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

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IV The law of inheritance II freedmen and freedwomen

I Introduction

Having examined seven cases on inheritance without a slave context in the previous chapter, in this chapter seven *responsa* on testaments and codicils will be addressed, of which six concern freedmen, while the seventh concerns a testator who changed his will via a codicil. Adhering to the chronology of the jurists, first the replies by Scaevola are examined, then a reply by Paul and lastly a reply by Modestin. One reply by Scaevola on manumission has already been addressed earlier, namely Dig. 40.5.41.4 (Scaev. 4 *Resp.*), in which two slaves were to be manumitted if they rendered account and pleased the heir, their new master[1]. From the seven *responsa* mentioned, five are taken from Scaevola's *Digesta*. These are: Dig. 33.8.23.2-3 (Scaev. 15 *Dig.*) on the inheritance of among other things a *peculium* by manumitted slaves (freedmen), Dig. 34.1.16.1 (Scaev. 18 *Dig.*) on a *fideicommissum* beneficial to one of the freedmen of the testator's father, Dig. 34.4.30.1 (Scaev. 20 *Dig.*) and Dig. 34.4.30.3 (Scaev. 20 *Dig.*)[2] and Dig. 40.4.60 (Scaev. 24 Dig.) on the status of a man born before or after his mother was manumitted. Next, one reply by his student Paul will be examined, Dig. 40.5.39.1 (Paul. 13 *Resp.*). In this *responsum* the exact wording of a testamentary manumission of a slave and his family is discussed. The last reply analysed in this chapter is one by Modestin, namely Dig. 34.1.4*pr* (Mod. 10 *Resp.*). In this legal writing the issue is treated whether proprietary rights or a right of usufruct of landed estates were bequeathed to manumitted or soon to be manumitted slaves.

I.1 Regulations regarding slaves and freedmen in the Greco-Roman world

Regulations governing slavery and manumission can be found in all classical civilisations. In Attic law, in the *Codex Gortina,* in Hellenistic law and in abundance in Roman law such regulations are attested. This was apparently not an un unnecessary luxury considering the myriad cases on slavery and

1 See pp. 119*sqq*.

2 Dig. 34.4.30.3 (Scaev. 20 Dig.) is not about freedmen or freedwomen, but is treated here, because Dig. 34.4.30.1 (Scaev. 20 *Dig.*) and Dig. 34.4.30.3 (Scaev. 20 *Dig.*) come from the same fragment. These two *responsa* concern a controversy between two *liberti* on the inheritance of a landed estate, and a testator who changed his will via a codicil regarding his two daughters, respectively.

manumission included in the *Corpus Iuris Civilis,* of which the bilingual cases mentioned above represent just a fraction.

For various reasons, but mostly to ensure social peace by making the status quo bearable for the enslaved, (legal) authors from Ancient Greece, such as Aristotle and Xenophon[3], and authors from Rome have stressed the importance of the manumission of slaves. In his *Oeconomica,* Aristotle[4] or pseudo-Aristotle showed a pragmatic approach to this legal concept:

> (pseudo-)Aristotle *Oec.* 1344b
>
> Χρὴ δὲ καὶ τέλος ὡρίσθαι πᾶσιν· δίκαιον γὰρ καὶ συμφέρον τὴν ἐλευθερίαν κεῖσθαι ἆθλον· βούλονται γὰρ πονεῖν, ὅταν ᾖ ἆθλον καὶ ὁ χρόνος ὡρισμένος. δεῖ δὲ καὶ ἐξομηρεύειν ταῖς τεκνοποιίαις· καὶ μὴ κτᾶσθαι ὁμοεθνεῖς πολλούς, ὥσπερ καὶ ἐν ταῖς πόλεσιν· καὶ τὰς θυσίας καὶ τὰς ἀπολαύσεις μᾶλλον τῶν δούλων ἕνεκα ποιεῖσθαι ἢ τῶν ἐλευθέρων·
>
> It is necessary that for them a final purpose is determined, because it is just and profitable to offer their freedom as a prize. For they are willing to suffer toil, when there is a prize and a time determined to this end. Furthermore, one must bind them by means of child production, and not possess many of the same race, as in the cities, and make offerings and set rewards for the sake of the slaves rather than for those set free.

In this treatise, presumably by one of Aristotle's students, some basic rules concerning slavery and the treatment of slaves are given in order to manage them in the most efficient way. Besides not buying many slaves of the same ethnicity and providing enough festive offerings and rewards, it was important to give the slaves hope that they would be free during their lifetime, as can also be seen in the quote from Xenophon's *Oeconomicus* (5. 16), who added that this would make them more docile and more at peace with their situation.

In case of the manumission of slaves, questions arose on how these freedmen were to be treated. The intricate relationship between freedmen and freedwomen on the one hand and their former owner or the heirs of their former owner on the other differs from society to society. For example, in the Roman world manumitted slaves became citizens. *Apeleutheroi* in the Greek city-states, however, were not granted citizenship. These former slaves did acquire a form of legal personality[5]. Legal thinkers have pondered the relationship that citizens ought to have with freedmen and the relationship between these former slaves and the city-state in which they were manu-

3 See for example Xenophon *Oecon.* 5.16: *καὶ ἐλπίδων δὲ ἀγαθῶν οὐδὲν ἧττον οἱ δοῦλοι τῶν ἐλευθέρων δέονται, ἀλλὰ καὶ μᾶλλον, ὅπως μένειν ἐθέλωσι* (and no less do the slaves need to have good hopes for freedom, but even more, so that they want to stay).

4 See also Aristotle *Pol.* 1330a.

5 Zelnick-Abramovitz 2005, 320.

mitted. In Athens, as well as in other city-states such as Azorus in Thessaly and on the island of Calymna, a law regarding the obligations of freedmen must have been enacted[6] as references to such a law can be found in inscriptions such as IG IX^2 1296, 31-32 (Azorus, 18-17 BC): *ὑπὸ τοὺ<ς> τῶν ἀπελευθέρω<ν> // [ν]όμους*[7]. According to Zelnick-Abramovitz, this law on freedmen only prescribed general obligations which freedmen had towards their masters and that specific obligations, such as the obligation of *paramone* which was common in the Hellenistic East, were left to the discretion of the manumittor[8]. Freedmen who did not fulfill their duties towards their master were liable to a special kind of procedure falling under the *δίκη ἀποστασίου* which entailed a private law-suit brought by a manumittor against his freedman[9]. Being condemned in such a procedure would lead to either the freedman being sold back into slavery or to the freedman being given back to his former master[10], while being acquitted would lead to a status in which the freedman was freed from all obligations towards his manumittor[11].

Plato is another legal thinker who wrote about the relationship between former slaves on the one hand and their former masters and the city-state in which they were manumitted on the other. Regulations on slavery and manumission can be found in his *Leges*[12]. These regulations follow Attic law, although Plato was in some ways stricter than the Athenian lawmakers[13]. Plato's meticulous exposition of the duties of freedmen, however, anticipated law and custom in the Hellenistic age, during which the tasks and obligations of freedmen were described with great precision and agreed upon in documents of the manumission[14].

The Roman jurists cultivated the hope of freedom (and a more docile slave nature) and gave legal standing to the idea of the *favor libertatis*. This concept dictated that interpretative difficulties surrounding a manumission of a slave had to be decided in favour of his 'freedom'. This is, for example,

6 Zelnick-Abramovitz 2005, 301-302.

7 More examples can be found in Zelnick-Abramovitz 2005, 303.

8 Zelnick-Abramovitz 2005, 303.

9 For attestations of this *δίκη ἀποστασίου* see, for example, the inscription IG II 1578, 1-2 (Attica, 330 BC) and Aristotle *Ath. Resp.* 58.3: *αὐτὸς δ' εἰσάγει δίκας τάς τε τοῦ ἀποστασίου* (he himself [i.e. the Polemarch] brings forth law-suits regarding *apostasy*).

10 See (pseudo-)Demosthenes *C. Aristog.* I 65: *καὶ τὴν μητέρ' [αὐτοῦ] ὀφλοῦσαν ἀποστασίου ἀπέδοσθε* (and you sold his mother because she was condemned in a law-suit on *apostasy*). In this case it is questioned whether *ἀπέδοσθε* means 'you sold (back into slavery)' or 'you gave back (to her former master)'. See Zelnick-Abramovitz 2005, 280.

11 Zelnick-Abramovitz 2005, 280.

12 Cf. Morrow 1939, 123.

13 In acknowledging manumissions by private persons, Plato's view was stricter than Attic law on slavery with regards to the freedman's wealth and the duration of his stay in the city-state in which he was manumitted. Plato was, however, far more lenient than Laconian views on slavery in which only the state could in rare cases decide on manumission of a *helot*.

14 Morrow 1939, 105 & 110.

evidenced in the works of Claudius Tryphonin, a jurist and colleague of Papinian, Paul and Messius in the *consilium* of Septimius Severus[15], who must be placed at the ending of the second and the beginning of the third century AD[16]. In Dig. 49.15.12.9 (Tryph. 4 *Disp.*) after having discussed Sabinus and an imperial constitution on this topic, Tryphonin raised the (rhetorical) question whether one would remain a slave if there were no possibilities to sue his master for his freedom. Tryphonin's answer was that such a thing would be unjust and against a legal concept cultivated by the *maiores*, namely that of the *favor libertatis*. Both Roman jurists and the (Julio-Claudian) emperors have thoroughly elaborated on the concept of manumission[17], making it a complex and unique legal concept in which both views on Roman law and Roman society were taken into consideration.

II Freedmen in bilingual replies by Scaevola

All the replies in this section are from Scaevola's *Digesta*. These *Digesta* are very casuistic. They consist almost solely of replies to concrete legal questions and were not meant as a treatise in which legal doctrine is explained based on different case studies. Presumably, the *Digesta,* after being sparsely edited following the death of Scaevola, were published by Tryphonin. A theory on why this work is so casuistic is that the *Digesta* were a more elaborate and edited version of Scaevola's *Responsa*. This would explain some cases of '*Doppelüberlieferung*' (cases which can be found twice in the Justinianic Digest) in the writings of Scaevola[18]. In the previous chapters, six of his bilingual legal writings concerning Greek documentary practice from his *Digesta* have already been analyzed[19]. In total eleven bilingual replies can be found in Scaevola's Digest.

15 See Stepan 2018, 6-7 & Kunkel 2001, 231.

16 Dig. 49.15.12.9: *Si nec conveniendi eius sit facultas? Liber erit servus, qui nullo merito suo poterit a domino libertatem consequi? Quod est iniquum et contra institutum a maioribus libertatis favorem* (What if he did not have the capability of filing suit himself? Shall the slave be free, who cannot by his own merit procure his freedom from his master? The latter is unjust and against the '*favor libertatis*' (inclination towards freedom) instituted by our forefathers).

17 Since the time of emperor Trajan, the position of testamentary or fideicommissary manumitted slaves improved drastically by a multitude of *senatusconsulta,* e.g the *SC Rubrianum, SC Damusianum* and the *SC Iuncianum*. See Finkenhauer 2010, 27. Furthermore, a great many imperial constitutions by, for example, Marcus Aurelius, made great improvements to the position of testamentary or fideicommissary manumitted slaves. See Finkenhauer 2010, 8-9.

