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MANCIPATIO AND ITS LIFE IN LATE-ROMAN LAW

THE AIM OF THIS PAPER is to demonstrate a crucial point of change in the field of *mancipatio*, understood as the act consisting of solemn formulae and gestures and performed in front of witnesses and a scale-holder. The starting point for my research was the classical will, *testamentum per aes et libram*, and the exact moment when it stopped being an oral act requiring *mancipatio* and was converted into a simple document[1] known from both Late-Roman and Byzantine sources of law (for instance *C. Th.* 4.4.1; 4.4.3; 4.4.7; *Nov. Th.* 16 = C. 6.23.21).

The form of will described in the Theodosian Code, Justinian's Code and other sources required a properly protected and closed document written according to the testator's wish. Such a document had to be offered to seven witnesses whose task was to seal and subscribe the will.[2]

[1] In postclassical Roman law, two forms of wills were recognised by law, the oral and the written one, but as the papyrological evidence dealing with oral wills is drastically limited, the focus of this paper is to discuss solely the written wills. See M. KASER, *Das römische Privatrecht*, II: *Die nachklassischen Entwicklungen*, Munich 1975 (2nd ed.), p. 481.

[2] In Late Antiquity the subscriptions had a function very similar to modern signatures. Cf. Katelijn VANDORPE, 'Seals in and on the Papyri of Graeco-Roman and Byzantine Egypt', [in:] Marie-Françoise BOUSSAC & A. INVERNIZZI (eds.), *Archives et sceaux du monde hellénistique / Archivi e sigilli nel mondo ellenistico. Torino, Villa Gualino, 13–16 Gennaio 1993* [= *BCH*, *Supplément* 29], Turin 1996, pp. 258–286; Maria NOWAK, 'The function of witnesses in the wills from late antique Egypt', [in:] *Proceedings of the 26th International Congress of Papyrology* (forthcoming).

This had to be done in the presence of all witnesses at the same time. Witnesses had to know that they had witnessed to a will; however they did not have to know the content of the document. Also the testator had to subscribe his own testament.[3] These rules are described by a constitution issued by the emperors Theodosius and Valentinianus in AD 439 and later incorporated to Justinian's Code (*Nov. Th.* 16 = C. 23.21).

Generally the way of making wills in Late-Roman times was quite comprehensible even for someone who was legally ignorant. However, we cannot forget that this idea evolved from Roman law, which offered much more formal rules for making wills,[4] expressed in the second century Roman law manual, the *Institutiones* of Gaius.

> G. 2.104: Eaque res ita agitur: qui facit <testamentum>, adhibitis, sicut in ceteris mancipationibus, v testibus ciuibus Romanis puberibus et libripende, postquam tabulas testamenti scripserit, mancipat alicui dicis gratia familiam suam.
>
> The proceedings are as follows: the testator, as in other mancipationes, takes five Roman citizens above puberty to witness and a scale-holder, and having previously written his will on tablets, formally mancipates his *familia* to someone (tr. F. de Zuletta).[5]

[3] Yet, there were some exceptions to these rules, for instance in the case of the communicable disease of a testator (C. 6.23.8), his illiteracy (C. 6.23.21), the lack of persons being able to play the role of witness (C. 6.23.31), etc. See P. Voci, *Diritto ereditario romano*, II: *Parte speciale. Successione ab intestato. Successione testamentaria* [= *Diritto ereditario romano* 2], Milan 1963, pp. 62–64.

[4] The most antique ways of making wills, *testamentum calatis comitis* and *testamemtum in procinctu,* are not to be discussed here, but see E. Besta, *Le successioni nella storia del diritto italiano*, Padua 1935, pp. 137 ff.; B. Biondi, *Successione testamentaria e donazioni*, Milan 1955 (2nd ed.), pp. 33–35; Kaser, *Das römische Privatrecht* (cit. n. 1), pp. 105–107; A. Watson, *The Law of Succession in the Later Roman Republic*, Oxford 1971, pp. 8–10.

We do not know the exact moment when the will understood as the *mortis causa* act appeared, but there is no doubt that it was directly preceded by *mancipatio familiae*. See S. Randazzo, *Leges mancipii. Contributo allo studio dei limiti di rilevanza dell'accordo negli atti formali di alienazione* [= *Pubblicazzioni della Facoltà di giurisprudenza, Università di Catania*, ns 160], Milan 1996, pp. 41–45; Stefania Pietrini, *Deducto usu fructu. Una nuova ipotesi sull'origine dell'usufrutto* [= *Quaderni di 'Studi senesi'* 113], Siena 2008, pp. 63–128.

[5] *The Institutes of Gaius*, tr. F. de Zuletta, Oxford 1946.

The original act was oral, so the testator had to express his/her will aloud in the presence of required persons. However, if he/she wanted to keep the content of the dispositions secret, *nuncupatio* was reduced to the symbolic formula known thanks to Gaius, G. 2.104: HAEC ITA UT IN HIS TABULIS CERISQUE SCRIPTA SUNT, ITA DO ITA LEGO ITA TESTOR, ITAQUE VOS, QUIRITES, TESTIMONIUM MIHI PERHIBETOTE.[6]

The difference between the rules concerning *testamentum per aes et libram* and the Late-Roman written will is significant. The interesting question is when exactly the formal act consisting of *mancipatio* and the solemn oral formulae became a simple document.

According to some romanists, Pasquale Voci,[7] Mario Amelotti,[8] Max Kaser,[9] Bernardo Albanese,[10] and Fritz Sturm,[11] it was Constantine the

[6] In the case of a secret will its content was preserved on tablets, but there is no doubt that even in the late classical period it could be expressed orally (D. 28.1.21.pr-1; D. 28.1.25; D .28.5.1.1; D. 28.5.1.5; D. 28.5.59.pr; D. 29.7.20; D. 37.11.8.4), even if happened very rarely. Unfortunately, there is only one example of a will composed fully orally in the classical period (Suet., *V. Hor.* 75). See A. Guarino, 'La forma orale e la forma scritta nel testamento Romano', [in:] *Studi in onore di P. de Francisci* II, Milan 1956, pp. 51–77, at 58–64; G. G. Archi, 'Oralità e scrittura nel 'testamentum per aes et libram', [in:] *Studi in onore di Pietro de Francisci* IV, Milan 1956, pp. 287–318, at 293–294; Voci, *Diritto ereditario romano* (cit. n. 3), p. 53; Kaser, *Das römische Privatrecht* (cit. n. 1), p. 679; Watson, *The Law of Succession* (cit. n. 4), p. 12. The above interpretation is proven also by the commentary to Justinian's *Institutes*, Theophilus, *Paraphrasis* II 10.1.

