ἐξ ἴσου μ[έρους] ἐμοῦ κληρον[όμο]ι [ἔστωσαν].

I order that my slave Marcella, who is over thirty years old, and my slave Kleopatra, who is over thirty years old, shall be freed ... they shall be my heirs in equal parts.

P. Diog. 10, ll. 2–3: L(ucius) Ignatius Nemesianus fr[a]ṭer meus ex asse mihi heres esto o(mnium) b(onorum) m[(eorum)].

Lucius Ignatius Nemesianus, my brother, shall be my heir to everything which belongs to me.

The quoted passages come from both Greek copies of the wills and protocols drafted at the moment of their opening.[33] Despite the differences in the language of documents the formulae are similar and based on the same pattern. The quoted documents are just a few examples of *heredis institutio ex quota* in papyri (cf. *P. Select.* 14, *SB* V 7630, *P. Diog.* 9, *P. Mich.* VII 437, *P. Oxy.* LII 3692, *ChLA* X 427, *P. Diog.* 10, *P. Princ.* II 38, a Roman will from Wales[34]).

Moreover, in wills composed before Alexander Severus' constitution heirs were instituted *ex quota.* Before the mid-third century in Egypt we

[33] The Latin copy was probably drafted after the opening of the will subsequent to the testator's death. Information about the opening was written on this document and the signatures of witnesses who recognised their seals were attached. Later such a document was a pattern for other copies. This procedure is attested at least for Late Antiquity: P. Oxy. LIV 3758 (AD 325, Oxyrhynchos); *P. Ital.* I 4–5 (after AD 552, Ravenna); *P. Ital.* I 6 (AD 575, Ravenna). For the earlier period cf: A. BOWMAN, J. D. THOMAS, 'P. Lond.Inv. 2506: A Reconsideration', *BASP.* 14 (1977), p. 61; AMELOTTI, *Il testamento romano* (cit. n. 5), p. 183; H. KRELLER, *Erbrechtliche Untersuchungen auf Grund der gräco-ägyptischen Papyrusurkunden*, Leipzig – Berlin 1919, pp. 394–406.

[34] R. TOMLIN, 'A Roman Will from North Wales', *Archaeologia Cambrensis* 150 (2001), pp. 143–156.

do not find Roman wills in which an heir was appointed to certain things, thus it was the *heredis institutio ex quota* that dominated in documents of legal practice. As we examine the wills made before the constitution on the language of wills, we notice that the institution of heir is based on the concept of *heredis institutio ex quota,* regardless of the actual understanding of the concept of an inheritance as one thing. Therefore, we can clearly state that until the first half of the third century it was the stated law that created the legal practice. The situation, however, started to change in the mid-third century, that is after Alexander Severus' constitution.

In the wills made after the issuing of Alexander Severus' constitution we find two types of *heredis institutio.* One of them is similar to the old type known from the sources made before the constitution on the language of wills, and the second one is new.

The former Roman manner of instituting an heir appears mostly in wills from the third century. We find it in five of almost forty wills composed after Alexander Severus' constitution (*P. Stras.* IV 277, *P. Princ.* II 38, *P. Oxy.* VI 907, *PSI* VI 696, *P. NYU* II 390). The disappearance of *heredis institutio ex re certa* is parallel to the decay of the pattern of classical will form among the documents of legal practice. Most of the wills including the former type of *heredis institutio* known from the works of classical jurists appears in documents displaying all of the characteristics of the Roman will form from before Alexander Severus' constitution; they include a *mancipatio* clause, a fideicomissary clause, a *cretio* clause, etc.