18 For these and other theories on Scaevola's *Digesta* see Stepan 2018, 12 & Staffhorst *SZ* 123 (2006), 316.

19 These are Dig. 32.101 on pp.83*sqq*, Dig. 32.37.5 on pp. 99*sqq*, Dig. 32.37.6 on pp. 174*sqq*, Dig. 20.1.34 on pp. 72*sqq*, Dig. 44.7.61 onpp. 64*sqq* and, lastly, Dig. 50.9.6 on pp. 251*sqq*.

II.1 Dig. 33.8.23.2-3 (Scaev. 15 *Dig.*): An implicit bequest of a slave patrimony and other assets

In this section Scaevola's bilingual Digest fragments on freedmen are addressed, of which Dig. 33.8.23.2 (Scaev. 15 *Dig.*) and the following fragment Dig. 33.8.23.3 are the first. These fragments are linked to each other with *item quaesitum,* and in the text of Dig. 33.8.23.3 the author refers to the Greek quotation in Dig. 33.8.23.2. The first two texts of this fragment, which is fr. 49 in Lenel's *Palingenesia* (*de Legatis et Fideicommissis*) are unrelated to the bilingual fragment in Dig. 33.8.23.2, other than that they share the topic of legacies to freedmen. In the fifteenth book of Scaevola's Digest, one other bilingual *responsum* can be found, namely Dig. 33.4.14 (fr. 48)[20]. In the Digest of Justinian, Dig. 33.8.23.2 has been incorporated in a section on legacies concerning the *peculium* (slave patrimony; property 'owned' by a slave through a legal fiction), which is the topic of this reply.

Dig. 33.8.23.2-3 (Scaev. 15 *Dig.*)

Servis libertates legataque dederat et condicionem ita scripserat: "ὅσους κατέλιπον ἐλευθέρους καὶ τὰ ληγάτα αὐτοῖς, τούτους βούλομαι εἶναι ἀνεξετάστους". Quaesitum est, an peculia quoque legata his videbuntur. Respondit secundum ea quae proponerentur non videri legata. 3. Item quaesitum est, an ex isdem verbis reliqua rationum quasi legata retinere possint, aut si res dominicas apud se habuerint, aut, si qui eorum coloni praediorum fuerunt, pensiones. Respondit supra responsum.

To his slaves he had given their freedom and legacies and he had written the following condition: "As many as I have left behind free and the legacies bestowed upon them, I wish that they are not subjected to inquiry". It is asked, whether the slave patrimonies should be considered as legacies for them too. He responded that according to the facts presented these did not appear to be legated. 3. In the same way it is asked, whether based on the same words they could keep the balance of their accounts as if they were legacies, or the belongings of their master they would happen to have with them, or payments of those of them who were tenants of landed estates. He responded with the answer above.

In this case, a testator manumitted slaves via his testament and bequeathed things to them through legacies (*ληγάτα*[21]). The use of the Roman legal concept of *legatum* transcribed into Greek, combined with the reference to the practice of *rationes reddere* in *ἀνεξέταστος,* further discussed below, leads to the assumption that the testator in Dig. 33.8.23.2-3was either a

20 See pp. 166*sqq*.

21 In the papyrological sources up until the second century AD, the word *legata* transcribed in Greek is attested in twelve papyri and exclusively found in documents with a Roman context or a presumed Roman context.

Roman citizen or a strongly Romanized inhabitant of the Roman East with knowledge of Roman law or with access to knowledge of Roman law via, for example, a notary versed in Roman law.

The testator wished his former slaves not to be subjected to any form of inquiry (*ἀνεξέταστος*). Presumably, this inquiry was concerned with *rationes reddere* (to render account) as seen in Dig. 40.5.41.4 (Scaev. 4 *Resp.*) where it is translated into Greek as *τὰς ψήφους ἀποκαταστήσωσιν*[22]. Häusler suggests that the papyrological sources do not help in interpreting *ἀνεξέταστος*[23]. Only three attestations of this word can be found, one of which is from Scaevola's time, namely P. Oxy. LX 4061 (Oxyrhynchus, 163 AD)[24]. Words based on *ἐξέτασις* (close examination, scrutiny) and *ἐξετάζω* (to examin closely), however, can be found frequently in the papyrological sources in the meaning of an inquiry into accounts and registers[25]. The above-mentioned P. Oxy. LX 4061 (Oxyrhynchus, 163 AD) contains official correspondence between the strategus of Oxyrhynchus, Calpurnius Artimidorus, and a former gymnasiarch. In this document *ἀνεξέταστος* is used in the meaning of a financial inquiry concerning taxes. Lines 6 – 7 of the damaged papyrus read: *ἀνεξετάστοις εἴδεσι*[26] *τῆς* [*διοικήσεως*[27] -5-8-] // [- ca.15 -] *ων ὑπὸ τοῦ τοῦ νομοῦ ἐγλογιστοῦ* (unexamined taxes of the administration … by the auditor of the nome). Therefore, the interpretation of *ἀνεξέταστος* as free of any type of inquiry into the slaves' financial administration is warranted by papyrological sources.

According to Africanus, a jurist from Scaevola's timeframe, *rationes reddere* meant nothing other than *reliqua solvere* (to pay the balance)[28], which must be contrasted to *reliqua retinere* from Dig. 33.8.23.3. A chain of thought could have been that if the slaves did not need to *rationes reddere,* they did not need to *reliqua solvere*. If the slaves were not obliged to *reliqua solvere,* they could keep the *reliqua* (*reliqua retinere* in the question of Dig. 33.8.23.3). The jurist Callistratus, however, added more criteria to this *rationes reddere* in Dig. 35.1.82: *Nam quod ipse vivus facturus erat, ab heredibus suis fieri iussisse intellegitur*: *ille autem utique non sic solebat servo suo ostendenti reliqua*

22 It must be assumed that in Dig. 40.5.41.4 the testator and his heir were Roman citizens.

23 Häusler 133 *SZ* (2016) 429.

24 The other two attestations can be found in BKT VII 32, 33 & 52 (provenance unknown, III-IV AD) and SB XVIII 13734, 9 (Arsinoite nome, I-IV AD).

25 The word *ἐξετάστος* is attested more than 250 times in the DDbDP (consulted in Oct. 2021). See e.g. SB V 7558 (Karanis, 172-173 AD), 24: *καὶ τοὺς λόγους ἐξετάσει* (and he will examine the accounts) and P. Tebt. II 335, 8 (Tebtynis, ca.165 AD, BL III 242): *εἰς τὴν ἐξέτασιν τῶν βιβλίων Ἑρ*[*μαίσκου* (for the investigation of the administration of Hermaiscus).

26 For *εἴδη εἰς ἐξέτασιν* see Lewis *BASP* 18 (1981), 127-128.

27 BL XI 172.

28 See Dig. 35.1.32 (Afr. 2 *Quaest.*). See Koops 2020, 38, who connects this text to Dig. 35.1.82 (Call. 2 *Quaest.*).

rationes subscribere, sed ita, ut legeret, examinaret, exciperet[29]. As the testator in Dig. 33.8.23.2-3 did not want his slaves to be subjected to such an examination, the freedmen could have had the question whether they could keep the goods to which end they were not to be examined. The freedmen in this case could have thought that if they did not need to render account, they also did not need to pay the balance (*reliqua solvere*) and therefore could keep the *reliqua,* as mentioned above. Another way to interpret this *ἀνεξέταστος* is that the testator did not want his heirs to meticulously investigate the financial administration of the freedmen, as is the case in Dig. 30.119 (Marcian. 1 *Reg.*), where it is stated that if the testator prohibited his heirs to ask the slaves to render account, this was to be understood as a prohibition for the heirs of a *scrupulosa inquisitio*[30].

The interpretation of *ἀνεξέταστος* is so important, because from both the legal questions asked in Dig. 33.8.23.2-3 it can be inferred that these slaves operated with a great deal of autonomy. They had their own *peculium* with them, and they completed business transactions for their master, which is why the former slaves still had the *reliqua*[31] of those transactions in their possession. Furthermore, they had their master's property with them and used it. Some of them were given the opportunity to cultivate their master's land as tenants of an estate in exchange for payments. This explains why these slaves still had the *pensiones* due from them, when the testator died. The *peculia*, the *reliqua*, the *res dominicae* and the *pensiones* could have amounted to a substantial sum of money.

The reason for breaking this fragment into Dig. 33.8.23.2 and Dig. 33.8.23.3 is that the position of a slave with regard to his own *peculium* was a different one from his position to other assets belonging to his master which were at the slaves' disposal. Of the latter it was clear that they belonged to their master. Even though the texts appear to contain the same legal question, in fact two completely different legal questions were asked. The *peculium*, the slave patrimony, was an intricate legal fiction which was treated in over a thousand fragments of the Digest[32]. Slaves could not own property, everything they 'owned' was technically owned by their master. Through the legal fiction of *peculium*, however, Romans feigned that slaves could own property. Ulpian wrote that, even though slaves could not own their own money, dealings with this kind of property had to be considered *coniventibus oculis* (with closed eyes) in Dig. 40.1.4.1 (Ulp. 6 *Disp.*)[33].

29 Dig. 35.1.82: It is understood that he ordered from his own heir to be done what he himself would have done while he was still alive: certainly, he was not wont to sign the accounts when his slave presented the balance, but rather he would have read it, examined it and verified it.

30 Häusler *SZ* 133 (2016), 429.

31 Cf. Daalder 2018, 387.

32 Koops 2020, 57.

33 See Koops 2020, 57.

It is most unlikely that the testator or the freedmen were unaware of the Roman concept of the *peculium* or a similar concept. In a Greek or Hellenistic context, an idea similar to a Roman *peculium* was known, be it not so methodically developed as in Rome. Both in Attic law and in Hellenistic legal documents this concept is attested. The Attic legal concept of *ἀποφορά* (money *which slaves let out to hire,* paid *to their master*) had similarities to the Roman *peculium*, as shown by Lipsius[34]. Slaves could pay their master a sum of money as *ἀποφορά* to 'buy' time in which they could make their own money[35], which can be paralleled with the *pensiones* the slaves paid in order to cultivate land in Dig. 33.8.23.3. This *ἀποφορά* was also attested in Scaevola's time and could be bequeathed, e.g. in the testament of Acusilaus in P. Oxy. III 494, 15 (Oxyrhynchus, 156 AD)[36]. The word *peculium* in Roman Egypt of Scaevola's time is scarcely attested. It only occurred in a Roman context. The word *πεκούλιον* (in Greek) is attested in an ostracon from a Roman military settlement in the Thebais: SB XII 11256, 3 (provenance unknown, after 138 AD)[37]. In Roman epigraphy *peculium* is also not often attested. An example of an attestation in which can be seen that slaves could use their own *peculium* is AE 2009, 1256 (Macedonia, 151-225 AD)[38].

As slaves, the freedmen dealt with assets separated from their master's assets and made money by cultivating their master's land. Therefore, the reason that the *peculium* was not explicitly bequeathed cannot have been that the concept was too unfamiliar. That the *peculium* and other assets belonging to the testator were not explicitly bequeathed must be considered the reason for Scaevola to advise against the transfer of these assets to the freedmen. In Scaevola's time this explicit mention must have been a legal maxim still under question. A decision on the matter can be seen in the following rescript by the emperors Septimius Severus and Antoninus Caracalla, which is only one

34 Lipsius 1915, 797. His examples are Hyperides Against Athenogenes IX, 19 and Aeschines Against Timarchus 97: *ἐννέα ἢ δέκα, ὧν ἕκαστος τούτῳ δύ' ὀβολοὺς ἀποφορὰν ἔφερε τῆς ἡμέρας, ὁ δ' ἡγεμὼν τοῦ ἐργαστηρίου τριώβολον* (nine or ten [slaves], all of whom paid him two obols as *ἀποφορά* per day and a superintendent of the shop three obols). Partsch refutes a comparison between the *ἀποφορά* and *peculium* in Partsch 1908, 136*sqq*. *Peculium* and *ἀποφορά* are discussed alongside one another in Love 2015, 98 & 105*sqq*. In this passage, Love argues that *peculium* and the *ἀποφορά* were indeed closely related.