For a contrary opinion, see, e.g., Elisabeth. A. Meyer, *Legitimacy and Law in the Roman World: Tabulae in Roman Belief and Practice*, Cambridge 2004, pp. 114–115.

[7] P. Voci, 'Testamento pretorio', *Labeo* 13 (1967), pp. 319–348; P. Voci, 'Il diritto ereditario romano nell'età del tardo impero. Il IV secolo. Prima parte', *Iura* 29 (1978), pp. 17–113, at 30–34.

[8] M. Amelotti, *Il testamento romano attraverso la prassi documentale*, I: *Le forme classiche di testamento* [= *Studi e testi di papirologia* 1], Florence 1966, p. 246.

[9] Kaser, *Das römische Privatrecht* (cit. n. 1), p. 479.

[10] B. Albanese, 'L'abolizione postclassica delle forme solemni nei negozi testamentari', [in:] *Scritti giuridici* II, Palermo 1991, pp. 1637–1654, at 1650–1651.

[11] F. Sturm, 'Das Absterben der *mancipatio*', [in:] S. Buchholz, P. Mikat, & D. Werkmüller (eds.), *Überlieferung, Bewahrung und Gestaltung in der rechtsgeschichtlichen Forschung* [= *Rechts- und staatswissenschaftliche Veröffentlichungen der Görres-Gesellschaft*, NF 69], Paderborn 1993, pp. 347–356, at 353.

Great who abolished the classical testamentary form, *testamentum per aes et libram*. This assumption is based on an interpretation of the constitution issued by the emperor in 326[12] and preserved in Justinian's Code (C. 6.23.15 pr-1 + C. 6.37.21 + C. 6.23.15.2).[13] In the first part of the constitution we find the following phrase:

> C. 6.23.15.pr.: 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 inflexis.
>
> For it is unworthy that tablets and judgments of the dead should become void because of the failure to observe a vain pedantry, it has been decided that having taken away these formalities whose use is only imaginary, a particular form of words is not to be observed in the appointment of an heir, either this is done by imperative and direct expressions or by indefinite ones.

According to the above-mentioned scholars the words *placuit ademptis his, quorum imaginarius usus est* are to be interpreted as the decision concerning *mancipatio nummo uno*.[14] However, the context denies such interpretation, as we shall see later on.

As an argument for Voci's and Amelotti's statement it must be said that the adjective *imaginaria* present in the quoted phrase often appeared in connection with the noun *venditio* and together *imaginaria venditio* meant *mancipatio* (G. 1.113: *coëmptio*; G. 1.119: *est autem mancipatio, ut supra quoque diximus, imaginaria quaedam uenditio*; *Tit. Ulp.* 20.2: *testamentum per aes et libram*). This is also how *mancipatio* is quoted twice in Justinian's Institutes (I. 1.12.6: *emancipatio*; I. 2.10.1: *testamentum per aes et libram*). However, this is not the unique function of the adjective *imaginarius* in the legal sources. The examples are many. Even the conjunction *imaginaria venditio* has another meaning,

[12] For the date of the constitution, see C. Tate, 'Codification of late Roman inheritance law. *Fideicommissa* and the Theodosian Code', *TR* 76 (2008), nos. 3–4, pp. 237–248.

[13] Albanese, 'L'abolizione postclassica' (cit. n. 10), pp. 789–790.

[14] Voci, 'Il diritto ereditario romano' (cit. n. 7), p. 32.

'fictitious sale' or Latin *venditio simulata*[15] (*P. S.* 2.23.4; *C. Th.* 16.5.58.4; *Gai Fragmenta Augustodunensia* 1.67; D. 18.1.55; D. 40.1.4.2; D. 44.7.54; D. 48.18.1.6; D. 50.17.16; C. 5.16.20; C. 8.27.10.2). The adverb *imaginarius* is an element of many other combinations in legal texts (G. 3.169; G. 3.171; G. 3.173; I. 3.29.1: *imaginaria solutio*; D. 4.5.3.1: *imaginariam servilem causam*; *C. Th.* 11.1.2: *ex solis apochis falsis vel imaginariis*; *N. Val.* 2: *dignitatem imaginariam*). A very important fact is that the adjective *imaginarius* never appeared to indicate *mancipatio* in the Theodosian and Justinianic Codes.

The next argument by which the aforementioned scholars supported their claim is this passage from the *Vita Constantini*.[16]

> *V. Cons.* 4.26: *Κἄπειτα τῶν τὸν βίον μεταλλαττόντων ὁμοίως παλαιοὶ μὲν νόμοι ἐπ' αὐτῆς ἐσχάτης ἀναπνοῆς ἀκριβολογεῖσθαι ῥημάτων λέξεσι τὰς συνταττομένας διαθήκας τρόπους τε τίνας καὶ ποίας δεῖ φωνὰς ἐπιλέγεσθαι ὥριζον, καὶ πολλὰ ἐκ τούτων ἐκακουργεῖτο ἐπὶ περιγραφῇ τῆς τῶν κατοιχομένων προαιρέσεως. Ἃ δὴ συνιδὼν βασιλεὺς καὶ τοῦτον μετεποιεῖτο τὸν νόμον, ψιλοῖς ῥηματίοις καὶ ταῖς τυχούσαις φωναῖς τὸν τελευτῶντα δεῖν τὰ κατὰ γνώμην διατάττεσθαι φήσας κἂν τῷ τυχόντι γράμματι τὴν αὐτοῦ δόξαν ἐκτίθεσθαι, κἂν ἀγράφως ἐθέλῃ, μόνον ἐπὶ μαρτύρων τοῦτο πράττειν ἀξιοχρέων, τὴν πίστιν δυνατῶν σὺν ἀληθείᾳ φυλάττειν.*
>
> Then in regard to dying persons, the old laws had ordained that even at the terminal breath they should be precise in words and phrases of the provisions of the will and select certain ways (of expression) and definite words. These (laws) had occasioned many fraudulent attempts towards the will of the deceased. As soon as our emperor was aware of them, he changed this law likewise, declaring that a dying man ought to be permitted to indicate his wishes in simple words, and in whatever terms he pleased; and to set forth his will in any written form; or even by word of mouth, provided it were done in the presence of proper witnesses, who might be competent faithfully to discharge their trust (tr. E. C. Richardson, with my modifications).[17]

[15] Cf. *TLL*, *s.v.* 'imaginarius'.