The last example of the old form of *heredis institutio*, and at the same time *testamentum per aes et libram* preserved on papyrus is *P. NYU* II 39.[35] For a testament of this type it is late, drafted in the second half of the fourth century. The document is very unusual because the intention of the author was to compose a *testamentum per aes et libram*: it includes a *mancipatio* clause, a *cretio* clause and a *heredis institutio.* However, the author's

[35] The document was published by Lionel COHEN in the thirties of twentieth century: COHEN, 'Heredis Institutio' (cit. n. 18), pp. 345–346 and later also by other scholars: Amelotti, *Il testamento romano* (cit. n. 5), App. no. 16, MIGLIARDI ZINGALE, *I testament romani nei papyri e nelle tavolette d'Egitto*, Torino 1997, no. 30; B. NIELSEN & K. WORP, 'New Papyri from the New York University Collection: IV', *ZPE* 149 (2004), p. 104.

intention was not supported by his knowledge of Roman law, since all Roman elements of the will are consistently defective.

Let us consider solely the clause of instituting an heir in *P. NYU* II 39. It begins with the sentence (ll. 2–3): [πα]τρὸς Εὐδ̣αίμ̣ωνο̣[ς] καὶ Ἰσ̣ί̣δ̣ωρος ὁμοίως π̣α̣τ̣ρ̣[ὸ]ς Ε[ὐδαίμωνος [- - - ca. 130 - - -] κληρο]ν̣όμοι μο̣υ̣ ἔστωσαν – '(...) of the father Eudaimon and Isidoros of the same father (...) shall be (my) heirs. The beginning of the institution remains perfectly in accordance with the rules of Roman law. But right after it comes a phrase (l. 2) αἱρέσει τῇ ὑποκιμένῃ (l. ὑποκειμένῃ) καθώς ἐξῆς ἕ̣κ̣[ασ]τ̣ο̣[ς προσδέξεται], 'they will take according to this what is written and every one will accept' followed by a list of the objects designated for each heir. Most likely it means that the clause is only seemingly *herdis institutio ex quota*, while the real intention of the testator was to institute heirs to certain things. In other words, it is a detailed allocation of property amongst successors upon death. However, one must remember that if according to Roman law (also after Justinian) any legal debate arose, heirs instituted to certain things were liable as instituted to certain parts of the inheritance.

The desire to divide property among successors was a trait of the local form of instituting heir, intuitional for the author of the document. The only question is why the will was drafted based on a scheme that was obviously incomprehensible to the authors, when that model was already disappearing, if used anywhere at all.[36]

The above is not an isolated example. We find a similar way of instituting heir in a copy of Aurelius Hermogenes' will (*P. Oxy.* VI 907) drafted earlier – AD 276 in Oxyrhynchos. Like the previous example, the will is based on the Roman model, but more successfully. As far as the *heredis institutio* clause is concerned, first there is an institution of heirs to the whole inheritance, then the same instruction as in *P. NYU* II 39, and after that a list of goods to be inherited by particular successors.

The text indicates that the usage of the Roman formula was more conscious than in *P. NYU* II 39. However, it is hard to assume that the author of the document knew Roman law well enough to institute his heir to the

[36] Amelotti states that the author of the document might use the older pattern in place of a composition, AMELOTTI, *Il testamento romano* (cit. n. 5), p. 70.

ideal parts of the inheritance and to make them beneficiaries of *legata per praeceptionem,* because there is no trace of legal formulae characteristic for this kind of testamentary disposition in the text.[37] Moreover, the testator allocated his belongings to heirs, therefore his disposition cannot be considered as *legatum per praeceptionem*, since the function of the latter was to give an heir something more than a share in the inheritance. It is quite obvious that in both documents heirs are instituted to certain things, even though the pattern of *heredis institutio ex quota* was applied.