35 In some cases, a slave could earn enough money to buy his freedom from his master, which is attested in the many manumission inscriptions at Delphi.

36 In this line the testator bestowed among other things the *ἀποφορά* of his slave-girl upon his wife for as long as she lived.

37 See Sijpesteijn *ZPE* 14 (1974), 235. The date has been given as after 138 AD in BL IX, 272. The only other 2nd century AD attestation of *πεκούλιον* is P. Cair. Goodsp. 30 (Karanis, 192 AD).

38 AE 2009, 1256 (Macedonia, 151-225 AD): *Urbica Vibiae Salviae* // *hic sita est quae vix*[*it*] // *annis XXI de eius* [*s*(*uo*)] *peculi*[*o*] // *permissu dominae factum es*[*t*] (Urbica slave of Vibia Salvia who lived for 21 years is placed here. This was made from her own slave patrimony with permission from her mistress).

generation later than Scaevola[39]. In his *Institutiones* Justinian referred to this rescript[40]:

> *Inst*. II 20.20
> (…) Peculium autem nisi legatum fuerit, manumisso non debetur, quamvis si vivus manumiserit, sufficit si non adimatur: et ita divi Severus et Antoninus rescripserunt. Iidem rescripserunt, peculio legato, non videri id relictum, ut petitionem habeat pecuniae quam in rationes dominicas impendit. Iidem rescripserunt, peculium videri legatum, cum rationibus redditis liber esse iussus est et ex eo reliquas inferre.
>
> If a slave patrimony has not been bequeathed via a *legatum,* it is not due to the manumitted, even though if he would have been manumitted while alive, it sufficed if he was not deprived from it: and the late [Septimius] Severus and Antoninus [Caracalla] have decided thus by rescript. The same [emperors] decided per rescript, that, when the slave patrimony is bequeathed via a *legatum*, the ability to bring action for the money, which he had spent on his master's account, does not appear to be given. The same [emperors] decided by rescript, that the slave patrimony appeared to be bequeathed via a *legatum,* when he is commanded to be free after having rendered account and to bring forth the remaining sum[41].

The emperors made a difference between slaves who were manumitted *inter vivos,* and, slaves freed upon death (i.e. per testament), the so-called *orcini.* The *inter vivos* freedmen could bring action for their *peculium*, even if it was not explicitly given, if the *manumittor* did not take it from them as slaves while alive. The same did not apply to those manumitted per testament, as is the case in Dig. 33.8.23.2. At the end of *Inst.* II 20.20, Justinian cited a rescript by the same emperors (Septimius Severus and Antoninus Caracalla) in which they decided that an implicit *legatum* of the slave patrimony can be admitted, if the slaves were freed under the obligation to render account and to make up for deficits. In opposition, then, manumitting 'unexamined' slaves per testament would rather hint to a manumission without their *peculium* than to a manumission with an implicit *legatum* of their *peculium*.

39 This rescript has also been connected to Dig. 33.8.23.2 by Kübler (*SZ* 28 (1907), 190) and Häusler (*SZ* 133 (2016), 429).

40 This rescript has also been cited in Dig. 33.8.6.4 (Ulpian. 25 *ad Sab.*).

41 See also Dig. 33.8.7 (Ulpian. 25 *ad Sab.*), in which Ulpian stated that the *peculium* was implicitly bequeathed in case the slave had to render account. In this case the *peculium* was according to the emperors Caracalla and Severus assumed to be bequeathed implicitly because the (to be manumitted) slave had to pay a hundred to the heirs of the testator. From this statement, one had to assume that the 'hundred' had to come from the slave patrimony. Therefore, the slave patrimony had to be bequeathed. Even though, this bequest was not explicitly mentioned.

In a case similar to Dig. 33.8.23.3, which is Dig. 34.3.31.1[42] (Scaev. 3 *Resp.*), Scaevola came to the same conclusion. In this fragment a testator writing in Latin had manumitted slaves without the obligation to render account. It was asked whether any *reliqua* belonged to the freedmen or to the heir. Scaevola denied the implicit bequest of *reliqua* and advised that these could be claimed by the heir as his property[43]. This fragment has no Hellenistic context.

To conclude, in this fragment the context of the Hellenistic East played no role. Even though Greek is used by the testator, it must be assumed that the testator is either a Roman citizen or a strongly Romanized inhabitant of the Roman East. The Roman concept of slave patrimony or the Hellenistic equivalent of this concept must have been known by both the testator and the former slaves. The Greek quoted in the testament was not unclear and it cannot be said that any imprecision in the Greek phrasing led to problems of interpretation in Roman law.

II.2 Dig. 34.1.16.1 (Scaev. 18 *Dig.*): A freedman of my father's freedman

The following fragment from Scaevola's Digest is Dig. 34.1.16.1 (Scaev. 18 *Dig.*). The fragment is added to *de Alimentis vel Cibariis Legatis* in the Justinianic Digest. In this section another bilingual reply can be found, namely Dig. 34.1.4 by Modestinus. This reply will be examined later in this chapter[44]. Ulpian's earlier examined case from *Africae vel forte Aegypti* (Dig. 34.1.14.3)[45] is also found in this section of the Justinianic Digest. In Lenel's *Palingenesia* the fragment (fr. 72) is incorporated in a section on *legata* and *fideicommissa.* In the eighteenth book of Scaevola's Digest two other bilingual fragments are attested, which were examined in the previous chapters, viz. Dig. 32.37.5 on *parakatatheke* and 32.37.6 on *fraus legis* in a codicil[46]. In the reply that follows, namely Dig. 34.1.16.2 (fr. 72), the names of the *liberti* are all Greek, which are Basilice, Epictetus and Callistus.

> Dig. 34.1.16.1 (Scaev. 18 *Dig.*)
>
> Libertis libertabusque, item quos quasque testamento codicillisve manumiserat, alimenta commoda, quae viva praestabat, dari iusserat: item omnibus libertis libertabusque fundos: quaesitum est, an ad ea legata admitteretur liberti paterni libertus, cui scribere solebat ita: ἀπὸ Ῥουφίνης ἡμετέρῳ ἀπελευθέρῳ. Epistula etiam emissa ad ordinem civitatis, unde oriunda erat, petierat, uti publice (quod

42 In the case of Dig. 34.3.31.1 (Scaev. 3 *resp.*) / Dig. 34.3.28.4 (Scaev. 16 *Dig.*), which was added to the Justinianic Digest twice (*Doppelüberlieferung*), the possible implicit bequest of *reliqua* in a case of tutelage, in which the tutor was exempted of examination, is treated. Scaevola denied such an implicit bequest.

43 This did not mean that implicit bequests of a slave patrimony did not exist. See Dig. 33.8.7 (Ulpian. 25 *ad Sab.*).

44 See pp. 244*sqq*.

45 See pp. 207-208.

46 See pp. 99*sqq* and pp. 174*sqq*.

> medicus erat) salaria ei praestarentur, manifestando litteris suis eum suum esse libertum. Respondit eum, cuius notio est, aestimaturum, ut, si quidem viva ea et ei praestabat, nihilo minus ad fideicommissum admitteretur, aliter vero non.
>
> She had ordered that the adequate supplies, which she made available during her lifetime, were to be given to her freedmen and her freedwomen, and similarly to those whom she had manumitted per testament or per codicil and similarly landed estates to all her freedmen and freedwoman: it is asked, whether a freedman of a freedman of her father should be admitted to these *legata*, to whom she was wont to write as follows: "From Rufina to our freedman". And also, through a letter sent to the council of the city from which she came, she petitioned for him to be given a public salary (for he was a doctor), making evident in her letter that he was her freedman. [Scaevola] responded that he who had the duty to decide on this should judge that if she made things available also to him while she was alive, he should be admitted to the *fideicommissum* for nothing less, but otherwise not.

A testatrix had bequeathed property to several of her slaves and freedmen via a standard Roman legal formula. With this formula she could incorporate all the slaves she wanted to manumit or already had manumitted. In case she manumitted slaves or drew up a codicil, in which slaves were to be manumitted in the time after drawing up the testament, those slaves were beneficiaries of the bequest too. This formula can also be seen in Dig. 34.1.4*pr* (Mod. 10 *Resp.*)[47] and it is attested in epigraphical sources, in for example CIL XIV 382 (Ostia): *et l*[*ib*(*ertis*) *lib*(*ertabusque*) *et*] // *quos testamento aut co*[*dicillis manumisero*][48]. The testatrix was raised in a *civitas* in the Roman East, as she wrote letters in Greek. The letter she sent to the city council may also have been in Greek. The reference to a public salary for a doctor is a further indication that this text came from the Hellenistic East, as such a 'public health service' was typical for Greek city-states and later for the Hellenistic East[49].

The name of this testatrix has not always been clear. In a gloss to the text, *Gl. 'Commoda' ad Dig. 34.1.16.1,* the glossator says that Commoda is the name of the testatrix[50]. In Mommsen's *Editio Maior* of the Digest, however, *commoda* is not spelled with a capital C[51]. The real name of the testatrix, Rufina, must be taken from the letter cited in Greek: *ἀπὸ Ῥουφίνης* 'from Rufina'. In the translations of Spruit and Watson *ἀπὸ Ῥουφίνης* is rendered as

47 The formula in this *responsum* in which the (freed or to be freed) beneficiaries are mentioned is written in Greek, but stems from a Roman context. It is the last *responsum* examined in this chapter on pp. 244*sqq*..

48 CIL XIV 382 (Ostia): and to my freedmen and freedwomen en those whom I shall have manumitted via testament or via codicil. Other examples from epigraphical sources are: AE 1988 193 (Ostia, I AD), CIL VI 10239 (Rome) and CIL IX 7153 (Sulmo, 101-130 AD).

49 See Woodhead *Cambridge Hist. Journal* 10 (1952), 235.

50 *Gl. 'Commoda' ad Dig. 34.1.16.1*: *Commoda proprium nomen testricis* (Commoda is the name of the testatrix herself).

51 Mommsen mentions the reading of *commodo* from F², but prefers the reading of *commoda*. In his translation Spruit c.s. translate the emendation *commodaque* (*en de voorzieningen*).

'*zoon van Rufina*' and '*son of Rufinus*' respectively[52], but this is contradicted by the documentary praxis of writing letters. On the back of letters on papyrus the sender was frequently mentioned after *ἀπὸ*[53], as can be seen, for example, in P. Mich. Mchl. 25 (Karanis, 88 AD) *ἀπὸ Διογένους Δωρίωνι τῶι ἀδελφῶι* (from Diogenes to Dorion my brother) or in P. Oxy. XXXIII 2680 (Oxyrhynchus, II/III AD) *ἀπὸ Ἀρσινόης Σαραπιάδι γυναικὶ Πολυκράτ(ους)* (from Arsinoe to Sarapias wife of Polycrates).