[16] Voci, 'Il diritto ereditario romano' (cit. n. 7), pp. 31–34; Amelotti, *Il testamento romano* (cit. n. 8), p. 246 ff.; Tate, 'Codification of late Roman inheritance law' (cit. n. 12), p. 244.

[17] Eusebius of Caesarea, *The Life of the Blessed Emperor Constantine*, tr. E. C. Richardson, Grand Rapids 1890.

In the article 'L'abolizione postclassica delle forme solemni' Bernardo Albanese successfully proved that this passage of the *Life* paraphrases the above-quoted constitution.[18] However, the quoted passage does not prove that Emperor Constantine abolished either the testamentary form, *testamentum per aes et libram,* or the *mancipatio* as such. Even the previously mentioned scholars never analysed the passage thoroughly, they just quoted it as an argument for their opinion that Constantine abolished *testamentum per aes et libram* without explaining why they thought so.[19] We cannot disagree that the passage paraphrased the constitution issued by Constantine, but Eusebios never mentioned *mancipatio* in his text. It is true that he was not a lawyer, as Albanese argued, but he was still an educated person.[20] Thus, if wills performed in the form of *mancipatio* had existed right before he wrote the *Vita*, he would have mentioned either the term or the act, for it was not a technical detail but the entire ceremony.

The situation described by the bishop is as follows. Before the emperor issued his law, someone who wanted to make a will had to employ *τρόπους τε τίνας καὶ ποίας δεῖ φωνάς*, 'certain methods and language'. Since there were many attempts at trickery towards testators, the emperor established a rule making valid any will composed in front of witnesses, no matter if it was composed *ψιλοῖς ῥήμασιν καὶ ταῖς τυχούσαις φωναῖς*, 'with simple words and common language'. Thus the aim of the said regulation was to make a testator able to control the content of his will. The passage discussed the same problem as the previously quoted constitution did. By abolishing solemn formulae required by classical law, the emperor reformed the law of wills. However, in the first part of the quoted passage Eusebios mentioned some distant memory of formalism concerning the form of wills in order to contrast it with the general concept of Constantine's reform which took place in the field of the Roman law of wills.

One reservation could still be made: the constitution was preserved in Justinian's Code, so one could assume that the text originally spoke of

[18] Albanese, 'L'abolizione postclassica' (cit. n. 10), p. 1648.

[19] Cf., e.g., Amelotti, *Il testamento romano* (cit. n. 8), pp. 245–246; Voci, 'Il diritto ereditario romano' (cit. n. 7), pp. 31–33.

[20] Albanese, 'L'abolizione postclassica' (cit. n. 10), p. 1650.

mancipatio, but the codification committee purified it. However, the already presented statement that the constitution never concerned either *testamentum per aes et libram* or *mancipatio* is supported by the context of the above-quoted laws. The passage from Justinian's Code is a part of a longer constitution.[21] The other parts of the law concern the verbal form of testamentary dispositions, *heredis institutio*, *legata*, and *fideicommissa* (C. 6.23.15. pr-1; C. 6.37.21), but they do not deal with formalities accompanying the making of a will; it seems therefore that it could hardly mention the rules concerning fictitious sale as well.

The beginning of the discussed constitution, namely the phrase, *indignum est ob inanem observationem irritas fieri tabulas*, also supports this statement, since by regulating the will the author clearly meant a written deed. We can infer the same from the last part of the constitution, in which a will is understood as a document.

> C. 6.23.15.2: Et in postremis ergo iudiciis ordinandis amota erit sollemnium sermonum necessitas, ut, qui facultates proprias cupiunt ordinare, in quacumque instrumenti materia conscribere et quibuscumque verbis uti liberam habeant facultatem.
>
> And the necessity of the solemn language shall be abolished in making final judgments so that the ones who want to arrange their own matters have a free possibility to write it on whatever writing material and in whatever words.

First, the passage clearly concerns the language, *quibuscumque verbis*. Second, for the author of the text a will was a written deed, as he mentioned that it could be written on whatever writing material, *in quacumque instrumenti materia conscribere*. The most important argument supporting the last sentence is the fact that the author, expressing the act of making a will, applied the verb *conscribere*.

Careful examination of the quoted texts does not allow the conclusion that *mancipatio* was abolished through Constantine's constitution. Moreover, the constitution concerns the will as a document, not as a solemn act.

[21] Tate, 'Codification of Late Roman inheritance law' (cit. n. 12), p. 241.

This was so, because *mancipatio* was no longer necessary to make a will and it had not been performed since before Constantine the Great issued the law. Thus the interesting question is when both *mancipatio* and *testamentum per aes et libram* disappeared from the sources and how this happened.

To answer this question we need to come back to the classical period of Roman law and look at testamentary deeds composed at that time. Most of testamentary tablets composed in the period before the *constitutio Antoninana* were based on a Roman model. A significant number of wills and their copies also contained the so-called mancipatory clause, which was supposed to prove that the proper act of *mancipatio nummo uno* took place when the will was composed. The clauses are of very repetitive character based on the following scheme: *Familiam pecuniamque testamenti faciendi causa emit quis, libripende quo, antetestatus est quem*.

The mancipatory clause is traceable in fourteen wills preserved on papyrus and wax tablets.[22] The number is significant, since we have no more than thirty classical testaments in total. The clauses are virtually identical. The conclusion is that the mancipatory clause was an inseparable element of the Roman testamentary form; however it is not certain if it was still performed during the composing of a will. A few arguments justify such doubts.