Later wills do not show much resemblance to the model of Roman will known from before Alexander Severus' constitution. The institution of an heir loses its former uniformity. Instead of one way of instituting an heir, different types of the *heredis institutio* clause appear. The one described above can be called the inter-temporal type.[38]

Besides the discussed type of institution of an heir we also find a direct *heredis institutio ex re certa*, which is a direct institution to certain things.[39] One of the documents where the said type is to be found is a will of a courier named Flavius Pousi.[40]

P. Oxy. XVI 1901 (sixth cent. AD, Oxyrhynchos): *βούλομα[ι δὲ καὶ κελεύω ὥστε τὴν πρ]οσκωλληθεῖσάν (l. [πρ]οσκολληθεῖσάν) [μοι γυναῖκα Κυρίαν] κληρονο[μεῖν τὰ εὑρεθησόμενα ἱμάτι]α (l. ἱματια) αὐτῆς ἐν τῷ ᾧ[ὑτῷ μου οἴκῳ καὶ] κόσμια, οὐ μὴν καὶ τὸ [ἥ]μισυ μέρος [τοῦ ἄ]λλου ἡμίσους μέρ[ους τοῦ αὐτοῦ οἴκου] τοῦ διαπραθέντος μ̣ο̣[ι πα]ρὰ Ἐπιφ[ανίου] ἀδελφοῦ Π̣ο̣[...*

[37] See KRELLER, *Erbrechtliche Untersuchungen* (cit. n. 33), p. 385; BEAUCAMP, 'Le testament de Grégoire' (cit. n. 10), p. 229.

[38] A later Byzantine example of this type of *heredis institutio* is to be found in Dioscorus' archive, *P. Cair. Masp.* III 67312 (AD 567, Antinoopolis). Admittedly, when composing the will for his client, Flavius Theodoros, Dioscorus did not draft the document based on the already forgotten Roman pattern, but the institution of an heir is of the same character as in the former examples.

[39] It is worth mentioning that this type of institution was typical for the Coptic wills composed in seventh and eighth century. See *P. KRU* 75 (seventh cent. AD, Thebaida), *P. KRU* 65 (seventh cent. AD, Jeme), *P. KRU* 66 + 76 (before AD 722, Jeme), *P. KRU* 68 (AD 723, Jeme), *P. KRU* 67 (AD 725, Jeme).

[40] The quoted type must have been popular throughout the Empire, since it appears in one of Justinian's Novels (*Nov.* 159).

καὶ τὴν ἐν τῷ οἴκῳ] μου πᾶσαν ὕλην ἀπὸ κεφαλαίου μέχρι ἐλαχίστου τινός. β[ούλομαι δὲ καὶ κελεύω] ἔχε[ι]ν κ[..].[.....].[.].[..].....ον κύραν Μάνναν λόγῳ [ca. 12] τὸ ὑπόλο[ιπον ἥμισυ μέρος τοῦ ἡμίσους μ]έρους τοῦ αὐτοῦ μου οἴκ[ου τοῦ διαπραθέντος] παρὰ τοῦ αὐ[τοῦ, τουτέστι τὸ τέταρτο]ν μέρος τῆς πά[σης οἰκίας, καὶ τὸ] βατελλίκιον καὶ τ[ὰ τρία μου κοχλιάρ]ια καὶ τὰ δύο μου [καμψία? ca. 9] ἀργύρου ἀνήκοντ[ο]ς τ[ῇ κυ]ρίᾳ [αὐ]τῆς μητρὶ Ταρωτ..[, ἔχειν δὲ τὴν αὐτὴν] κύραν Μάνναν βούλομαι καὶ τὸ τρίτον μέρος πάντων τῶ[ν ἱματίων καὶ τῶν] χιμονικῶν (l. χειμονικῶν) καὶ τῶν θεριακῶν.

I want and I order that my wife Kyria, who was joined to me, shall inherit the garments, which will be found in my house, and the ornaments, and the half-share of the remaining half-share of the same house which was sold to me by Epiphanios, brother of Po[...], and everything wooden in my house, from the chief pieces down to the smallest items. I want and I order that ... mistress Manna should have ... the remaining half-share of the half-share of my said house which was sold by the said person, that is to say, the quarter-share of the whole house, and the small plate and my three little spoons and my two caskets, ... the silver belonging to her late mother Tarot..., I want the said mistress Manna to have the third-share of all my garments, both winter and summer.