Rufina wanted all her freedmen to be bequeathed with *alimenta commoda* (adequate supplies) and *fundi* (landed estates). A freedman of a freedman of Rufina's father asked if he also had a right to the *legata* mentioned. To support this, he presented two pieces of evidence, namely that she used to address him as *ἡμετέρῳ ἀπελευθέρῳ* and that she wrote an official petition for him to the city council to get a public salary as a doctor. In this letter she apparently also described him as 'my' freedman.

Scaevola was willing to accept the possibility that this former slave of the freedman of Rufina's father was her own freedman or, more precisely, had to be equated to one of her own freedmen in the context of her testament, even though technically he was not. Scaevola urged the appointed judge or magistrate to look beyond these letters and to look at the actual behaviour of the testatrix. In this legal controversy the *voluntas* of the testatrix had to be discovered: did the testatrix consider the former slave one of her own freedmen, or did she not? To find a criterium, Scaevola looked at the *legatum*. Apparently, the testatrix gave adequate supplies to her freedmen while she was alive (*quae viva praestabat*), from which according to Scaevola it should be concluded, that those whom she did not favor with such supplies were not to be considered her freedmen. Scaevola advised that if the former slave of her father's freedman received supplies while she was alive, he was to receive them after her death and profit from the landed estates which she had bequeathed as well. A generation later than Scaevola, Modestin replied in a comparable case on the meaning of the words *libertis libertabusque*. This can be found in Dig. 50.16.105 (Mod. 11 Resp.): *Modestinus respondit his verbis "libertis libertabusque meis" libertum libertae testatoris non contineri*[54].

To conclude, Dig. 34.1.16 revolved around the question whether someone was or was not to be considered one of the beneficiaries of certain *legata.* This was unclear, because the testatrix had called the freedman of a freedman of her father 'our freedman' in writing, implying that he was also her freedman while this was technically not the case. These questions often occur in legacies concerning freedmen. A reply of Modestin (Dig. 50.16.105) concerns a

52 Presumably this interpretation originates from the glossae. *Gl. 'Ita †' ad Dig. 34.1.16.1,* in which Alciatus is cited. His interpretation of the Greek cited is *Rufina prognato liberto nostro* (to our freedman, the offspring of Rufina).

53 P. Oslo. II 60: to Didyme from Heron. See for this view also Hanson 1976, 443. It can, for example, also be seen on the verso of BGU II 632 (Arsinoites, II AD) and on the verso of BASP LI 42 (provenance unknown, II/III AD).

54 Dig. 50.16.105: Modestin responded that in these words "to my freedmen and freedwomen" the freedman of a freedwoman of the testator is not enclosed.

similar case, in which he specified the proper interpretation of 'my freedmen'. The Hellenistic context of Scaevola's *responsum* in Dig. 34.1.16.1, as evidenced by the Greek letter and the public salary of the doctor, does in no way influence this legal controversy or Scaevola's advice.

II.3 Dig. 34.4.30.1: A testatrix who changed her will

The next two Scaevola texts, Dig. 34.4.30.1 and Dig. 34.4.30.3, belong to the same fragment (fr. 84) in Lenel's *Palingenesia*. Lenel added them to a section on *legata* and *fideicommissa.* Because the two replies belong together, these texts are examined alongside one another[55]. This fragment from Scaevola's 20th book of his Digest consists of five texts of which Dig. 34.4.30.2 also has a "provincial" origin. The *principium* and Dig. 34.4.30.1 are linked together because they both feature a 'foster-child' / 'foster-sister', as can be seen by the word *alumna* in Dig. 34.4.30*pr* and *collactanea*[56] in Dig. 34.4.30.1. The overarching theme of the fragment is the alteration of the last will by the testator. In the Justinianic Digest the compilators added the fragment (Dig. 34.4.30*pr* – 4) to a segment on the ademption or conversion of *legata* and *fideicommissa*. No other bilingual text or text with a Hellenistic context can be found in this segment.

Dig. 34.4.30.1 (Scaev. 20 *Dig.*)

Titia testamento Seiam libertam eandemque collactaneam ex parte duodecima heredem instituerat, Pamphilo liberto suo praedia per fideicommissum dedit, in quibus et σύγκτησιν praediorum quae appellabatur circa Colonen: eidem liberto postea per epistulam[57] alias etiam res donavit, in quibus de Seia et Pamphilo ita est locuta: "Τιτία τοῖς κληρονόμοις μου χαίρειν. Βούλομαι βέβαια εἶναι τὰ ὑποτεταγμένα, ὅσα ἔφθασα εἰς τὸ ὄνομα τὸ Παμφίλου πεποιηκέναι. ἐὰν Σεῖα ἥ σύντροφός μου κληρονόμος μὴ γένηται, ἐξ οὗ γέγραφα αὐτὴν μέρους, βούλομαι αὐτῇ δοθῆναι τὴν σύγκτησιν τὴν περὶ Κολώνην". Quaesitum est, cum Seia liberta omissa parte hereditatis ei testamento adscripta ex codicillis fideicommissum, id est σύγκτησιν circa Colonen, eligat, an, si Pamphilus ex causa fideicommissi eadem praedia vindicet, doli mali exceptione summoveri debeat. Respondit translatum videri fideicommissum praediorum, id est σύγκτησιν quae est circa Colonen, in Seiam libertam.

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55 This was also done by Kubler *SZ* 28 (1907), 196-202, Scarcella AUPA 55 (2012), 645-647 and Häusler *SZ* 133 (2016), 433-435.

56 The freedwoman in Dig. 34.4.30.1 is called *collactanea*, 'foster-sister' or more accurately one who was fed from the same breast (see Ter Beek 1999, 998 and Van der Meer 1996, 171, who adds that Seia's mother was Titia's wet nurse, which made them 'milk sisters'). It was accepted that these foster-siblings had a strong bond with the children of the household. They could be manumitted *inter vivos* by a person under twenty and while the slave in question was under thirty. Cf. Gaius, *Inst*. I 39, Dig. 40.2.13 (Ulpian. *de Off. Proc.*). In P. Ryl. II 106 (Ptolemais Euergetis, 158 AD) = C. Pap. Gr. II 46, the combination of foster-brother and freedman can be found in a notification of a death in ll. 3-4: *παρὰ Καπίτωνος συντρόφου ἀπε- // λευθέρου Πτολέμας* (from Capito foster-brother and freedman of Ptolema).

57 Mommsen suggests *per litteras* in his *Editio Maior,* on which will be elaborated below.

> In her testament Titia had instituted her freedwoman and foster-sister Seia, as heir for a share of one twelfth and gave her freedman Pamphilus landed estates per *fideicommissum*, among which the *σύγκτησις* [i.e. joint ownership[58]] of the landed estates designated as 'in the vicinity of Colone'. Additionally, she later donated other things to the same freedman per letter, in which she stated the following regarding Seia and Pamphilus: Titia, to my heirs, greetings. I want that all the following provisions, that I just made to the name of Pamphilus, are valid. If Seia, with whom I was brought up, does not become my heir for the part for which I wrote her down, I wish that the joint-ownership of the estate 'in the vicinity of Colone' is given to her. It is asked, since Seia the freedwoman, having left aside the share of the inheritance granted to her in this testament chose the *fideicommissum* from the codicil, which is the joint-ownership of the estate 'in the vicinity of Colone', whether Pamphilus was to be repelled due to the exception of fraud, if he were to claim the same estates on account of the *fideicommissum*. [Scaevola] responded that it appears that the *fideicommissum* regarding the landed estates, which is the joint-ownership 'in the vicinity of Colone', was transferred to the freedwoman Seia.

The testatrix Titia instituted her freedwoman and foster-sister Seia as an heir for a twelfth part of her estate. The freedman Pamphilus was bequeathed with a number of landed estates via a *fideicommissum*. Titia had some lands in joint-ownership in the vicinity of Colone. This joint-ownership was part of the *fideicommissum* to Pamphilus. The testator then changed her will in two aspects. Firstly, she bestowed more of her assets upon Pamphilus[59], as can be seen in the Latin introduction of the controversy (*alias etiam res*) and secondly, she bequeathed Seia, if she did not accept the twelfth part of the inheritance as an heir, with the joint-ownership of the landed estates in the vicinity of Colone instead. The problem arose when Seia chose the joint-ownership, which had also been bequeathed to Pamphilus. Scaevola was asked for advice in case Pamphilus would bring action to acquire the joint-ownership[60]. He advised that the *fideicommissum* of the joint-ownership of the landed estates had to be considered transferred to Seia (*translatio fideicommissi*[61]).

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58 Ter Beek does not translate 'joint-ownership of the landed estates', but '*een bij elkaar behorende groep landgoederen*' (a group of landed estates belonging together). Ter Beek 1999, 998. Van der Meer translates 'conglomerate of parcels'. See van der Meer 1996, 171. The translation 'joint-possession' for *σύγκτησις* can be found in the LSJ, which warrants the translation 'joint-ownership'. Due to Scaevola's use of the word *praedia* Kaiser (Kaiser *SZ* 138 (2021), 524-525) opts for the meaning of '*zusammenhängende/unmittelbar benachbarte Grundstücke*' in Kaiser *SZ* 138 (2021), 523.

59 The part of the letter which mentioned the other bequests is not cited in Greek, presumably because they were not the objects of this legal controversy.

60 The text has *si Pamphilus vindicet* which conveys that it is a possibility for Pamphilus to do so. Whether he actually did this is uncertain.

61 Ter Beek 1999, 999, Spina 2012, 433, who quotes Finazzi, G. (2006), *L' 'exceptio doli generalis' nel diritto ereditario romano*, Padua, 140 and Impallomeni *BIDR* 70 (1967), 80.

The Hellenistic context can be inferred from the Greek letter[62]. The *βέβαια*-clause in the letter is very common in the Hellenistic East[63]. An example of this clause in a testament is the earlier mentioned P. Oxy. VI 907, 14 (Oxyrhynchus, 276 AD)[64]. Additionally, the landed estates in question were situated *περὶ Κολώνην*. The exact location of this Colone remains unclear. According to Talamanca, Colone must definitely be located in the Roman East[65], but regarding the exact location his suggestion ranges from Sparta to Thessaly and Asia Minor[66]. He based this on the similarity of the name with Colonai and Colona.

By means of this codicil in epistolary form the testatrix wished to alter her will as stated in her testament. She began with a statement in which she guaranteed all the provisions made concerning her freedman Pamphilus. This clause has been examined above with regard to Dig. 32.37.5 (Scaev. 18 *Dig.*): *Βούλομαι πάντα τὰ ὑποτεταγμένα κύρια εἶναι*[67] and more elaborately in Dig. 28.1.29*pr*-1 (Paul. 14 *Resp.*): *τὴν διαθήκην βούλομαι εἶναι κυρίαν*[68]. In both examples and in the *responsum* of Dig. 34.4.30.1 the authors of the clause intended to validate provisions. In Dig. 28.1.29*pr*-1, it is evident that contrary to the classical Roman law on testaments, Paul declared the testamentary provisions, even though there was no valid testament, valid due to this sentence. By doing so Paul could protect the *voluntas testatoris* of the deceased in Dig. 28.1.29*pr*-1. Contrary to his pupil, Scaevola apparently did not consider this clause to be decisive, because he gave the advice that the *fideicommissum* regarding the landed estate must be considered transferred to Seia[69]. This contradicted the testatrix's earlier mentioned statement in which she guaranteed the provisions concerning Pamphilus. Holding these provisions valid, however, would have contradicted the testatrix's later wish to

62 Mommsen suggests *litteras* in his *Editio Maior* (with a question mark), because *quibus* cannot refer to *epistula.* This *quibus* can be an *Augensprung* by the author as there is an *in quibus* above it. Kübler mentions that *epistula* might be taken as *codicilli,* which would make *quibus* fitting. The suggestion from the glossators in *Gl. 'In quibus' ad Dig. 34.4.30.1* is *inter quae verba epistolae*. Another explanation given by Ter Beek is that *quibus* refers to *alias res.* See Ter Beek 1999, 999.

