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Application, adaptation and rejection: the strategies of Roman jurists in responsa concerning Greek documents

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I INTRODUCTION

A large portion of the bilingual replies by the jurists concern the interpretation of Greek wording in documents, testaments and codicils in particular. From the works of three Roman jurists, Scaevola, Paul and Modestin¹, bilingual texts on the law of inheritance are known.

In the following two chapters, fourteen bilingual replies with regard to the law of inheritance will be examined. In this chapter an introduction to the law of inheritance will be given using Scaevola's *responsum* in Dig. 32.39.1 (Scaev. 20 *Dig.*) as an example, to be followed by an analysis of the *responsa* on testamentary documents not containing references to slaves and *liberti*. Six of the replies mentioned do concern slaves and *liberti* and these will be analysed in the next chapter². Roman law strictly governed the (socio-)legal relations between masters, slaves and freedmen and as such no interference from a Hellenistic legal culture is to be expected in replies concerning this subject. This is the rationale behind the distinction between *responsa* concerning slaves and *liberti* and those without slaves and *liberti*.

The *responsa* (and one *sententia*) will be examined in the chronological order of the corresponding jurists. First three *responsa* by Scaevola will be analysed, namely Dig. 33.4.14 (Scaev. 15 *Dig.*), Dig. 32.37.6 (Scaev. 18 *Dig.*) and Dig. 26.7.47*pr* (Scaev. 2 *Resp.*)³. Subsequently, two fragments by Paul, viz. Dig. 36.1.76 (74) *pr* (Paul. 2 *Decr.*) and Dig. 28.1.29*pr* (Paul. 14 *Resp.*)⁴. Lastly, a reply by Modestin will be addressed which is found Dig. 31.34.1 (Mod. 12 *Resp.*)⁵.

1 These jurists have also been discussed in Häusler SZ 133 (2016).

2 Because Dig. 34.4.30.1 (Scaev. 20 *Dig.*) and Dig. 34.4.30.3 belong to the same fragment in Lenel's *Palingenesia* (fr. 84), they will be examined together in the following chapter, even though Dig. 34.4.30.3 does not contain references to freedmen or freedwomen.

3 Dig. 32.101*pr* (Scaev. 16 *Dig.*), Dig. 32.37.5 (Scaev. 18 *Dig.*), Dig. 31.88.15 (Scaev. 3. *Resp.*), and Dig. 40.5.41.4 (Scaev. 4 *Resp.*) also concern the law of inheritance. These *responsa* are examined on pp. 83*sqq.*, pp. 99*sqq.*, pp. 135*sqq.* and pp. 119*sqq.* respectively.

4 In the appendix to this chapter Dig. 8.3.37 (Paul. 3 *Resp.*) is examined. In this *responsum* the Greek text cited is not a testament or a codicil, but a deed of gift. The object of this gift is claimed by the heir of the receiver. Therefore, the *responsum* does have a connection to the law of inheritance.

5 The case of Dig. 31.34.7 (Mod. 10 *Resp.*) also concerns the law of inheritance. This *responsum* is examined on pp. 124*sqq.*

I.1 An introduction to the law of inheritance

Differences in the laws of inheritance between the Roman and Hellenistic legal culture could cause interpretation problems. The Roman law of inheritance on the one hand and Hellenistic laws of inheritance on the other were very distinct. Furthermore, in Attic law, which is largely continued in Hellenistic legal cultures, the principle of testamentary freedom itself is heavily debated. The transfer of the entire *oikos* to a son of the testator was favoured until, allegedly, the laws of Solon⁶ gave testamentary freedom to the Athenians. In Plato's dialogue *Leges* an Athenian speaks to Clinias (Plato II. 922e *Leges*) on the matter of testamentary freedom⁷.

Plato XI. 922e *Leges*

Ἀθηναῖος: μαλθακοὶ ἔμοιγ', ὦ Κλεινία, δοκοῦσιν οἱ πάλαι νομοθετοῦντες γεγονέναι καὶ ἐπὶ σμικρὸν τῶν ἀνθρωπίνων πραγμάτων βλέποντές τε καὶ διανοοῦμενοι νομοθετεῖν. Κλεινίας: πῶς λέγεις; Ἀθηναῖος: τὸν λόγον τοῦτον, ὡγαθέ, φοβούμενοι, τὸν νόμον ἐτίθεσαν τὸν ἐξεῖνα τὰ ἑαυτοῦ διατίθεσθαι ἀπλῶς ὅπως ἂν τις ἐθέλη τὸ παράπαν.

Athenian Citizen: The lawmakers of old appear to be faint-hearted to me, dear Clinias, and they have ordained laws having looked only at the insignificant things of human affairs and having only those in mind. Clinias: What do you mean? Athenian: Fearing this word, honourable friend, they ordained the law, which makes it possible to bequeath one's property frankly, altogether in whatever way one would like to.

In an Attic chain of thought the *oikos* did not belong to the testator, because he got it from his father and his father before him and the testator had to pass it through to the new head of the *oikos*⁸. To have testamentary freedom to divide it or to bequeath it to a citizen outside of his *oikos*, did not befit such legal thought. According to the Athenian in Plato's *Laws*, it is only through weakness and narrow-mindedness that the lawmakers governed it by law. This *oikos* mind-set could explain the urge to preserve property within the family⁹

6 Lipsius 1915, 561. To support this claim Lipsius cites Demosthenes *Against Leptines* 102 and Plutarchus *Sol.* XXI.

7 In Hellenistic law the regulations in favor of the male descendants of the testator, which protected the classical Greek *oikos*, disappeared completely. See Modrzejewski in Gagarin 2005, 353. In fact, the Greek *oikos* as an institution, which shaped 'the order of family and property in private and public law, which mediated membership in the citizenry via the phratry and the deme' also disappeared in Hellenistic law. See Rupprecht in: Gagarin 2005, 330.

8 Biscardi 1982, 123.

9 In Attic law usually, the oldest son inherited the paternal property from his father. In Roman Egypt, however, it was more common for all the children, including the daughters, to receive a share of the inheritance. See Huebner 2013, 50.

as can be seen in the Greek text of Dig. 31.88.15 (Scaev. 3 *Resp.*), examined in the previous chapter. Contrary to Attic law, Doric law, as known from the Gortyn code, did not allow testamentary succession¹⁰, which is why intestate succession was regulated up until the third generation¹¹. Attic law also had provisions to regulate intestate succession. These provisions can be found in, among others, two orations, both concerning the allocation of Hagnias' estate, namely Demosthenes' *Against Macartatus* and Isaeus' *On the Estate of Apollodorus*¹².

Returning to testate succession, there were no formal requirements for drawing up a testament in classical Athens, albeit the presence of witnesses was common¹³. The bilingual *responsa* in this chapter and the following mostly deal with a quoted testament or a codicil in Greek. A considerable source on the Attic law of inheritance is the Athenian rhetorician Isaeus of Chalcis (IV BC)¹⁴. His speeches often reveal details on Attic law of inheritance, such as in the oration on the estate of Nicostratus: Ἀλλὰ μὴν καὶ ὁ νόμος, ὧ ἄνδρες, οὐκ ἐάν τις διαθήτῃται μόνον, κυρίας εἶναι κελεύει τὰς διαθήκας, ἀλλὰ ἐὰν εὖ φρονῶν¹⁵. A testament in Attic law could have had every possible form and could have been in a written or an oral form. The only condition Attic law required was that the testator was *compos mentis*.

Contrary to Attic law, the classical Roman law of inheritance had formal requirements for drawing up testaments. The Roman codicil, however, could be drawn up in a form-free manner and gained more and more force of law throughout Roman imperial times. Roman law both regulated intestate

10 Karabelias 1986, 29 & 37.

11 See Col. V. 9-13 of the Gortyn Code: εἴ κ' ἀποθάνει ἀνὴρ ἢ γυνὴ // ἂ, αἱ μὲν κ' εἴ τέκνα ἢ ἐς τέκνον τέκνα ἐς τούτων τέκνα // κνῶ, τούτος ἐκε[ν] τα κρεμα- // τα (when a man or a woman dies, if there are children or children of them or children of those children, the property will belong to them). See Karabelias 1986, 29-30. The concept of testamentary succession is absent.

12 In paragraph 51 of Demosthenes' *Against Macartatus* the law is cited "Ὅστις ἂν μὴ διαθέμενος ἀποθάνῃ" (when one dies without having drawn up a testament), i.e. in cases of intestate succession. The regulations were complex: If the deceased had no sons, the estate would go to the daughters. If the deceased had no daughters, the estate would go to brothers from the same father of the deceased. Male heirs and sons of male heirs took precedence. If there were no relatives on father's side in the degree of 'children of cousins', then relatives of mother's side to the degree of 'children of cousins' could inherit the estate. If these were absent, then the nearest of kin on the father's side, with exception of illegitimate children, would inherit. See Harris 2013, 196-198 and Miles *Mnemosyne* 75 (1950), 69-77. For *nomoi* cited on intestate succession, see also Isaeus *On the Estate of Apollodorus* VII. 20-22.

13 Biscardi 1982, 127; Lipsius 1915, 568.

14 His eleven remaining orations all deal with the Attic law of inheritance to some extent. Demosthenes' orations on behalf of Macartatus, Leochares and Olympiodorus also deal with the Attic law of inheritance. See Lipsius 1915, 538.

15 Isaeus *Nic.* XIV: But, honorable men, the law dictates that testaments are valid not only when a testament has been drawn up, but that he [who has drawn up the testament] is sound of mind.

succession¹⁶ and succession via a testament. The ability to draw up a testament (in this case *per aes et libram*)¹⁷ is already attested in archaic Roman law in the Law of the Twelve Tables¹⁸. In such a testament all of the testator's goods were transferred to a *familiae emptor* (the buyer of the estate) by means of a *mancipatio*. This *mancipatio*, in which a 'symbolic sale' was achieved, made the testament operative. During the ritualistic *mancipatio*, the *familiae emptor* promised to do everything written in the testament. The testator then publicly declared his will which is called a *nuncupatio* (a public pronouncement)¹⁹.

In his testament, the testator appointed an heir or several coheirs (*heredis institutio*) and often added a clause that all others were not heirs. In principle the heirs were instituted for (a share of) the whole inheritance and not of individually attributed parts and an *institutio ex certa re* (appointment to certain property of the estate) was prohibited²⁰, as this would go against the Roman idea of "universal succession", in which heirs inherit all the rights and duties of the deceased²¹. Sometimes, a guardian was instituted for minors and women who needed one (*tutela testamentaria*). Testamentary provisions were added via *legacies* and *fideicommissa*. The latter were not enforceable via Roman *ius civile*. In Augustean times, however, the *fideicommissa* were made enforceable via *ius praetorium*²².

Another formal requirement of the testament in classical Roman law was that Latin was the only language allowed in drawing up a testament²³. Because of this reason Latin testaments can be found in Roman Egypt. According to Kaser, it is possible that during the reign of Alexander Severus (222-235 AD)

16 Intestate succession is attested in the Law of the Twelve Tables. See Babusiaux 2015, 47.

17 In his *Institutiones*, Gaius mentioned two other ways to construct a testament, namely before a special assembly named the *comitia calata* and *in procinctu*. The latter was reserved for military personnel 'girded up for battle'. It is seen as the origin of the special rules and regulation regarding testaments of soldiers which will be elaborated below on pp. 164-165.

18 Kaser 1971, 94.

19 See Gaius, *Inst.* II 104.

20 Babusiaux 2015, 160.

21 The idea of universal succession is a Roman view on the law of inheritance and was as such not known in Hellenistic legal cultures. See Nowak 2015, 144, who also quotes Kreller 1919, 346-347. A testament, for example, in which the concept of universal succession was ignored completely, can be found in P. Oxy. XXVII 2474 (Oxyrhynchus, III AD). This testament is examined below on pp. 168sq. See also Nowak 2015, 162.

22 See Just. *Inst.* II 25pr.

23 In the testament of the veteran Gaius Longinus Castor this becomes evident by the (professional) translation of the text in BGU I 326, 22-23: Γαίος Λούκκιος Γεμινι[ανὸς] νομικὸς Ῥωμαϊκὸς ἡρμῆνευσα τὸ προκείμενον ἀντίγραφον καὶ ἔστιν σύμφω- // νον τῇ αὐθεντικῇ διαθήκῃ (Gaius Lucius Geminianus, a Roman law specialist, has translated the preceded copy and it is in keeping with the original testament).

the prohibition to testate in Greek was lifted, but this might only be the case for Roman Egypt²⁴.

The *Gnomon Idiologi*, however, mentions a prohibition for (non-military) Roman citizens to testate in Greek. This is also the case if in a Roman testament a testator specifically validated (*κυρία*-clause) provisions drawn up in testamentary tables in Greek, as can be seen in § 8 of the *Gnomon Idiologi* (see below). As a collection of regulations based on case law by the *Idiologus*, the *Gnomon Idiologi* contains a large number of rules regarding the law of inheritance in general and the validity of testaments in particular.

The special exception to draw up testaments in Greek granted by Emperor Hadrian to Popillius Theotimus, the head of the Epicurean school in Athens, emphasizes that in normal circumstances testaments were drawn up in Latin²⁵. As can be seen in the works from Scaevola from the second century AD, however, testaments were drawn up in Greek and the validity of these documents was not questioned²⁶. This privilege is also granted to military personal in Roman Egypt as becomes apparent from § 34²⁷ (ll. 96-98)²⁸ of the *Gnomon Idiologi*.

§ 34 (ll. 96-98) of the *Gnomon Idiologi*

Τοῖς ἐν στρατείᾳ καὶ ἀπὸ στρατείας οὔσι συνκεχώρηται διατίθεσθα[ι]
καὶ κατὰ Ῥωμαϊκὰς καὶ Ἑλληνικὰς διαθήκας καὶ χρῆσθαι οἷς βού-
λωνται ὀνόμασι, ἕκαστον δὲ τῷ ὁμοφύλῳ καταλείπειν καὶ οἷς ἕξ[ε]σ[σι]ν.

- 24 Kaser 1971, 686. See P. Oxy. VI 907 (Oxyrhynchus, 276 AD) = FIRA III 51 for an original will in Greek (the so-called will of Hermogenes). This topic will be discussed further below. An explicit reference to the constitution of Alexander Severus is attested in Stud. Pal. XX 35, 12-14 (Heracleopolite nome, 235 AD): *τὴν διαθήκην ἐποίησα γράμμασιν*] (BL II.2 159 / BL V 143) // *Ἑλληνικοῖς ἀκο[λού]θως τῇ θείᾳ κ[ε]λε[ύ]σ[ει]* (BL V 143) *τοῦ κυρίου ἡμῶν Ἀυτοκράτορος Μάρκου Ἀυρηλίου* // *Σεουήρου Ἀλεξάνδρου Εὐσεβοῦς Εὐ[τυ]χ[οῦς] Σεβαστοῦ* (I have drawn up this testament in Greek words according to the divine constitution of our Lord, Emperor Marcus Aurelius Severus Alexander Pius Felix Augustus). On this constitution, see Meyer, 2004, 60, Keenan/Manning/Yiftach-Firanko 2014, 124 (n. 44) and Nowak 2015, 111-112. Another reference to this constitution can be found in the testament of P. Oxy. VI 990 (Oxyrhynchus 331 AD) and possibly in P. Lips. I 29 (Hermopolis Magna, 295 AD). Nowak (cited earlier) also mentions N. Th. 16.8 (439 AD): *quoniam Graece iam testari concessum est* (because drawing up a testament in Greek is already allowed). The precise content of this constitution by Severus Alexander remains unknown.
- 25 This is preserved in CIL III 12283 (Athens, 121 AD) = FIRA I 79. After the man in question (or his legal counsel) had asked emperor Hadrianus permission to draw up a testament in Greek, the legal office of the emperor responded as follows: *[I]mp(erator) Caesar Traianus Hadrianus Aug(ustus) Popillio Theotimo permitto Graece testari de eis quae pertinent ad diado/chen sectae Epicureae* (Emperor Caesar Trajanus Hadrianus Augustus to Popillius Theotimus having been granted the permission to draw up a testament in Greek concerning these things pertaining to the successor of the Epicurean School).
- 26 See, for example, Dig. 34.4.30.3 (Scaev. 20 Dig.).
- 27 For a detailed analysis of this paragraph of the *Gnomon Idiologi* (and literature), see Nowak 2014, 14-15.
- 28 See for this text also the *New Papyrological Primer*, text 41. See BL Konkordanz II, 16.

It is granted to those in the army and those discharged from military service²⁹ to draw up a Roman testament or a Greek one and to use the words they want and that each bequeaths to one of the same status³⁰ and to those allowed (to receive an inheritance).

Greek as a testamentary language was not only used in a purely military context, but also in a civilian context³¹. Roman *testamenta* could be drawn up in Greek, for example, the second century AD text of Dig. 40.4.60 (Scaev. 24 Dig.). In the Latin of the (prejudicial question) to the jurist, the writer referred to the Greek text cited with the words *his verbis testamenti* (with these words of the testament) and the validity of the testament in Greek was not questioned. Another example is Dig. 34.4.30.3 (Scaev. 20 Dig.), in which Greek sentences were added to a testament, which made it likely that also the rest of the testament was written in Greek. The validity of the testament in Dig. 34.4.30.3 was not questioned. Furthermore, in Dig. 31.34.1 (Mod. 12 *Resp.*), from the third century AD a Greek fragment from a testament is cited. That the Greek comes from the testator's last will follows from the Latin '*in testamento suo ita cavit*' (In his own testament he declared the following in writing). The *responsum* continues in Greek and also in this fragment the validity of the testament remained unquestioned. The examples mentioned will be analysed in the following chapter. Papyrological sources on Roman testaments are attested in both Greek and Latin from Roman Egypt as well as Roman Syria.

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- 29 Babusiaux views this translation of ἀπό στρατείας as problematic. See Babusiaux SZ 135 (2018), 163-165. Documents preceding BGU V 1210 and from the same century, however, indicate that a translation as discharged from military service must be correct as is the case in P. Mich. IX 554, 5-6 (Karanis, 81-96 AD): Γαίου Σεμπρω[νίου] Πρείσκου ἀπ[ολυσι]μου ἀπό στρατειᾶς (BL XII 123) ἐκ λεγιῶνος ὡς ἐτῶν [π]εντή- // [κοντα] (of Gaius Sempronius Priscus, who is discharged from military service with the legion, about fifty-x years of age). At the time in which the document was drawn up, Gaius Sempronius Priscus was in his fifties, which is an indication that he served a full term in a Roman legion, after which he was discharged. Ἀπό στρατειᾶς is found with the same meaning in P. Mich. IX 551 (Karanis, 103 AD), BGU II 581 (Arsinoite nome, 133 AD) and P. Oslo. III 139 (Arsinoite nome, 175-200 AD).
- 30 The translation of τῶ ὁμοφύλῳ is extremely difficult. Alston argues that *homophylic* persons both included those of the same status as the soldier at time of his subscription in the army and those of the status the soldier had after being released from the army. See Alston 1995, 57.
- 31 See for example the testament of Aurelius Hermogenes, also known as Eudaemon from the third century AD. Hermogenes was an important government official in the city of Oxyrhynchus. His testament was drawn up in P. Oxy. VI 907 (Oxyrhynchus, 276 AD) as follows: (ll. 1-2): [Ἀδρῆ]λιος Ἐρμογένης ὁ καὶ Ε[ὐ]δαίμων ἐξηγητῆς βουλευτῆς [καὶ π]ρ[ύτανις τῆς λαμπ]ρᾶς (BL I 329) καὶ λαμπροτά[της Ὀξυρυγχιτῶν πόλεως τότε τὸ βούλημα] // Ἑλληνικοῖς γράμμασι κατὰ τὰ συνκεχωρημένα ὑπηγόρευσεν (Aurelius Hermogenes also known as Eudaemon, *exegetes*, member of the city council and *prytanis* of the illustrious and most illustrious city Oxyrhynchus has dictated his testament in the Greek language in accordance with the regulations). See Nowak 2015, 111-112.

The Hellenistic law of inheritance as known from the *Gnomon Idiologi* and legal practice found in papyri³² is not as strict as the classical Roman law of inheritance when it came to testaments, yet not completely without formal requirements such as Attic law. In paragraph seven of the *Gnomon* is written that for testaments to be valid, they needed to be registered at the public record office: Δ[ι]αθήκαι, ὅσαι μὴ κατὰ δημοσίους χρηματισμοὺς γείνων- // ται, ἄκυροί εἰσι³³. Furthermore, in the following paragraph (§8) of the *Gnomon* is written with regard to the language of the testament: Ἐὰν Ῥωμαικῇ δια[[κ]]θήκη προσκαίηται (read: προσκέηται) ὅτι “ὅσα δὲ ἐὰν διατά- // [ξ]ω κατὰ πινα[[κ]]ίδας Ἑλληνικὰς κύρια ἔστω” οὐ παραδεκτέα // [ἐ]στίν, οὐ γὰρ ἔ[ξ]εστιν Ῥωμαίῳ διαθήκην Ἑλληνικὴν γράψαι³⁴. Therefore, in the *Gnomon Idiologi* a difference is acknowledged between two systems of the law of inheritance, one being Greek and the other Roman. In the *Gnomon Idiologi* the Greek language is only admitted if you are of non-Roman ethnicity.

I.2 An example from the Digest of Greek in the Roman testamentary practice

A case in which legal questions arose, presumably, because of the language and the process of drawing up the testator's last will, is a *responsum* by Scaevola in Dig. 32.39.1 (Scaev. 20 Dig.)³⁵, which could be considered a bilingual reply. In this reply the Greek context or at any case a Greek-speaking context must be inferred, because of the use of one Greek word (μάλιστα):

Dig. 32.39.1

Propositum est non habentem liberos nec cognatos in discrimine vitae constitutum per infirmitatem arcessitis amicis Gaio Seio contubernali dixisse, quod vellet ei relinquere praedia quae nominasset, eaque dicta in testationem Gaium Seium redegisse etiam ipso testatore interrogato, an ea dixisset, et responso eius tali μάλιστα inserto: quaesitum est, an praedia, quae destinata³⁶ essent, ex causa fideicommissi ad Gaium Seium pertinerent. Respondit super hoc nec dubitandum esse, quin fideicommissum valet.

32 An overview of testaments written on papyri from the Ptolemaic, Roman and Byzantine periods can be found in Salomons *ZPE* 156 (2006), 232-236. The 'patterns' non-Roman citizens in Roman Egypt used to draw up their testaments (prior to the *Constitutio Antoniniana*) are described by Yiftach-Firanko in: *Deeds of Last Will in Graeco-Roman Egypt: A Case Study in Regionalism* in Yiftach-Firanko *BASP* 39 (2002), 149-164.