In another type of institution of an heir the instruction regarding the division of objects belonging to an inheritance among appointed heirs is absent. The best example of such a will is a testament composed by centurion Valerius Eion from the village of Karanis (*SB* XX 13479 [AD 320, Karanis]). First we find an institution of seven heirs (Valerius Eion's siblings, wife, and daughter) to everything which is left after the testator's death. Then a very detailed list of Eion's belongings follows; viz. money both in gold and silver, a list of the testator's debtors, and a list of his movables.[41] An interesting passage is the institution of a curator responsible for the division of goods belonging to the inheritance among the heirs. We find a similarly composed disposition in a will of Aurelius Kollouthos (*SPP* I, p. 6–7 = *FIRA* III 52 [late fifth cent. AD, Antinoopolis]), in a will drafted by Dioscorus for his client Flavius Phoibammon (*P. Cair.*

[41] Perhaps there was also a list of the testator's immovables, but it was not preserved in the document.

Masp. II 67152 [AD 570, Antinoopolis]) and in another one composed in Aphrodito (*P. Köln* X 421 [AD 524–545, Aphrodito]). However, in these three documents the clause in which a curator is instituted does not appear. The need for a fixed division of a particular inheritance most likely depended on the social situation. The division seems to appear in wills if heirs were not related or a later division of an inheritance could cause a conflict among heirs.

Another type of the clause includes a 'completeness formula'. The clause appears in wills composed in the later period.[42] A typical one is:

> *SPP* I, pp. 6–7, with *BL* III, p. 233 (late fifth cent. AD, Antinoopolis), ll. 10–14: *κληρονόμος μου ἔστω ἡ εὐνουστάτη μου γαμετὴ* (l. *γαμετη*ι) *[Τισοΐα ... ἀπὸ τῆς Ἀντινοο]υπόλεως πάντων τῶν καταλειφθησο[μένων ὑπ' ἐμοῦ* - ca. 21 - *κ]ινητῶν τε καὶ ἀκινήτων ἐν παντὶ εἴδη* (l. *εἴδει*) *καὶ γένει μέχρις ἀ[σσαρίου ἑνός.*
>
> My most kind-hearted wife Tisoïa from Antinoopolis shall be my heir to all things left by my ... movable and immovable, of every kind and sort, down to one coin.

Many a time the clause precedes a full register of objects comprising the inheritance or at least a list of the most important ones, as in the will of Apa Abraham.

> *P. Lond.* I 77, p. 231 = *MChr.* 317 (seventh cent. AD, Hermonthis), ll. 15–28: *ἐπὰν δὲ ὅπερ ἀπεύχομαι ἀνθρώπινόν τι πάθω καὶ τὸν βίον τοῦτον καταλύσω βούλομαι καὶ κελεύω μετὰ τὴν ἐμὴν ἀποκοίμησιν σὲ τὸν προμνημονευθέντα † Βίκτορα τὸν εὐλαβέστατον πρεσβύτερον καὶ μαθητήν μου ὑπεισϊέναι εἰς τὴν καταλειφθησομένην ὑπ' ἐμοῦ παντοίαν μετρίαν ὑπόστασιν καὶ κληρονομεῖν με κινητήν τε καὶ ἀκίνητον καὶ αὐτοκίνητον ἐν παντὶ εἴδει καὶ γένει καὶ ποιότητι καὶ ποσότητι ἔν τε χρυσῷ καὶ ἀργύρῳ καὶ ἐσθήσεσι καὶ χαλκώμασι καὶ ἱματίοις καὶ γραμματείοις καὶ οἰκοπέδοις καὶ ψιλοῖς τόποις καὶ αὐλαῖς καὶ πᾶσιν ἁπαξαπλῶς ἀπὸ τιμίο(υ) εἴδους ἕως ἐλαχίστου καὶ πλέθρο(υ) γῆς καὶ ἀσσαρίου ἑνὸς καὶ ὀβόλου καὶ τοῦ τυχόντος ὀστρακίνο(υ)*

[42] The clause appears also in a will composed outside Egypt, the one drafted for Gregory of Nazianzus.