63 The use of such clauses is to some extent an indication of an embedding in the Hellenistic legal culture.

64 See p. 198.

65 Talamanca 2009, 550.

66 Talamanca 2009, 572. Presumably Talamanca mentions Sparta in particular because of the description of Laconia by Pausanias in Paus. III 13.7, in which Pausanias mentioned Colona: *ἀπαντικρὺ δὲ ἥ τε ὀνομαζομένη Κολώνα καὶ Διονύσου Κολωνάτα ναός* (and on the opposite is what is called Colona and the sanctuary of Dionysus Colonata).

67 Cf. Kübler *SZ* 28 (1907), 197.

68 See pp. 99*sqq* and pp. 189*sqq*.

69 Paul is one generation younger than Scaevola. It could be that in Scaevola's time the jurists did not connect legal consequences to this 'validation' clause. A generation later the attitude of the jurists concerning such a clause changed presumably influenced by documents from the Roman East, which could be the reason why Paul did consider the testamentary provisions valid via this clause.

bequeath Seia with the *fideicommissum* in case she would not be her heir for a twelfth part of the inheritance.

In the codicil, the testatrix continued by adding a provision regarding Seia, one of her heirs. In the original testament she made Seia an heir for one twelfth of her estate. In the codicil she added that, should she reject being an heir, she is bequeathed with the joint-ownership of the *circa Colonen* property via a *fideicommissum*. She chose the joint-ownership. Such a conflict, when two parties claim the same thing based on testamentary or codicillary provisions, is also described by Gaius (*Institutiones* II 199)[70] regarding a thing that was legated twice via vindication legacies[71]. The reason for looking at Gaius' work on *legata per vindicationem,* even though the response concerns a *fideicommissum*, is a part of the question of Dig. 34.4.30.1, namely *ex causa fideicommissi eadem praedia vindicet*. From this it would appear that Pamphilus had an action *in rem*, which would also have been the case if the property had been legated by a *legatum per vindicationem* instead[72].

Inst. II 199

Illud constat, si duobus pluribusve per vindicationem eadem res legata sit, sive coniunctim sive disiunctim, et omnes veniant ad legatum, partes ad singulos pertinere et deficientis portionem collegatario adcrescere.

This is evident that if the same thing is bequeathed via a *legatum per vindicationem* to two or more persons, either jointly or separately, and all enter upon the *legatum,* each of them individually is entitled to a part and the part of him who forgoes befalls the co-beneficiaries.

Both Gaius, a generation before Scaevola, and Ulpian, a jurist from a generation after Scaevola, had a solution for twice bequeathed property via *legata per vindicationem*. These solutions were for the case that two bequests were

70 Kübler *SZ* 28 (1907), 198. Kübler also mentions two fragments by Ulpian from the *Tituli Ex Corpore Ulpiani* (XXIV 12 and 13). In these fragments Ulpian mentioned (in XXIV 12) that if a thing is legated to two persons separately via *legata per vindicationem* the thing must be shared between the two beneficiaries: *iure civile concursu partes fiebant* (according to civil law parts are made because of equal claims). In case of separate *legata per damnationem* in XXIV 13 the heir must pay to both the beneficiaries individually: *singulis solidum debetur* (the whole is due to each of them individually). Gaius made the same distinction between vindication and condemnation legacies (Gaius, *Inst*. II 205). In case the same thing was bequeathed twice in separate provisions, the heir had to hand over the thing to one of the beneficiaries and an estimation of the worth of the thing was to be paid to the other beneficiary.

71 A vindication legacy or *legatum per vindicationem* is a bequest by which means a beneficiary could bring an action *in rem* against the heir to procure the property, as can be seen in Gaius, *Inst*. II 194. A *legatum per damnationem* only provided the beneficiary with an action *in personam*.

72 An action *in rem* in case of *fideicommissa* has been established in the sixth century AD with Justinian's reforms of the law of inheritance. See Cod. 6.43.1.1 from Justinian to Demosthenes [529 AD]. Cf. Spina 2012, 435.

made in one sentence and in case of two bequests in two separate sentences. Paul also drew up regulations specifically for this situation in Dig. 30.33 (Paul. 3 *Reg.*). If it is unclear to whom of the beneficiaries the bequeathed thing, be it bequeathed via *legatum* or *fideicommissum*, shall belong and it is apparent that the testator bequeathed the whole thing to two beneficiaries, Paul stated that *tunc enim uni pretium, alii ipsa res adsignatur electione rei vel pretii servanda ei, qui prior de legato sive fideicommisso litem contestatus est*[73]. In Dig. 34.4.30.1, two bequests regarding the same thing were made by the testatrix in two separate sentences in two separate documents. One bequest written in the testament to Pamphilus, and the other in the codicil to Seia. A solution to the problem in Dig. 34.4.30.1 could be to grant Seia and Pamphilus *condominium* of the *σύγκτησις* analogous to the texts by Gaius and Ulpian. This solution mimics the solution in a case of double vindication legacies. A different solution, analogous to the rules on *legata per damnationem,* could have been to transfer the property to either Seia or Pamphilus and let the heirs pay the other beneficiary an estimation of the property. From the fragment, it is clear that the provisions made were not bequests via *legata per vindicationem*, but via *fideicommissa* and it cannot be assumed that *mutatis mutandis* these rules could be applied to a *fideicommissum*[74]. Kübler suggest that the use of the word *vindicare* in this text must be considered untechnical, to which end he also mentions Dig. 31.88.6 (Scaev. 3 *Resp.*)[75]. In this reply, it is asked whether the foster-daughter and fideicommissary beneficiary of Lucius Titius could bring action (*vindicare possit*) for half of a landed estate[76]. Scaevola replied that she was only entitled to an equal share of the landed estate.

The author of the question in Dig. 34.4.30.1 wondered whether the defendant could make use of an *exceptio doli mali* against Pamphilus' demands[77]. The *exceptio doli* was granted in similar cases concerning *legata,* when a beneficiary claimed the bequeathed property while knowing that the last will of

73 Dig. 30.33: then, certainly, the worth [of the thing] must be assigned to one and to the other the thing itself, to which end the choice of either the thing or the worth must be given to him, who brought action based on the legacy or the *fideicommissum* first.

74 Kübler *SZ* 28 (1907), 198.

75 Kübler *SZ* 28 (1907), 198. Scaevola, however, did not respond to this *vindicare*. Paul rejected such a *vindicare* in PS. IV 1.18 *Ius omne fideicommissi non in vindicatione sed in petitione constitit* (all rights from a *fideicommissum* are not based on an action *in rem*, but on an action *in personam*). In PS IV 1.15, Paul, however, suggested that if an heir had sold a thing which was subject to a *fideicommissum*, the beneficiary could retrieve it via *missio in possessionem* if the one to whom it was alienated knew about the *fideicommissum*. Again, the grounds here are not an action *in rem* as such, but a praetorian intervention against an acquirer in bad faith.

76 Dig. 31.88.6: (…) *Quaero, an Seia in communione cum libertis habeat portionem an vero sibi partem dimidiam eius praedioli vindicare possit. Respondi perspicuam esse testantis voluntatem omnes ad viriles partes vocantis* (I ask whether Seia had her portion together with the freedmen or if she could bring action for half of his parcel of land. I responded that it was evident that the will of the testator was to call each to equal parts).

77 Impallomeni states that these words (*vindicet* and *exceptio doli mali*) are adequate in opposition to one another, but do not fit the *petitio fideicommissi* very well. Impallomeni *BIDR* 70 (1967), 80.

the testator had been changed[78], for example by means of a confirmed codicil, as seen in TCU XXIV 29. Ter Beek[79] argues that the *exceptio doli* was indeed applicable, as Pamphilus' action would fall into the definition of *dolus malus* by Labeo[80], because it must be assumed that Pamphilus has read the pertinent final letter, and by bringing action ignored the last wishes of the testatrix[81] in order to benefit himself by "deceiving" Seia[82]. It may perhaps appear odd that the action would be fended off by appeal to an *exceptio doli mali,* since *fideicommissa* were pursued by means of the *cognitio extra ordinem* (a legal procedure before an imperial magistrate) in the second century AD. This can, however, also be seen in a reply by Modestin. In the reply of Dig. 31.34.2 (Mod. 10 *Resp.*). Here, the question arose whether the master of a slave forfeited a *fideicommissum* in favour of his slave by being present at the division of the property while not claiming it. Modestin replied: *fideicommissum ipso iure amissum non esse, quod ne repudiari quidem potest: sed nec per doli exceptionem summovetur, nisi evidenter apparuerit omittendi fideicommissi causa hoc eum fecisse*[83]. Kübler suspects that this text is interpolated by the compilators[84]. It is, however, not unimaginable that an *exceptio doli mali* or a similar legal remedy could have been used during a *cognitio extra ordinem*. Roman legal principles must not be considered abandoned just because the form of the process is a *cognitio extra ordinem* and not a formula procedure. It remains uncertain what Scaevola's opinion was on this use of the *exceptio doli*, as he based his advice on '*translatio fideicommissi*'.

Scaevola responded that the provision regarding the property must be considered transferred to Seia (*translatum videri*). Such a *translatio fideicommissi*[85] is also found in the works of other jurists from the second century AD

78 See Kaser 1971, 755. The *exceptio doli mali* can be used if someone claims a thing based on a testament but *contra voluntatem* in Dig. 44.4.4.10 (Ulpian.76 *ad Ed.*) and Dig. 34.4.3.11 (Pomp. 5 *ad Sab.*).

79 Ter Beek 1999, 1000.

80 Ter Beek 1999, 619-620 & 1216. See Dig. 4.3.1.2 (Ulpian. 11 *ad Ed.*) on the definition of *dolus malus* by Labeo (quoted by Ulpian).

81 Scarcella AUPA 55 (2012), 646.

82 Arguably, this can be seen as falling within the category of *omnem calliditatem … ad circumveniendum, fallendum decipiendum alterum adhibitam* (every shrewdness employed in order to defraud, cheat or deceive another), as seen in Dig. 4.3.1.2.

83 Dig. 31.34.2: That the *fideicommissum* was not lost by operation of law, because it could not even be rejected; and he was not to be repelled due to the exception of fraud, unless it became evident that he had done this in order to forfeit the *fideicommissum*.

84 See Kübler *SZ* 28 (1907), 198. He adds that Papinian used a more correct expression regarding the *exceptio doli* and *fideicommissa*, which is *ratione doli exceptionis* and *ratione doli mali exceptionis* in resp. Dig. 31.67.3 (Pap. 19 *Quaest.*) and Dig. 31.69.3 (Pap. 19 *Quaest.*).