33 BGU V 1210, 33-34: Testaments are invalid, when they are not drawn up as publicly registered contracts. See Babusiaux *SZ* 135 (2018), 134sq.

34 BGU V 1210, 35-37: When in a Roman testament the provision is added, "the testamentary provisions I have made on Greek tablets, shall be valid", these must not be admitted, because it is not allowed for a Roman to write a Greek testament (with BL II.2 27).

35 Kübler does not analyse this case, presumably because the case does not have 'griechische Tatbestände' as it contains only one Greek word.

36 In his *Editio Maior* Mommsen gives as a possible suggestion for an emanation to *designata*.

A case is proposed in which someone who did not have children or cognates, and who was in peril of death through sickness, having sent for his friends, had said to Gaius Seius his companion that he wanted to bequeath to him the landed estates, which he named, and that Gaius Seius composed an affidavit of what was said with him as a witness, even having questioned the testator himself, if he had said these things, and his response was attached as follows: “most definitely”. It is asked, whether the landed estates which were bequeathed, belonged to Gaius Seius based on a *fideicommissum*. He responded that regarding this matter there must not be any doubt that the *fideicommissum* is valid.

This *responsum* originating from book twenty of Scaevola’s *Digesta* has been included by the compilers under the title *de Legatis et Fideicommissis*. In the other *responsa* of Dig. 32.39, no Hellenistic elements are attested. Lenel’s reconstruction of the twentieth book of Scaevola’s Digest on *Legata* and *fideicommissa* encompasses, other than this fragment (fr. 82), six other fragments on succession (fr. 80-86), five of which show no indication of a Hellenistic context. In fragment 84, however, two Greek documents are cited, which will be discussed in the following chapter.

The case in the *responsum* cited above is as follows: a man on his deathbed had summoned his friends to be present, while he bequeathed his property. Gaius Seius, to whom the testator bequeathed lands, wrote the provisions regarding the testator’s last will down in a document and at the end he asked the testator to confirm what he had written. The testator then replied ‘most definitely’ in Greek. Some time later the testator died without leaving a proper testament. Presumably, the testator is quoted verbatim (*‘et responso eius tali’*) in this fragment, which is why the word is in Greek. It is, therefore, more than reasonable to assume that the rest of his words were also in Greek³⁷. In the text of this fragment the man who is ‘in danger of dying’ is mentioned as the testator. This, however, does not indicate that the document on which the legal question was based, was a *testamentum*. The fragment mentions Gaius Seius as the writer of a *‘testatio’*, which had a different legal status than an official Roman *testamentum*. A *testatio*, known from both Roman and Roman-Egyptian sources, is a document to prove that certain facts took place and as such only has an evidentiary function, contrary to Roman testaments, which had a dispositive effect. A *testatio* was mostly written in an objective style³⁸ which is also to be expected in the cited *responsum*, where the testator dictated and confirmed to Gaius Seius in the presence of witnesses.

37 It is unlikely, although not impossible, that the testator by means of codeswitching only used this word in Greek and dictated the other provisions in Latin. Codeswitching, for example, occurs in the Digest, when jurists write about medical terms. Often the names of diseases are mentioned in Greek in otherwise Latin texts. See the article *Quod Graeci ... vocant – Emblematischer Codewechsel in den Juristenschriften* by Babusiaux in Coriat, J./E. Metzger e.a. (eds.), (2014), *Inter cives necnon peregrinos Essays in honour of Boudewijn Sirks*, 35-59, Göttingen.

38 See Kaser RE s.v. *testimonium*, 1030.

The original *testatio*, however, is not cited and therefore it cannot be stated with certainty whether the *testatio* had an objective style. Furthermore, the addition of witnesses to this affidavit was mandatory for it to have legal effect and in Roman Egypt the document also had to be registered by a state notary from the second century AD onwards (*ἀναγραφική*). A problem with the *testatio* from Dig. 32.39.1 could also have been, that the affidavit was not registered properly and was therefore ineffective from a Roman-Egyptian point of view. As seen in his reply, Scaevola did not consider such a matter.

In this *responsum*, the validity of a *fideicommissum* is questioned, presumably either because the document regarding the bequeathed property had not been created in the proper fashion by the testator, or because the testator spoke Greek, or because of the orality of the confirmation. The orality of the confirmatory *μάλιστα* or the use of a different language would not have posed a problem in Attic law, because the only requirement for bequests was that the testator had to be *compos mentis*, as stated above. Official Roman testaments to which category the *testatio* in Dig. 32.39.1 did not belong written by a third party (*extraneus*), however, must be confirmed by the testator in a specific way (*quod illi dictavi et recognovi*) as can be seen in Dig. 48.10.1.8 (Marcian. 4 *Inst.*) on the *lex Cornelia de Falsis*³⁹. The confirmatory *μάλιστα* from Dig. 32.39.1 must be seen not as a specific subscription, but as a general subscription. Apparently, such rules were not applicable when dealing with a *testatio* as Scaevola replied that the *fideicommissum* from the document was valid.

As is the case in Attic law and Hellenistic law, the presence of witnesses was also common in classical Roman law. In this case his *contubernalis* Gaius Seiuis was both the witness, together with other *amici* whom the testator had gathered, and the scribe of the written *testatio*. Therefore, it is unlikely that the absence of witnesses was the reason for this dispute. An explanation as to why the document was challenged, is that the heir of the testator found the *testatio*

39 Dig. 48.10.1.8: *Inter filium et servum et extraneum testamentum scribentes hoc interest, quod in extraneo, si specialiter subscriptio facta est "Quod illi dictavi et recognovi", poena cessat et capi potest, in filio vel servo vel generalis subscriptio sufficit et ad poenam evitandam et ad capiendum* (This difference exists between a son and a slave writing a testament [for someone] and a third party, that in case of a third party if the following subscription is specifically made 'What I have dictated, I also acknowledge', the penalty is not applicable and [the provisions] can be taken, in case of a son and a slave a general subscription suffices in order to avoid the penalty and to take [the provisions]). See for a papyrological example of a bilingual witness declaration PSI IX 1027, 6-11 & 16-20 (Crocodylopolis, 151 AD). In this document a woman (by means of her mother) who was the sole heir of her father called those who were going to sign the document to witness her accepting the inheritance.

to be suspect because it was conveniently advantageous to the beneficiary Gaius Seius himself⁴⁰.

Scaevola ruled that the *fideicommissum* from the document must not be questioned. Even if the testator had passed away *intestatus*, *fideicommissa* made on a deathbed were considered to be valid according to Gaius (*Inst.* II 270) and later also Paul⁴¹:

Gaius, *Inst.* II 270

Item intestatus moriturus potest ab eo, ad quem bona eius pertinent, fideicommissum alicui relinquere; cum alioquin ab eo legari non possit.

In the same way, one who is about to die intestate, can charge the one, to whom his property will belong, with a *fideicommissum* for another, while on the contrary he cannot charge him with a legacy.

Even though there seems to be an entitled party, the testator in Dig. 32.39.1 lacked cognates and descendants. A military context could explain this lack of cognates in the vicinity and is possible via a reading of the Latin *contubernalis*⁴² which is by no means a precisely defined Roman military term and can

40 In Dig. 48.10.7 (Marcian. 4 *Inst.*) on a *Senatus Consultum Neronianum* (61 AD?) regarding the testaments of soldiers, however, is stated that no-one, while writing a testament for another is allowed to write *legata* or *fideicommissa* beneficial to himself. For *legata* see also Sueton. *Ner.* 17: *ac ne qui alieni testamenti scriptor legatum sibi ascriberet* (and that one who wrote down a testament for another, could not ascribe a *legatum* to himself). These provisions could be made valid by a special type of subscription. See Dig. 48.10.15.1 & 2 (Callist. 1 *Quaest.*) on regulations of emperor Claudius regarding the *lex Cornelia de Falsis*. See also Dig. 34.8.1 (Salv. Jul. 78 *Dig.*).

41 See Dig. 29.7.8.1 (Paul. *lib. sing. de Iur. Cod.*): *Sed ideo fideicommissa dari possunt ab intestato succedentibus, quoniam creditur pater familias sponte sua his relinquere legitimam hereditatem* (but therefore *fideicommissa* can be given by a person without a testament to successors, because it is then believed that a *pater familias* leaves the legitimate inheritance to them voluntarily). See P. Oxy. VIII 1114, 13-16 (Oxyrhynchus, 237 AD) in which the wife of the author had died intestate. The author in question wrote to an official that their two daughters were the beneficiaries of some of the wife's property as is evidenced by an affidavit which had been added to the text.

42 Without explaining Simonis states that a non-military context must be assumed in Simonis 2017, 22. The text, however, is inconclusive. A distinct military context of *contubernalis* in the Digest can be found in Dig. 13.6.1 (Afric. 8 *Quaest.*), Dig. 48.5.12 (Papinian. *lib. sing. de Ad.*), Dig. 49.16.5 (Men. 2 *de Re Mil.*) and Dig. 50.16.184 (Paul. 28 *ad Ed.*). The word *contubernalis* in the texts of the Digest is always used in either a military context or a slave context. The *contubernalis* in a slave context is the 'wife' or 'husband' of a slave. In the *responsa* of Scaevola this meaning of *contubernalis* is found frequently, e.g. Dig. 32.41.2 & 5 (Scaev. 2 *Dig.*), Dig. 33.7.20.1 (Scaev. 3 *Resp.*) and Dig. 34.1.20pr & 1 (Scaev. 3 *Resp.*). See Heumann/Seckel s.v. *Contubernalis* (and *Contubernaliūm*). A slave context in this *responsum* is very unlikely due to the fact that slaves could not inherit property. In Dig. 34.2.40pr (Scaev. 17 *Dig.*), the meaning of *contubernalis* remains unclear too. In this reply a slave context is unlikely and there are no indications for a military context, as the *contubernalis* is a doctor and the travel companion of the testator.

be translated as comrade-in-arms. This context would explain the form-free manner, in which this document came into existence, because, according to Gaius, military men are often to a (too) great extent inexperienced with the law (Gaius, *Inst.* II 109⁴³). They even received a special privilege to draw up official Roman testaments without having to adhere to the strict *ius civile*.

II THE BILINGUAL TEXTS IN THE DIGEST ON THE LAW OF INHERITANCE BY SCAEVOLA

Three replies by Scaevola are examined in the following section. Two replies from his *Digesta* are addressed and one from his *Responsa* will be examined. This is followed by a conclusion.

II.1 Dig. 33.4.14 (Scaev. 15 *Dig.*): A dowry for Crispina

The first reply, Dig. 33.4.14, is incorporated under the title *de dote praelegata*⁴⁴ in the Justinianic Digest and in the 15th book of Scaevola's *Digesta*, which in the *Palingenesia* by Lenel is given the title *de Legatis et Fideicommissis* (Lenel II 228)⁴⁵. Using Lenel's reconstruction, two other fragments can be found in the 15th book of Scaevola's Digest, namely a reply in Dig. 33.8.23.2 (fragment 49)⁴⁶ in which a document written in Greek is cited and a reply in Dig. 33.2.32.1 (fragment 47), in which a Greek woman, the mother of the testatrix,

43 Gaius, *Inst.* II 109: *Sed haec diligens observatio in ordinandis testamentis militibus propter nimiam imperitiam constitutionibus principum remissa est nam quamvis neque legitimum numerum testium adhibuerint neque vendiderint familiam neque nuncupaverint testamentum, recte nihilo minus testantur* (but a strict observation of these regulations concerning drawing up testaments with regard to military personnel is relaxed through imperial constitutions due to too much inexperience on their part, for even though they did not bring the lawful amount of witnesses or they did not sell the estate or they did not in the presence of witnesses call the heir by name, they devised their will correctly). Earlier Gaius also stated that in archaic Roman times military personnel had the right to draw up a testament *in procinctu* (in battle formation), deviating from standard testamentary practices. See Gaius, *Inst.* II 101.

44 This is not the only *praelegatum de dote* found in the texts by Scaevola, see for example Dig. 33.4.17*pr* (Scaev. 3 *Resp.*). In the narration of Dig. 33.2.27 (Scaev. 1 *Resp.*) a *praelegatum de dote* is described via a *fideicommissum*: *Uxori maritus per fideicommissum usum fructum et alia et dotem praelegavit: heredes usum fructum ei concesserunt: post biennium illicitum matrimonium fuisse pronuntiatum est...* (a married man made a *praelegatum* concerning usufruct, other things and the dowry: the heirs conceded the usufruct to her: after two years the marriage was declared to have been unlawful). For another *praelegatum* in the works of Scaevola see also Dig. 33.2.33*pr* (Scaev. 17. *Dig.*). Cf. Kaser 1971, 748, in which he quotes Dig. 34.4.31.1 (Scaev. 14 *Dig.*).

45 See Lenel II fragments 46-52.

46 For an analysis of this *responsum* see pp. 217sqq.

named Aelia Dorcas⁴⁷ had been bequeathed with a right of usufruct on the testatrix's property. The legal question in this case also betrays a provincial provenance, as the inquirer asked whether a right of usufruct of Aelia Dorcas would be inherited by the daughter of the testatrix after Aelia Dorcas' death. Scaevola replied that the right of usufruct would befall the one who retains the 'bare ownership' (*nuda proprietas*). In accordance with classical Roman law the right of usufruct ceases to exist when the usufructuary dies. The inquirer, however, assumed that the right of usufruct could be bequeathed and could exist after the death of usufructuary, which was the case in Roman Egypt.

Dig. 33.4.14 is concerned with the testament of Theopompus:

Dig. 33.4.14 (Scaev. 15 *Dig.*)

Theopompus testamento facto duas filias et filium aequis partibus instituit heredes et codicillis ita cavuit: τὴν θυγατέρα μου Κρισπίναν, ἣν ἠϋχόμην ἐκδοῦναι, ᾧ ἂν οἱ φίλοι μου καὶ οἱ συγγενεῖς δοκιμάσωσι, προνοήσει ἐκδοθῆναι Πολλιανὸς εἰδὼς μου τὴν γνώμην ἐπὶ τοῖς ἴσοις, ἐφ' οἷς καὶ τὴν ἀδελφὴν αὐτῆς ἐξέδωκα. Pollianus a marito puellae iuratus scripsit voluisse patrem eandem quantitatem in dotem accipere etiam minorem filiam, quam maior accepisset. Quaero, an eandem summam dotis nomine coheredes extra partem hereditatis minori filiae praestare debeant. Respondit eum cuius notio est aestimaturum, ut eadem quantitas ex communi praecipua minori filiae dotis nomine detur.

Having drawn up a testament Theopompus instituted his two daughters and his son as heirs for equal parts and declared the following in a codicil: 'Pollianus will consider that my daughter Crispina, whom I wish to be given in marriage, is given in marriage to whomever my friends and kinsmen shall deem fit, knowing full well that my intention is exactly the same, with which I also gave her sister away in marriage'. Pollianus bound by an oath to the girl's spouse has written that the father wanted his younger daughter to receive a dowry to the same extent as his older daughter had received. I ask, whether the coheirs need to give the same amount to the younger sister on account of the dowry apart from her share of the inheritance. He responded that he, to whom the judicial decision befalls, shall determine that the same quantity taken first from the communal inheritance is to be bestowed upon the younger daughter on account of the dowry.

Scaevola's reply in Dig. 33.4.14 concerns a complex case, in which a father, Theopompus, instituted his three children, two daughters and a son, as heirs for equal parts in a testament. The testament is not included in the reply. With the addition of a codicil in Greek, a problem arose with regard to the height of these 'equal' parts. Because one of the daughters had already received her

47 According to Talamanca the name Aelia Dorcas was the name of a free Greek woman (*liberta*). See Talamanca 2009, 662. Due to the fact that *dorcas* (gazelle) is a derivative of the Greek *δόρξ*, it is plausible that the woman originated from the Hellenistic East. The name is attested in only one papyrus, P. IFAO III 41, 11 (provenance unknown, III AD). The reading of *Δορκᾶς* is, however, highly speculative.

dowry from her father, while the other was still unmarried at the time of her father's death, the inquirer now had become unsure, whether the dowry had to be taken from the joint inheritance as a *praecipuum* (a thing taken from an inheritance before division of that inheritance) as used in Gaius, *Inst.* II 217⁴⁸, from Crispina's own part of the inheritance or solely from the inheritance of Crispina's siblings⁴⁹. Three parties are named in this reply, namely the father Theopompus, his youngest daughter Crispina and (probably) a family friend named Pollianus. As for the name Theopompus (Θεόπομπος), which is frequently attested in this timeframe in papyrological sources from Roman Egypt, Talamanca holds it for real and because it is a Greek name in a Greek codicil he places him in a Hellenistic context⁵⁰. Both the names Crispina⁵¹ and Pollianus are authentic Roman names and according to Talamanca the real names of the persons in question.

Just like the *parakatatheke*-text by Modestin in Dig. 31.34.7 from the previous chapter (pp. 124sqq), this reply also concerns dotal law. According to Stepan, however, this legal writing does not add additional knowledge to the research concerning *dos*⁵². Furthermore, Häusler mentions that this reply is mostly concerned with the exegesis of elliptically formulated codicils and not with difficulties regarding Hellenistic views on dowry⁵³. Scaevola concluded from his exegesis that in this case of a bequeathed dowry, the dotal property had to be separated from the estate, prior to the division of it.

As can be seen in the following, the papyri show a tendency in the Hellenistic East that the sons of the deceased father had to provide his daughter with a dowry or the sons had to provide their father's wife with the worth of her original dowry. Therefore, it could be the case that the daughter Crispina wanted to receive her dowry after the division of the inheritance from the parts of her co-heirs.

48 See also Dig. 24.3.1 (Pomp. 15 *ad Sab.*), in which Pomponius stated that it is of the utmost importance that a woman is given a dowry and that an issue regarding this matter did often take precedent (*praecipua*) due to the public interest of it.

49 The eldest daughter of the two has already received a *dos* (D_1) and the father, apparently, wanted the *dos* of the younger daughter (D_2) to be of the same height ($D_1 = D_2$). According to Scaevola, the amount of the *dos* (D_2) must be taken from the inheritance (I) first, meaning that the inheritance will be $1/3(I-D_2)$ per person. As $D_1 = D_2$, the daughters would both have $1/3I + 2/3D$, because the first daughter already received a *dos* and the second one would receive one of the same amount. The son would have $1/3(I-D_2)$. See Kübler SZ 28 (1907), 180-181 for an example based on a fictitious amount of sesterces ($I = 30,000$ HS and $D = 5,000$ HS).

50 See Talamanca 2009, 554.

51 Crispina can be frequently found in epigraphical sources from both Greek and Latin speaking regions. In papyrological sources, however, Crispina is rare. From the second century AD two Crispinae are known, Vibia Crispina in SB XXII 15849, 8-9 (Karanis, 121 AD) and from Roman Arabia Iulia Crispina in P. Yadin I 20, 5 (Maoza, 130 AD).

52 Stepan 2018, 97. See Stepan 2018, 97 for a list of Scaevola texts on dowries.

53 Häusler SZ 133 (2016), 428.

A testament on papyrus, which shares great similarities with the case in Scaevola's *responsum*, is P. Oxy. XXVII 2474 (Oxyrhynchus, III AD)⁵⁴. This testament from the middle to late III century AD, which came down to us in a fragmentary state, belonged to a very wealthy man by looking at the assets described⁵⁵. He instituted four heirs for equal shares, which can be reconstructed from l.4 *θέλω ἐξ ἴσου μέρους τοὺς τέσσαράς μου* [...]⁵⁶. Probably three of these heirs were his own sons. This reconstruction can be safely assumed due to ll. 25-31 of the document⁵⁷.

P. Oxy. XXVII 2474, 25-31 (Oxyrhynchus, III AD)

ἐὰν δέ, ὃ μὴ εἶη, ὀπότερος τῶν

αὐτῶν παιδῶν μου ἐξ ἀνθρώπων γένηται ἄτεκνος ἢ καὶ ἀδιάθετος, τὸ μέρος αὐτῆς τῆς κληρονομ[ί]ας τῆς ἐμῆς ἀνατρέχειν εἰς τοὺς λοιποὺς ἀδελφοὺς \ αὐτοῦ/ ἐμοῦ τε υἱοῖς καὶ κληρογόμεους ἐξ ἴσου μέρους. Ἄμα δὲ τῇ τελευτῇ μου ἐλευθέρους εἶναι θέλω ἡμετέρους οἰκέτας Θεώνα καὶ Τααμμῶνιν. Εἶναι δὲ αὐτοὺς βούλομαι ὑπὸ τῆν ἐξουσίαν τῆ[ς]

30 αὐτῆς εὐνουστάτης μου συμβίου Χαιρημονίδος, ἐφ' ὃν περισσιν χρόνον· Πρὸς τῷ τε τελευτᾶν α[ὐτ]ῆ[ν] πορεύεσθαι αὐτοὺς ἀκωλύτως, ὅπουδὰν βουληθῶσι.

l. 27: υἱοὺς

If, may it not be so, one of the same children of mine will die without children or intestate, let his share of this inheritance of mine devolve upon his remaining brothers, sons of mine, and heirs in equal shares⁵⁸. Upon my death I wish that our household slaves Theon and Taammonis are free. However, I want them to be at the disposal of the same most well-minded beloved wife of mine, the aforementioned Chaeremonis, for as long as she lives. After her death they may go unhindered wherever they want.

This testament is a mixture of Roman law and local law, which becomes evident from, for example, the redistribution of the inheritance in case of the death of an heir without children or testament in the part here quoted (ll. 25-28)⁵⁹ and in the *paramone*-clause for the freed slaves in ll. 28-31. After the

54 See also Babusiaux SZ 133 (2016), 532.

55 Strobel 2014, 249.

56 P. Oxy. XXVII 2474, 4: I wish that my four [heirs will be instated] for equal parts...

57 That the four heirs are in part his children and in part other heirs is also evident from ll. 22-23: *πᾶσαν πίστειν μέλλοντα ἀποσώζειν τοῖς αὐτοῖς // παισί[ν] μου καὶ κληρονόμοις* (that he with administering all his trust will look after these children of mine and the heirs). See Strobel 2014, 244. Strobel argues correctly that of the four heirs a minimum of three must be brothers. If one son would die, a minimum of two brothers would remain as the plural *ἀδελφοὺς* suggests.

58 According to the editors of the text, this provision is a combination between *substitutio vulgaris* and *pupillar*. This addition of 'without children or intestate' is often used in Hellenistic wills and points to a Greek provenance. This will be discussed below.

59 According to Nowak, this practice is directly derived from local legal practice. Nowak 2015, 152.

manumission of the slaves, they were charged with the burden to stay with the wife of the deceased. This legal concept is known as the Hellenistic legal concept of *paramone* and, as it was unknown to Roman law, it exceeded the regulations regarding patronage found in Roman law⁶⁰. Furthermore, because of the ‘fideicommissary’ style of the document it can be linked to local documentary practice⁶¹, even though the testator was a Roman citizen.