καὶ ξυλίνο(υ) καὶ λιθίνο(υ) σκεύους πρὸς τὴν αὐτὴν καταλειφθησομένην ὑπ' ἐμοῦ παντοίαν μετριακὴν ὕπαρξιν καν (l. *καὶ ἂν*) *ἀπὸ κληρονομίας τῶν ἀποιχομένων μου καν* (l. *καὶ ἂν*) *ἀπὸ ἰδίων μο(υ) καὶ ἱδρωτῶν καὶ ἀπὸ ἀγορασίας καὶ χαρίσματος καὶ ἑτερασδηποτοῦν ἐπινοίας ἐγγράφως ἢ ἀγράφως, οὐ μὴν δὲ ἀλλὰ καὶ τὸ ὑπ' ἐμὲ ἅγιον τόπιον τοῦ ἁγίου ἀθλοφόρου μάρτυρος ἀββᾶ Φοιβάμμωνος τοῦ διακειμένου κατὰ τοῦ προρηθέντος θείου ὄρους Μεμνονίων ὡσαύτως τὴν ἀδιάλειπτον δεσποτείαν παρεθέμην σοι μετὰ τῆς αὐτοῦ σεπτῆς ὕλης ἀπὸ εὐτελοῦς εἴδους ἕως πολυτελοῦς καὶ ἀνθρακέως.*

But should I (which I pray may be averted) suffer the common lot of humankind and leave this life, I wish and order that, after my death, you, the aforementioned Victor, the most pious priest and my disciple, shall enter upon all of the moderate property bequeathed by me and be my heir, viz. movable, immovable and animate property, of every kind and sort and of whatever type and quantity, in gold and silver and cloth and copper, and clothing and books and building sites and waste lands and buildings. In a word, [you will inherit] everything, from the most costly kind to the least and down to one *jugerum* and the worth of one *assarion* and one obol, and whatever there happens to be of pottery and wooden and stone household utensils, as regards all of that same moderate property bequeathed by me, including what I inherited from my forebears and what I acquired by my own sweat and by purchase and by charitable gift and by any manner or intent whatsoever, by written or unwritten means. Not only that, but also the holy monastery which is under me, that of the holy prize-bearing martyr Abba Phoibammon which lies in the aforementioned holy mountain of Memnonion, I leave to you in unhindered ownership, together with its venerable property, from the cheap kind to the costly, down to a cinder.[43]

An interesting detail is the fact that both of the mentioned examples of wills include the institution of only one heir, thus the aim of the 'completeness formula' must express the testator's determination to leave an heir to the entire inheritance and prevent anyone else, such as an intestate successor, from acquiring anything not mentioned in the will.[44] This tendency proves that the authors were unaware of the Roman concept of

[43] Translated by Leslie S. B. MacCoull, 'Apa Abraham: Testament': [in:] J. Thomas & A. Constantinides Hero (eds.), *Byzantine Monastic Foundation Documents: A Complete Translation of the Surviving Founders' Typika and Testaments*, Dumbarton Oaks 2000, pp. 51–58.

[44] In case of Abraham's will the statement is supported by the presence of the disinheritance clause, which suggests that the bishop had some close relatives.

inheritance. The cited institutions of an heir cannot be classified as *heredis institutiones ex re certa sensu stricto,* but in fact they are ones because of the concept of inheritance which they represent.

These examples show the evolution of the *heredis institutio*. They demonstrate that the concept of inheritance as an abstract being completely disappeared and was replaced by the idea of inheritance understood as a total of separate things comprising the testator's property.