85 According to Talamanca *translatio* can be distinguished into two types. The first one concerned *legata per damnationem*, the second one *legata per vindicationem* and *fideicommissa*. Furthermore, he mentioned that in the context of *fideicommissa,* the *translatio* can be seen as an implicit revocation. This implicit revocation can be seen in Dig. 36.2.26.1 (Papinian. 9 *Resp.*) and Dig. 33.1.18.1 (Scaev. 14 *Dig.*). See Talamanca *in Studi in onere de Emilio Betti* IV (1962), 183, 186 & 213.

such as Gaius, Marcellus and Julian[86]. By such a *translatio* the earlier *fideicommissum* regarding Pamphilus is considered to have been implicitly revoked. The *bebaia clausula* by the testatrix, however, obstructs such an interpretation. A solution is provided in a fragment by Paul on *translatio legati*, which is Dig. 34.4.6*pr* (Paul. 5 *ad Leg. Iul. et Pap.*): *aut quod pure datum est, transfertur sub condicione* (or that which is given unconditionally, can be changed to conditionally)[87]. Applied to *fideicommissa*, it appears that, because in the codicil the testatrix bequeathed Seia with the property *circa Colonen,* should she reject being an heir, the *fideicommissum* regarding Pamphilus concerning this property could be construed as subject to an implicit condition. By these means the *fideicommissum* from the testament would remain valid, albeit conditional.

Two other explanations can be given. Scaevola could have deemed this *translatio fideicommissi* in favor of Seia as the *novissima voluntas,* because it was written later in the codicil. Seeing the whole codicil as one and the same moment, when the *voluntas testatoris* emerges, would object to this, as the *clausula* that all the provisions regarding Pamphilus should remain valid would then be as '*novissima*' as the *traditio fideicommissa.* A response by the second century AD jurist Aburnius Valens in Dig. 34.4.28 (Val. 5 *Fid.*), however, justifies the interpretation to distinguish several 'moments' in a testament (in case of Dig. 34.4.30.1 a codicil). In Dig. 34.4.28 he wrote on *fideicommissa* that when legacies and *fideicommissa* in a testament contradict one another, priority must be given to the last clause of the testament[88]. This priority could explain why Scaevola responded in favour of Seia.

The last explanation can be found in the Greek in Dig. 34.4.30, specifically in the word *ὑποτεταγμένα*. In the first part of the text of Dig. 34.4.30,1, Scaevola mentioned that in the codicil in epistolary form the testatrix bequeathed Pamphilus with *aliae res*. This means that in the original letter, there was probably more text in which the testatrix elaborated on these *aliae res*. If *ὑποτεταγμένα* from that clause would only concern these *aliae res* still to follow in the original text omitted in the Greek citation, the codicil would not contradict the testament. It would also explain why the testatrix bequeathed Pamphilus with more property in the codicil, namely because of the risk of Seia accepting the joint-ownership of the landed estates in the vicinity of Colone.

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86 Gaius, *Inst*. II 286a, Dig. 35.1.36.1 (Marcian. *lib. sing. Resp.*) and Dig. 36.1.26 (25) (Jul. 39 *Dig.*): *fideicommissum translatum esse* (that the fideicommissum had been transferred). While discussing the works of the first century AD jurist Sabinus, Ulpian mentioned it in Dig. 34.4.3.2 (Ulpian. 24 *ad Sab.*). The so-called *translatio legati,* is encountered more often.

87 See Talamanca 1962, 193-194 and Kaser 1971, 755.

88 Dig. 34.4.28 (Val. 5 *Fid.*): *Et magis posteriorem scripturam testamenti placuit spectari* (And it pleases the more that the last provision of the testament is considered). Another *contra* mentioned in *Gl. 'non a tota' ad Dig. 34.4.30.3* is a text by Ulpian in his commentary on Sabine in Dig. 28.1.21.1 (Ulpian. 2 *ad Sab.*), in which the jurist stated that if one wants to alter a testament '*omnia integro facienda sunt*' (everything must be done as a whole).

To conclude, the reason why Scaevola came to this advice cannot be provided with certainty. The testatrix could have accounted for Seia's possible choice for the *circa Colonen* property by bequeathing more property (*aliae res*) to Pamphilus. Perhaps for this reason, Scaevola deemed it equitable to advise in favour of Seia. The terms *vindicare* and *exceptio doli* as used by the author of the question seem out of context for *fideicommissa* and might be more appropriate in case of *legata*. Scaevola, however, does not elaborate on this matter. In the local Hellenistic legal culture of Roman Egypt, a sharp distinction between these two cannot be found, which may explain the terminology employed by the author of the question. By the third century AD, the distinction between *legata* and *fideicommissa* started to disappear and all formulaic differences in testamentary provisions were abandoned at the beginning of the fourth century AD, as can be seen in a constitution by Constantin[89]. According to Kaser the distinctions between legacies and *fideicommissa* already started to disappear in classical Roman times[90]. In Dig. 34.4.30.1 the first signs can be seen of this disappearance of the classic distinctions between *legata* and *fideicommissa*.

The testatrix Titia was a Roman citizen embedded in a Hellenistic legal context, and the codicil that she drew up shows some influence from a Hellenistic legal culture. This is most evident in the *bebaia*-clause, by which she validated all provisions concerning Pamphilus. Scaevola, however, did not value this clause highly enough (or did not interpret this clause in such way) to advise in favour of Pamphilus.

II.4 Dig. 34.4.30.3: A testator who changed his will

In the same fragment as discussed above, Dig. 34.4.30.3 can be found. Both replies feature testamentary provisions cited in Greek. The link between Dig. 34.4.30.3 and the previously examined Dig. 34.4.30.1 is that in both replies the deceased had altered an earlier testament via a codicil, and that due to this codicil complications arose with regard to the interpretation of the testator's last will. In Dig. 34.4.30.1 part of the codicil is cited in Greek, while in Dig. 34.4.30.3 part of the testament is cited in Greek.

> Dig. 34.4.30.3 (Scaev. 20 *Dig.*)
>
> Qui filias ex disparibus portionibus testamento heredes instituerat, paene omnium bonorum suorum eodem testamento divisionem fecit, deinde haec verba adiecit: "τὰ δὲ λοιπὰ πάντα τῶν ὑπαρχόντων μου, ὁμοίως καὶ τὰ τῆς κληρονομίας βάρη ἔσται μόνων τῶν δύο μου θυγατέρων Πρίμης καὶ Σεκούνδης ἢ τῆς ἐξ αὐτῶν περιούσης". Postea codicillis longe aliam divisionem fecit bonorum inter easdem, inter quas et testamento diviserat, quaedam tamen nulli

89 See Cod. 6.23.15 (339 AD). Some parts of this text can be traced back to 320 AD. See Kaser 1975, 489.

90 Kaser 1975, 552.

> nominatim dedit. Quaesitum est, an Prima et Secunda filiae ex verbis testamenti consequi possint, ut solae habeant ea, quae nominatim nulli relicta sunt in divisione, quae novissima a patre facta est. Respondit non a tota voluntate recessisse videri, sed his tantum rebus quas reformasset.
>
> Someone, who had instituted his daughters as heirs in his testament for unequal parts, made a division of almost all his goods in the same testament. Subsequently he added the following words: "All of the remainder of my property, and the burdens of this inheritance too, shall only be for my two daughters Prima and Secunda or for her, who outlives the other." In a codicil, he later made a completely different division of his goods between those [daughters] amongst whom he had divided his goods by testament, yet granting some goods to no one specifically. It is asked, whether his daughters Prima and Secunda based on the wording of the testament could claim to be solely entitled to the things bequeathed to no one specifically in the division made lastly by their father. He [Scaevola] responded that he did not seem to have abandoned his intent completely, but only concerning the things which he had changed.

An unnamed testator instituted his two daughters Prima and Secunda as heirs for unequal parts[91]. It is unclear whether these were the only heirs.[92] Kübler even questioned whether the two daughters were really instituted as heirs on which will be elaborated below[93]. The testator then made a division of almost his entire estate to beneficiaries (and possibly other co-heirs) and finally added that his two daughters were left with the remainder of his estate and all debts which the testator had. In a later codicil which is not cited, the testator made other provisions concerning, one must assume, a large part of his estate. In this codicil, however, he did not divide all of his property again. The daughters wanted to bring action for the property divided by the testament but not expressly mentioned in the codicil. The argument for this action presumably was that the codicil proved that the will of their father regarding his property had changed completely. By not mentioning some parts of the estate, the wish of their father would have been that these would fall into the category of the *λοιπὰ πάντα τῶν ὑπαρχόντων* claimable by the daughters. Scaevola does not follow this reasoning stating that in the codicil the testator did not alter his will entirely, but only for the distribution of the parts explicitly mentioned. The property divided and bequeathed by name in the testament, but not in the codicil, can therefore not be claimed by the daughters as *λοιπὰ πάντα*, but must be transferred to the testamentary beneficiaries.

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91 The possible reasons for a *heredis institutio* in unequal parts are myriad. When it concerns women, though, a reason may be that one of the daughters is already married and has therefore already received a dowry. This is for example the case in P. Oxy. VI 907 (Oxyrhynchus, 276 AD).

92 In *Gl.* '[*Qui filias.*]' *ad Dig. 34.4.30.3,* Vivianus assumes in his description of the casus that the testator instituted more co-heirs than Prima and Secunda.

93 Kübler *SZ* 28 (1907), 200.

From the testament in Greek and the description of the testament in Latin, it can be inferred that the document originated from a Hellenistic legal culture[94]. Kübler's reason to doubt that the testator instituted his daughters as heirs (or only his daughters as heirs)[95] is connected to this Hellenistic legal culture. To this end he cites two testaments which are distinctively from a Hellenistic legal culture, which are P. Oxy. III 494 (Oxyrhynchus, 165 AD)[96] and P. Oxy. III 491, 12-14 (Oxyrhynchus, 126 AD)[97], the latter text has:

P. Oxy. III 491, 12-14 (Oxyrhynchus, 126 AD)

12 Εὐδαίμων Θωνασύχιος πεποίημαι τὴν [δια]θήκην κ[αὶ] κα[ταλεί]πω μ[ετὰ τὴν τελευτὴν κληρονόμους τοὺς]
υἱούς μου Θῶνιν καὶ Ὧρον καὶ Εὐδαίμονα ἐξ ἴσου ὧν ἐὰν ἀπολί[πω] οἰκοπέδων καὶ ἐ[δα]φῶν κ[αὶ δούλ]ων [σ]ωμάτων [μό]ν[ον δὲ τὸ]ν Θ[ῶ]ν[ιν]
τῶν λοιπῶν μου πάντων ἐπὶ τῷ αὐτὸν ἀποδοῦναι <ἃ> ἂν ὀφείλω

I, Eudaemon son of Thonasuchis made this testament and after my death I leave as my heirs my sons Thonis and Horus and Eudaemon, in equal shares of the houses I may leave behind, and landed estates and slaves, and Thonis alone [as the heir] of all of the remainder so that he can pay my debts, should I owe anyone.

In the testament, Eudaemon's son Thonis is bequeathed with the remainder of the inheritance (*λοιπῶν πάντων*), similar to Dig. 34.4.30.3. And similar to the two sisters in the *responsum,* Thonis was made responsible for the debts owed by the testator at his death. In other Hellenistic testaments such provisions can also be found. In one document from Tebtynis the public and private debts were devolved on the heirs in equal shares: P. Hamb. IV 278, 23-25 (Tebtynis, 190 AD?): *ὅσα δὲ ἐὰν φανῷ ὀφ*[*είλουσα*] // *δημόσια ἢ ἰδιωτικὰ χρέα*

94 Scaevola did not comment on the Hellenistic origin of this testament and made no remarks on whether the testament was drawn up in the correct Roman way or not. Scaevola handled this case pragmatically by just giving advice on the question which was posed.