Testamentary provisions in Greek denoted with the verb *θέλω* are also often associated with *fideicommissa*. In the document (ll. 18-20) the testator most likely bequeathed the (worth of the) dotal property back to his wife via such a provision, which in Roman law is a *legatum pro dote*. Because this share of the property was related to the *dos* it was separated from the rest of the property in favor of the wife. The slaves and the slave-children are presumably bought with money from the wife’s dowry, which in this way is now legated back to her⁶².

P. Oxy. XXVII 2474, 18-20 (Oxyrhynchus, III AD)

καὶ ὅσα ἐώνημαι καὶ συνεταξάμην ἐπ’ ὀνόματος τῆς αὐτῆς συμβί[ο]υ
μου Χαιρημονίδος δοῦλικά σώματα ε. γ τε καὶ Πανχάριον καὶ τὰ ταύτης
τέκνα

20 Κοπρῆν καὶ Π. . . καὶ Θναῦν, ἔχειν α[ὐτῆ]ν θέλω κυριευτικῶς.

And I want her to have with full proprietary rights as many slaves as I have bought and registered under the name of my same wife Chairemonis, (N. N.) and Pancharius and her children Copres and P... and Thnas.

In this document the property was given back to the wife as if it were her own dowry⁶³ possibly to recreate her dowry, which is different from Scaevola’s reply in Dig. 33.4.14. In other testaments testators wished to create new *dotes*⁶⁴ for their daughters, of which an example is the aforementioned will of Aurelius Hermogenes⁶⁵. In ll. 19-20 (partly reconstructed), he ordered that his daughter Didyme had to be given a dowry of four talents of silver by her brothers taken from the inheritance. The complicating factor in the *responsum* of Dig. 33.4.14 is that the person to receive the dowry was also one of the heirs.

60 Nowak 2015, 179-180.

61 Nowak 2015, 162-163.

62 For a similar case see Dig. 33.4.6 (Lab. 2 *post. a Iav. Epit.*).

63 See also the copy of a Roman will in P. Diog. 9, 16-18 (Philadelphia, 186-224 AD), in which the testator’s spouse is bequeathed with an estimation of her dowry in full.

64 An early example of this is P. Dryton I 4, 19-20 (Pathyris, 126 BC): *δότησαν δὲ Ταχράτει εἰς φερνήν // [χαλκο]ῦ (τάλαντα) ἑβ̄ ἐκ τῶν κοινῶν* (they are to give to Tachratis on account of her dowry 12 bronze talents from the communal inheritance). This is the only property bequeathed to Tachratis. The lion’s share of the inheritance is bequeathed to the testator’s son and five daughters.

65 P. Oxy. VI 907 (Oxyrhynchus, 276 AD) on p. 160.

In the *responsum* by Scaevola, the dowry and the accompanying marriage were managed by Pollianus, in whom Theopompus had put his trust. Pollianus seems to take the role of a close family friend or perhaps of Crispina's *tutor*, if she was a minor. Presumably, Pollianus, who was asked to find a suitable husband, had after finding him sworn an oath to the future husband of Crispina in order to further persuade him to marry her. Pollianus swore⁶⁶ to him that Crispina's late father had promised her a dowry of the same worth as her sister⁶⁷. Whether the conduct of Pollianus was conform the content of the codicil by Theopompus is debatable and the correct interpretation of *ἐπὶ τοῖς ἴσοις* is difficult. It appears that the testator wanted his younger daughter to have a marriage, which was both in social, but also in contractual terms equal to that of his oldest daughter. This does not necessarily correspond with the oath and the document of Pollianus, who interpreted that a dowry of an equal amount had to be assumed. Theopompus, however, wrote that Pollianus knew what his opinion concerning the matter was (*εἰδώς τὴν γνώμην*). Scaevola, either interpreting *ἐπὶ τοῖς ἴσοις* as at least entailing an equal dowry for the younger daughter or believing that Pollianus acted on the wishes of Theopompus, because according to the codicil he knew them, replied that the magistrate, who needed to judge on the matter, had to decide that the dowry had to be taken from the inheritance before it was divided.

To conclude, in his interpretation of the legal issue, which must be placed in a Hellenistic legal context, it seems that Scaevola followed the Roman legal doctrine of the *favor dotis* also present in the writings of Pomponius (Dig. 24.3.1), which is why the dowry can be taken from the undivided inheritance. Papyrological sources such as P. Oxy. XXVII 2474 (Oxyrhynchus, III AD) also show that dowries can be taken from the undivided inheritance. P. Oxy. VI 907 (Oxyrhynchus, 276 AD) even shows that the dowry could be taken from the combined inheritance of the male coheirs and did not affect the (different) share of the two female coheirs. Scaevola, however, did not bother himself with such an interpretation.

Lastly, in this reply Scaevola explicitly addressed the person who was appointed to make the judicial decision (*notio*)⁶⁸. According to Scarcella, the *notio* in this *responsum* must be connected to the legal instrument of the *petitio fideicommissi*, which can be found in Dig. 35.3.6 (Call. 4 *de Cog.*)⁶⁹. The

66 In the *Editio Maior* Mommsen suggests an emendation of *iuratus* into *interpellatus*. This is, however, unnecessary when reading *autem* for *a*, which is possible due to the stripe, indicating an abbreviation, on the *a* by F2. In the Dutch translation by Spruit *iuratus* is translated, while *a* is omitted. Watson appears to follow Mommsen in his translation of the Digest.

67 The swearing of an oath in the context of the Hellenistic East is examined in the previous chapter. The testator in the bilingual reply of Dig. 32.37.5 swore an oath and Scaevola advised that the oath must be considered real and trustworthy.

68 Heumann/Seckel s.v. *Notio*.

69 Scarcella *AUPA* 55 (2012), 639-640.

magistrate entitled to make the decision is indicated by the Latin *'cuius de ea re notio est'*⁷⁰. Save the *responsum* examined here, this expression can be found four times in Scaevola's Digest⁷¹, of which also two other times in bilingual *responsa*, namely Dig. 34.1.16.1 (Scaev. 18 Dig.) examined in the next chapter and Dig. 44.7.61.1, of which the *principium* is addressed above (pp. 64sqq).

II.2 Dig. 32.37.6 (Scaev. 18 Dig.): Callimachus the *incapax*

The second case which will be examined is Dig. 32.37.6 from the 18th book of Scaevola's Digest. In the Justinianic Digest it is incorporated in *de Legatis et Fideicommissis*. The place of this fragment in the Justinianic Digest and in Lenel's *Palingenesia* are discussed in the previous chapter in the context of Dig. 32.37.5, which is in the same fragment as this *responsum*.

In this case Titia has drawn up her testament, after which she added a *fideicommissum* in Greek in favour of Callimachus and in her own handwriting. The validity of the testament of Titia itself remained unquestioned in this reply, as it focused on this addendum. In this *responsum* by Scaevola⁷², Titia asked her heir to give ten thousand *denarii* to Callimachus based on a labour contract. According to Talamanca, Callimachus was the real name of the beneficiary⁷³. Apparently, the heirs of Titia refused to transfer the money to Callimachus and the legal issue was brought in front of a judge, who asked Scaevola to give his advise on the matter. Both arguments in favour of Callimachus and against him are mentioned with regard to the ten thousand *denarii*, which was either due because of the labour contract or illegitimately bequeathed. In his reply, Scaevola had to advise whether Callimachus (or his representatives) could lay claim on the money. Even though it may seem that Scaevola decided in favour of the heirs, he in fact offered no direct solution to the problem. He merely instructed the magistrate not to be misled by the content of a piece of paper, just because it was put in writing.

70 Scarcella *AUPA* 55 (2012), 640. Scarcella also mentions a rescript by emperor Caracalla on the *petitio fideicommissi* cited by Ulpian in Dig. 36.4.5.16 (Ulpian. 52 *Ad Ed.*), in which this formula is mentioned (*quorum de ea re notio est*).

71 Scarcella *AUPA* 55 (2012), 640. The other *responsa* are Dig. 34.1.15.1 (Scaev. 17 Dig.) and Dig. 34.3.28.3 (Scaev. 16 Dig.).

72 Scarcella *AUPA* 55 (2012), 635.

73 Talamanca 2009, 553. Callimachus, a name which occurs three times in the Digest (see Häusler *SZ* 133 (2016), 433), seems generic. Talamanca, however, argues that the name is real, because it is not only written in the Latin text, but also in the Greek document cited. In Javolenus' letter presented in Dig. 35.1.55 (Javol. 13 *Epist.*) the testator cannot bequeath (another) Callimachus a sum of money as is evidenced by *'Callimacho cum quo testamenti factionem non habebat'* (Callimachus, while with regards to him he [i.e. the testator] had no right to bequeath property via his testament), which is also the case in the *responsum* cited below.

Dig. 32.37.6 (Scaev. 18 Dig.)

Titia honestissima femina cum negotiis suis opera Callimachi semper uteretur, qui ex testamento capere non poterat, testamento facto manu sua ita cavit: “Τίτια διεθέμην καὶ βούλομαι δοθῆναι Καλλιμάχῳ μισθοῦ χάριν δηνάρια μύρια”. Quaero, an haec pecunia ex causa mercedis ab heredibus Titiae exigi possit. Respondi non idcirco quod scriptum est exigi posse in fraudem legis relictum.

Titia, a most honorable lady, who in her business transactions always made use of the services of Callimachus, who was not able to inherit via testament, having drawn up a testament, declared in her own handwriting the following: “I, Titia, have drawn up my will and I want Callimachus to be given ten thousand *denarii* on account of a salary.” I ask, whether this money on account of salary can be claimed from the heirs of Titia. I responded that that which has been bequeathed due to evasion of the law cannot be claimed just because it is put in writing.

The introduction to the legal document by Titia contains three peculiar features, all of which must be linked to the actual reply by Scaevola. These three are the characterization of Titia as a most honorable lady⁷⁴, secondly the business connection between Titia and Callimachus, and thirdly the fact that Callimachus was incapable to inherit via testamentary provisions, which is a form of legal incapacity (*incapacitas*)⁷⁵.

In the text Titia is explicitly introduced as a *honestissima femina*. Kübler also highlights this fact and wonders how this can be combined with the *fraus legis* of Scaevola’s reply⁷⁶. This statement together with the business connection between Titia and Callimachus provides an argument in favor of Callimachus and his claim to the ten thousand *denarii*. Allegedly, due to some labor provided by him, Titia owed him ten thousand *denarii*⁷⁷ of salary. This could hold true, because Titia was a most honorable woman, who tended to do business with Callimachus and arguably *honestissimae feminae* do not lie to evade the law.

The counter arguments could be that Callimachus was not able to inherit via testamentary provisions and the fact that Titia’s ‘fideicommissary’ statement is conveniently (and suspiciously) placed outside of the testament. The reason for Callimachus’ legal incapacity is not mentioned in the *responsum*,

74 The word *honestus*, however, could also be used to denote the wealth of a person as is the case in Dig. 47.2.52.21 (Ulpian. 37 *ad Ed.*). See Heumann/Seckel s.v. *Honestus*. This would warrant an interpretation as a most wealthy lady. Furthermore, in papyri the title ‘most honorable’ (ἐνδοξότατος) is frequented often. The term *honestissima femina* can be found as honorific titles in twelve epigraphical sources in a burial context, an example of which is CIL IX 2232 (Telesia, II AD).

75 Kaser 1971, 601sqq.

76 Kübler SZ 28 (1907), 187.

77 Kübler cautiously suggests that *fraus legis* could be deduced from the fact that the sum of ten thousand *denarii* was an enormous amount of money for a contract based on labor. He does, however, not speculate on the nature of this contract. Kübler 1907, 187.

but could be that he was a *peregrinus* falling under the *senatus consultum Pegasianum*, as it forbade a *peregrinus* to be the beneficiary of a *fideicommissum*⁷⁸.

The fragment not only stated that the provision was written, but stressed that it was written *manu sua* (with her own hand), which was no requirement for codicils, as evidenced by Marcian⁷⁹. With *manu sua* a reference is made to Hellenistic *cheirographon*-styled documents⁸⁰. Modestin replied that from *sua manu* documents the consent of the writer becomes manifest.⁸¹ Apart from Titia's own writing, Callimachus would have had to prove that his contract of labour was real and not indeed a way to circumvent his incapability to legally enter into the inheritance.

To conclude, other than Titia's Greek in the codicil, the fact that Callimachus might be incapable to accept an inheritance due to him being a foreigner (*peregrinus*) from the Hellenistic East and a reference to a *cheirographon*-styled document (*manu sua*), there seem to be no indications of interference with regulations from a Hellenistic legal culture. In fact, the opposite is true, as Roman regulations interfere with the dealings of inhabitants of the Roman East. Scaevola seemed in no way inclined to hold the Hellenistic context in account in which there was more contact between Roman citizens and *peregrini* (if *peregrinitas* was in fact the reason of Callimachus' legal incapacity), by letting Callimachus be bequeathed with such a sum of money. He did, however leave room open for an examination whether the contract, which Titia mentioned as the reason for the debt of ten thousand *denarii*, was real, with a caveat that it should not be considered real, simply because the *testatrix* had written this in her testamentary provisions.

78 See Häusler SZ 133 (2016) 433, who also cites Gaius. In Gaius, *Inst.* II 285 it is stated that the regulations concerning *fideicommissa* with non-Roman beneficiaries had been made stricter (*Ut ecce peregrini poterant fideicommissa capere, et fere haec fuit origo fideicommissorum* (For example, peregrines used to be able to receive from *fideicommissa* and this was the entire origin of *fideicommissa*)). *Peregrini*, such as perhaps Callimachus in this case, were no longer able to be beneficiaries of *fideicommissa* from the reign of emperor Hadrian onwards according to a *senatus consultum*. The *senatus consultum Pegasianum* is mentioned by Gaius in *Inst.* II 286a.

79 See Dig. 29.7.6.1 (Marcian. 7 *Inst.*): *Codicillos et plures quis facere potest et ipsius manu neque scribi neque signari necesse est* (Someone can draw up a codicil and many of them and it is not necessary that they be written or signed by his own hand).

80 See for *cheirographa* p. 116.

81 See Dig. 20.1.26.1 (Mod. 4 *Resp.*): (...) *Modestinus respondit: cum sua manu pignori domum suam futuram Seius scripserat, consensum ei obligationi dedisse manifestum est* (Modestinus responded: when Seius had written with his own hand that his own house would be pledged, it is clear that he had given his consent to this obligation). Earlier in this reply, Modestin linked *sua manu* to the legal instrument of the *chirographum*: (...) *mandante patre manu sua perscripsit instrumentum chirographi* (upon request of his father he with his own hand wrote out the legal instrument, a *chirographum*, in full).

II.3 Dig. 26.7.47pr (Scaev. 2 Resp.): Titius and Maevius tutors with unequal powers

The third and final bilingual *responsum* of Scaevola examined in this chapter also has a ‘fideicommissary’ statement using the Greek βούλομαι καὶ παρακαλῶ, like Dig. 32.37.6. This fideicommissary statement, however, is more elaborate than in Dig. 32.37.6. It is unclear whether the Greek text is taken from a codicil or from a testament. In the Greek text cited in Dig. 26.7.47pr (Scaev. 2 Resp.), the same formula is used as in Dig. 40.5.41.4 (Scaev. 4 Resp.). The formula must be seen as Roman testamentary language translated into Greek. The Greek βούλομαι, sometimes used in a local legal context (see above), is used for the Latin *volo*, while παρακαλῶ must be understood as either *rogo* or *peto*. This combination of words appears in Gaius’ Institutes on *fideicommissa* in II. 249: *Verba autem utilia fideicommissorum haec [recte] maxime in usu esse videntur: PETO, ROGO, VOLO, FIDEI COMMITTO, quae proinde firma singula sunt, atque si omnia in unum congesta sint*⁸². Here, two of the verbs are employed together in one sentence⁸³.

Furthermore, the reply is not mainly concerned with the hereditary context of the case as it focuses more on a form of financial *administratio* derived from the testament. The reply is included by the compilers in a section specifically on the *administratio* of guardians and the legal risks to which these guardians are exposed. In Lenel’s *Palingenesia* the fragment (247) is therefore placed in a section on guardianship. Both the fragment as a whole and the other two fragments in this section show no indications of a Hellenistic context, other than the Greek passage cited below, although in Dig. 26.7.47.2 debtors and pledged property from outside the Italic peninsula are mentioned.

Dig. 26.7.47pr (Scaev. 2 Resp.)

Titium et Maevium tutores quis dedit et cavit: βούλομαι καὶ παρακαλῶ πάντας⁸⁴ γίνεσθαι μετὰ τῆς Μαιβίου τοῦ ἀδελφοῦ μου γνώμης, καὶ δίχα αὐτοῦ τὸ γινόμενον ἄκυρον ἔστω. Titius solus a debitoribus exegit: an liberati essent? Respondi, si et administrationem Maevio dedisset, non recte solutum.

82 Gaius, *Inst.* II 249: It seems to be, however, that the proper words of *fideicommissa*, that are predominantly in use, and rightly so, are: I beg (*peto*), I ask (*rogo*), I want (*volo*), I place in your trust (*fideicommitto*). And it is equally effective to use one of them, or if all are brought together in one sentence.

83 In the will of Sambathion, for example, she requested her nephew Gaius Julius Sabinus to provide her with a proper burial using only παρακαλῶ. P. Mich. IX 549, 12 (Karanis, 117-118 AD): μου περιστολήν καὶ κηδείαν παρακαλῶ ποιήσ[α]σθαι (I request that you take care of my funeral rites and laying out). This παρακαλῶ is also seen in the inscription cited in the previous chapter, SEG LIV 1221, 112 (Nakrason, I AD): Ὀμοίως παρακαλῶ (In the same way I request).

84 It is assumed that the Greek πάντας is a scribal error for πάντα. In his *Editio Maior*, Mommsen also suggests the emendation πάντα.

Someone appointed Titius and Maevius as guardians and declared the following in writing: I want and wish that all is done with the consent of my brother Maevius, and let that which is done without him be invalid. Titius solely collected payment from the debtors: [The question arose,] whether they would be discharged [from their obligations]. I responded that, if he [i.e. the testator] also gave the right of administration to Maevius, the debt would not have been rightly paid.

Titius and Maevius have been appointed as guardians (*tutela testamentaria*) by Maevius' brother. Titius and Maevius, however, are, not granted the same powers⁸⁵, as acts done without Maevius' explicit consent will not have legal effect. Furthermore, Scaevola considered the possibility that on top of his guardianship, Maevius was mandated the *administratio*, as can be seen in 'also' in the translation of *et*. If Maevius was granted this power, Titius lacked the power to collect payment from the debtors and accordingly the payments that were made to him, would not discharge the debtors from their debts⁸⁶.

Tutela testamentaria was, presumably, already attested in archaic Roman law, as can be seen in Ulpian's quote of the Law of Twelve Tables in *Tituli ex Corpore Ulpiani* XI.14⁸⁷. Gaius also mentioned this in Dig. 26.2.1pr (Gaius, 12 *ad Ed. Prov.*). The title Dig. 26.2 is entirely on testamentary tutelage. As is to be expected the *tutela testamentaria* is not only known from Roman legal writings. The practice to appoint tutors in a testament can also be found in Attic law⁸⁸ and in papyrological sources from the Hellenistic East⁸⁹. Attic law must have known a set of rules which governed *tutela legitima* as some

85 See also Häusler SZ 133 (2016), 435-436.

86 Even though the debtors were not discharged from their debt, it is not unlikely that on the one hand Titius thought he was entitled to collect payment and on the other hand that the debtors thought they could pay off their debts. This state of mutual error would have led to an undue payment actionable via a *condictio*.

87 TCU XI 14: *Testamento quoque nominatim tutores dati confirmantur eadem lege duodecim tabularum his verbis: UTI LEGASSIT SUPER PECUNIA TUTELAVE SUAE REI, ITA IUS ESTO: qui 'tutores dativi' appellantur* (From these words of the same regulation of the Law of Twelve Tables, tutors, who are appointed via testament, will also be confirmed 'That which he has bequeathed via legacies regarding money or tutelage of his own business, let that be law', who are called 'given tutors').

88 Plato mentioned *tutela testamentaria* in his dialogue *Leges* 924a-b: *ὅ δ' ἂν ἐπιτρόπων οἱ παῖδες δέωνται, ἐὰν μὲν διαθέμενος τελευτᾷ καὶ γράψας ἐπιτρόπους τοῖς παισὶν ἐκόντας τε καὶ ὁμολογοῦντας* [924b] *ἐπιτροπεύσειν οὐστινασοῦν καὶ ὁπόσους ἂν ἐθέλῃ, κατὰ ταῦτα τὰ γραφέντα ἢ τῶν ἐπιτρόπων αἴρεσις γιγνέσθω κυρία* (When one's children need guardians, in the case that after his death having drawn up a testament and having written whoever and how many men he wishes to act as guardians to his children, should they be willing to do so and agree to it, let the choice of the guardians be valid according to what is written).

89 Early sources are, for example P. Dryton I 1 (Diospolis Micra, 164 BC) and P. Dryton I 4 (Pathyris, 126 BC). Examples of this can also be found in Roman Egypt, e.g. P. Oxy. III 491 (Oxyrhynchus 126 AD) and P. Ryl. II 153 (Hermopolis Magna, 169 AD).

authors such as Isaeus refer to these laws⁹⁰. Kübler states that no influences of ‘Greek’ law can be found in the passage under discussion, but mentioned that to appoint multiple guardians via testament is common in Attic law, as is the case in this *responsum* and in papyrological sources⁹¹. In Attic law indeed, no limitations on how many guardians a minor needed can be found, as can be seen in Plato’s dialogue *Leges*⁹². Appointing multiple guardians was practical, because the tasks of the guardians included taking care of the minor, his or her education and general wellbeing, as well as the care of the financial wellbeing of the minor. According to Lipsius, in the case of multiple guardians, they had separate roles. One guardian was especially appointed for the personal wellbeing of the minor, while another was appointed for legal representation and the care of the minor’s estate⁹³. In case of *tutela testamentaria* not only an appointment of tutors could be found in the testament but also a description of the tasks and powers of these tutors. An example of this is the papyrus CPR VI 1, 10-13 and 22-23 (Ptolemais Euergetis, 125 AD), in which the testator mentioned that his wife could not be held accountable for the finances, as she was *ἀνεγλόγιστος*⁹⁴. The testator’s wife was appointed as a guardian (*ἐπίτροπος*) of the testator’s underaged children, without financial or legal powers, as she was not allowed to dispose of goods, which belonged to their children. On the other hand, his brother Theon was appointed to super-

90 See Isaeus *On the Estate of Aristarchus* in the *hypothesis*: *μετὰ δὲ τὴν τελευτὴν Ἀριστάρχου Ἀριστομένης ἀδελφὸς ὧν αὐτοῦ καὶ κατὰ νόμον ἐπίτροπος τῶν τοῦ ἀδελφοῦ γινόμενος παίδων ...* (after the death of Aristarchus, Aristomenes, who was his brother, after becoming the guardian of his brothers’ children according to the law). See also Lipsius 1915, 524.