First, we know well that wills were made on the basis of ready patterns.[23] It can be supported, *inter alia*, by the fact that one such pattern has

[22] *Ch. L. A.* IX 399 (AD 91, provenance unknown); *Ch. L. A.* X 412 (AD 131, Ptolemais Euergetis); *P. Oxy.* XXXVIII 2857 (AD 134, Oxyrhynchos); *Tablette Keimer* = *FIRA* III 47 (AD 142, Alexandria); *P. Select.* 14 (2nd cent. AD, Arsinoites); *SB* III 6273 = *P. Hamb.* I 73 (2nd cent. AD, Philadelphia); *P. Hamb.* I 72 = *Ch. L. A.* XI 496 (2nd–3rd cent. AD, provenance unknown); *BGU* VII 1655 (AD 169, Philadelphia); *SB* V 7630 (AD 172–175, Alexandria); *BGU* I 326 = *M. Chr.* 316 = *FIRA* III 50 (AD 194, Karanis); *P. Diog.* 9 (AD 186–224, Philadelphia); *P. Oxy.* XXII 2348 (AD 224, Oxyrhynchos); *P. Laur.* I 4 (AD 246, Hermopolis Magna); *P. NYU* II 39 (*ca.* AD 345, Arsinoites).

[23] See Livia MIGLIARDI ZINGALE, 'Dal testamento ellenistico al testamento romano nella prassi documentaria egiziana, cesura o continuità?', *Symposion* 1995, pp. 303–312, at 311; M. AVENARIUS, 'Formularpraxis römischer Urkundenschreiber und *ordo scripturae* im Spiegel testamentsrechtlicher Dogmatik', [in:] M. AVENARIUS, C. MÖLLER, & R. MEYER-PRITZL (eds.), *Ars Iuris. Festschrift für Okko Behrends zum 70. Geburtstag*, Göttingen 2009, pp. 13–14, 20 ff.

been preserved (*P. Hamb.* I 72 [2nd cent. AD, provenance unknown]). Moreover, this form contains a mancipatory clause identical to the clauses present in concrete wills and their copies: *pec*[*uni*]*a*[*mq*]*ue testam(enti) f(aciendi) c(ausa) e(mit) quis (sestertio) I, lib*[*rip(endis)*] *lo(co) quis ant(etestatus est) quem*.

Also other clauses, like *heredis institutio*, *cretio* clause, etc., are similar to one another. The wills are parallel regardless of their provenance, be it Egypt, be it Wales (a second-century will on wax tablets published some ten years ago by Roger Tomlin),[24] or be it Rome.[25] Some of the clauses are even ill-composed and demonstrate that their authors did not have legal knowledge sufficient to understand the patterns they applied. The best illustration for this statement is the *cretio* clause, which in the majority of cases plays the role of *una clausola di stile*, as Mario Amelotti rightly observed.[26] Mistakes are also traceable in mancipatory clauses (*BGU* VII 1655 [AD 169, Philadelphia]), *P. NYU* II 39 [AD 335, Karanis]), as the symbolic price is one thousand coins, while it should be one coin. Nevertheless, the mistakes are much less frequent than in other clauses. However, this only proves that they were much simpler and better understood than any other testamentary clause, since they required only personal names to be added. For the above reasons it is hardly plausible that *mancipatio* was effectively performed during the composition of the wills; it can only be said that the mancipatory clauses were an element of the pattern.

Second, there is no evidence of the application of *mancipatio* in the papyri in the classical period of Roman law, but for the mancipatory clauses in wills. The only exception is a document of emancipation of a daughter composed at the beginning of the third century in Oxyrhynchos (*FIRA* III 14 = *CPL* 206 = *Jur. Pap.* 9, after AD 212, Oxyrhynchos).

[24] R. S. O. Tomlin, 'A Roman will from north Wales', *Archaeologia Cambrensis* 150 (2001), pp. 143–156.

[25] See Avenarius, 'Formularpraxis römischer Urkundenschreiber' (cit. n. 23). Testamentary patterns are nothing exceptional in Roman legal practice, as there are many more examples of legal forms in the Empire (e.g. *formula Baetica*). See M. Amelotti & G. Costamagna, *Alle origini del notariato italiano* [= *Studi storici sul notariato italiano* 2], Rome 1975, p. 13; H. J. Wolff, 'Der byzantinische Urkundenstil Ägyptens im Lichte der Funde von Nessana und Dura', *RIDA* 8 (1961), pp. 115–154.

[26] Amelotti, *Il testamento romano* (cit. n. 8), pp. 121 ff.

Outside of Egypt the practice of *mancipatio* is unsatisfactorily attested.[27] It is worth underlining that all these sources mention *mancipatio* serving as a means of transferring ownership and none of them comes from the Roman East, except for the quoted Egyptian deed of *emancipatio*.

Moreover, some deeds of sale containing the mancipatory clause are not obviously a proof for the presence of *mancipatio* in Roman legal practice. For instance, a deed of sale from Roman Britain, so-called Fortunata tablet, contains the following mancipatory clause:

> *Tabula Fortunatae*:[28] Vegetus Montani imperatoris Aug(usti) ser(vi) Iucundiani vic(arius) emit mancipioque accepit puellam Fortunatam sive quo alio nomine Diablintem de Albiciano ... (denariis) sescentis.
>
> Vegetus, *servus vicarius* of the imperial slave Montanus Iucundus bought for six hundred denarii and acquired through *mancipatio* from Albiniacus ... a girl Fortunata, or whatever her name is, of the tribe Diablintes.

The document states that Vegetus bought the slave-girl and acquired her through *mancipatio* (*mancipioque accepit*). This would not be exceptional, except for the fact that the acquirer and party to the *mancipatio*, the one *accipiens*, was a slave, *servus vicarius*, of another slave Montanius Iucundianus. The problem is that a slave could take a part in *mancipatio* only if he acted on behalf of his master which is clearly not the case of the quoted tablet.[29] The quoted tablet as well as the tablets from Dacia that list pere-

[27] *FIRA* III 91 (AD 61, Pompeii), *TH* 61 (AD 63, Herculaneum), *FIRA* III 92 (1st–2nd cent. AD, Baetica), the so-called Fortunata tablet (1st–3rd cent. AD, London), *FIRA* III 87–90 (AD 139–160, Dacia), *FIRA* III 93–95 (2nd–3rd cent. AD, Rome).