The sources of this concept and the described types of clauses originated from wills composed in the Hellenistic period[45] and documents composed by non-Romans in the Roman period before *Constitutio Antoniniana*.[46] Since the Ptolemaic period the common testamentary practice was instituting heirs to certain belongings of a testator. Thus, it is hardly surprising that this practice entered the wills composed by new citizens in spite of being totally foreign to Roman law.[47]

> *P. Dryt.* 2 (150 BC, Latopolis), ll. 17–21: *Ἐὰν δέ τι ἀ[νθρώπινο]ν πάθω, κατα[λείπω καὶ δίδωμι ἀπὸ τ]ῶν ὑπαρχόν[των μοι π]άντων ἐγγαί[ων καὶ ἐπίπ]λων Ἐσθλά[δαι τῶι] [ἐξ ἐμοῦ καὶ Σαραπιάδ]ος τῆς Ἐσθλά[δου ἀστῆ]ς υἱῶι ἧι συνή[μην γυνα]ικί, Ἐσθλά[δαι [τῶι προγεγραμμ]ένωι υἱῶι τὸ ἥ[μισυ καὶ] τὰ ὅπλα καὶ τ[ὸν ἵππ]ον ἐφ' οὗ στ[ρατεύομαι,] [τὰ δὲ λοιπὰ τοῖσ] ἐπεσομένο[ις ἐ]ξ ἐμοῦ καὶ Ἀπολλωνί[ας τέκνοις.]*[48]

[45] Documents published as *P. Petrie*[2] I: third cent. BC, Krokodilopolis; *P. Dryton* 2 (150 BC, Latopolis), *P. Dryton* 4 (126 BC, Pathyris), *P. Dryton* 3 (126 BC, Pathyris), *SB* XVIII 13168 (128 BC, Pathyris), *BGU* VI 1285 = *Jur. Pap.* 56C (110 BC, Herakleopolis Magna).

[46] See, *inter alia*, *P. Oxy.* I 104 (AD 96, Oxyrhynchos), *P. Oxy.* I 105, *BGU* VII 1654 (AD 98–117, Ptolemais Euergetis), *CPR* VI 72 (first cent. AD, Hermopolis Magna), *P. Wisc.* I 13 (AD 100–150, Oxyrhynchos), *CPR* VI 1, (AD 125, Oxyrhynchos), *P. Oxy.* III 491 = *M. Chr.* 304 (AD 126, Oxyrhynchos), *P. Oxy.* III 492 (AD 130, Oxyrhynchos), *P. Köln* II 100 (AD 133, Oxyrhynchos), *P. Oxy.* III 494 = *Jur. Pap.* 24 = *M. Chr.* 305 = *Sel. Pap.* I 84 (AD 165, Oxyrhynchos), *P. Oxy.* III 495 (AD 182–189, Oxyrhynchos), *P. Oxy.* VII 1034 R (second cent. AD, Oxyrhynchos), *P. Ryl.* II 153 (AD 169, Hermopolis Magna).

[47] COHEN, 'Heredis Institutio' (cit. n. 18), p. 354.

[48] See *P. Petr.* (2) I 1 (238/7 BC, Krokodilopolis), *P. Petr.* (2) I 2 (238/7 BC, Krokodilopolis), *P. Petr.* (2) I 4 (238/7 BC, Krokodilopolis), *P. Petr.* (2) I 6 (238/7 BC, Arsinoe), *P. Petr.* (2) I 7 (238/7 BC, Krokodilopolis?), *P. Petr.* (2) I 11 (238/7 BC, Krokodilopolis), *P. Petr.* (2) I 13 (238/7 BC, Arsinoe), *P. Petr.* (2) I 14 (238/7 BC, Krokodilopolis), *P. Petr.* (2) I 15 (238/7 BC, Arsinoe), *P. Petr.* (2) I 16 (236/5 BC, Krokodilopolis), *P. Petr.* (2) I 17 (236/5, Krokodilopolis), *P. Petr.* (2)

If I suffer a human fate, I bequeath and give from all the earth and utensils that belong to me to Esthlades, the son (born) of me and Sarapias, citizen, daughter of Esthlades, with whom I lived as a wife, to Esthlades, the abovementioned son, a half and armour and horse, on which I fight, and the rest to the children (born) of me and Apollonias.