91 Multiple guardians are e.g. found in the document ‘the will of a Hermopolite citizen’ of P. Ryl. II 153, the testator appointed two guardians for his son on the condition that they provide him with as much food and clothing as they think necessary. In line 20 of P. Oxy. VI 906, the testator appointed Aurelius Demetrius and his wife Isidora also known as Prisca as the guardians of his three children.

92 See also Lipsius 1915, 526-527.

93 Lipsius 1915, 527. To this end Lipsius cites Demosthenes *Against Aphobus* I. 6, from which he also deduces the division between an *ἐπίτροπος* and a *κύριος*. The former only took care of the person of the minor, while the latter took care of the minor’s financial business and legal representation as well as of the person of the minor (Lipsius 1915, 527).

94 See for *ἀνεγλόγιστος* also P. Lond. II 375, 25 (Ptolemais Euergetis, first half II AD) and for literature on *ἀνεγλόγιστος* see Salomons *ZPE* 156 (2006), 222.

wise this guardianship and to handle any purchases done by the children, to which end the testator had deposited a sum of money at a bank⁹⁵.

In the document cited by Scaevola such a division of powers must also be assumed. Kübler concludes that the brother of the testator, Maevius, must be more than just a guardian by comparing this case to Dig. 46.3.14.5 (Ulpian. *ad Sab.*)⁹⁶, in which the jurist claimed that debtors in cases of multiple guardians could rightfully pay their debt to one of the guardians⁹⁷. Furthermore, from the same title as Scaevola's reply is Dig. 26.7.24.1 (Paul. 9 *ad Ed.*). In this reply Scaevola's pupil Paul stated the following in the case of multiple guardians: *Si duobus simul tutela gerenda permissa est vel a parente vel a contutoribus vel a magistratibus, benigne accipiendum est etiam uni agere permissum, quia duo simul agere non possunt*⁹⁸. Ulpian has the opinion that in case of two guardians a payment could be rightfully made to either one of the guardians, while Paul seemed to hint on different and specific roles for each of the guardians in case of multiple guardians, as only one guardian could have the power of representation.

In the reply of Dig. 26.7.47*pr*, Scaevola hinted at a division of tutelary powers, from which the idea of Kübler originated, that there is more to this case than a regular guardianship. The division of tutelary powers is also attested in the works of Papinian. Dig. 26.7.38*pr* (Papinian. 12 *Quaest.*) must be considered as a regulatory provision and reads.

95 CPR VI 1, 10-12: [τ]ὴν γυναικὰ μου] // [ἐπι]τροπον καθ' [ὀ]πίστασιν (BL VIII 103) τῶν ἐξ ἀλλήλων ἀφηλικῶν τέκνων ἄχρι οὗ ἐν ἡλικίᾳ γένηται οὖσαν ἀν[ε]πιτρόπουτ[ον καὶ ἀ]νεγλόγιστ[ον - ca.13 -] // [. . . .] . . τητον (ἀπερ)ίσταστων? BL VIII 103) κατὰ πάντα τρόπον οὐθὲν μέντοι ἀπλῶς ἐξαλλοτριούσαν οὐδὲ καταχρηματίζουσαν τῶν ἀνηκόντων (my wife guardian and with regard to the property of our underaged children ... until they come of age, being without a guardian and being unaccountable ... under no circumstances [will it be permitted to her] to alienate or to dispose of the property which belonged to the children in any way). CPR VI 1, 22-23: ἄς δὲ {ἄς δὲ} ἔχω ἐν θέματι ἐπὶ τῆς Πάππου τραπέζης ἀργυρίου δραχμῶν τρισχειλίας διακοσίας βούλομαι κατατεθῆναι // [. . .] τοῖς τέκ[ν]οις μου (or -μα? BL VIII 103) ἐπακολουθο[ῦντο]ς τῇ ἐπιτροπῇ καὶ τῷ ἀγορασμῷ τοῦ ἀδελφοῦ μου Θέωνος καθὼς πρόκειται (I want that the three thousand and two-hundred silver *drachmae* which I deposited in the bank of Pappus will be reserved for my children, while my brother Theon will oversee the guardianship and the purchasing as stated above). For an analysis of the concrete rights of the wife of the testator, see Yiftach-Firanko *JJP* 36 (2006), 162-164.

96 Dig. 46.3.14.5: *Sive autem legitimi sunt sive testamentarii sive ex inquisitione dati, recte vel uni solvitur* (Payment will be made rightfully to either one [of the guardians], whether they are guardians based on the law, appointed by testament or given after an investigation). In this passage Ulpian is commenting on the writings of Sabinus, a first century AD jurist.

97 Kübler *SZ* 29 (1908), 216.

98 Dig. 26.7.24.1: If the power to manage a guardianship is granted to two persons at the same time either by a parent or by co-guardians or by magistrates, it must be accepted generously that the power of legal representation is similarly granted to one of them, because two persons cannot have the power of legal representation at the same time.

Dig. 26.7.38pr

Si plures tutelam non administraverint et omnes solvendo sint, utrum, quia nullae partes administrationis inveniuntur, electioni locus erit an ut eiusdem pecuniae debitores excipere debebunt periculi societatem? Quod magis ratio suadet.

If several [guardians] have not handled the administration of the guardianship and all of them are solvent, [it is asked], since no divisions of the power of administration can be found, whether there will be an opportunity to choose or that they as debtors of the same amount of money must carry the risk collectively. The latter reasoning is more persuasive.

In this question to Papinian, guardians were appointed to a minor and it is assumed that all guardians were solvent. Several of these guardians, however, were not properly handling the financial aspects of the guardianship. The question arose whether on behalf of the minor in question an action (*actio tutelae utilis*) could be brought against a guardian of one's own choice⁹⁹ or not and if the guardians were jointly accountable for the financial mishaps. Papinian was in favour of joint-responsibility of the guardians, provided that they were all solvent¹⁰⁰. Contrary to Dig. 26.7.38pr, in Dig. 26.7.47pr, there is the possibility of the appointment of specific tasks to specific guardians. A similar case can be found in Papinian's *responsum* in Dig. 27.7.6 (Papinian. 2 resp.)¹⁰¹.

To conclude, except for the Greek of the document no other indications for a Hellenistic context of this reply can be found. Nothing can be inferred from the Roman names of the parties in both Latin and Greek letters. As seen in the papyri cited and in the *Leges* by Plato, in Attic law and in Hellenistic legal cultures it was not unusual to appoint multiple guardians to a minor. This can, however, also be seen in Roman legal writings, e.g. Dig. 27.7.38pr by Papinian. The guardians were given different tasks and powers. The *administratio* of the minor's estate is one of the tasks of the guardian. If only one guardian was appointed with the power of *administratio*, due payment could only be made to him and not to other guardians. In this, classical Roman law

99 Babusiaux 2011, 202. Babusiaux suggests that the text, notably the *utrum ... an* question, has been interpolated by the compilers. See for literature on this topic also Babusiaux 2011, 202.

100 The reason why Papinian stressed the solvency of the guardians is to protect the pupil from the insolvency of one of his *tutores*. It would have been disadvantageous for the pupil if he had to bring action to an insolvent tutor for a part of the debt as claiming money from insolvent parties is difficult.

101 Dig. 27.7.6 (Papinian. 2 Resp.): *Officio cognoscentis conveniet, si tutores solvendo sint et administratio non dispar, sed communis fuit, portionum virilium admittere rationem ex persona tutorum* (It is in accordance with the duty of the one who examines this case, that, if the guardians are solvent and the administration is not divided but joint, he administers to each [of the guardians] a proportional share based on the number of guardians).

is no different. That Scaevola left the possibility open that both tutors had different powers based on the codicillary provision, which in this case meant that only one tutor had the power to collect debts, must be considered to be both conform Roman law and Attic law and can also be found in Hellenistic legal cultures.

II.4 Conclusion based on the three bilingual *responsa* by Scaevola

Confronted with these three (parts of) Greek documents from the Hellenistic East regarding inheritance and subsequent legal questions, Scaevola in his advices does not appear to deviate from classical Roman legal doctrine. Furthermore, it cannot be said that Scaevola tried to use Roman law to accommodate the inhabitants of the Roman East. It is also true that the case studies on Scaevola in this chapter are of such a nature that it is either not possible to take local or Hellenistic law into account, as it, for example, was in conflict with Roman law (Dig. 33.4.14), or that it is not visible, as the cases in both Roman and Hellenistic law lead to similar conclusions. Following the doctrine of *favor dotis* in Dig. 33.4.14 (Scaev. 15 Dig.) does not lead to significantly different conclusions than following the provisions in P. Oxy. XXVII 2474 (Oxyrhynchus, III AD) and P. Oxy. VI 907 (Oxyrhynchus, 276 AD). In Dig. 33.4.14 (Scaev. 15 Dig.) there is an opportunity to accommodate Callimachus, a possible *peregrinus* from the Roman East, but this would have violated provisions from a decree of the senate. The last case examined, which is Dig. 26.7.47pr (Scaev. 2 Resp.), involves *tutela* and *administratio*. Both the Roman legal system and Hellenistic legal cultures were accustomed to a division of powers amongst guardians of a minor, especially concerning the *administratio*, the legal representation and the general well-being of the minor. In conformity with Roman law (and society) Scaevola left the possibility of such a division of powers in the Greek document open and he was not concerned with any Hellenistic practices regarding the matter.

III THE BILINGUAL TEXTS IN THE DIGEST ON THE LAW OF INHERITANCE BY THE JURIST PAUL

Having examined these *responsa* from Scaevola, two texts from Paul will now be addressed. One of these texts is a *responsum*, namely Dig. 28.1.29pr-1 (Paul. 14 Resp.), while the other is an imperial decision (*decretum*). Dig. 28.1.29pr-1 is incorporated because this reply contains Greek language for provisions concerning the last will of a deceased. Dig. 36.1.76 (74) pr (Paul. 2 Decr.) is examined in this chapter, even though it is not a *responsum*, but an imperial decision, because the contested passage from the testament, on which an imperial decision had to be made, was in Greek and was cited in the *decretum*. The imperial decision will be examined first.

III.1 Dig. 36.1.76 (74) *pr* (Paul. 2 *Decr.*): An imperial decision on the *libertas testamenti faciendi*

In Lenel's *Palingenesia* this fragment (fr. 70) is included in a section on *legata* and *fideicommissa* and is followed by a case (fr. 71), which was submitted to Aurelius Proculus the proconsul of *Achaea* (Dig. 36.1.83 (81)), and which will be discussed below. In Paul's collection of imperial decisions of emperor Septimius Severus twelve other cases can be found which are to a more or lesser degree identifiable as cases from or connected to the Roman East, out of thirty-eight reports of thirty-seven different legal issues¹⁰², so a considerable number.

Some of these cases from the Roman East are possibly related to persons who are known to us from other sources, such as Dig. 4.4.38*pr*¹⁰³, Dig. 28.5.93¹⁰⁴, Dig. 49.14.47*pr*¹⁰⁵, Dig. 49.14.47.1¹⁰⁶, and possibly Dig. 32.27.1. Other imperial decisions have Greek names in it. These are Dig. 32.27*pr* (Paula Callinico), Dig. 46.1.68.1 (Petronius Thallus), a case on the deportation and relegation of Metrodorus and Philoctetes in Dig. 48.19.46, Dig. 37.14.24 (Hermogenes) and Dig. 40.1.10 (a slave-girl named Euemeria).

The *decretum* from *Achaea* (Roman Greece) mentioned above, Dig. 36.1.83 (81)¹⁰⁷, and the *decretum* examined in this section, Dig. 36.1.76 (74) *pr*, show great similarities and were both added to a section on the *senatus consultum Trebellianum*. Both concern provisions regarding a female heir who died without children and both limit their heir(s) in their freedom to testate. In this *decretum* a certain Julius Phoebus had drawn up a testament and instituted his three children as co-heirs (Phoebus, Heraclia and Polycrates who was from another mother). The testator commanded his oldest son and

102 Daalder 2018, 1.

103 In this case Claudius Telemachus may be identified as the Claudius Telemachus from a prominent Greek family from Xanthus, who was promoted to senatorial ranks by emperor Septimius Severus. See Daalder 2018, 195.

104 A Greek freedman named Pactumeius Androsthenes is featured here. His master Pactumeius Magnus, also mentioned, could have been the Prefect of Roman Egypt of the same name. This Pactumeius Magnus is known from the papyri, e.g. BGU II 525*dupl*, 10 (Arsinoite nome, 178 AD). See Daalder 2018, 328-330.

105 This fragment concerns a woman named Moschis, who might have been Numitoria Moschis. See Koops 2010, 52-60 and Daalder 2018, 520-522.

106 The Aemilius Ptolemaeus from this case could be identified with the Aemilius Ptolemaeus in line four of a Greek inscription in Roman Syria (AD 195), published as IGLSyr II 448. See Daalder 2018, 536.

107 This *decretum* from Paul's collection of imperial decisions features parties with Greek names (Julius Phoebus, Phoebus the younger, Polycrates and Heraclia) and the proconsul of *Achaea*. The word *μονομερῶς* 'in a one-sided hearing', is mentioned. The use of such a technical legal term in Greek is an indication that the whole procedure including the hearing itself was in Greek. The *decretum* itself, however, does not contain documentary Greek or references to a Greek document and for this reason it falls beyond the scope of this dissertation and is, therefore, not examined in full. A brief summary is given. For an elaborate analysis of this *decretum*, see Daalder, 2018, 423-432.

his daughter not to allocate the inheritance to a third party via testament, should one of them die without children, but to the remaining siblings. Later, it appears that the daughter Heraclia had indeed died childless, but allocated the property only to one of her remaining two brothers, namely Phoebus. This testamentary provision, lastly, is also found in another *decretum* from Paul's collection mentioned above, namely Dig. 32.27.1, in the form of *si sine liberis Hermippus moretur* (should Hermippus die without children) written in a codicil. The *decretum* of Dig. 32.27.1 is also presumed to be from the Roman East, because it is not unlikely that the parties mentioned in the codicil can be identified as members of a highly esteemed family from Ephese in Asia Minor (the Pompeii Hermippi) and that the heir mentioned in the codicil was the well-known Gnaeus Pompeius Hermippus Aelianus.¹⁰⁸

As mentioned above, the compilers of the Justinianic Digest have added the *decretum* of Dig. 36.1.76 (74) *pr* to a section on the *senatus consultum Trebellianum*. This decree of the senate originates from the year 55 AD and was issued under the rule of emperor Nero and named after consul Trebellius Maximus¹⁰⁹. The decree was issued to reduce the rate of refusals of inheritances. These refusals happened because via testamentary provisions a testator could request his heir to hand over substantial parts of his estate to a fideicommissary beneficiary, while the heir remained liable for actions brought against him. Due to the risks an heir was exposed to, combined with the insignificant benefits of the inheritance, inheritances were refused, which was considered problematic. Both Gaius and Ulpian made explicit mention of this *senatus consultum* and Ulpian even quoted (a piece of) the decree verbatim in his treatise on *fideicommissa* in Dig. 36.1.2 (Ulpian. 3 *Fid.*)¹¹⁰. The final sentence of Ulpian's quote reveals the intended purpose of the decree by the senate: "*quo magis in reliquum confirmentur supremae defunctorum voluntates*"¹¹¹.

The *senatus consultum Trebellianum* addressed a broader range of topics concerning *fideicommissa* in order to correctly regulate a testator's last will. The following bilingual text in Dig. 36.1.76 (74) *pr* apparently concerns one of these other topics of the *senatus consultum*¹¹² and was therefore added to this section by the compilers:

108 See for sources on this identification Daalder 2018, 363-365.

109 See Dig. 36.1.1 (Ulpian. 3 *Fid.*), in which Ulpian wrote the exact date of the *senatus consultum*, namely the eighth day before the calends of September [i.e. the 25th of August] during the consulship of Annaeus Seneca and Trebellius Maximus.

110 See also Gaius, *Inst.* II 253 and for further information and literature see Kaser 1971, 762-763.

111 Dig. 36.1.2 (Ulpian. 3 *Fid.*): "... that the final wills of the deceased be more confirmed for the future".

112 The text can be found in Kübler's article *Griechische Tatbestände* SZ 29 (1908), 183-189 and from more recent years Spina (2012), 491-493, Häusler SZ 133 (2016), 439-440 and lastly Daalder (2018), 399-409.

Dig. 36.1.76 (74) *pr* (Paul. 2 *Decr.*)

Qui filium et filiam habebat, testamentum fecit et ita de filia sua caverat: ἐντέλλομαι σοι μὴ διατίθεσθαι, πρὶν τέκνα σοι γενέσθαι. Pronuntiavit imperator fideicommissum ex hac scriptura deberi, quasi per hoc, quod prohibuisset eam testari, petisset, ut fratrem suum heredem faceret: sic enim accipiendam eam scripturam, ac si hereditatem suam rogasset eam restituere.

Someone, who had a son and a daughter, had drawn up his will and declared the following concerning his daughter in writing: “I command that you do not make a testament until you have got children”. The emperor [i.e. Septimius Severus] sentenced that from this provision a *fideicommissum* was due, as it were for this reason, that he had asked, by forbidding her to make a testament, that she would make her brother her heir: and that therefore the provision must be interpreted, as if he had asked her to reconstitute her inheritance.

This case is different from the *responsa* examined in this chapter, as it is an imperial decision or *decretum*, while a *responsum* is a legal advice from a jurist. Presumably, the case was brought to a lower court in the Roman East. Possibly, after an appeal the case was first brought to the imperial court, where (the bureau of) emperor Septimius Severus, as highest judicial body, made a final decision regarding the matter.

In this case a testator who had two children had made a will in Greek, in which he commanded his daughter not to draw up a testament before she had children, which means before she had heirs of her own. The Greek word used to initiate this request is ἐντέλλομαι. In this testamentary context ἐντέλλομαι must be taken as a command rather than a request to the daughter.¹¹³

The same verb ἐντέλλομαι is used in P. Oxy. XXII 2348 (Oxyrhynchus, 224 AD), 31 in a slightly different meaning. This document is a record of an opening of a *per aes et libram*¹¹⁴ testament containing the text of the will copied in Greek¹¹⁵. This testament, which belonged to Aurelius Chaeremon son of Heraclides, was formally opened at the office of the *strategus* (Aurelius Harpocraton) in the city of Oxyrhynchus:

τοῦ σώ]ματός μου

[τῆ]ν φρ[ο]ντίδα ἐντέλλομαι τοῖς αὐτοῖς υἱοῖς μου καὶ τὸ σωματ[ι]όν μου κα[τ]απαφῆναι θέλω ἐν ᾧ ἡτοίμασα ὀρύγματι πρὸς τῷ μνημείῳ τῆς προτε-
[τραμέ]νης μακαρεΐτιδος μου γυναικὸς Ἡρακλείας. εἰς δὲ τὴν περιστολήν
35 βούλομαι ἐξ ἴσου δοῦναι τοὺς υἱοὺς μου δραχμὰς πεντακοσίας σὺν ἀνοι-
κοδομῇ τύμβου

113 Kübler SZ 29 (1908), 184.

114 The ‘Roman’ style of the testament is connected to the chronological proximity to the *Constitutio Antoniniana* of AD 212. See Amelotti *SDHI* 15 (1947) 36-37.

115 For an overview on literature on the procedure of opening testaments, see Colella *Tyche* 33 (2018), 55.

I entrust the care of my body to my sons and I want my body to be buried in the grave I prepared near the tomb of my aforementioned deceased wife Heraclia. I want that my sons equally give five hundred *drachmae* for the wrapping [of the corpse] and the erection of the tomb.

In these testamentary dispositions the testator made requests concerning the care of his body¹¹⁶ using three different Greek verbs, which are *ἐντέλλομαι*, *θέλω* and *βούλομαι*. These three verbs must be considered more or less interchangeable and more intuitively used in a local legal context than in a concise Roman legal manner¹¹⁷. With regard to the Greek testamentary dispositions of Dig. 36.1.76 (74) *pr* Spina mentions that the Greek these are not technical Roman legal terms and typical for certain local legal cultures and as such would not be recognizable for a Roman jurist¹¹⁸. In the papyrus these verbs form the basis of testamentary dispositions to his sons and in this way *ἐντέλλομαι* in the Greek text cited in the *decretum* by Paul must be understood. The difference between the Greek cited by Paul and of P. Oxy. XXII 2348 is, that the papyrus is a Greek copy of a Latin testament, while the Greek cited by Paul seems to be taken directly from a testament in Greek.

The testamentary provision by the father in Dig. 36.1.76 (74) *pr* is made to limit the freedom to testate of his daughter for as long as she had not produced an heir which continued her father's bloodline. As the testator only had two children, the family fortune would be reunited and restored to her brother, if she died intestate without children. The father probably had in mind that if his daughter would die childless and intestate that her brother could claim the patrimonial property¹¹⁹. This idea was confirmed by the Emperor as he sentenced that this provision had to be viewed as a *fideicommissum* to restitute the inheritance to her brother.

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- 116 In many testaments dispositions were made which mention that the sons (children) of the testator should provide a proper burial and proper care for the body of the deceased. See Thoma *CdE* 93-185 (2018), 154-155.
- 117 See for this use of *θέλω* Nowak 2015, 162-163. Nowak indicates that via the use of verbs such as *θέλω* the testator did not intend to create Roman-styled *fideicommissa*. These verbs must be considered to originate from a local legal context, which was unfamiliar with *fideicommissa*. These provisions, however, when subjected to Roman legal interpretation, were interpreted as *fideicommissa*.
- 118 Spina 2012, 492. Wacke mentioned that even though in the text the document has been (*untechnisch*) called 'testament', this would not have meant that it was an officially recognized *testamentum* in Wacke *SZ* 110 (1993), 50. Both Spina and Wacke, however, do not provide further argumentation.
- 119 See Dig. 30.114.6 (Marcian. 8 *Inst.*), in which, based on a *senatus consultum*, the request of a testator to his heir to appoint a specific heir, must be seen as a request to restitute the inheritance '*si rogasset hereditatem restitui*' (as if he had asked that the inheritance be returned). See also Dig. 36.1.18*pr* (Ulpian. 2 *Fid.*). This of course did not alter the fact that the daughter of the testator had the ability to allocate the rest of her property, if not inherited from her father, to others via a testament.