About *tabula Fortunatae*: R. S. O. TOMLIN, 'The girl in question: a new text from Roman London', *Britannia* 34 (2003), pp. 41–51. Second edition with major corrections: G. CAMODECA, 'Cura secunda della *tabula cerata* londinese con la compravendita della *puella Fortunata*', *ZPE* 157 (2006), pp. 225–230. See also Francesca REDUZZI MEROLA, *Forme non convenzionali di dipendenza nel mondo antico*, Naples 2010 (2nd ed.), pp. 44–46.

[28] CAMODECA, 'Cura secunda' (cit. n. 27), p. 226.

[29] REDUZZI MEROLA, *Forme non convenzionali* (cit. n. 27), p. 46. Cf. H. ANKUM, '*Mancipatio* by slaves in classical Roman law', *Acta Juridica* 1 (1976) [= *Essays in Honour of Ben Beinart*], pp. 1–13.

grines as the parties of *mancipatio* demonstrate poor performance of *mancipatio* and the degeneration of the act itself, which would mean that the range of persons entitled to take part in the act was extended to non-citizens and slaves.[30] On the other hand, a different statement is also justified. Another possible interpretation is that there was no *mancipatio* performed, but the mancipatory clause was written anyway. Thus the presence of the said clause would again be a proof for the presence of premade patterns in Roman legal practice, but not information for how the act was performed.[31]

On the other hand, the preserved Roman documents of sale which do not contain the mancipatory clause are far more numerous. The deeds[32] concern things such as slaves and oxen, the objects classified by Gaius as *res mancipii*. Despite the fact that the documents were written in the provinces, they are of Roman character because of features typical for Roman deeds of sale, such as the declarations concerning legal and physical defects, etc. There is also no doubt that the parties were Romans. Moreover, the majority of the documents state that a sold thing was transferred by *traditio*. Furthermore, we cannot forget about the praetorian protection of bonitary owners that must have affected the need to perform *mancipatio* in order to transfer any of the *res mancipii*, as Fritz Sturm

[30] Camodeca, 'Cura secunda' (cit. n. 27), p. 226.

[31] Francesca Reduzzi Merola is of the same opinion. Reduzzi Merola, *Forme non convenzionali* (cit. n. 27), pp. 46–47: 'Potremmo però anche ipotizzare che nella nostra tavoletta la *mancipatio* venisse menzionata solo come ripetizione di un formulario tralatizio, ed invece l'atto non venisse effettivamente compiuto; il trasferimento della schiavetta si sarebbe realizzato tramite traditio, che risulta nel documento, ma l'aquirente non ne avrebbe acquistato (e non avrebbe potuto acquistarne) la proprietà'.

[32] For example *FIRA* III 137 (AD 29 or 116, Frisia); *P. Hamb.* I 63 (AD 125/6, Upper Egypt); *FIRA* III 133 = *BGU* III 887 = *M. Chr.* 272 = *C. Pap. Jud.* III 490 (AD 151, Pamphilia); *P. Turner* 22 (AD 142, Pamphilia); *FIRA* III 134 = *SB* III 6304 (AD 151, Ravenna); *P. Lond.* II 229, p. xxi = *Jur. Pap.* 37 = *FIRA* III 132 (AD 166, Seleucia Pieria); *P. Oxy.* XLI 2951 = *Ch. L. A.* XLVII 1415 (AD 267, Oxyrhynchos); *BGU* I 316 = *M. Chr.* 271 = *FIRA* III 135 (AD 359, Ascalon); *P. Kell.* I 8 (AD 362, Oasis Magna).

Cf. J. A. Straus, *L'Achat et la vente des esclaves dans l'Égypte romaine: Contribution papyrologique à l'étude de l'esclavage dans une province orientale de l'empire romain* [= *Archiv für Papyrusforschung und verwandte Gebiete*, *Beiheft* 14], Munich – Leipzig 2004, pp. 116–119.

observed.[33] These documents may be also seen as an argument supporting the statement about the absence of *mancipatio* in Roman legal practice.

The above arguments are not enough to state that the *mancipatio* was absent from at least eastern legal practice in the classical period of Roman law. However, further issues support such a statement. The *mancipatio* was not only a way of transferring ownership and making a will, but it also served other legal purposes. Among them were the emancipation of children and adoption. Except for the above-quoted *emancipatio* deed we do not find any proofs of application of the *mancipatio* in such acts. Moreover, *emancipatio* based on the *mancipatio* probably disappeared from legal teaching as well. Such an assumption is supported by the fifth-century text, *Epitome Gai*. The author of the text described the act of emancipation through paraphrasing the parallel passage of *Gai Institutiones*.[34]

[33] Sturm, 'Das Absterben der *mancipatio*' (cit. n. 11), pp. 354–356.

[34] Cf. the paraphrased text, G. 1.132: Praeterea emancipatione desinunt liberi in potestate parentum esse. Sed filius quidem tribus mancipationibus, ceteri vero liberi sive masculini sexus sive feminini una mancipatione exeunt de parentium potestate: lex enim XII tabularum tantum in persona filii de tribus mancipationibus loquitur his verbis: 'Si pater <ter> filium venum duit, a patre filius liber esto'. Eaque res ita agitur: mancipat pater filium alicui; is eum vindicta manumittit: eo facto revertitur in potestatem patris; is eum iterum mancipat vel eidem vel alii (sed in usu est eidem mancipari) isque eum postea similiter vindicta manumittit; eo facto rursus in potestatem patris revertitur; tertio pater eum mancipat vel eidem vel alii (sed hoc in usu est, ut eidem mancipetur) eaque mancipatione desinit in potestate patris esse, etiamsi nondum manumissus sit sed adhuc in causa mancipii.