P. Köln II 100 (after AD 133, Oxyrhynchites), ll. 5–12:[49] *ἐὰν δὲ ἐπὶ ταύτῃ τῇ διαθήκῃ τελευτήσω μηδὲν ἐπιτελέσασα, καταλείπω κληρονόμ[ους τὰ τέκνα μου Πτολεμαῖον καὶ Βερενίκην καὶ Ἰσιδώραν τὴν καὶ Ἀπολλωνάριον] τοὺς τρεῖς χρηματίζοντας μητρὸς ἐμοῦ, ἕκαστον δὲ αὐτῶν ἐὰν ζῇ, εἰ δὲ μή, τὰ τούτου τέκνα τὸν μὲν Πτολεμαῖον ἀφ' ὧν ἔχω οἰκοπέδων ἐν μὲν τῇ Ὀξυρύγ[χων πόλει ἐπ' ἀμφόδου Νότου Δρόμου οἰκίας καὶ αἰθρίου καὶ αὐλῆς καὶ χρηστηρίων καὶ] εἰσόδων καὶ ἐξόδων καὶ (...). τὴν δὲ Βερενίκην καὶ τὴν Ἰσιδώραν τὴν καὶ Ἀπολλωνάριον] ἑκατέρα<ν> αὐτῶν διὰ τῆς πρὸς τὸν ἄνδρα συνγραφῆς ἐφ' οἷς περιέχουσι δικαίοις πᾶσι καὶ διὰ τῆσδε τῆς διαθήκης κοινῶς ἐξ ἴσου οὗ ἔχω πρότερον Ἡραίδος Τεῶτος καὶ ἄλλων ἐν [Ὀξυρύγχων πόλει ἐπὶ τοῦ αὐτοῦ ἀμφόδου Νότου Δρόμου ἡμίσους μέρους οἰκίας καὶ αἰθρί]ου καὶ χρηστηρίων καὶ εἰσόδων καὶ ἐξόδων καὶ*, etc.

If I die with this will, having completed no other, I leave as heirs my three children Ptolemaios and Berenice and Isidora, also called Apollonarion, born of me, if each of them lives, and if not, their children: Ptolemaios to buildings that I own in the polis of Oxyrhynchos, at the *amphodos* of the South Avenue, a house and atrium and courtyard and household utensils and entrances and exits and (...); Berenice and Isidora, also called Appollonarion, either of them, according to an agreement with (her) husband, with all mentioned laws and through this will, jointly and equally, to the second part of the house and atrium and household utensils and entrances and exits, which I own in the polis of Oxyrhynchos, at the same *amphodos* of the South Avenue, front of (the possessions of) Herais, daughter of Teos, and others, etc.

I 22 (235/4 BC, Krokodilopolis), *P. Petr.* (2) I 23 (235–225 BC, Arsinoe), *P. Petr.* (2) I 24 (226/5 BC ., Krokodilopolis), *P. Petr.* (2) I 25 (226/5 BC, Krokodilopolis), *P. Petr.* (2) I 27 (226/5 BC, Krokodilopolis), *P. Dryton* 4 (126 BC, Pathyris), *P. Dryton* 3 (126 BC, Pathyris), *BGU* VI 1285 (110 BC, Herakleopolis Magna).