In a similar case, which is Dig. 31.77.24 (Papinian. 8 *Resp.*), Papinian rejected such an interpretation as a *fideicommissum*¹²⁰:

Dig. 31.77.24

“Mando filiae meae pro salute sollicitus ipsius, ut, quoad liberos tollat, testamentum non faciat: ita enim poterit sine periculo vivere”. Fideicommissariam hereditatem sorori coheredi non videri relictam apparuit, quod non de pecunia sua testari, sed oportu consilii derogare iuri testamentum fieri prohibendo voluit.

“Concerned about her well-being, I request my daughter not to draw up a testament until she has children, so that she shall be able to live without danger”. It became evident that there appeared to be no fideicommissary inheritance for her sister and co-heir, because he did not want to make testamentary dispositions concerning his money, but under the pretext of counsel wanted to restrict her rights by prohibiting her to draw up a testament.

The testator requested his daughter to refrain from making a testament until she had children, which is similar to the provision in the *decretum* of Dig. 36.1.76 (74) *pr.* Both cases anticipate that the daughter may die without children and without a testament in the hopes that a consanguineous heir, which in Dig. 31.77.24 was her sister and in the *decretum* her brother, would receive her part. Papinian, however, rejected the interpretation that there could be an actionable *fideicommissum*, because he saw it not as a way for the deceased father to make provisions about his property, but as a way to limit the freedom to testate of his daughter. In both Dig. 31.77.24 and Dig. 36.1.76 (74) *pr.*, the rationale of the father must have been to keep the family property in the hands of his children, even though the father in Dig. 31.77.24 pretended to give this advice to his daughter for her own well-being. The question remains why emperor Severus understood such a provision to be a *fideicommissum*, while Papinian denied that interpretation¹²¹. An answer could be found in the legal context of the Hellenistic East in which the case of Dig. 36.1.76 (74) *pr.* was embedded. Therefore, the legal context of such provisions in the Hellenistic East will now be examined.

A similar case is found in a bilingual papyrus, P. Thomas 20 (Oxyrhynchus, 269/270 AD). In this document consisting of a Latin and a Greek papyrus glued together, the Latin part is damaged, but could be reconstructed

120 As remarked by Daalder, both texts are often juxtaposed to one another in scholarly research, see Daalder 2018, 408. The two texts are also examined in a Greek context, see Kübler SZ 29 (1908), 188, Spina 2012, 494*sqq.* and Häusler SZ 133 (2016), 440.

121 In a rescript by the emperors Valerian and Gallienus from 259 AD attested in Cod. 2.3.15, the emperors decide against the restriction of a father's freedom to testate, even though he himself restricted his own freedom via a provision in the dowry agreement, in which he stated that in case he would die his daughter and his son would be his co-heirs for equal parts: ...*neque ullam obligationem contrahere, nec libertatem testamenti faciendi mulieris patri poterit auferre* (and nor can it carry to effect any obligation, nor can it take away the freedom to draw up a testament from the father of the woman).

based on the Greek document (col. II)¹²². The Latin document is a copy of a petition by Aurelius Thonis submitted to the prefect of Egypt. In line 6 the writer stated that his sister Aurelia Saraheus died intestate and without children (*sine p]ueris*¹²³ *et intestatae defuncta*). This sister can be compared with the daughter in Dig. 36.1.76 (74) *pr*.

P. Thomas 20, Col. II 3-25 (Oxyrhynchus, 269/270 AD)

- ἐ[ρωτ]ῶ, κύριε, ὅπως μο[ι] καὶ τ[οῖς]
 ἀδ[ελφ]οῖς μου τοῖς κωνσανγυ[ιν-]
 5 αἰ[οῖς] Αὐ]ρηλίους Θωνίω καὶ Θεω[νί-]
 γ[ω τῶ] καὶ Πετρωνίω ἐκ τοῦ [αὐ-]
 τρο[ῦ καὶ πρ]οκειμένου πατρός, μη-
 τρ[ός] Ἰερ]ακιαίνης, δῶς ὑπαρχόν-
 τ[ων διακ]ατοχήν Αὐρηλίας Σ[αρα-]
 10 ε[ῦ]τος ἀδελφῆς ἡμῶν κωσα[ν-]
 γυιναίας ἀτέκνου καὶ ἀδιαθέτου
 τελευτησάσης ἐκ τοῦ μέρους τοῦ
 διατάματος δι' οὗ τοῖς νομίμ[οι]ς κλη-]
 ρονόμοις δοθῆναι ὑπεσκέθη.
 15 ἐδόθη ἐπὶ τοῦ κυρίου ἡμῶν
 Κλαυδίου Καίσορος Σεβαστοῦ καὶ
 Πατέρνου ὑπάτοις. Αὐρήλιος
 Θῶνις αἰτοῦμαι τὴν διακα[τοχήν]
 ἔμαντῶ καὶ ὁμοπατρίοι[ς]
 20 μου ἀδελφοῖς τῶν τῆς ἀδελφῆς
 ἡμῶν Σαραεῦτος ὡς πρόκειται.
 Αὐρήλιος Διόσκορος ἔγραψα ὑπὲρ
 αὐτοῦ μὴ εἰδότες γράμματα. (ἔτους) β
 Θῶθ κθ. ἐκ τοῦ διατάματος ἀνέ-
 25 γνων. κολ(λήματος) μη, τόμ(ου) α.

ll. 8-9: ὑπαρχον- | τ[ων papyrus, l. 14: ὑπεσχέθη, ὑπεσκεθη papyrus, l. 17: ὑπα-
 τοισ papyrus, l. 22 ὑπερ papyrus

I ask you my Lord, to grant me and my consanguineous brothers, Aurelius Thonis and Aurelius Theoninus also known as Petronius, who are from the same aforementioned father, their mother being Hieraciaena, the possession of the property of Aurelia Saraheus¹²⁴ our consanguineous sister, who died without children and intestate, based on the part of the Edict¹²⁵, in which it is promised

122 Gagos/Heilporn in P. Thomas 20 intro.

123 The Greek in Col. II, 11 has ἀτέκνου, which is why *sine pueris* (without children) is supplemented.

124 The name Saraheus is chosen over the more common Saraeus due to the Latin spelling of the name on line 5 of Col. I of this papyrus.

125 Διατάγμα (translated from the Latin *edictum* in Col. I, 11) can either refer to an imperial edict or to that of the prefect of Egypt. According to Katzoff διατάγμα refers to the edict of the urban *praetor* in Rome, see Katzoff *TvR* 37 (1969), 418 & 435.

to be given to the legitimate heirs. Handed during the consulship of our Lord Claudius Caesar Augustus and of Paternus. I, Aurelius Thonis, request the possession of the property of our sister Saraheus for myself and my brothers of the same father as stated above. I, Aurelius Dioscorus have written this for him, because he does not know letters. In the 2nd year, on the 29th of Thoth. In accordance with the Edict: I have read it. Column 48, volume I.

The case in the papyrus shows a local Roman citizen¹²⁶, Aurelius Thonis, requesting admission of the possession of the property (*agnitio bonorum possessionis*¹²⁷) of his deceased sister, since she died intestate and without children. The editors Gagos and Heilporn suggest that this petition was drawn up and sent to the prefect to strengthen their claim on the property¹²⁸. In the petition no description of the property is given. Furthermore, no mention is made as to how the sister obtained it. Three possibilities are mentioned by the editors of the papyrus, namely that she inherited the property from her parents, from a deceased husband or as result of a divorce.¹²⁹ The first reason would be in line with the *decretum* of Dig. 36.1.76 (74) *pr*.

Returning to the *decretum*, the father envisaged to reunite the family property, if his daughter did not produce a consanguineous heir. In his *Institutiones*, Gaius mentioned the regulations regarding intestate succession. In *Inst.* III. 9-10 can be read that, according to the Law of the Twelve Tables, if the deceased did not have heirs of his (or her) own, the inheritance would befall his/her *agnati* (family relations on the father's side), who in the first place were brothers from the same father (*eodem patri fratres agnati*)¹³⁰, which in the case of the *decretum* was the deceased's brother.

The idea to restitute property to family members, when an heir did not have children is common in the Hellenistic East and is attested in testamentary documents of the same time as Dig. 36.1.76 (74) *pr*. An example of such is P. Oxy. III 491, 10-12 (Oxyrhynchus, 126 AD).

P. Oxy. III 491, 10-12 (Oxyrhynchus, 126 AD)

10 ἐὰν δέ τινη τῶν τριῶν υἱῶν συμβῆ ἀτέκνω τελευτῆσαι ἔστω τὸ το[ύ]του μέρος τῶν περιόντων αὐτοῦ ἀδελφῶν ἐξ ἴσου, παρὰ δὲ ταῦτα μὴ [οὔσης μηδενὶ τῶν κα]θόλου ἐξουσίας παραβαίνειν τὸν δὲ παραβησόμενον ἀποτίνειν τῷ ἐνμένοντι τό τε βλάβος καὶ ἐπίτι[μον] ἀργυρίου δραχμᾶς χ.ιλίας καὶ εἰς τὸ δημ[όσιον τὰ]ς ἴσας, καὶ μηδὲν ἦσ[σον κύρια μένειν τ]ὰ προκείμενα. ἢ διαθήκη κυρία.

126 In this timeframe all free persons were Roman citizens.

127 This procedure to acquire the *possessio bonorum* was applied by both Romans and peregrines. See Thoma 2019, 476. For other papyri concerning the *agnitio bonorum possessionis*, see Thoma 2019, 476.

128 Gagos/Heilporn 2001, 179.

129 Gagos/Heilporn 2001, 175. For literature on this see note 4 on the same page.

130 See in detail Kaser 1971, 695sqq.

Should it come to pass that either one of my three sons dies without children, let his share befall his remaining brothers in equal parts, let no one at all have the power to transgress beyond these provisions, let the party that will transgress these provisions pay to the party that abides by these the damages and a fine of a thousand *drachmae* and the same amount to the treasury and the aforementioned provisions be no less valid. This testament must be valid.

In this testament the testator, Eudaemon son of Thonasychis, has drawn up a testament, in which his three sons, all of the same mother (P. Oxy. III 491, 4) were appointed as co-heirs, two of which were minors at the time when the testament was drawn up. The father clearly wanted to exclude non-kindred third parties from the family property, as the property was to be restituted to the remaining brothers in case of a childless death by one of the co-heirs. It is not stated that the testator forbade his children to draw up testaments themselves regarding the property. In case of a childless death the property needed to be transferred to the remaining brothers, but could this also hold true if the deceased co-heir had drawn up a testament, which included other heirs than his brothers? Arguably, it can be seen as a transgression of the provisions of the father, if in this case the property would befall a non-kindred heir and not the co-heirs, albeit that the penalty clauses mentioned in the citation were applicable to all the provisions of the testament and not just the provisions cited. In this the testator Eudaemon seemed to limit the freedom to testate of his sons¹³¹.

In most documents with similar provisions *ἀδιάθετος* (without having drawn up a testament) is added. In such cases, the testator left the option open for his heirs to bequeath the property themselves via a testament. If the heir would die childless and without a testament, then the property of the father had to be transferred to the heirs of the deceased father. This is, for example, the case in the testament of P. Oxy. XXVII 2474, 25-28 (Oxyrhynchus, III AD)¹³². The Greek of this document is quoted above on pp. 168-169. In this testament, which has visible influences from a local legal context, such as a *paramone*-clause which is unknown to Roman law¹³³, the testator, whose name is not preserved on the papyrus, wanted the property that he bequeathed to befall his remaining sons, should one die childless. This construction shows some similarities to the Roman *substitutio vulgaris* (substitution of an heir by another in case this heir does not accept the inheritance or is already deceased)¹³⁴ and *pupillaris* (substitution of an heir in place of a

131 As is also the case in the *decretum* of Dig. 36.1.76 (74) *pr.*

132 See also the earlier cited P. Thomas 20. Other examples in testaments are P. Oxy. III 490, 6-7 (Oxyrhynchus, 124 AD) and P. Oxy I 105, 6 (Oxyrhynchus, 117-137 AD). On these testaments see Kübler SZ 29 (1908), 186.

133 Nowak 2015, 179-180 (also for further literature).

134 Substitution was common in local wills from Roman Egypt. For the different substitution-clauses used in testaments, see Derda and Nowak 2016, 141. They also mention the testament of P. Oxy. III 491.

minor), as seen in, for example, Gaius, *Inst.* II 181 and Dig. 28.6.4.2 (Mod. 1 *de Heur.*), in which a testator could substitute his heirs under certain conditions. In the practice of the papyri, however, not the heir is substituted, but the property is being transferred to family members (brothers in this case) of the deceased. The testator in P. Oxy. XXVII 2474 held into account the possibility that his sons, even when they died childless, could have made testamentary provisions themselves to allocate the inherited property. Only in the case that one of his sons died childless *and* without having drawn up a testament would the patrimonial property befall the remaining sons¹³⁵.

To conclude, the *decretum* as well as the Greek testamentary provisions discussed above had their roots in a Hellenistic legal context and practice. Three *decreta* from the Hellenistic East in the collection of imperial decisions by Paul have similar testamentary provisions¹³⁶, which all had the purpose to preserve a family's fortune within that family. Similar provisions can also be found in papyrological sources from Roman Egypt. The Greek provision in Dig. 36.1.76 (74) *pr* is given shape as a Roman legal concept by emperor Severus, who deduced a *fideicommissum* from this provision (*fideicommissum ex hac scriptura*), so it could be operational in the structure of the Roman legal system. The contents of this *fideicommissum* were to be interpreted as a command to restitute her patrimonial inheritance to her brother, should she die childless. Thus, in this case the emperor converted the limitation of the heir's ability to testate into a provision that was actionable as a *fideicommissum hereditatis* under the condition that the female heir die childless. In Roman legal doctrine this condition is referred to as a *si sine liberis decesserit*-clause. Papinian advised against this practice in his *responsum* of Dig. 31.77.24. Emperors Valerian and Gallienus did not follow Emperor Severus, as can be seen in the rescript of Cod. 2.3.15. By doing so Severus showed his willingness to go to great lengths to adjust a Hellenistic legal practice as found in papyri containing testamentary provisions into the framework of Roman law by means of the *voluntas testatoris*.

135 The provision stating that patrimonial property of an heir had to be given to other consanguineous heirs in case the former had died without children can already be found in second century BC in P. Ashm. I 22, 18 (Hawara, 107/106 BC). In a form comparable to P. Oxy. XXVII 2474 it is already attested in the first century AD in P. Mich. V 276, 2-3 (Tebtynis, 47 AD): τὸ ὑπάρχων (read: ὑπάρχων) τῶι τετελευτηκότι ἡμῶν ἀτέκνῳι καὶ ἀδειαθέτῳι ὁμοπατρῶι καὶ // ὁμομητρῶι ἀδελφῶι Λυσιμάχῳι ἔβδομον μέρος ἡμῶσους μέρος οἰκείας καὶ ἀλλῆς καὶ τῶν συ<v>κυρωντων πάντων (the seventh part of half a house and court yard and all appurtenances, which belonged to our brother Lysimachus from the same father and the same mother who died without children and intestate). From the papyrological sources, therefore, it seems that the concept of keeping property within consanguineous family members via such clauses was a well-established practice.

136 In the works of Paul this provision can be seen in these three instances: Dig. 36.1.76 (74) *pr*, Dig. 36.1.83 (81), and Dig. 32.27.1.

III.2 Dig. 28.1.29pr-1 (Paul. 14 Resp.): A Greek validation clause in writing

The second text by Paul discussed in this section is Dig. 28.1.29pr-1 from the fourteenth book of his replies. The compilers of the Justinianic Digest have incorporated it under the title *Qui testamenta facere possunt et quemadmodum testamenta fiant* (Those, who can draw up a testament and in what way testaments come to be). Under this title no other Greek documents appear other than the, in Paul's times already Romanized, Hellenistic legal instrument of the *chirographum* (Dig. 28.1.30 (Paul. 3 Sent.) and one Greek word used as a technical term, which is *χαρακτήρ* (used for seals of documents¹³⁷) in Dig. 28.1.22.5 (Ulpian. 39 ad Ed.). In Lenel's *Palingenesia* the fragment (fr. 1561) is included in a segment on *fideicommissa*. Fragment 1561 contains the only Greek text in the fourteenth book of Paul's replies, with the exception of the Greek names of two freedmen in Dig. 31.87.2 (Symphorus and Beryllus).

Dig. 28.1.29pr-1 (Paul. 14 Resp.)

Ex ea scriptura, quae ad testamentum faciendum parabatur, si nullo iure testamentum perfectum esset, nec ea, quae fideicommissorum verba habent peti posse. 1. Ex his verbis, quae scriptura¹³⁸ pater familias addidit: τούτην τήν διαθήκην βούλομαι εἶναι κυρίαν ἐπὶ πάσης ἐξουσίας, videri eum voluisse omnimodo valere ea quae reliquit, etiamsi intestatus decessisset.

From this writing, which was being prepared for the making of a will, even these things which entail words of *fideicommissa* cannot be claimed, if the testament was never lawfully completed. 1. From these words, which a *pater familias* added to a writing: "I want this testament to be valid in every power", it appears that he wanted that the provisions which he left behind were valid by all means, even if he had died intestate.

In the first part of the fragment a 'testator to be' wanted to draw up a testament and had already started doing so. In the draft of the document the author had written sentences containing testamentary provisions including fideicommissary statements. These provisions, such as *legata* and the *institutio heredis* and even the fideicommissary provisions were not actionable, if the testament had not been completed lawfully¹³⁹. *Fideicommissa* could be

137 Such usage of *χαρακτήρ* can be found frequently in papyrological sources from the first century AD until the sixth century AD. The expression *χωρὶς χαρακτήρος* (without a seal) is often used in customs receipts, see for example P. Customs 469, 6 (Dionysias, 208 AD).

138 Mommsen mentions a possible emanation to *scripturae* in his *Editio Maior*.

139 See also Ulpian in Dig. 32.11.1 (Ulpian. 2 Fid.), in which Ulpian stated that if a person started to draw up a will, but died before the testament was completed, even the fideicommissary provisions were not actionable, as this was decided per rescript by emperor Antoninus Pius. For the combined analyses of the fragments Dig. 32.11.1 and Dig. 28.1.29, see Longchamps De Bérrier *RIDA* 45 (1998), 490-492. Furthermore, Longchamps De Bérrier analyses a third fragment Dig. 29.7.13.1 (Papinian. 19 *Quaest.*), in which the problem is considered from another point of view.

constructed in a form-free way. Testators could write down *fideicommissa* outside of the testament and they were actionable. Regardless of the form-free nature of the *fideicommissa*, *fideicommissa* apparently were not actionable if the testator's testament in which they were written was not lawfully completed¹⁴⁰. In Roman testamentary law an incomplete testament must be considered null and void¹⁴¹. This is also concluded by Spina, who further adds two cases from the Digest¹⁴². One of those cases is Dig. 5.2.13 (Scaev. 3 *Resp.*), in which Paul noted that: *probat autem nec fideicommissa ab intestato data deberi, quasi a demente*¹⁴³. The same argument is made by Claudius Tryphoninus who commented on the 18th book of Scaevola's *Digesta*¹⁴⁴: *Nec fideicommissa ab intestato data debentur ab eo, cuius de inofficioso testamento constitisset, quia crederetur quasi furiosus testamentum facere non potuisse*¹⁴⁵.

The text of Dig. 28.1.29 continues with a bilingual passage featuring a Greek clause. The *principium* deals with the validity of provisions of incomplete and therefore invalid testaments. In paragraph 1 the topic is a case in which a person died intestate leaving only some writing (*scriptura*) behind in which parts of his property were bequeathed. The complicating factor here is that the *scriptura* featured a clause in Greek stating that all dispositions were meant to be valid. Such a clause was very common in documents¹⁴⁶ and more specifically in testaments. An elaborate example from the sixth century AD illustrates the importance of such a clause and shows that this single clause

140 Contrary to this, *fideicommissa* in separate codicils were enforceable. See Dig. 29.7.16 (Paul. 21 *Quaest.*). An earlier example can be found in Dig. 29.7.3.1 (Salv. Jul. 39 *Dig.*). A later example is attested in a rescript by emperor Diocletian to Stratonicus in Cod. 6.36.4 (*sine die et consule*).

141 See Daalder in Hekster (e.a) 2019, 61.

142 Spina 2012, 509. She also quotes Voci 1967, 586 and 1014.

143 Dig. 5.2.13 (Scaev. 3 *Resp.*): He, however, approves the view that *fideicommissa* bequeathed by a person who died intestate are not due, as if they were bequeathed by a madman.

144 In some extraordinary cases, against the regulations of Roman *ius civile*, incomplete and/or invalid testaments could have legal effect. In the case of Dig. 40.5.38 (Paul. 3 *Decr.*), a testament, incomplete (and therefore invalid) due to the fact that the testator died before completing it, contained *fideicommissa* bequeathed to a slave-girl and the manumission of that slave-girl, whom the testator treated like a foster-daughter (*alumna*). Due to the invalidity of the testament, it became questionable whether the *alumna* should be freed and the *fideicommissa* bestowed upon her, or not. It came to an imperial decision by Septimius Severus, who decided that the manumission of the girl was valid and that the *fideicommissa* bequeathed to her were actionable. See Daalder 2018, 446-447 and Daalder in Hekster 2019, 61-62. For a similar case, which contains an imperial decision by emperor Antoninus Augustus, see Dig. 28.4.3 (Marcian. 29 *Dig.*) and Dig. 34.9.12 (Papinian. 16 *Quaest.*).

145 Dig. 32.36 (Tryphon. *Not. ad Scaev.* 18 *Dig.*): And *fideicommissa* bequeathed intestate by him whose testament is declared undutiful are not due, because it is believed that he could not make his will just like a madman.

146 The same clause can be observed in Dig. 17.1.60.4 (Scaev. 1 *Resp.*) and 32.37.5 (Scaev. 18 *Dig.*), examined above on pp. 99sqq. In the latter text, it is quoted verbatim from a codicil.

developed into an intricate section of a testament: P. Cair. Masp. II 67152¹⁴⁷, 51-59 (Antinoopolis, 570 AD)¹⁴⁸.