'Furthermore, children are released from the paternal power through emancipation. But a son leaves paternal power with three *mancipationes*, other ascendants either men or women with one. The law of the Twelve Tables only mentions three mancipationes in regard to the son, as follows: If a father sells his son three times, the son shall be free from his father. It happens as follows: a father delivers a son to someone by *mancipatio*; the latter frees him by *manumissio vindicta*; and when this is done he is again under the power of his father, then he (the father) delivers him (the son) by *mancipatio* either to the same person or to another one for the second time (but it is customary that he is delivered to the same person); and then he frees him again, and when this is done he is again under the power of his father; and then the father delivers him (the son) by *mancipatio* either to the same person or to another one for the third time (but it is customary that he is delivered to the same person) and by the virtue of this *mancipatio* he ceases to be under paternal power, even if he has not been manumitted yet, but he is still *in mancipio*.'

Ep. Gai 1.6.3: Item per emancipationem filii sui iuris efficiuntur. Sed filius masculus tribus emancipationibus de potestate patris exit et sui iuris efficitur. Emancipatio autem, hoc est manus traditio, quaedam similitudo uenditionis est: quia in emancipationibus praeter illum, hoc est certum patrem, alius pater adhibetur, qui fiduciarius nominatur. Ergo ipse naturalis pater filium suum fiduciario patri mancipat, hoc est manu tradit: a quo fiduciario patre naturalis pater unum aut duos nummos, quasi in similitudinem pretii accipit, et iterum eum acceptis nummis fiduciario patri tradit. Hoc secundo et tertio fit, et tertio eum fiduciario patri mancipat et tradit, et sic de patris potestate exit. 4. Quae tamen emancipatio solebat ante praesidem fieri; modo ante curiam facienda est, ubi quinque testes ciues Romani in praesenti erunt, et pro illo, qui libripens appellatur, id est stateram tenens, et qui antetestatus appellatur, alii duo, ut septem testium numerus impleatur. Tamen quum tertio mancipatus fuerit filius a patri naturali fiduciario patri, hoc agere debet naturalis pater, ut ei a fiduciario patre remancipetur et a naturali patre manumittatur, ut, si filius ille mortuus fuerit, ei in hereditate naturalis pater, non fiduciarius succedat.

Similarly children become *sui iuris* through emancipation, but a son leaves paternal power after three emancipations and he becomes *sui iuris*. Hence, *mancipatio*, that is delivery with a hand, is somewhat similar to a sale; since in emancipations a certain father summons another father who is called the fiduciary father. Then the same natural father delivers his son to the fiduciary father through *mancipatio*; that is, he delivers him with a hand. The natural father accepts a coin or two from the fiduciary father, as if in the likeness of a price, and again having accepted the coins he delivers him to the fiduciary father. This happens for the second and the third time; thus he leaves the parental power, when he (the natural father) delivers him to the fiduciary father through *mancipatio* for the third time. 4. It was customary to perform emancipation before a *praeses*; recently it is to be done at the *curia* in the presence of five witnesses, Roman citizens, before the one called the *libripens*, that is the one holding the scale, and another one called the *antetestatus*. These two are to fill the number of seven witnesses. But, when the natural father delivers his son to the fiduciary father through *mancipatio* for the third time, the natural father should do so that he (the son) is remancipated to him (the natural father) by the fiduciary father and is released by the natural father, not the fiduciary father, who shall inherit his property, if the son dies.

Even a very brief examination of the passage justifies the conclusion that the author had only a blurry idea of what *mancipatio* could have

looked like. First, the author of the text preserved in the *Epitome* mentions the *antetestatus*, who never appeared in the Gaian text, but we know that the *antetestatus* was one of five witnesses present during the *mancipatio*, whose name was listed as the first one in the mancipatory clause. In the discussed passage the *antetestatus* is described as an additional person taking part in the *mancipatio*, but not as a witness. Since the author did not know that the seventh person taking part in the *mancipatio* was a fictitious acquirer he replaced him by the *antetestatus* in order to complete the number known to him thanks to the Gaian text.

Second, the author explaining the emancipation of a son says *et tertio eum fiduciario patri mancipat et tradit*, which, in my opinion, may prove that the one who wrote the *Epitome Gai* did not see the difference between the *mancipatio* and *traditio.* He probably did not know what *mancipatio* was so he assimilated this act with the simple delivery. Third, the author of the *Epitome* says that the price that should be paid by a fiduciary father to a natural father is *unum aut duos nummos*, while the symbolic price was one coin.[35] The most obvious explanation for this is that the author did not know much about the *mancipatio* and tried to explain the Gaian passage in the best way he could. There is no doubt that the discussed text is very late, but we still do not have any proof of the *mancipatio* performed as a part of the emancipation in the earlier period. Thus it could be considered as an argument for the much earlier disappearance of *mancipatio* from the legal practice. On the other hand, we cannot exclude that *mancipatio* survived until late period, but in a changed form, for instance as a solemn declaration.[36]

There are not many examples of *mancipatio* in the imperial constitutions. In the Theodosian Code we find only three examples of laws mentioning it (*C. Th.* 8.12.4–5; *C. Th.* 8.12.7). All of them concern donations and were issued during the reign of Constantine the Great and his successors. Ernest Levy did not devote a lot of attention to them, but he

[35] Cf. C. S. Tomulescu, 'Le funzioni del nummus unus nella mancipatio', *RIDA* 23 (1976), pp. 223–237.

[36] P. Voci, 'Tradizione, donazione, vendita da Constantino a Giustiniano', *Iura* 37 (1987), pp. 72–148, at 98–99.

stated that they prove the absence of the *mancipatio* in the early fourth century.[37] Wulf Eckart Voss was of a contrary opinion. He claimed not only that the *mancipatio* was well known, but also that it was performed during the reign of Constantine.[38] The text of the first constitution runs as follows.