95 Kübler *SZ* 28 (1907), 201. Kübler remarks that if the sisters were to be the only heirs, the cited passage from the testament was superfluous, because Prima and Secunda would have been automatically liable for all debts of the testator. If the sisters were the only heirs of the testator, the clause indeed seems superfluous.

96 This document is the testament of Acusilaus discussed on p.220. The testator instituted his sons as heirs, but not his wife (although the wife was beneficiary of some bequests). His wife, however, was liable for all the debts of the testator. As can be seen in lines 21-22 of the document; *ἡ δ' αὐτὴ γυ-// νή μου Ἀρι*[*σ*]*τοῦς ἡ καὶ Ἀπολλωνάριον ἀποδώσει πάντα ἃ ἐὰν φανῶ ὀφείλων* (and my wife, the aforementioned Aristous, also called Apollonarion, shall pay all things, which I shall be found to owe).

97 This is the testament of Eudaemon discussed on pp. 186-187.

ἀποδώσουσι οἱ αὐτοὶ κληρ[*ονόμοι*] // *ἐξ ἴσου*[98]: showing that in Hellenistic legal culture the Roman concept of the *heres* was not applied. In a Roman legal sphere, the provision of P. Hamb. IV 278 would have been useless as the only two *heredes* in this testament would automatically have been liable for the debts of the deceased. In these Hellenistic testaments the bequest of the remaining goods and an arrangement of the debts by the testator function as a closing formula of the division of goods.

Having examined all testaments from Roman Egypt, Nowak concludes that the Roman concept of *heredis institutio* as a way to bequeath an entire or partial estate is unique to the Romans and was foreign to the inhabitants of the Roman East, who adhered to local Hellenistic law in which the appointment of an heir was understood as 'a series of individual successions'[99]. In (Greek) testaments from the Roman East a *heredis institutio* is often mentioned. This, however must be seen as "the application of a legal formula rather than a genuine understanding of the concept"[100]. Considering the Greek language of the testament and the *λοιπὰ πάντα* clause, it is not unlikely that the daughters mentioned in Dig. 34.4.30.3 were not instituted as *heredes* in a Roman sense of the word.

Universal succession was quintessential to the Roman law of inheritance. It was, however, foreign to the Hellenistic East. It is, therefore, imaginable that the bequests of the debts did not have internal effect[101], but external effect. This led to a diminution of property for which recourse was available, as creditors of the testator could only enforce payment from the heir who was made liable for the debts by the testator. Without the idea of universal succession it is hard to imagine how other beneficiaries of the testament could be liable for the debts of the testator.

98 P. Hamb. IV 278, 23-25 (Tebtynis, 190 AD?): The same heirs shall pay in equal shares all the public and private debts, as many as I am found owing (these public and private debt must be seen as as debts based on registered deeds of loan and unregistered *chirographa* as can also be seen in Klamp *ZPE* 2 (1968), 121). See also P. Mich IX 554, 50-51 (Ptolemais Euergetis, 81-96 AD), in which a division of the inherited property is made between three Romans (a brother and two sisters). The brother Gaius Minucius Aquila had been bequeathed with the payment of all the debts by the testator. The document has a distinct military context as the guardians of both the sisters were veterans from a Roman legion.

99 This is a paraphrase of Nowak 2015, 144. See also Klamp *ZPE* 2 (1968). 83 and Kreller 1919, 342. He mentions that in these testaments no *heredis institutio* in a Roman sense of the word can be found.

100 Nowak 2015, 145. Kreller states that testators from Roman Egypt did not use clauses for *heredis institutio* in a technical Roman way, and that the clause must be considered *'willkürlich nachgeahmt'*. See Kreller 1919, 348.

101 In case of internal effect, creditors of the testator could bring action for the debt against the heir (H1) which they preferred. If the testator had designated other heirs (H2 and H3) to pay his debts, the heir (H1) had to be compensated for his payment of the debt by the other heirs (H2 and H3).

The testator later changed his testament by means of a codicil. Changing or revoking a will could not be achieved in Roman Egypt merely by means of a new document[102]. The testator could only invoke such a right if he had added a revocation clause in his testament[103]. The documents discussed above all contain this clause, e.g. P. Oxy. III 494, 3-5: *ἐφ' ὅν μὲν πε- // ρίειμι χρόνον ἔχειν με τὴν τῶν ἰδίων ἐξουσίαν ὃ ἐὰν βούλωμαι ἐπιτελεῖν καὶ μεταδιατίθεσθαι καὶ ἀκυροῦν τὴν δια- //θήκην ταύτην, ὃ δ' ἂν ἐπιτελέσω κύριον ὑπάρχειν* (On the condition that during the time in which I am still alive, I have the power over my own property to prescribe new provisions and to alter my will and to deprive this testament of its validity, and that the provisions which I shall prescribe be valid).[104] One must assume in the case of Dig. 34.4.30.3 that the alteration of the testament was completed successfully by the testator. Prima and Secunda may have been under the assumption that by the new division of goods the entire division of the earlier testament between the *heredis institutio* formula and the closing formula, in which the remainder and the debts are mentioned, had been revoked. The property not expressly mentioned in the new division would then fall under the *λοιπὰ πάντα* bequeathed to the sisters.

The glossators agree with Scaevola that by means of the codicil the entire testament must not be considered broken or the entire will of the testator considered changed[105], but also give examples of opposite cases[106], which would be in favor of the daughters Prima and Secunda.

To conclude, the case of Dig. 34.4.30.3 must have originated in the Roman East, as the testament quoted in Greek is similar to second century AD testaments from Roman Egypt. Whether differences in regulations on the validity of testaments between the Roman legal system and Hellenistic law played a role cannot be said with certainty due to the lack of the complete Greek testament and the entire codicil.

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102 For the correct bureaucratic way of changing or revoking a testament in Roman Egypt, see Lewis *SCI* 24 (2005), 137. For an example of a revocation of a will see P. Oxy. XXXVI 2759 (Oxyrhynchus, 116 AD). In P. Oxy. I 106 (Oxyrhynchus, 135 AD) an 'in-house memorandum' is written to the *agoranomi* of Oxyrhynchus from an assistant-official, who got an order from the strategus, that the will of Ptolema had been given back to her on her own request. The testament was given back to her in order to be revoked.

103 According to El-Mosallamy, this was the reason why the cancellation of the testament of Arrius could not be achieved in SB X 10562 (Oxyrhynchus, 146-161 AD). El-Mosallamy, *Aegyptus* 50 (1970), 66.

104 More cases of these revocation clauses can be found in Nowak 2015, 127.

105 *Gl.* '*non a tota*' ad Dig. 34.4.30.3: *Testamentum non rumpitur per codicillos* (a testament is not made invalid via a codicil).

106 For example, in *Gl. 'non a tota' ad Dig. 34.4.30.3* a text by Ulpian is mentioned from his commentary on Sabine in Dig. 28.1.21.1 (Ulpian. 2 *ad Sab.*), in which the jurist stated that if one wants to alter a testament '*omnia integro facienda sunt*' (everything must be done as a whole).

II.5 Dig. 40.4.60: A false demonstration?

Returning to *liberti* and *libertae* in testamentary provisions, the last text by Scaevola examined in this chapter is Dig. 40.4.60 (Scaev. 24 *Dig.*). The fragment is incorporated in the Justinianic Digest in a section *De Manumissis Testamentis* (on those who are manumitted via testament). This section in the Justinianic Digest features an abundance of Greek slave names, but only one bilingual reply. In Lenel's *Palingenesia* the text is labeled fragment 105 in a section on testamentary and fideicommissary manumission. No other bilingual replies can be found[107].

> Dig. 40.4.60 (Scaev. 24 *Dig.*)
>
> Testamento ita cavit: "Εὔδονι βούλομαι δοθῆναι νομίσματα χίλια, ἐπεὶ ἔφθασεν γεννηθῆναι μετὰ τὸ τὴν μητέρα αὐτοῦ γενέσθαι ἐλευθέραν". Quaero, an, si Eudo non probet se post manumissionem matris suae natum, possit his verbis testamenti libertatem consequi. Respondit non oportere eiusmodi consultationem praeiudicium parare.
>
> In his testament someone declared the following: "I want a thousand gold coins to be given to Eudo, since he was born immediately after his mother became a free woman". I ask whether, if Eudo cannot prove that he was born after the manumission of his mother, he can claim his freedom from these words of the testament. He responded that it is not right to raise a prejudicial inquiry into such matters.

In this fragment a part of a testament in Greek is quoted containing a *fideicommissum* (*βούλομαι δοθῆναι, volo dari*)[108]. The beneficiary of the *fideicommissum*, Eudo, was to be given thousand *νομίσματα*[109]. Talamanca suspects a Hellenistic origin for the name Eudo, but is not entirely sure whether this name should be considered Greek or Carian[110]. The testament was in Greek and the name Eudo presumably originated from the Hellenistic East, but except for the name and the Greek, there are no indications that the testament is derived from a Hellenistic legal context. The testament and the legal problem appear to be distinctively Roman.

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107 One text has a provincial context, namely Dig. 40.5.19*pr* (Scaev. 24 *Dig.*), as it mentions slaves asking their provincial governor for their freedom, which he bestowed upon them.

108 See also Dig. 34.4.30.1 discussed above and Dig. 40.5.46.3 (Ulpian. 6 *Disp.*).

109 In his translation of Dig. 40.4.60 Watson translates 'a thousand aurei'. A thousand *aurei* represented the substantial sum of 100,000 sesterces.

110 Talamanca 2010, 553. Talamanca comes to this conclusion by referencing Pliny *Nat. Hist.* V 108: *adluitur Eudone amne* (the river Eudon flows through it). In this passage Plinius described Caria, located in the south-west of modern Turkey.

The problem in this case is not the bequeathed money. This sum of money can be claimed by Eudo or by his master, if he had one[111]. Apparently, Eudo's status as a free person was questioned and he lacked proof that he was born after his mother had been manumitted. To prove that he was born free when his mother had already been freed (presumably *inter vivos* by the testator), Eudo needed to produce certain *instrumenta*[112]. Because he could not produce these *instrumenta,* he showed this testamentary provision. The question was, whether the statement of the testator was enough to prove that Eudo had been born free. Scaevola did not provide an answer. He merely stated that the issue did not warrant prejudicial inquiry. According to Buckland, Eudo cannot be considered free from this testamentary statement alone, while admitting that this text is obscure[113]. A rescript from Emperor Alexander Severus to Fortunatus a century later (229 AD), stated that a legacy in a non-military testament does not cover the manumission of the beneficiary merely by the testator calling him 'my freedman' (Cod. 6.21.7*pr*): *Ex his verbis* "*Fortunato liberto meo do lego*" *vindicare tibi libertatem non potes, si pagani testamentum proponatur*[114]. From the statement "*liberto meo*" from Cod. 6.21.7*pr* can be deduced that Fortunatus had been freed. From the statement "*μετὰ τὸ τὴν μητέρα αὐτοῦ γενέσθαι ἐλευθέραν*". from Dig. 40.4.60 can, in a similar fashion, be deduced that Eudo had been born a free man.