P. Cair. Masp. II 67152, 51-59 (Antinoopolis, 570 AD)

καὶ βούλομαι αὐτὴν τὴν ἰδίαν ἰσχὺν καὶ δύν[αμ]ι[ν]
 ἔχειν ἐφ' οἷς περιέχει πᾶσι κεφαλαίοις κατὰ τὴν ἐκάστου
 διαστολήν, ἐπέχειν τε αὐτὴν οὐδὲν ἥττον καὶ κωδικίλλου τάξι
 καὶ πάσης τελευταίας βουλήσεως καὶ φιδεϊκομισσαρίας ἐπιστολῆς,
 55 προκομιζομένην καὶ δημοσιευομέ(νην) ἐπὶ πάσης ἀρχῆς καὶ ἐξουσίας
 καὶ θρόνου καὶ κυριότητος ἐν παντὶ χρόνῳ καὶ καιρῷ, κατὰ τὰ θειώδως
 ὑπὸ τῶν νόμων διηγορευμένα, καὶ πάντα τὰ ἐν αὐτῇ κεφάλαια
 δίδοσθαι καὶ πληροῦσθαι κατὰ τῶν ἐξ ἀδιαθέτου βουλομένων
 κληρονομῆσαι τῶν ἐμῶν δικαίων

And I want [this testament] to have power and force of its own in all the sections it encompasses regarding each disposition and that it holds no lesser rank than a codicil and than any last will and fideicommissary letter, when being brought forth to and produced as evidence to whatever magistracy or power or judge's bench or authority at any time or moment, according to imperial declarations under the law, and that all sections in this [testament] are given and fulfilled according to the rights of those who want to inherit my belongings without a testament.

In this draft of a testament¹⁴⁹ from the famous Dioscorus archive from the sixth century AD, a testator named Flavius Phoibammon had a testament drawn up in which an entire section instead of a single clause is used to make sure that the testament was valid¹⁵⁰. The author of the document wrote an entire paragraph to elaborate on the validity of testament, even though in the document it is stated that it had been officially registered at the office of the *dux* of the Thebaid¹⁵¹ (ll. 43-5) and in the presence of seven witnesses who were all Roman citizens. It appears that by using such clauses as seen in P. Cair. Masp. II 67152¹⁵², P. Oxy. III 491 and Dig. 28.1.29.1 the testator anticipated on the possibility of nullity of the document in question and tried

147 This text is the draft of P. Cair. Masp. II 67151. Presumably this draft is drawn up by the notary Flavius Dioscorus, the name giver of the Dioscorus archive.

148 For other examples from the second century see earlier in this chapter on p. 161 the *Gnomon Idiologi* §8 and P. Oxy. III 491, 12 (Oxyrhynchus, 126 AD).

149 Keenan mentions that this is a draft or perhaps even a pre-draft and that neither P. Cair. Masp. II 67152 or P. Cair. Masp. II 67151 were authoritative versions of the document. Keenan 2020, 116.

150 This testament has both elements from Justinianic law and from Hellenistic legal practice. See Beaucamp *SubGron* 7 (2001), 2-3.

151 Nowak 2015, 428.

152 According to Keenan, the document of P. Cair. Masp. II 67152 and P. Cair. Masp. II 67151 'suggest a provincial Egyptian capital alert to and respectful of Roman imperial law'. See Keenan 2020, 116.

to counteract these effects¹⁵³. Paul seems to authorize this. From Paul's use of *voluisse* it seems that the provisions which are *κυρίαν ἐπι πάσης ἐξουσίας* must be considered the *voluntas testatoris*. The document (*scriptura*) with such clauses therefore contained valid and actionable testamentary dispositions¹⁵⁴.

Long before Paul a documentary tradition already existed to declare a contract valid by including a *κυρία*-clause in the document. This *κυρία*-clause, as argued in previous chapters¹⁵⁵, derived from the time of the Greek city states, which operated with comparable, but not at all the same legal systems. To ensure the validity of a document in all the different Greek city-states contracting parties embedded this clause into the contract. Even though the differences between the legal systems of the Greek city-states became less important, the clause did not disappear in the Hellenistic East, possibly because of the use of it in a territory with a diversity of legal systems or because of 'conservatism' in documentary writing. The clause was also widely used in testaments, codicils and other writings conveying the last will of the deceased. The Roman laws on testamentary succession had precise regulations regarding the form of the document to make it enforceable and actionable. The *κυρία*-clause, therefore, was used to counteract the results of possible nullity of the testamentary document on grounds of technicalities. Paul confirmed the view that a *scriptura* with a *κυρία*-clause had valid testamentary provisions, even if the testator had died without leaving a valid testament, because such a clause confirmed the *voluntas testatoris* in the document. Paul seems to allow the construction of a document with testamentary provisions as an alternative for a *testamentum* when the provisions are validated by a Hellenistic *κυρία*-clause.

To conclude, Paul accommodated inhabitants of the Eastern empire by giving force to a clause which aimed to counteract the effects of possible nullity, by which means a document with provisions to bequeath property even in case of intestate succession was made enforceable. In the sixth century, the time of emperor Justinian, it was (at least in Roman Egypt) still a current custom to counteract the nullity of a testament by using a clause such as the *κυρία*-clause or by adding an entire paragraph to the document to confirm its validity. Even though the testament of P. Cair. Masp. II 67152 was drawn up in accordance to all the rules and regulations given by the Roman law on testamentary succession, it still had such a paragraph. This could be an explanation for the reason why the compilers of the Justinianic digest added this fragment from Paul's Replies to a section on 'in what way testaments come to be'.

153 This idea is derived from Spina who herself quotes Negri *La clausola codicillare nel testamento inofficioso* (1975), 56. See Spina 2012, 536.

154 Spina 2012, 536

155 See above on p. 63 with references to Hässler (1960) and Hengstl (1996).

III.3 Conclusion

Based on the first case examined, Dig. 36.1.76 (74) *pr* (Paul. 2 *Decr.*), it is difficult to make assumptions on Paul's opinion of the matter, because it concerns a report of a decision made by emperor Septimius Severus. From time to time Paul did hold and voice a different opinion than the emperor¹⁵⁶. Be that as it may, in this case the emperor used a strategy of *adaptation* of a Hellenistic legal norm to take the Hellenistic testamentary practice into account by converting testamentary dispositions invalid by classical Roman legal standards into valid and actionable *fideicommissa*.

In the last case examined, Dig. 28.1.29*pr*-1, Paul deviated from classical Roman law on drawing up testaments by means of the Roman doctrine of the *favor voluntatis*, by which documents containing provisions regarding bequeathed property drawn up by the deceased, even if no valid testament was drawn up, could be valid and actionable. He therefore used a strategy of *adaptation* in which he used a Roman legal concept (*favor voluntatis*) to account for a Hellenistic legal norm. He based the *voluntas testatoris* in this case on the insertion of a handwritten *κῤῥία*-clause, which has its origin in Attic law and Hellenistic documentary practice.

IV A BILINGUAL TEXT IN THE DIGEST ON THE LAW OF INHERITANCE BY THE JURIST MODESTIN

Having discussed bilingual Digest fragments from Scaevola and Paul, the third and last jurist to be examined in this chapter on the law of inheritance is Modestinus, the youngest of the three. From the works of Modestinus two fragments containing a document cited in Greek will be discussed, which are Dig. 31.34.1 from the 12th book of his *responsa* and Dig. 34.1.4*pr* from the 10th book of his *responsa*. The former will be examined in the next chapter as it concerns freedmen and freedwomen. The latter, Dig. 31.34.1, will be examined here.

As seen in the previous chapter on real contracts, Dig. 31.34.1 and Dig. 31.34.7, a bilingual text on *parakatatheke* and dotal law originating from Roman Syria Coele, belong to the same fragment in Lenel's *Palingenesia* (fr. 318) and to the same section in the Digest on *legata* and *fideicommissa*. In Dig. 31.34.1 reference is made to landed estates, which, next to the Greek document cited, could place this fragment in the Hellenistic East. A landed estate in Gaza (*Syria Palaestina*) is mentioned as well as an estate 'Comiana'. The exact location of the latter site remains unclear. Plinius the Elder referred to a tribe called the *Comini* in his *Naturalis Historia* (Book 3, 12 §108), who however lived on the Italic Peninsula in the Samnic region¹⁵⁷. It can also

156 An example of this is the famous case of Rutiliana in Dig. 4.4.38*pr*-1, see Daalder 2018, 205.

157 See also the town *Cominium* in Livy Book 10, 39.

refer to a *civitas Comanensium* (Cod. 9.35.10 (294 AD)), of which two are known. One of these *civitates* was located in the Roman province of Armenia II (*Κόμανα* in Nov. 31.1.1), the other in Cappadocia. Modestinus himself, in the second book of *de Excusationibus* (Dig. 27.1.6.9) mentions *Κομανεύς* and *Κομανεύσιν*, as the inhabitants of a town close to *Νεοκαισάρεια* (present-day Niksar in Turkey)¹⁵⁸.

Dig. 31.34.1 (Mod. 12 *Resp.*)

Lucius Titius in testamento suo ita cavit: “Ὁκταβιάνη Στρατονίκη τῇ γλυκυτάτῃ μου θυγατρὶ χαίρειν. βούλομαι αὐτὴν παρ’ ἐαυτῆς λαβεῖν χωρίον Γάζαν σὺν ταῖς ἐνθήκαις αὐτοῦ πάσαις. Ὁκταβιάνῳ Ἀλεξάνδρῳ τῷ γλυκυτάτῳ μου υἱῷ. Ἐξαιρετόν βούλομαι αὐτὸν παρ’ ἐαυτοῦ λαβεῖν σύγκτησιν ἀγνώφορον Κομιάνην σὺν αἷς ἔχει ἐνθήκαις πάσαις.” Quaero, an huiusmodi scriptura integrum praedium singulis datum esse videatur an vero partem hereditariam dumtaxat contineat, cum inutiliter a semet ipso quemque eorum quam habebat partem accipere voluit. Modestinus respondit non sic interpretandam scripturam de qua quaeritur, ut fideicommissum inutile fiat. Item quaero, si integrum praedium relictum esse videatur, an pretium portionis fratri et coheredi solvendum sit, ut hoc ipso, quod a semet ipso accipere praecepit, pretio illato integrum habere eum voluerit. Item respondit ad solutionem pretii fideicommissarium minime compellendum.

In his own testament Lucius Titius declared the following in writing: “To Octaviana Stratonice, my sweetest daughter greetings. I want that she takes from herself the estate Gaza with all its appurtenances. To Octavianus Alexander, my sweetest son. I want him to take from himself the joint-ownership reserved for him¹⁵⁹, the estate full of chaste-trees in Comiana with all the appurtenances it entails”. I ask, whether via a testamentary provision of this nature the landed estate as a whole appears to be given to each of them individually or for as far as it encompasses part of the inheritance, because he invalidly wanted that both of them received from themselves the share which they already had. Modestinus replied that the provision, regarding which the question is asked, must not be interpreted in this fashion, that the *fideicommissum* becomes invalid. I also ask, if the landed estate as a whole appears to be bequeathed, whether the value of the share must be paid by the brother and coheir, as if, by payment of the price, he had wanted him to have in full, what he had prescribed to receive from himself in advance. Similarly, he responded that least of all the beneficiary of the *fideicommissum* must be compelled to pay the price [of the share].

In his testament drawn up in Greek, Lucius Titius bequeathed the two landed estates mentioned in the introduction to respectively his daughter Octaviana Stratonice¹⁶⁰ and his son Octavian Alexander. Next to endowing his children

158 The identification of *Comiana* as *Comana* is derived from Bynkershoek *Observationum Juris Romani* lib. VI cap. 9. See also Sirks *TvR* 79 (2011), 250.

159 In his translation of the Digest, Watson translates ‘exclusively’. Watson 1985, 44.

160 See, for example, from this timeframe Aurelia Stratonice in P. Oxy. VIII 1114, 9-10 (Oxyrhynchus, 237 AD).

with landed estates, Lucius Titius also named them co-heirs (*coheredes*) of all his belongings. The Greek / Latin names of the children are no anomaly for inhabitants of the Hellenistic East of the third century AD (i.e. after the *Constitutio Antoniniana*), from which time this *testamentum* originated. The document is drawn up in a subjective style in the form of a letter, as can be seen from the opening in which the testator greeted (*χαίρειν*) his sweetest daughter. Similar openings have been examined in earlier chapters, for example in the deed of *mandatum* in Dig. 17.1.60.4 (Scaev. 1 *Resp.*)¹⁶¹.

The document continues with several testamentary provisions introduced by *βούλομαι*, which is according to Cujas a '*verbum precarium, non directum*' used to introduce *fideicommissa* and not *legata*¹⁶². After this *βούλομαι* follows the object of the inheritance. In the first of the two provisions the daughter is bequeathed with an estate with all appurtenances, '*ἐνθήκαις*'. The Greek '*ἐνθήκαι*' is mentioned by Papinian in Dig. 33.7.2 (Papinian. 7 *Resp.*): *Dotes praediorum, quae Graeco vocabulo ἐνθήκαι appellantur, cum non instructa legantur, legatario non praestantur.*¹⁶³

The following addition by the testator is peculiar. Stratonice received the estate *παρ' ἑαυτῆς* (from herself). Because of these Greek words, it remains unclear what the father Lucius Titius was bequeathing his daughter. The meaning of these words will be examined alongside *παρ' ἑαυτοῦ* from the second provision.

In the second testamentary provision Lucius Titius turned to his son Octavian Alexander. The testator bestowed upon him a piece of land, which is *ἀγωνόφορον*, in joint-ownership (*σύγκτησιν*¹⁶⁴). Presumably, this joint-ownership is a joint-ownership of the testator Lucius Titius and a third party, so that Octavian received his father's part of the estate. Joint-ownership of houses and landed estates is very common in the Hellenistic East. For example, in the testament of P. Oxy. VI 907 (Oxyrhynchus, 276 AD) cited below, this can also

161 See Chapter II on consensual contracts on pp. 47sqg.

162 *Gl. 'βούλομαι' ad Dig. 31.34.1* by Cujas.

163 Dig. 33.7.2: Accessories of landed estates, which are called *ἐνθήκαι* in the Greek language, need not be handed over to the legatee, when they are not legated with all belongings. In the glosse *Gl. 'σὺν ταῖς ἐνθηκαῖς πάσαις' ad Dig. 31.34.1*, Cujas remarks: *Enthecas vocant dotes praediorum, instrumenta praediorum causa reposita. Quamobrem haec verba interpretatus sum hoc modo, cum omni iure suo, omni dote sua, omni re instrumento suo (Enthecae are what instructed lands are called, when the tools needed for these landed estates are included. Because of this reason I have interpreted these words in this way, with all its rights, all its accessories and all its tools). Therefore, Häusler speaks of 'Dotgrundstücke' in Häusler SZ 133 (2016), 441.*

164 The reply in Dig. 34.4.30.1 (Scaev. 20 Dig.) also revolves around an inheritance of a joint-ownership of a landed estate. In the Greek of the fragment cited the word *σύγκτησις* is used. This bilingual text will be examined in the next chapter. The word *σύγκτησις* was not always correctly understood, for example by Accursius, as Bynkershoek showed in an overview. See Bynkershoek *Observationum Juris Romani* lib. VI cap. 9. The exact meaning of *σύγκτησις* is obscure as both joint-ownership and a conglomerate of lands are options. Kaiser in *Zur Bedeutung von σύγκτησις in Inschriften* in Kaiser SZ 138 (2021), 523-539 opts for the meaning a conglomerate of lands.

be seen in lines 10 and 12 in the Greek ‘ὁ ἔχω κοινὸν πρὸς’ (which I hold in joint-ownership with). In the Digest fragment the Greek *χωρίον* is omitted as it has already been used in the previous sentence. Turning to the landed estate itself, it is not at all clear what is meant by *ἀγρονόφορον* and Spruit chooses to translate *ἀγρονόφορον* (bearing chaste-trees)¹⁶⁵, while Watson translates it with ‘osier-beds’. Along with specifying which landed estate the testator meant, the addition suggests some economic value of the land¹⁶⁶, which could be important in light of the division between the inheritance of both siblings. In the *Diccionario Griego-Español* the authors suggest that *ἀγρονόφορον* could mean *improductivo*.

The testator wanted his son to take the joint-ownership *ἐξαιρέτων*, which Watson translates with ‘exclusively’. Both ‘exclusively’ and ‘especially’ as well as ‘by preference’ are translations that fit this context, as evidenced by the use in, for example, Isaeus in the case on the inheritance of Dicaeogenes¹⁶⁷. Another possible interpretation of *ἐξαιρέτων* is ‘in advance’. This interpretation is warranted by legal sources which are from a later date (respectively IX AD and VI AD), but refer back to practices of classical Roman law. One of these sources is the *Basilica*, a Byzantine summary of the Digest in Greek. In Bas. 44.4.37¹⁶⁸ the topic of the text is a share of an inheritance, which can be given in advance via a *legatum per praecipionem*: ‘Ὁσακίς ὁ κληρονόμος καὶ ληγάτων ἔχει ἐν τῇ διαθήκῃ κατὰ ἐξαιρέτων τῆς κληρονομίας, δύναται καὶ παραιτούμενος τὸ μέρος τῆς κληρονομίας αὐτοῦ, λαβεῖν τὸ καταλειφθὲν αὐτῷ ληγάτων.’¹⁶⁹ The second legal source is on the same topic. *Ἐξαιρέτων* is found in Theophilus’ *Institutiones* II.20.2 on *legata*, where the four different types of *legata* are treated. By Justinian’s legislation the different formal aspects of creating each of the four types of *legata* were effectively eliminated. Both Justinian and Theophilus, however, deemed it worthwhile to digress on the subject as a thing of the past, possibly for its educational value:

Theoph. *Inst.* II. 20.2

Praecipionos δὲ ρήματα· “κατεξαιρέτων ὁ δεῖνα ὁ μερικὸς κληρονόμος λαμβανέτω τόδε τὸ πρᾶγμα.” ἀμέλει οὐ καλῶς τῷ μὴ ὄντι μερικῷ κληρονόμῳ κατὰ praecipiona καταλιμπάνομεν. τὸ γὰρ εἰπεῖν Ῥωμαῖστί “praecipito”,

165 This emanation can also be seen in the *Editio Maior* by Mommsen.

166 Mentioning the type of vegetation of land or its economic purpose is common in the papyri, as can be seen in the testament in P. Oxy. VI 907 (Oxyrhynchus, 207 AD) examined below.

167 See Isaeus *On the Estate of Dicaeogenes* V, 29: ἔδομεν αὐτῷ τὴν ἐν ἄστει οἰκίαν ἐξαιρέτων προσθέντες τῷ τρίτῳ μέρει τοῦ κλήρου ἔχειν ἀντὶ τῶν ἐπεσκευασμένων, ἦν οὗτος ἀντὶ πεντακισχιλίων δραχμῶν παρέδωκε Φιλονείκῳ (We gave exclusively to him a house in the city, having added it to the third share of an estate he had due to his repairs, which he sold to Philonicus for five thousand *drachmae*).

168 For *ἐξαιρέτων* see also Bas. 44.4.32.

169 Bas. 44.4.37: As often as an heir has a *legatum* in the testament to take a thing from the inheritance in advance, he can, next to requesting his share of the inheritance, receive the legacy bequeathed to him.

τουτέστι “κατεξαίρετον λαμβανέτω”, δηλωτικόν ἐστὶ προϋποκειμένου μέρους κληρονομίας, τουτέστι πρὸς τῷ μέρει ὅπερ αὐτῷ κατέλιπον. βούλομαι αὐτὸν καὶ τόδε ἔχειν ἐν ἐξαίρετῳ.

The wording of a *legatum per praeceptionem*: “such and so heir, instituted for a part, shall take this thing in advance”. Certainly, we do not justly bequeath to an heir, who is not instituted for a part of the inheritance via a *legatum per praeceptionem*. Because the Romans say *praecipito* and this is “let him take it in advance”, it is apparent that it is a share of the inheritance, which had been divided previously, and this is in addition to the share which I bequeathed to him. I want him to have it in advance.

Theophilus discusses what used to be the wording of the so-called *legatum per praeceptionem*. Because *praecipito* is the technical term which he explains, the word is written in the Latin alphabet. When a Latin speaking Roman would say (*Lucius Titius hominem Stichum*) *praecipito*¹⁷⁰ a Greek speaking Roman would say ‘κατεξαίρετον λαμβανέτω’. Theophilus then explains the legal concept of the *legatum per praeceptionem* as a share of the inheritance which the heir can take in advance, before the rest of the inheritance is divided. Upon the beneficiary of this *legatum* a part of the inheritance is bestowed beyond what is due to him by the division of the inheritance among the co-heirs. Such an interpretation is also possible for Dig. 31.34.1. With *ἐξαίρετον λαβεῖν* the testator could have tried to shape the provision into a *legatum/fideicommissum per praeceptionem*. This interpretation is supported by *praecipit* in the legal question in the fragment¹⁷¹. From the reply by Modestin, however, it is clear that the provision was not regarded a *legatum*, but as a *fideicommissum*. Roman legal texts on *legata per praeceptionem*, for example Gaius, *Inst.* II 216-222, do not mention *fideicommissa per praeceptionem*. In classical Roman legal doctrine this type of ‘*Vorausvermächtnissen*’ were drawn up as *legata*. It is true that in the third century AD there was a development that the difference between a *legatum* and a *fideicommissum* became less and less important until eventually all meaningful distinctions between the two vanished as evidenced by Cod. 6.37.21 (339 AD), approximately a hundred years after this Digest fragment¹⁷². This development continued in the fourth century, in which these differences were effectively equalized¹⁷³. In this case Modestin assumed the possibility of a *fideicommissum per praeceptionem*, which cannot be seen in legal texts from the Digest before Modestin’s time.

170 See Gaius, *Inst.* II 216.

171 Cf. Wimmer 2004, 25 & 35-36.

172 Cf. Kaser 1971, 758.

173 See Cod. 5.9.3 [Gratianus, Valentinianus and Theodosius, 382 AD]. Eventually, this development is completed by Justinian. See Cod. 6.43pr [Justinian, 529 AD]. Cf. Kaser 1975, 552-553.