> *C. Th.* 8.12.4 (AD 319): Idem A(ugustus) ad Bassum p(raefectum) u(rbi). Iuxta Divi Pii consultissimi principis instituta valere donationes placet inter liberos et parentes in quocumque solo et cuiuslibet rei liberalitas probabitur extitisse, licet neque mancipatio dicatur neque traditio subsecuta, sed nuda tantum voluntas claruerit, quae non dubium consilium teneat nec incertum, sed iudicium animi tale proferat, ut nulla quaestio voluntatis possit irrepere et collata inter ceteras exceptas Cinciae legi personas obtinere propriam firmitatem, sive mancipationis decursa fuerit sollemnitas vel certe res tradita doceatur.
>
> The same Augustus to Bassus, Prefect of the City. In accordance with the statutes of the sainted Pius, an Emperor most learned in the law, it is Our pleasure that gifts shall be valid between children and parents on whatever soil and of whatever thing the gift is proved to have been made, even though the formal words of mancipation may not have been spoken and delivery may not have been followed, and only the bare intention was declared which contained a plan that was not doubtful and indefinite but expressed such a judgement of the mind that no question of intention could creep in. If any gift is bestowed between persons exempt from the requirements of the Cincian Law, it shall obtain its proper validity, whether the formality of mancipation has been executed or at any rate the property is proved to have been delivered (tr. C. Pharr).[39]

[37] E. Levy, *West Roman Vulgar Law: The Law of Property* [= *Memoirs of the American Philosophical Society* 29], Philadelphia 1951, p. 141, n. 108: 'Such nominal reminiscences indicate the complete disuse rather than survival of the true *mancipatio*'. The author, however, did not prove his statement sufficiently.

[38] W. E. Voss, *Recht und Rhetorik in den Kaisergesetzen der Spätantike. Eine Untersuchung zum nachklassischen Kauf- und Übereignungsrecht* [= *Forschungen zur byzantinischen Rechtsgeschichte* 9], Frankfurt 1982, p. 175.

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

The text informs us that donations between parents and children were valid, even if either *traditio* or *mancipatio* were not performed, as long as the will of the donor was clear. Contrary to Levy, I am of the opinion that the author of the quoted text knew that *traditio* and *mancipatio* were two very different acts, *obtinere propriam firmitatem, sive mancipationis decursa fuerit sollemnitas vel certe res tradita doceatur* – 'it shall obtain its proper validity, whether the formality of mancipation has been executed or at any rate the property is proved to have been delivered'. We can infer that the author knew at least that the act of the *mancipatio* required some formalities and that *traditio* was the simple giving of a thing. There is also no doubt that the author of the passage was well educated in classical law.

The next text mentioning *mancipatio* was issued a few years later by the same emperor. It was probably issued together with the older, already quoted constitution, since the former law supplemented the latter one.

> *C. Th.* 8.12.5.1 (AD 333): Idem A(ugustus) ad Severum com(item) Hispaniarum. Cum igitur ne liberos quidem ac parentes lex nostra ab actorum confectione secernat, id, quod necessario super donationibus apud acta conficiendis iam pridem statuimus, universos teneat, salvo tamen iuris privilegio, quod liberis et parentibus suffragatur, scilicet ne traditionis vel mancipationis sollemnitas sit necessaria.
>
> The same Augustus to Severus, Count of Spain. Since, therefore, Our law does not exempt even children and parents from the execution of records, all persons shall be held by Our statutes formerly issued with reference to the necessity for registration of gifts in the public records. However, We preserve the priviledge of the law whereby children and parents are assisted, namely, that for them the formality of delivery and mancipation is unnecessary (tr. C. Pharr).

The third constitution was issued by the Emperors Constantius and Constans over twenty years later.

> *C. Th.* 8.12.7 (AD 355): Iidem A(ugusti) ad Orfitum p(raefectum) u(rbi). Cum genitoris mei scitis evidenter expressum sit nullam donationem inter

> extraneos firmam esse, si ei traditionis videatur deesse sollemnitas et idem huiusmodi necessitatem liberis tantum ac parentibus relaxarit, in omnibus deinceps observari negotiis oportebit, ut donatio inter extraneos minus firma iudicetur, si iure mancipatio et traditio non fuerit impleta.
>
> The same Augustuses (Constantius and Constans) to Orfitus, Prefect of the City. Since by the decrees of My father it has been clearly stated that no gift between extraneous persons shall be valid if it should appear that the formality of delivery is lacking, and since Our father also relieved only children and parents from the necessity of such formality, hereafter such rule must be observed in all such undertakings, so that a gift between extraneous persons shall be adjudged invalid if mancipation and delivery have not been legally executed (tr. C. Pharr).

Both above-quoted constitutions prove that neither *mancipatio* nor the difference between it and *traditio* were fully understood by the authors of these texts. We can infer this from the phrases *traditionis vel mancipationis sollemnitas*, 'the formalities of the *mancipatio* and *traditio*', and *traditionis sollemnitas*, 'the formalities of the *traditio*'. Moreover, it is hardly plausible that they were aware of the fact that *mancipatio* and *traditio* were applied in order to transfer the ownership of two different types of things, *res mancipii et nec mancipii*, as Pasquale Voci rightly observed.[40] Thus the laws cannot be considered proof of the presence of the *mancipatio* in the fourth century. In my opinion the quoted constitutions can be interpreted as follows. The text does not indicate that there was any difference between performing *mancipatio* and *traditio*. The only reasonable explanation is that the *sollemnitas* signifies the clearness of the transfer; thus *mancipatio* may mean a kind of solemn declaration.[41] On the other hand, by inserting the term into a legal text its author could have wanted to increase its authority, as is the case of documents of sales and donations from Ravenna. Coming back to the first constitution (*C. Th.* 8.12.4) there is no doubt that it was composed by a person well-educated in law, but it cannot be proof of the existence of the act either in imperial legal practice or legal

[40] Voci, 'Tradizione, donazione, vendita' (cit. n. 36), p. 98.

[41] *Ibidem*, pp. 98–99.

education, since two constitutions, one of which was issued during the reign of the same emperor, lead to the contrary opinion.