[49] Similar type of the disposition: *P. Lond.* II 375 (second cent. AD, Oxyrhynchos), *P. Oxy.* I 105, *P. Oxy.* III 491 (AD 126, Oxyrhynchos), *PSI* XII 1263, *P. Stras.* IV 284 (AD 176–180, Ptolemais Euergetis), *P. Oxy.* III 495 (AD 181–189, Oxyrhynchos); *P. Lund.* VI 6 (AD 190–191, Arsinoe).

Those examples demonstrate that the institution *ex quota* was a purely Roman concept originating from an abstract idea of inheritance that was alien to people rooted in a different legal culture, who had their own habits regarding institution of heirs and to whom an inheritance was a sum of particular items rather than a uniform entity.[50] The local practice and concept contradicted the Roman ones. The concept of *heredis institutio ex quota* was probably alien to common people throughout the Empire as well, to anyone except lawyers. For this reason Roman jurists started inventing the said ways of keeping such institutions valid already at the beginning of the classical period. This fact was also a factor of change in *heredis institutio* clauses in late Roman law.

When the new type of *heredis institutio* became at least an equal partner for the old one, Emperor Justinian issued a law recapitulating the rules elaborated by the jurists and simplifying them. Discussing the case of a will that included both types of institution he decided that only heirs instituted to the entire estate or its part were liable for debts and entitled to claims, while those instituted *ex re certa* took the place of common legatees. This was the last step on the way to a complete regulation of the matter.

> C. 6.24.13: Quotiens certi quidem *ex re certa* scripti sunt heredes vel certis rebus pro sua institutione contenti esse iussi sunt, quos legatariorum loco haberi certum est, alii vero ex certa parte vel sine parte, qui pro veterum legum tenore ad certam unciarum institutionem referuntur, eos tantummodo omnibus hereditariis actionibus uti vel conveniri decernimus, qui ex certa parte vel sine parte scripti fuerint, nec aliquam deminutionem earundem actionum occasione heredum *ex re certa* scriptorum fieri.
>
> Whenever some people are instituted heirs to certain things or they are ordered to consider certain things as their institution, it is settled that they are considered to take the place of legatees, others (appointed) to certain share or without the designation of a share are considered as entitled to definite number of twelfths of the inheritance, which is for continuity

[50] The statement is supported by the fact that many a time a person liable for inheritance debts is indicated in a will (*P. Oxy.* I 104, *P. Oxy.* III 648 descr. [second cent. AD, Oxyrhynchos], *BGU* VII 1654, *P. Köln* II 100, *P. Ryl.* II 153). The same was applied in Aurelius Kolluthos' will (*FIRA* III 52).

> of ancient laws, we decree that these heirs appointed to a specified part of the inheritance or without any share are entitled to all hereditary actions, or may be sued, and that their right to these actions shall not be diminished by the heirs who were appointed to certain things.

The changes in the clause presented above were not unique, as it was enriched by other formulae originating from the local tradition. One of them is the expression of the *mortis causa* character of the act: *ἐὰν δέ συμβαίη τί μοι ἀνθρώπινον* (if I suffer human fate), another is the clause addressing the fact that the testator was sane and in the right mind.

To be sure, the clauses differed depending on the time and place of composition; however, the model clause included: the phrase expressing its *mortis causa* character, formula regarding the physical and mental sanity, institution of an heir expressed in arbitrarily chosen words, and the object of institution. After Alexander Severus' constitution we observe a variety of wordings and formulae. The effect of this constitution was the first step towards flexibility of form which resulted in the variety of documents.

Even if Alexander Severus' constitution was not directly responsible for freeing the will, illustrated here on the example in the institution of an heir, it truly became the catalyst of these changes and at the same time the first step towards adapting the law to the needs of the practice. The effect of the dissolution was diversity of both institution of an heir and the will itself. The thesis that it is the practice that comes before the law in Late Antiquity is not only supported by the documents of this practice, but also by Emperor Constantine's explanation of the reasons for introducing the constitution, stating that ancient and imaginary rules need to be abolished.

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