The term *κατ' ἐξάιρετον* is attested in the papyrological corpus. In the copy of the testament of Aurelius Hermogenes, documented as P. Oxy. VI 907¹⁷⁴ (Oxyrhynchus, 276 AD), the testator used *κατ' ἐξάιρετον* presumably twice, namely in ll. 10 & 13. In line 13 it is supplemented by the editors of the papyrus after line 10¹⁷⁵. According to Strobel, the meaning of this *κατ' ἐξάιρετον* can be interpreted as a *legatum per praeceptionem*¹⁷⁶, just as in the text of Theophilus above and in the *Basilica*.¹⁷⁷ The testament of a certain Hermogenes is written in Greek, with a reference to an exemption¹⁷⁸, as shown above in the introduction of this chapter:

P. Oxy. VI 907, 7-16 (Oxyrhynchus, 276 AD)

- Αὐρηλίους Ἐρμείνω καὶ Ὠρείωνι καὶ Ἡρακλείδῃ τοῖς τρισὶ μου [υἱοῖς γλυκυτάτοις δίδωμι καταλείπω κοινῶς ἐξ ἴ-]
 σου¹⁷⁹ ὑπὲρ τῆς κληρονομίας τῆς ἐμῆς ὃ ἔχω περὶ τὸ Ἴστρου τῶν κατὰ τὸ ἄνω Ἰσεῖον¹⁸⁰ ἀμπελικὸν χωρίον καὶ σειτικὰς ἀρούρας πάσας καὶ – ca.16 -]
 νυς καὶ χρηστήρια καὶ συνκυροῦντα πάντα καὶ ἃς ἔχω περὶ Σεφῶ σειτικὰς ἀρούρας πάσας καὶ ἐν τῇ μητροπ[όλει τὴν – ca.28 -]
 10 μου οἰκίαν καὶ τὴν ἐν αὐτῇ ἐνδομενεῖαν πᾶσαν, τῷ δὲ Ἐρμείνω μόνῳ κατ' ἐξάιρετον ἃς ἔχω περὶ Σεφ[-ca.?- κοινὰς πρὸς]
 σειτικὰς ἀρούρας πάσας καὶ δοῦλόν μου ὀνόματι Φιλοδιόσκορον. Αὐρηλίαις Πτολεμαίδι καὶ Διδύμῃ ταῖς προγογεγραμμέναις θυγατράσι μου δίδω-]
 μι καταλείπω καὶ αὐταῖς κοινῶς ἐξ ἴσου ὑπὲρ τῆς κληρονομίας τῆς ἐμῆς ὃ ἔχω κοινὸν πρὸς τὸν αὐτ[ὸν – ca.24 – ἀμπελικὸν]
 χωρίον καὶ σειτικὰς ἀρούρας πάσας καὶ προχρείας καὶ χρηστήρια καὶ συνκυροῦντα πάντα, τῇ δὲ Διδύμῃ [μόνη κατ' ἐξάιρετον – ca.20 -]
 ἀλλὰ καὶ τῇ Πτολεμαίδι βεβαίῳ διὰ τούτου μου τοῦ βουλήματος ἦν φθάσας ἐπιδέδωκα αὐτῇ προῖκα ε[- ca.21 – καὶ καταλείπω τὴν]
 15 δούλην ὀνόματι Εὐνοίαν, τὰ δὲ λοιπὰ μου δοῦλα σώματα τέσσαρα Διοσκουρίδην καὶ Σαβεῖνον καὶ Ἐρμ[. . . καὶ τοῖς προκειμένοις ἄρρεσι τοῖς]
 τρισὶ καὶ τῇ μιᾷ τῶν θηλειῶν, λέγω δὴ τῇ Διδύμῃ.

174 Cf. Babusiaux SZ 133 (2016), 531.

175 See also PSI VI 696,7 (Arsinoites (?), III AD) for *ἐξάιρετον*.

176 Strobel 2014, 214-215 and 218.

177 Nowak provides an alternative possibility, namely that the provisions in the text of P. Oxy. VI 907 must be interpreted as part of a *heredis institutio ex re certa*. An argument for this view is that according to Nowak in the testament the property was simply divided among the heirs. Furthermore, the testament lacked the necessary wording of a *legatum per praeceptionem*. For the argumentation and further literature, see Nowak 2015, 139. See also Derda and Nowak in *ZPE* 207 (2018), 151. In this article Derda and Nowak edit and discuss 'the testament of Ploution' in P. Oxy. III 646 (Oxyrhynchus, 117-138 (117-126?) AD). In lines 6-8 of this testament a legal concept can be found similar to (but not necessarily the concept of) *legatum per praeceptionem* (see pp. 151-152).

178 P. Oxy. VI 907, 2-3: *τόδε τὸ βούλημα*] // Ἑλληνικοῖς γράμμασι κατὰ τὰ συνκεχωρημένα ὑπηγόρευσεν (He has dictated the following testament in Greek letters according to the permission).

179 See BL III 133. The original edition has *ὡς πρόκειται* (as mentioned above).

180 For *ἄνω Ἰσεῖον*, see BL VIII 238 and BL IX 182, where this location is identified as a sanctuary for the goddess Isis.

I give to and bestow upon Aurelius Herminus and Aurelius Horion and Aurelius Heraclides, my three sweetest sons, in joint-ownership in equal parts with regards to my inheritance the vine-bearing estate which I have near the village of Istrus by the upper temple of Isis, and all the *arourae* of corn-land and ... and utensils and all appurtenances and all the *arourae* of cornland which I have around Sepho and in the metropolis ... my house and all the household goods in it, and to Herminus alone, by preference all the *arourae* of cornland, which I have near the village of Sen... in joint-ownership ... and my slave named Philodioscorus. I give to and bestow upon my aforementioned daughters Aurelia Ptolemais and Aurelia Didyme, to them in joint-ownership for equal parts with regards to my inheritance the vine-bearing estate which I have in joint-ownership with the same ..., and all the *arourae* of corn-land and all planting, utensils and appurtenances, to Didyme alone, by preference ..., and also to Ptolemais I affirm, by this last will, the dowry which I gave to her earlier ... and I bequeath [to her] the slave-girl named Eunoia (...). The remaining four slaves, Dioscurides and Sabinus and Herm... and I bestow upon the aforementioned three sons and one of my daughters, that is to say Didyme.

In this testament of Hermogenes, which stems from the same timeframe as the *responsum* of Dig. 31.34.1 by Modestin, the testator appears to adhere to traditional Roman *formulae* and testamentary practices¹⁸¹. The testator Hermogenes instituted five of his children, three sons and two daughters, as co-heirs, all other persons were disinherited¹⁸². Hermogenes apportioned different parts of his property to each of the coheirs. From these five *co-heredes*, two were singled out by the testator, viz. Aurelius Herminus and Aurelia Didyme. Aurelius Herminus received in joint-ownership with his two brothers a landed estate near Istrus and an amount of *arourae* of corn-land. Furthermore, Herminus alone received a joint-ownership of another landed estate and he received a slave¹⁸³. It appears that in dividing the property among the brothers Herminus could in advance take these goods from the inheritance (*μόνον κατ' ἐξάλρητον* in line 10). Aurelia Didyme is bequeathed with a joint-ownership together with her sister Aurelia Ptolemais of a jointly-owned vineyard and some corn-land. What she was to receive alone and in advance (l. 13) is not preserved on the papyrus. The lacuna in the papyrus, can be supplemented analogous to the provisions on Aurelius Herminus, which are formulated in a similar way.

181 Nowak, for example, calls the testament 'based on a Roman template' and 'Roman in name only'. The testament deviates from Roman *testamenta* in important ways: for example, the testament has been drawn up as a *testamentum per aes et libram*, but it does not contain a *mancipatio* clause. Furthermore, the testament has a *heredis institutio* to institute his children as heirs, but it is used in name only, as later in the testament the testator wanted his children to inherit only the share that was appointed to him or her. See Nowak 2015, 114 & 138-139. See also Strobel 2014, 206sqq.

182 P. Oxy. VI 907, 4-5. See for the reconstruction of this part of the text BL I 329.

183 Thoma states that in Roman wills from Roman Egypt a testator most likely appoints his children as heirs with either equal or unequal shares. In Egyptian wills two kinds of divisions can be discerned, namely a division in equal shares and a division in which the oldest son is favored above the other children. See Thoma 2019, 475. See also Huebner 2013, 50.

A rationale for the testator's 'extra' bequest in favor of his daughter Aurelia Didyme might be found in the fact that she was unmarried. The testator's other daughter Aurelia Ptolemais already had received a dowry from her father. In subsequent lines in the papyrus, not quoted, it appears that Aurelia Didyme at the time of the writing of the testament had not received a dowry¹⁸⁴. In this way her father Hermogenes may have secured for her a dowry for a possible future marriage apart from the rest of the inheritance¹⁸⁵.

From the testament it appears that all the testator's property is bequeathed to his children with two small exceptions. A share in a piece of land was bequeathed to his wife Aurelia Isidora, which the testator had previously placed under hypothec to her to secure the dowry that Aurelia Isidora had brought to the marriage (not quoted). This is in line with the Hellenistic view on dowries, which were transferred back to the wife in case of the death of the husband. In addition, the testator requested that Aurelius Dionysammon, a friend of his, was given thirty jars of wine and a number of *artabae* of wheat each year. The property was divided equally among the male co-heirs and among the female co-heirs. An exception to this were the larger shares of Aurelia Didyme and Aurelius Herminus, which might be considered to be *legata / fideicommissa per praeceptionem* or in case of Aurelia Didyme possibly a *legatum / fideicommissum pro dote*. Babusiaux citing Mitteis, acknowledges this in stating that the provisions in the document must be in part interpreted as a 'Hineinvermächtnisse' and in part as a 'Vorausvermächtnisse'¹⁸⁶.

Returning to the Greek testament cited in Dig. 31.34.1, the testator made the provisions in Greek more complicated with regard to what the objects of the *fideicommissa* exactly were. The testator added the words *παρ' ἑαυτῆς* regarding the share of Stratonice and *παρ' ἑαυτοῦ* regarding the share of Octavius Alexander. From this statement and the earlier mentioned *ἐξάριετον λαβεῖν*, it may be inferred that the author of the document, like the author of P. Oxy. VI 907, was aware of a few basic rules of the Roman law of succession. The purpose of the statement is clear as the testator wanted both co-heirs to receive a reserved part of the inheritance in advance. Yet this part would also befall them as heirs. The author of the legal question referred to this problem with *cum inutiliter a semet ipso quemque eorum quam habebat partem accipere voluit*. In this choice of words, it seems evident that the author of the question was familiar¹⁸⁷ with the rule *a semet ipsis inutiliter legatum est* (FV 87 (Ulpian.

184 Cf. Strobel 2014, 214, who defines this provision as a *legatum pro dote*.

185 Another part of the dowry had to come from her brothers who according to ll. 19-20 (not quoted) of this testament were obligated to give her four talents of silver. The case shows great similarity with Dig. 33.4.14 (Scaev. 15 Dig.) discussed above, in which the dowry of the testator's daughter had to be subtracted from the total inheritance and only after this the inheritance was to be divided among the coheirs. See Babusiaux 133 SZ (2016), 532.

186 Babusiaux 133 SZ (2016), 531.

187 This has also been stated by Kübler 28 (1907), 179.

17 *ad. Sab.*)¹⁸⁸) and that the testator had apparently hoped to counteract the consequences of this rule by the provisions of the will. This maxim entailed that a testator could only burden those parts of the inheritance with a *legatum per praeceptionem*, which would not already befall the beneficiary, as this would make the provision null and void (*inutiliter*). From *παρ' ἑαυτοῦ* it must be inferred that the bequeathed landed estates befall the beneficiaries at least partly. Cujas already noted this in his edition of the glosses:

Gl. 'παρ' ἑαυτῆς' ad Dig. 31.34.1

Dubitationem adferunt haec verba, *παρ' ἑαυτῆς & παρ' ἑαυτοῦ*, quae paulo post a seipsa, & a seipso, quod pater dabat. Sic autem interpretanda sunt illa verba fideicommissa a seipso, vel, a seipsa, ut partem tantum capiat a seipsa, non totum, ut fideicommissum non intercidat, & ut rata sit voluntas defuncti potius quam irrita.

The words *from herself & from himself*, which somewhat later are translated with *seipsa & seipso*¹⁸⁹, bring doubt as to what the father gave. The fideicommissary words *from himself* or *from herself* must be interpreted in this way that she only takes a part from herself, not the whole, so that the *fideicommissum* does not fall through, and so that the will of the deceased is upheld rather than broken.

A possible situation (Situation A) of the case of Dig. 31.34.1 is, taking the joint-ownership of the estate 'Comiana' of Octavian Alexander as an example, that the entire estate formed part of the inheritance, of which half had to go to Octavian Alexander and the other half to his sister Octaviana Stratonice. The testator requested his heir Octavian Alexander to receive in advance one half of the estate which would befall him, and the other half from what would befall Octaviana Stratonice, so that he would have the entire estate¹⁹⁰. This is probably what Cujas means with '*partem tantum non totum*'. Another possible reading (Situation B) is that the testator wanted his heir Octavian Alexander to take in advance the future share of the estate and only his own share of the estate, leaving half an estate to be divided amongst de coheirs, which in the example of the estate 'Comiana' would lead to a joint-ownership in which Octavian Alexander has three shares and Octaviana Stratonice one (75% – 25%) of the *σύγκτησις*. This is more in line with the Greek than Situation A. Furthermore, Situation B explains better why the author of the legal question brought up the *inuliter a semet ipso* maxim.

188 For other places where this adage is used, e.g. Dig. 30. 34.11 (Ulpian. 21 *ad Sab.*) and Dig. 30.18 (Salv. Jul. 31 *Dig.*), see Siber 29 *SZ* (1908), 83, Lübtow 68 *SZ* (1951), 512, Kaser 82 *SZ* (1965), 428 and Wimmer 2004, 7-8.

189 In this edition of the Digest, which is from Lyon 1627, the Greek in the fragment is translated into Latin. Cujas refers to this translation.

190 Part of this scenario could be that both heirs already had *de facto* ownership of the lands which would now fall into the inheritance and that the testator wanted the heirs to continue their ownership and have their respective estates in full making their ownership in accordance with the law. The testator could have meant this with *παρ' ἑαυτοῦ*.

Having analysed the fragment of the Greek testament cited in Dig. 31.34.1, the legal questions raised in this *responsum* will be examined. Two questions were asked of Modestin. The first question concerned the meaning of the *fideicommissa*. The author of the question wished to know, whether the testamentary provisions should be explained as leading to the coheirs both receiving a whole estate (situation A), or as leading to the coheirs both receiving a majority share of the estate bequeathed to them specifically and a minority share of the estate bequeathed to the other specifically (situation B). The validity of the *fideicommissa* is questioned. Modestin replied that the testamentary provisions were not to be interpreted in a way that would make them invalid, favouring Situation A above Situation B. In Situation B only the part of the estate belonging to the heir's own share is taken in advance, and this would render the provision ineffective due to the rule *a semet ipsis inutiliter legatum est*. Therefore, the correct interpretation must be that the *fideicommissa* entailed half of the part which each of them was to receive as coheirs and the other half from their sibling, meaning that both heirs could take the property bequeathed to them without sharing it with the other. In the case of Octavia Stratonice this is the landed estate 'Gaza' with all appurtenances, and in the case of Octavian Alexander it is a share (the entire share owned by the father) of the landed estate 'Comiana' with all appurtenances.

Anticipating such an answer the author of the question continued with a follow-up question to the Situation A scenario. From the second question, it becomes evident that this must be a legal argument amongst siblings concerning the inheritance, because the brother and coheir is explicitly mentioned. The sister Octavia Stratonice has been endowed with a landed estate which had significantly less economic value than the share of the property of the estate 'bearing chaste-trees' bequeathed to her brother Octavian Alexander¹⁹¹. This can be inferred from the question whether her brother should pay the difference in worth to equalise both shares of the inheritance (*fratri et coheredi solvendum*¹⁹²). Modestin replied that the brother Octavian Alexander was not required to make such a payment. The argument provided in favour of payment of the difference is, that the testator wanted his heirs to only have his or her own share, so that compensation was due to the heir with the share of lesser value, now that the whole estate was bequeathed. Modestin dismissed this chain of thought without further argumentation.

To conclude, from the analysis of Dig. 31.34.1 (Modestin. 12 *Resp.*) it appears that in two ways the jurist used a strategy of *adaptation* while confronted with a question based on a legal document from a Hellenistic legal practice. He adapted Roman law to a Hellenistic context in advising on the testament of the testator. Firstly, by accepting the provisions in questions as *fideicommissa per praeceptionem*. Such provisions are normally constructed

191 This would make the earlier mentioned translation of the DGE as *improductivo* less likely.

192 *Fratri et coheredi* is translated as a *dativus auctoris*. The agent of *solvendum* must be a man, as is evident from the last sentence of the reply *fideicommissarium compellendum*.

as *legata per praeceptionem*. As stated, in the Hellenistic East no clear distinction between *legata* and *fideicommissa* was made. Secondly, Modestin urged to interpret the provisions in such a way that they were not at odds with the *a semet ipsis inutiliter maxim*. Modestin answered that these provisions were valid, to which end he probably used the vehicle of the *favor voluntatis*. It appears that in Modestin's time (around 250 AD) so close after the *Constitutio Antoniniana* Modestin showed leniency towards a Roman citizen from the Hellenistic East who, similar to the testator of P. Oxy. VI 907 (Oxyrhynchus, 276 AD), had drawn up a Roman styled testament, but in the end – intentionally or unintentionally – did not fully observe the finesses of Roman testamentary law.

V CONCLUSION ON BILINGUAL RESPONSES REGARDING THE LAW OF INHERITANCE WITHOUT A SLAVE CONTEXT

By the second century AD and even more so by the third century AD, the Roman law of inheritance and Roman testamentary law in specific were highly specialised and technical fields of law. The same does not hold true for these fields of law in Attic law and in a Hellenistic legal culture. As explained before, both in Attic law and in Hellenistic legal cultures a developed doctrinal legal science was absent. The friction between the legal spaces of the West and the East is noticeable, when testamentary provisions from the East, where a broad testamentary freedom existed, collided with the rules and regulations of classical Roman law. This is the case in the examined Dig. 32.37.6 (Scaev. 18 *Dig.*), in which presumably a testatrix attempted to bequeath a sum of money to an *incapax* in spite of a *senatus consultum* to the contrary; Dig. 36.1.76 (74) *pr* (Paul. 2 *Decr.*), in which the testator tried to limit the testamentary freedom of his heir; Dig. 28.1.29*pr*-1 (Paul. 14 *Resp.*), in which a testator wanted written provisions to be valid and enforceable even if the testament itself was null and void or nonexistent; and in Dig. 31.34.1 (Mod. 12 *Resp.*), in which a testator tried to make the Roman rule of *a semet ipsis inutiliter legatum est* inoperative via testamentary provisions. Two *responsa* by Scaevola discussed in this chapter remain. These cases do not concern a collision of Hellenistic law with Roman law, as both legal systems were very similar on the topics involved, namely the legacy of a dowry before the division of an inheritance in Dig. 33.4.14 (Scaev. 15 *Dig.*) and the *tutela* and *administratio* of a minor in Dig. 26.7.47*pr* (Scaev. 2. *Resp.*).

In the four cases in which testators had drawn up testamentary provisions at odds with Roman law, two alternative strategies can be noted. Either the validity of the provision was fully denied (*rejection*), or some leniency and accommodation was shown towards invalidly drawn up provisions to make them valid and enforceable (*adaptation*). In one case, the jurist refused to validate the testamentary provisions. This case is Dig. 32.37.6 (Scaev. 18 *Dig.*). In this case Roman public law proved an insurmountable obstacle to accommodate the *voluntas testatoris*.

The Roman law of inheritance was not rigid. In the three other cases, which are Dig. 28.1.29*pr*-1 (Paul. 14 *Resp.*), Dig. 36.1.76 (74) *pr* (Paul. 2 *Decr.*) and Dig. 31.34.1 (Mod. 12 *Resp.*), Roman legal doctrine was pliant enough to turn *prima facie* invalid testamentary provisions valid and enforceable. In these three cases Roman legal doctrine was molded to fit a testamentary provision by means of the Roman principle of the *favor voluntatis*.

These cases from the Hellenistic East show the pragmatic nature of the Roman jurists. Testamentary provisions from the Hellenistic East that were truly contradictory to Roman law were dismissed, whereas provisions that could be upheld by stretching Roman legal concepts to their limits (or overstressing them), were upheld, even though these provisions, seemingly, intervened with critical aspects of the Roman law of inheritance.

APPENDIX: DIG. 8.3.37 (PAUL. 3 *RESP.*): THE USE OF WATER CANNOT BE INHERITED

A special case which is only indirectly related to the law of inheritance is the bilingual reply by Paul of Dig. 8.3.37 (Paul. 3 *Resp.*). In this case the cited Greek is not taken from a testament or a codicil, but from a deed of gift. The legal heirs of one of the contracting parties of the testator wanted to claim the object of the gift. In this way the *responsum* is, albeit indirectly, related to the law of inheritance.

In Lenel's *Palingenesia*, Dig. 8.3.37 has been incorporated in a section on servitudes¹⁹³ as fragment 1468 together with Dig. 8.2.40 (fr. 1467). Dig. 8.2.40 does not contain references to the Roman East. The compilers of the Justinianic Digest have incorporated the fragment in a title on rustic and praedial servitudes. No other bilingual texts can be found in the title other than a Greek rescript of emperor Antoninus Pius, in which catching birds on another man's estate without his permission is prohibited, cited through the works of the Roman jurist Callistratus¹⁹⁴ (Dig. 8.3.16 (Call. 3 *de Cogn.*)). The *responsum* by Paul will be examined in the following.

Dig. 8.3.37 (Paul. 3 *Resp.*)

“Λούκιος Τίτιος Γαῖω Σείῳ τῷ ἀδελφῷ πλεῖστα χαίρειν.” Ὑδατος τοῦ ῥέοντος εἰς τὴν κρήνην τὴν κατασκευασθεῖσαν ἐν ἰσθμῷ ὑπὸ τοῦ πατρός μου δίδωμι καὶ χαρίζομαι σοι δάκτυλον εἰς τὴν οἰκίαν σου τὴν ἐν τῷ ἰσθμῷ, ἢ ὅπου δ' ἂν βούλη. Quaero, an ex hac scriptura usus aquae etiam ad heredes Gaii Seii pertineat.

193 A servitude is a real right to a property of which one does not have the ownership, such as 'right of way' in civil law jurisdictions.

194 In his work *de Cognitionibus* (on Judicial examinations) the second/third century AD Roman jurist Callistratus included more bilingual legal writings, such as Dig. 50.6.6.2, Dig. 50.6.6.6 (both *rescripta*) and Dig. 50.11.2, in which the jurist cited Plato in Greek, as stated in the introduction.

Paulus respondit usum aquae personalem ad heredem Seii quasi usuarii transmitti non oportere.

“From Lucius Titius to Gaius Seius his brother many greetings. Of the water that flows to the cistern which was built by my father on the headland I give to and bestow upon you a finger’s height for your house located on the headland, or to wherever you want”. I ask, whether based on this deed the right of water use also belonged to the heirs of Gaius Seius. Paulus responded that the personal right to use the water should not be transferred to the heir of Seius as if he were entitled to a servitude.