There are a few examples of deeds of sale and donation composed in Ravenna that mention *mancipatio* and *traditio* as ways of transferring ownership,[42] for instance *P. Ital.* I 20 (*ca.* AD 600, Ravenna): *et in ius domini*[*umque s(an)ctae eccl(esiae) Rav(ennatis) im perpetuo*] *transcribo, cedo, trado et mancipo, id est ex fundum, cui vocabulum est Balonianum* – 'I transfer, concede, and deliver by both *traditio* and *mancipatio* what belongs to the soil named *Balonianus* to the holy Church in Ravenna in the right of ownership'. There is no doubt that the applied verbs do not express different methods of transferring the ownership, since they all regard one object, the land located close to Ravenna. Thus the phrase is of formulaic character and cannot be interpreted as proof of the application of *mancipatio* during the actual act of the donation of the land *Balonianus*.

The document of sale edited as *P. Ital.* II 30 (AD 539, Ravenna) is extraordinary, for it mentions that the legal act was performed in the presence of *libripens*, *antetestatus*, and witnesses. However, there is *iuris traditionisque causa* mentioned further, which is a clear proof that the document does not differ much from the other texts from sixth-century Ravenna, which list *mancipatio* as the way of transferring donated or sold property. Thus the discussed documents cannot be claimed as evidence of the existence of *mancipatio* in legal practice. According to Levy the presence of various already unused legal terms was the effect of the uncertainty of legal protection in general and the decreasing level of legal knowledge among the notaries in Ravenna.[43] Two arguments supporting such explanation may be added. First, the lists naming the ways of transferring the ownership are of formulaic character. Second, the discussed Ravenna documents were composed after the issuing of Justinian's compilation that replaced *mancipatio* by *traditio*. The discussed Ravenna documents are somewhat similar to at least two out of three above-discussed consti-

[42] *P. Ital.* I 13 = *Ch. L. A.* XXV 791 = *Ch. L. A.* XXIX 880 (AD 553, Ravenna); *P. Ital.* I 20 = *Ch. L. A.* XXI 717 (*ca.* AD 600, Ravenna); *P. Ital.* I 21 = *Ch. L. A.* XXII 720 (AD 625, Ravenna); *P. Ital.* II 30 = *Ch. L. A.* XX 706 (AD 539, Ravenna); *P. Ital.* II 35 = *Ch. L. A.* III 181 (AD 572, Ravenna); *P. Ital.* II 38–41 = *Ch. L. A.* III 198 + XXII 719 (AD 616–619, Ravenna).

[43] LEVY, *West Roman Vulgar Law* (cit. n. 37), p. 125.

tutions (*C. Th.* 8.12.5; 7), for they list ways of transferring ownership deprived of their original meaning.

The above arguments prove that *mancipatio* was absent from legal deeds long before the time of Constantine the Great. First, its application in acts other than the transferring of the ownership is unsatisfactorily attested (except for one emancipation of a daughter from Egypt and mancipatory clauses present in Egyptian wills), which is a strong argument supporting a statement that *mancipatio* as a part of acts such as adoption, emancipation, etc., disappeared very early.[44] Second, in western documents *mancipatio* is attested only as a way of transferring the ownership, while in eastern evidence we do not find even one such attestation. Third, some mancipatory clauses in the western documents are very likely to be a proof of the formulary practice, but not the actual performance of the act of *mancipatio* itself. Summing up, all these observations can prove that *mancipatio* as such (no matter if used as a means of transferring ownership or as an element of acts such as emancipation, adoption, etc.) was abolished by *desuetudo* before the fourth century.[45] Of course, we cannot forget that there are virtually no documents preserved from Italy itself; thus the conclusions regarding *mancipatio* can be representative mostly for the territories rich in the documentary evidence.

The above conclusions can strengthen the supposition expressed at the beginning of this article that the abolition of *testamentum per aes et libram* was much earlier than scholars argued. The arguments support the statement that the frequency of the mancipatory clauses in wills was the effect of formulary practice but not the real performance of the act. Moreover, after the *constitutio Antoniniana* and Alexander Severus' constitution on the language of the wills[46] the testamentary and formulary practice underwent

[44] Elisabeth Meyer claims that *mancipatio* continued to be performed in acts such as wills, adoptions, emancipations, *coëmptio*, *nexum* and noxal surrender of an erring child or slave until the time of Justinian or as long as these acts themselves continued to be used (Meyer, *Legitimacy and Law* [cit. n. 6], p. 114).

[45] Cf. Levy, *West Roman Vulgar Law* (cit. n. 37), p. 128, and W. Kunkel, 'Mancipatio', *RE* XIV, coll. 998–1009.

[46] See Joëlle Beaucamp, 'Tester en grec à Byzance', [in:] eadem, *Femmes, patrimoines, normes à Byzance* [= *Bilans de recherche* 6], Paris 2010, pp. 173–182; B. Rochette, 'La langue

significant changes. The unity of the Roman testamentary pattern disappeared. One of these changes was the disappearance of the mancipatory clauses. The fact that the clause disappeared so easily and right after the moment when the Roman testamentary pattern started collapsing can also indicate that its presence was a result of the formulary practice.

Discussing the moment of the disappearance of *mancipatio* from the testamentary form we cannot forget one more very important factor of this process, the praetorian protection imposed on correctly composed testamentary tablets. The praetorian edict granted *bonorum sine re*, and from the time of emperor Antoninus Pius *cum re*, to anyone instituted an heir on valid tablets, if the will was not effective for the lack of at least one of the formalities required to make a valid Roman will (G. 2.120). The significance of this law was huge, since it meant that the will composed according to civilian rules concerning testamentary form was equal to the will composed in writing.[47]

To conclude, in my opinion the constitution of Constantine the Great quoted at the beginning of this article did not abolish *mancipatio* because it had already been abolished through *desuetudo*. However, the emperor abolished the solemnity of the internal form of the wills; he also unified the form, but he did not abolish *mancipatio*, which belonged to *ius civile* generally very rarely eliminated via imperial constitutions.

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des testaments dans l'Égypte du III^e s. ap. J.-C.', *RIDA* 47 (2000), pp. 449–461; Maria Nowak, 'TITIVS HERES ESTO. The role of the legal practice in the law-creation in late Antiquity', *JJurP* 40 (2010), pp. 161–184, at 162–168.

[47] Sturm, 'Das Absterben der *mancipatio*' (cit. n. 11), pp. 352–353.