In the beginning of the reply a letter in Greek is quoted, which is a contract in the subjective style of a letter – similar to the Greek contract cited in Dig. 17.1.60.4 (Scaev. 1 *Resp.*), which has been examined in the chapter on consensual contracts¹⁹⁵. In the contract an anonymized man (Lucius Titius) wrote to his brother (Gaius Seius) that he is giving to him and bestowing upon him part of a ‘stream of water’. Their father, in any case the father of Lucius Titius (τοῦ πατρός μου), had constructed a κρήνη, which is normally to be translated as a well or a spring. Since water, however, flowed from an unknown source to this ‘well’ (εἰς τὴν κρήνην), it is more likely that the construction was some sort of water tank or reservoir¹⁹⁶, which validates the translation ‘cistern’. The father constructed this cistern on an unknown headland (*isthmus*). Azo notes on this that it is a *terra inter duo maria*¹⁹⁷ (land located between two seas)¹⁹⁸. The location between two seas could indicate a lack of fresh water, which might explain this quarrel over a finger’s height of it. Presumably, after using the water in the same way as Gaius Seius did during his lifetime, legal controversy arose between the heirs of Gaius Seius (*heredes Gaii Seii / heredem Seii*) and the heir(s) of Lucius Titius. Presumably, Lucius Titius was also deceased by the time of this legal controversy. The heir(s) of Lucius Titius wanted to make use of all the water in the cistern themselves¹⁹⁹ or wanted to be compensated for the water and refused the right to the heirs of Gaius Seius. In the legal procedure the heirs of Gaius Seius invoked the deed of gift which they got from the records of their father.

195 See pp. 47sqq.

196 On this matter and the many misinterpretations of the word κρήνη, see Hallebeek *TvR* 55 (1987), 46. The translation of the word into the Italian *stagno* (Biondi 1938, 426-427, from Hallebeek *TvR* 55 (1987), 46), for example, would lead to a conclusion that there could not have been a servitude due to the lack of a perpetual cause.

197 See *Gl. ‘In Isthmo ad Dig. 8.3.37’*.

198 It is indeed hard to say whether a specific *isthmus*, like the well-known Corinthian *Isthmus*, is meant, which is the case in P. Oxy. LXXIX 5202, 31 (Oxyrhynchus, I AD): ἐν [T] σθμῶι. This papyrus from Roman Egypt contains a copy of an inscription from Greece.

199 Another possibility is that, after the estate including the κρήνη (and the stream that flowed to it) were alienated, the new owners, seeing that the stream was being used by the heir(s) of Gaius Seius, brought action against him / them.

The donation in the deed is indicated with the two verbs *δίδωμι* (to give) and *χαρίζομαι* (to bestow upon). A deed of gift in the form of a letter with the word *χαρίζομαι* is not uncommon. An example of this (l. 3: *χαρίζεσθαι* and l. 9-10: *δόσεως*) can be seen in P. Grenf. II 68,1-10 (Kysis, Oasis Magna, 247 AD)²⁰⁰.

P. Grenf. II 68,1-10 (Kysis, Oasis Magna, 247 AD)

Αὐρήλιος Πετοσίρις Πετοσίριο[ς] νεκροτάφος ἀπὸ
 Ἰβειτῶν πόλεως Αὐρηλίῳ Πετεχῶντι υἱῷ Τμάρσιος
 ἀπὸ κώμης Κύσεως χαίρειν. Ὁμολογῶ χαρίζεσθ[αι] σοὶ
 5 χάριτι ἀναφαιρέτῳ καὶ ἀμετανοήτῳ, εὐνοίας ἔν[εκ]εν
 καὶ ἀμετανοή[τῳ]²⁰¹ ἦν ἔδειξας εἰς ἐμέ, ἀπὸ τῆς ὑπαρ-
 χούσης μοι κηδεῖας νεκροταφικῆς ἐν Κύσει με[τὰ] καὶ
 τῶν κωμῶν [τῆς] Κύσεως μέρος τέταρτον ἀπὸ
 τοῦ νῦν μεχρ[ι] παντός· καὶ οὐκ ἐξέσται μοι οὐ[τε ἄλλ]λῳ
 10 τινὶ τῶν ἐμῶ[ν] μετελθεῖν σε περὶ τῆσδε τῆ[ς] δό-
 σεως, διὰ τὸ οὕτως μοι δεδόχθαι.

Aurelius Petosiris son of Petosiris a grave-digger from the city of Hibis to Aurelius Petechon son of Tmarsis from the village Kysis greetings. I agree to bestow upon you with never diminishing and unrepentant favor due to your goodwill, which you showed towards me, from the gravediggers' enterprise in Kysis and the surrounding villages, which belongs to me, a fourth share for now and always. And it will not be permitted to me or anyone else of my people to bring action against you regarding this gift, because I decided this.

P. Grenf. II 68 is a deed of gift, in which a certain Aurelius Petosiris bestowed upon Aurelius Petechon a fourth share of his enterprise²⁰². In this deed, more provisions regulating the donation are enclosed. One of these clauses states that the object of the gift will from now on (*ἀπὸ τοῦ νῦν*) until the end of time (*μεχρὶ παντός*) belong to Aurelius Petosiris and in another is stated (l. 9) that no-one including Aurelius Petosiris himself could bring action against Aurelius Petechon regarding the gift as is evidenced by the Greek *μετελθεῖν*.

200 For more deeds of gift, see P. Monts. Roca IV 80 (provenance unknown, 161-169 AD), CPR XVII B 40 (Panopolis, 217-218 AD) and P. Grenf. II 71 (Oasis Magna 244-248 AD). In an extract from the property register of Arsinoites (*βιβλιοθήκη τῶν ἐγκτήσεων*), which is P. Coll. X 274, 3-4 (Arsinoites, 208-209 AD), a woman gave a notification of an irrevocable deed of gift (land) made through the record office. A similar case can be found in P. Ryl. II 155, 8 (Arsinoites, 138-161AD). In fr. a of P. Hever 64, 6-7 (Maoza, 129 AD) a gift 'lasting for an age' was agreed upon: a part of a deed of gift seemed to be to stress that it was valid, everlasting and/or irrevocable.

201 Another possible reading can be seen in BL I 190, which is *καὶ φιλοστοργίας*.

202 The object of a donation via such a deed did not appear to be limited to 'corporeal' things, such as a piece of land, as seen in P. Coll. X 274. As the deeds in Dig. 8.3.37 and P. Grenf. II 68 show also 'non-corporeal assets', such as the use of a stream of water or a fourth share of an enterprise, could be the object of a gift.

In the deed cited in Dig. 8.3.37 such clauses are not mentioned²⁰³, therefore there is no information on extra clauses regulating the donation. If, however, the deed of gift from P. Grenf. II 68 and the other deeds mentioned in the footnote above are representative for deeds of gift in the Roman East and these clauses were either included in such documents or when not included, were presumed to be included, the altercation regarding the use of water is understandable.

Paul gave advice against the heirs of Gaius Seius. The (gift of) use of water in Roman law is considered to be personal and ends with the death of the one to whom it is given. It cannot be transferred to an heir as if it were a praedial servitude (a servitude in which the owner of a dominant estate has a real right on a servient estate), such as for example the right of *aquae ductus* is²⁰⁴ (the right of the owner of a dominant estate to convey water through a servient estate). Later, Modestinus incorporated this regulation in his *Regulae* (Rules) as seen in Dig. 7.8.21 (Mod. 2 *Reg.*): *Usus aquae personalis est: et ideo ad heredem usuarii transmitti non potest* (The use of water is personal. Therefore, it cannot be transmitted to the heir of the one who was given the right of use)²⁰⁵. Ulpian, also, responded on a similar case in Dig. 34.1.14.3 (Ulpian. 2 *Fid.*) in a section on *legata* concerning livelihood (*alimenta*):

Dig. 34.1.14.3 (Ulpian. 2 *Fid.*)

Quidam libertis suis ut alimenta, ita aquam quoque per fideicommissum reliquerat: consulebar de fideicommisso. Cum in ea regione Africae vel forte Aegypti²⁰⁶ res agi proponebatur, ubi aqua venalis est, dicebam igitur esse emolumentum fideicommissi, sive quis habens cisternas id reliquerit sive non, ut sit in fideicommisso, quanto quis aquam sibi esset comparaturus. Nec videri inutile esse fideicommissum quasi servitute praedii non possessori vicinae possessionis relicta: nam et haustus aquae ut pecoris ad aquam adpulsus est servitus personae, tamen ei, qui vicinus non est, inutiliter relinquitur: in eadem causa

203 It appears that only the beginning of the deed is cited, as other clauses frequently attested in contracts, such as a *κνρία*-clause, were not mentioned.

204 In Dig. 8.1.1 (Marcian. 3 *Reg.*), the jurist stated that there are personal servitudes, such as *usus* (in this case by Paul use of water) and usufruct and real servitudes such as rustic, praedial and urban servitudes.

205 In Dig. 43.20.1.43 (Ulpian. 70 *ad Ed.*) on both daily and summer water, the right to get water from a distribution station (*castellum*) can be granted to estates and persons alike. In case of persons, this right ceases to exist when the person dies and it cannot be transferred to heirs or other legal successors (*neque heredem vel qualemcumque successorem*).

206 According to Bund, *vel forte Aegypti* must be seen as a gloss, because Ulpian is writing on a specific case. This is, however, not entirely convincing as it could have been one specific case that originated from either Roman Africa or per chance Roman Egypt (*vel forte Aegypti*) as Ulpian writing from memory could not quite remember from which of the two almost adjacent provinces the case originated.

erunt gestandi vel in tuo uvas premendi vel areae tuae ad frumenta ceteraque legumina exprimenda utendi. Haec enim aqua personae relinquitur²⁰⁷.

Someone had bequeathed to his freedmen via a *fideicommissum* in the way of livelihood water too: I was consulted on this *fideicommissum*. Because it was put forth that the action was brought in that region of Africa or perhaps Aegyptus, where water is purchasable, I therefore said that it fell under the benefit of the *fideicommissum*, whether one having water reservoirs had bequeathed it or not, so that in the *fideicommissum* was included, how much water one would have bought for himself. And the *fideicommissum* does not appear to be useless as if it were a praedial servitude bequeathed to someone not in possession of a neighbouring estate: for the right to draw water just as the right to water cattle is a personal servitude, even though it is invalidly bequeathed to him who is not a neighbor: in the same category also the right to drive or to press grapes on ones land or to use your threshing floor to thresh grain and other leguminous plants must be placed. This water, indeed, is bequeathed personally.

In this case by Ulpian, which is either to be situated in Roman Africa or Roman Egypt, a certain amount of water is bequeathed and this fell within the scope of a *fideicommissum*. Ulpian stated that the bequeathed right to draw water must be seen as a personal and not as a praedial servitude and in a broader sense that the right to draw water is a personal servitude rather than a praedial. The difference between Dig. 8.3.37 and Dig. 34.1.14.3, however, is that in Dig. 8.3.37 the gift of water was bestowed upon a person, who then died and left it to his heirs, while in Dig. 34.1.14.3 the gift of water was via a *fideicommissum* bestowed upon the heirs by the 'original owner'.

The two replies on the use of water in the Roman East mentioned in Dig. 8.3.37 and Dig. 34.1.14.3 raise the question, whether Greek law or Attic law in specific had legal concepts comparable to the praedial and personal servitudes known from Roman law. In the case of praedial servitudes this is not at all certain²⁰⁸. In Attic law, a case on the channelling of water can be found in Demosthenes' speech against Callicles (Dem. LV). In this case the claimant Callicles argued that the father of the defendant had damaged the claimant's property, by walling his own (the defendant's) estate, by which means water flowed through Callicles' property and damaged it. Callicles claimed that the estates had to 'serve' one another by allowing water to flow through them naturally, damaging all estates equally. In Roman law a concrete and well-defined dominant and servient estate is needed regarding praedial servitudes which cannot be seen in the case of Callicles. The fact that the claimant in

207 According to Bund there are strong indications that parts of the text, such as *iura gestandi*, were interpolated. Bund write this because both rights lack *ein herrschendes Grundstück*, which would be unthinkable in classical Roman law. Furthermore, according to him the interpolation must have come from the Greek speaking part of the Roman Empire as it contains an abundance of *Gräzismen* in the text such as *uti areae*, which according to Bund must be seen as a construction of *χρᾶσμαι* plus a noun in the dative case. Furthermore, the elliptic wording also suggests a translation from Greek. See Bund SZ 73 (1956), 178-181.

208 Biscardi 1982, 217.

the case, however, tried to appeal to a form of a praedial servitude could be a reason to assume that such rights indeed existed in Attic law.

The use of water from a neighbouring estate was indeed according to Plutarch mentioned in the laws of Solon. The alleged law of Solon quoted by Plutarch bears some resemblance to a Roman servitude. An important difference, however, between these laws and praedial servitudes in Roman law is that the former were laws enacted by a public body (public law) and the latter were regulations between citizens (private law).

Plut. Sol. XXIII 5-6

Νόμον ἔγραψεν, ὅπου μὲν ἐστὶ δημόσιον φρέαρ ἐντὸς ἵππικου, χρῆσθαι τούτω· τὸ δ' ἵππικὸν διάστημα τεσσάρων ἦν σταδίων· ὅπου δὲ πλεῖον ἀπέχει, ζητεῖν ὕδωρ ἴδιον· ἐὰν δὲ ὀρύξαντες ὀργυιῶν δέκα βάθος παρ' ἑαυτοῖς μὴ εὕρωσι, τότε λαμβάνειν παρὰ τοῦ γείτονος ἐξάχουν ὑδρίαν δις ἐκάστης ἡμέρας πληροῦντας.

He [i.e. Solon] wrote a law, that wherever there is a public well within a *hippicon*, it is to be used. A *hippicon* is a distance of four *stadia*. Where it is located at a greater distance, one should find his own water. If, after digging to a depth of ten fathoms on their own land, they do not find water, they are allowed to take it from their neighbors, filling a water-jar of six *choes* twice every day.

So, firstly, this Solonic law is applicable when a public well is located within one *hippicon* (a *hippicon* equals four *stadia*, which is roughly 740 meters). If this is the case the people living there need to use this well. If, however, there are no public wells within one *hippicon* and there can be (even after digging) no water found on one's own land, then one has the right to get water from a neighboring estate. Getting water from a neighboring estate must be seen as beneficial to all possible (future) owners of the 'waterless' estate and not just the current owner. Such a complex of facts is comparable with the Roman criterium of *utilitas* on praedial servitudes, which can be found in Dig. 8.3.5.1 (Ulpian. 17 *ad Ed.*). The serving estate only needed to 'tolerate' that two times a day a water-jar is filled with water and carried away, meaning that no additional action from the servient estate itself was required, which is also in line with Roman law on praedial servitudes, as a servitude could only concern a '*pati*' or a '*non facere*'²⁰⁹. Furthermore, the Roman criterium of *vicinitas* is met, because the water may be taken *παρὰ τοῦ γείτονος* (from a neighboring estate). Therefore, it is not unlikely that a rudimentary form of rules and regulations on servitudes on water, reasonably comparable to Roman law, was present in the Attic legal system.

Continuing on the use of water, in his *Leges* also Plato mentioned that since ancient times there were rules regarding the use of water in Athens. These laws on the use of water were even so well-established and of such high quality that the philosopher did not really want to digress on such regulations.

209 See Dig. 8.1.15.1 (Pomp. 33 *ad Sab.*).

The philosopher, however did digress on this topic as can be seen in Plato *Leges* VIII 844a- 844c:

Plato *Leges* VIII 844a- 844c

Ἐπεὶ καὶ τῶν ὑδάτων περὶ γεωργοῖσι παλαιοὶ καὶ καλοὶ νόμοι κείμενοι οὐκ ἄξιοι παροχετεύειν λόγοις, ἀλλ' ὁ βουλευθεὶς ἐπὶ τὸν αὐτοῦ τόπον ἄγειν ὕδωρ ἀγέτω μὲν ἀρχόμενος ἐκ τῶν κοινῶν ναμάτων, μὴ ὑποτέμνων πηγὰς φανεράς ἰδιώτου μηδενός, ἢ δ' ἂν βούληται ἄγειν, πλὴν δι' οἰκίας ἢ ἱερῶν τινῶν ἢ καὶ μνημάτων, ἀγέτω, μὴ βλάπτων πλὴν αὐτῆς τῆς ὀχεταγωγίας. [844b] Ἀυδρία δὲ εἴ τισι τόποις σύμφυτος ἐκ γῆς τὰ ἐκ Διὸς ἰόντα ἀποστέγει νάματα, καὶ ἐλλείπει τῶν ἀναγκαίων πωμάτων, ὀρυττέτω μὲν ἐν τῷ αὐτοῦ χωρίῳ μέχρι τῆς κεραμίδος γῆς, ἐὰν δ' ἐν τούτῳ τῷ βᾶθει μηδαμῶς ὕδατι προστυγχάνῃ, παρὰ τῶν γειτόνων ὑδρευέσθω μέχρι τοῦ ἀναγκαίου πάματος ἐκάστοις τῶν οἰκετῶν: ἐὰν δὲ δι' ἀκριβείας ἢ καὶ τοῖς γείτοσι, τάξιν τῆς ὑδρείας ταξάμενος παρὰ τοῖς ἀγρονόμοις, ταύτην ἡμέρας ἐκάστης κομιζόμενος, οὕτω κοινωνεῖτω τοῖς [844c] γείτοσιν ὕδατος.

Since concerning water old and splendid laws were set for farmers, a digression on this topic has no merit, but he who wants to lead water to his own place, let him lead water beginning from the communal spring in such a way that he does not intersect with the water source clearly belonging to a private person. Let him lead the water whatever way he pleases, except through private houses or temples or graves while not causing damage other than through the irrigation trench itself. [844b] If drought natural to the earth in some places keeps the water which comes from the heaven from streaming, and creates a shortage of necessary drinking water, let him dig into his own land until the clay-layer of the earth, and, if at this depth he in no way will obtain water, let him draw water from his neighbours as much as the necessary drinking water for each of his household members: if, however, there is only a limited amount of water available to his neighbours too, let him take a measure of water after a measure was set by *agoronomi* (the magistrates in charge) of the country districts, taking that each day, thus in this way he must share the water [844c] with his neighbours.

Plato summarised some of the regulations from these *παλαιοὶ καὶ καλοὶ νόμοι* laws set for farmers, that were beneficial to their lands. It appears, however that, as is the case regarding the laws of Solon, these laws must be considered public law. Plato described a legal concept, which resembled a praedial servitude as discussed above concerning Plutarch's mention of a law of Solon. In the example given by Plato, there was a right to convey and use water as long as no other waterways from private persons were intersected and it did not interfere with sacred places or graves (or places of 'memory' in general: *μνήματα*). Furthermore, as can be seen in both Plato and the laws of Solon, in case of shortage there seemed to have been a permanent right from one neighbouring estate (*praedium dominans*) to another (*praedium serviens*), i.e. not from one private person to another, to receive a specific amount of water, i.e. as much as the members of the household need to drink in a day. Moreover, Plato mentioned that in the case of only a limited supply of water, this

right still existed and that magistrates presiding over the countryside would have to allocate a specific amount of water. The limitedness of the water source raises the question, whether in these old and good laws a 'perpetual cause' was needed as is the case in Roman law. Both authors cited seem to indicate that in case of water use public laws safeguarded the use of water if it was scarce or hard to obtain for a person. In Roman law *aquae usus* was constructed via private law and personal servitudes.

Returning to the Digest, Paul qualified the gift in the deed as a personal servitude of *aquae usus*²¹⁰ and not as the Roman praedial servitude of *aquae ductus*²¹¹. The glossators, in this case Accursius, looked at this problem too and found an elegant answer in the Greek text of the deed: "ἡ ὄρου δ' ἄν βούλη" ²¹². This means that the giver Lucius Titius granted the receiver the use of a part of the stream of water to his house, which was in the vicinity (*vicinitas*, as shown above, is one of the criteria for a servitude), or to wherever Gaius Seius wanted. This last part meant that there was a servient estate (*praedium serviens*), namely the estate of Lucius Titius, but there was no fixed dominant estate (*praedium dominans*) and that therefore there could not have been a praedial servitude. As the text from Plato shows (ἡ δ' ἄν βούληται), a private person could choose how to channel the water from the source to his land, from which it is possible that in the Roman East such strictness as mentioned by Accursius did not exist.

To conclude, the question raised seems to be a non-issue in Roman law, since the regulations concerning personal servitudes appeared to have been crystal clear on the right of *aquae usus*: the use of water is a personal servitude, which ended when the beneficiary of this right died. It must, however, not be considered a surprise that in the two fragments of the Digest from the Roman East mentioned above (Dig. 8.3.37 and Dig. 34.1.14.3), questions on this highly dogmatic Roman legal topic were raised. Aside from the earlier mentioned lack of a developed legal science in the Roman East, it remains questionable if praedial servitudes comparable to those in Roman law even

210 According to Bund (to this end he cites Cohnfeld, R. (1862), *Die sogenannten irregulären Servituten nach römischem Recht*, Leipzig) the word *usus* in the context of Dig. 8.3.37 must be considered used a-technically as the actual 'Ausübung and Gebrauch machen' and not as the personal servitude of *use* in Bund SZ 73 (1956), 177.

211 In Dig. 8.2.28 (Paul. 15 *ad Sab.*), it is stated that a praedial servitude such as *aquae ductus* must have a perpetual cause, which cannot be man-made: *neque enim perpetuam causam habet quod manu fit* (that which is man-made surely does not have a perpetual cause). The Digest fragment continues with: *Omnes autem servitutes praediorum perpetuas causas habere debent, et ideo neque ex lacu neque ex stagno concedi aquae ductus potest* (All praedial servitudes, however, need to have a perpetual cause, and therefore the right of *aquae ductus* from a lake or a pool is not granted).

212 See *Gl. quocunq' ad Dig. 8.3.37: 'Ex hoc apparet quòd est personale ius: quia non alicuius praedii contemplatione fuit tradita. & sic non est contra supra l. prox. Quia ibi ad certum praedium constituebatur. Accurs.* (From this it appears to be that this is a personal right: because it was not handed over with regards to someone else's estate. And in this way, it does not contradict Dig. 8.3.36 (Paul. 2 *Resp.*), because in that text it was put in place with regard to a defined estate. Accursius')

existed in Attic or Hellenistic private law. These are at the least not well attested. As has been shown in Attic literary legal sources, such matters were presumably dealt with via regulation originating from public law and not via private law. In the case of Dig. 8.3.37 the situation is complicated further by the fact that the use of water is the object of a gift drawn up in a deed.

As mentioned above, deeds of gift from the Roman East show that gifts were deemed to be irrevocable and often clauses were added indicating that gifts were meant to be 'forever' and that the receiver of the gift had the power to dispose of it, in whatever way he saw fit. The object of a gift could have been corporeal, such as land, or incorporeal such as a share of an enterprise or the use of water. The jurist Paul was in this case, however, not at all inclined to accommodate the heir of Gaius Seius with regard to these Hellenistic views on gifts.

In Roman legal science the framework of rules and regulations regarding praedial and personal servitudes is too precise and too well-defined to deviate from them. Paul advised on the case using only Roman legal doctrine. He, therefore, used a strategy of *rejection* of Hellenistic legal norms. His contemporary Ulpian did so as well. Furthermore, as demonstrated, the younger jurist Modestin did so, too. In Roman law a deviation on such an essential point, namely the impossibility to inherit a personal servitude, was simply not possible and was deemed undesirable.