With regard to the quoted testament, both Kübler and Häusler focus on the word *ἐπεί*[115]. According to both scholars, by using *ἐπεί* the testator could have meant either *cum* or *si* (*demonstratio*[116] or *condicio*). As, in all likelihood, the testator was a Roman, he could have thought of *cum* in a conditional way, but should have written *εἰ* (if). According to Kübler, *cum* is often used in Roman legal texts, when *si* is meant[117]. Looking at the lexicon of Heumann and Seckel *cum* may have a conditional meaning: "*wenn, zur Bezeichnung eines Zeitpunktes oder einer Bedingung*"[118]. This conditional *cum* can, for

111 A *demonstratio falsa* which is the case, for example, when a testator wanted to bequeath an amount of money to a slave, but in doing so erroneously wrote down the name of a different slave, did not harm the validity of the testamentary provision, if it was still known which slave was meant. See Dig. 35.1.17*pr* (Gaius, 2 *de Leg. ad Ed. Prae.*).

112 See, for example, Dig. 4.2.8.1 (Paul. 11 *ad Ed.*).

113 Buckland 2010 [1970], 462.

114 Cod. 6.21.7*pr*: From the words "I give to and bestow upon my freedman Fortunatus", you cannot claim your freedom, if a non-military testament was produced.

115 Kübler *SZ* 28 (1907), 193 and Häusler *SZ* 133 (2016), 427.

116 It is possible, that in fact Eudo was born before his mother was manumitted, but tried to claim his freedom via this testamentary provision, even though he knew the statement it contained was false, because it revealed the testator's wish that Eudo should be free. Two possible reasons for the testator to use this statement and not a proper testamentary manumission are firstly that the testator may have tried to circumvent certain taxes which were due when slaves were manumitted or secondly that the testator could not manumit more slaves due to limitation by the *lex Fufia Caninia.*

117 Kübler *SZ* 28 (1907), 193.

118 Heumann-Seckel s.v. *cum.*

example[119], be seen in a testamentary provision in Dig. 27.1.45.1 (Tryph. 13 *Disp.*): *Sed si ita scriptum in testamento fuit: "Titius tutor esto*: *cum rei publicae causa aberit, tutor ne esto: cum redierit, tutor esto*…[120]. Kübler admits that by interpreting *ἐπεὶ* as *si* the Greek is maltreated as *ἐπεὶ* is normally used either temporal or causal. The Roman testator, however, may indeed have had the intention to bequeath a thousand in coin *if* Eudo had been born after his mother was manumitted. Because *ἐπεί* does not have this meaning in Greek, Eudo could have seized this opportunity to claim his freedom via a prejudicial procedure showing that the Greek text said 'since he was born immediately after his mother became a free woman'. It does, however, seem unlikely that the testator knowing both Eudo and his mother and knowing Eudo well enough to bequeath a thousand to him, would be uncertain whether Eudo had been born after the manumission of his mother or not.

From Scaevola's reply, it is evident that Dig. 40.4.60 refers to a prejudicial procedure (*consultationem praeiudicium*). Such a procedure is not uncommon when the controversy centers on the *status libertatis* of one of the parties. In his *Institutiones* Justinian (Inst. IV 6.15) explained that the prejudicial actions were among other things used in proceedings on someone's *status libertatis*: *Praeiudiciales actiones in rem esse videntur, quales sunt, per quas quaeritur, an aliquis liber vel an libertus sit, vel de partu agnoscendo*[121]. Scaevola, however, believed that the question did not warrant a prejudicial inquiry. This could have had three reasons. Firstly, Scaevola really did not consider this to be a matter for a prejudicial inquiry. In this case, Scaevola must have reasoned that the litigants had not chosen the right procedure for this legal controversy. Secondly, it was so self-explanatory that the question had to be answered in favour of Eudo that no such procedure was necessary, or thirdly, it was so self-explanatory that the question had to be answered negatively, that no such procedure was necessary. The glossator of *Gl. 'Consultationem' ad Dig. 40.4.60*, however, leaves it open to debate: *Sed quid si erat ancilla* [sic], *quia prius nata: an per haec verba testantis erit libera? Quidam sic: licet fit arg. Contra* (but what if she was a slave-girl, because she was born before [the manumission of

119 Other examples are: Dig. 45.1.45.3 (Ulpian. 50 *ad Sab.*) and Dig. 50.16.141 (Ulpian. 7 *ad Leg. Iul. Pap.*).

120 Dig. 27.1.45.1 (Tryph. 13 *Disp.*): If, however, it is written in the testament as follows: Let Titius be tutor: when/if he shall be away on account of state affairs, let him not be tutor: when he shall return, let him be tutor…

121 Inst. IV 6.15: "Prejudicial actions are considered to be *in rem*, such as those, by which it is asked whether someone is free or a freedman or on the recognition of a new-born". See also a rescript from Diocletianus to a woman named Thallusa in Cod. 7.16.21 (293 AD). See also Hackl 1976, 203, who mentions that this procedure is questioned with regard to classical Roman law by modern legal scholars. Hackl, however, argues that such a procedure existed in classical Roman law (Hackl 1976, 214).

her mother]: shall she be free based on the statements of the testator? Some say so, even though arguments against this interpretation can be made)[122].

To conclude, the testament in Greek from Dig. 40.4.60, most likely located in the Roman East, must not be considered to originate from a Hellenistic legal context, but must be considered as a Roman testament in Greek. It was asked whether a *fideicommisum* from the testament could be used by its beneficiary, who originated from a Hellenistic context, to proof or claim his freedom. Scaevola answered that this was not a matter for a prejudicial consultation.

II.6 Conclusion based on the *responsa* from Scaevola's *Digesta*

In section II five texts from Scaevola's Digest on inheritances were examined. In three texts, Dig. 33.8.23.2-3, Dig. 34.4.30.3 and Dig. 40.4.60, testaments in Greek are cited. Scaevola made no remarks on the validity of these Greek documents. Two of the three testaments should be considered Roman testaments in Greek, viz. Dig. 33.8.23.2-3 and Dig. 40.4.60. In these documents, no influence from Hellenistic legal culture can be found. Furthermore, the case of Dig. 34.1.16.1, in which a letter in Greek is cited, can also be considered a purely Roman matter, with no influence from Hellenistic legal culture. Dig. 34.4.30.3, however, must not be considered a Roman testament in Greek, but a testament which originated from and was embedded in a local Hellenistic legal culture. Again, Scaevola did not comment on the validity of this testament. Scaevola gave an advice purely based on Roman law and did not take into account Hellenistic practices of altering a testament, which could have played a role in this case.

In Dig. 34.4.30.1 a codicil in Greek is quoted. In both the codicil and the legal question asked in the fragment, influence from of a Hellenistic legal culture can be found. This is apparent from the clauses of the codicil, which betray an origin in the Roman East. In the legal question no functional distinction was made in the terminology of *fideicommissa* and *legata,* caused by the fact that in a Hellenistic legal context this distinction was not strictly made. Scaevola, however, ignored this Hellenistic context and gave advice on the matter as he saw fit.

Regardless of the question whether the Greek documents, testaments, codicils or letters presented to Scaevola were distinctively Roman, or mixed with elements from a Hellenistic legal culture, or distinctively stemming from a Hellenistic legal culture, Scaevola did not seem to deviate from the standards of *ius civile* of his time, nor did he address the complexities that could surround a local legal context, as is the case in Dig. 34.4.30.1 and Dig. 34.4.30.3.

122 The arguments against this interpretation which are mentioned by the glossator are Cod. 6.21.7*pr* discussed above and Cod. 7.3.1 (528 AD) on the repeal of the *lex Fufia Caninia.* It is unclear why the glossator referred to Eudo as a female.

III One bilingual *responsum* by Paul on testamentary manumission

In the works of Paul only one bilingual reply on *manumissio* is found, which is Dig. 40.5.39.1 (Paul. 13 *Resp.*) on a fideicommissary manumission of a slave and his children.

III.1 Dig. 40.5.39.1 (Paul. 13 *Resp.*): Showing gratitude towards a slave

The fragment of 40.5.39.1 has been incorporated in a section on fideicommissary manumission (*de Fideicommissariis Libertatibus*) in the Justinianic Digest. This section contains another bilingual reply on fideicommissary manumission in Dig. 40.5.41.4 (Scaev. 4 *Resp.*) discussed on pp. 119*sqq*. In his *Palingenesia*, Lenel added Paul's fragment to a section on *fideicommissa* and *legata* as fragment 1559. The first part of the fragment (Dig. 40.5.39.1) is also on a fideicommissary manumission, but in this case, it concerned a slave which did not belong to the testator.

> Dig. 40.5.39.1 (Paul. 13 *Resp.*)
>
> Paulus respondit his verbis "πίστευσον δέ μοι Ζώϊλε, ὅτι τὰς χάριτάς σοι ἀποδώσει ὁ υἱός μου Μαρτιάλιος καί σοι καὶ τοῖς σοῖς παισίν" plenam voluntatem defuncti contineri circa benefaciendum coniunctis personis Zoilum: qui si servi sint, nihil est[123] gratum his praestari posse quam libertatem ideoque praesidem debere sequi voluntatem defuncti.
>
> Paulus responded that in the words "Believe me, Zoïlus, that my son Martialis will show you and all your children his gratitude", the complete intention of the testator is embodied to favour Zoïlus and his family: if they are slaves, no gratitude can be shown them other than their freedom, and therefore the *praeses* (i.e. a provincial governor)[124] must follow the intention of the deceased.

In this reply, the Greek cited is thought to be taken from either a testament or a codicil. The glossator Franciscus Accursius wrote in a gloss, describing the *casus* of this reply, that these words were taken from a testament[125]. It is more likely with a view to the imperative *πίστευσον* and the subjective style of the document, that it was taken from a codicil in the form of a letter[126].

123 Mommsen suggest *aeque* (?) in his *Editio Maior*.

124 As can be inferred from Dig. 1.18.1 (Mac. 1 *de Off. Prae.*), the term *praeses* is generic and could have indicated a *proconsul,* an imperial *legatus* or everyone who governed a province.

125 Gl. 'CASVS' ad Dig. 40.5.39.

126 An example of a codicil drawn up in a subjective style is the earlier examined Dig. 34.4.30.1 (Scaev. 20 *Dig.*) on pp. 232*sqq*.

Next to the Greek and the subjective style of the document, other factors hint to a Hellenistic context as well, such as the name Zoïlus, which is common in e.g. Roman Egypt[127], and the reference to a provincial governor[128]. As the controversy is taken to a provincial governor, it is to be expected that the litigants belonged to a Roman context in the Hellenistic East. It could, however, also be the case that locals went to the provincial governor to have their cases heard. The case may have concerned a Roman family in the East, as is indicated by the Roman name Martialis with locally born slaves as indicated by the name Zoïlus[129].

In Dig. 40.5.39.1, an unnamed testator wrote to Zoïlus that the testator's son Martialis would show him and his children his gratitude. The correct interpretation of *τὰς χάριτας ἀποδώσει* is the core issue in this legal controversy. Maybe the son Martialis would interpret this as an instruction to be a good master to Zoïlus and his children, while Zoïlus interpreted it as a *fideicommissum* to bestow freedom upon him and his children. Paul concurred with the latter point of view and even stated that regarding Zoïlus and his children the intentions of the testator were completely clear.

The interpretation of *τὰς χάριτας ἀποδώσει* by Paul as 'to bestow freedom' cannot be found in other Greek sources in which this expression is found. The expression is not attested in a context of manumission of slaves. The expression is attested in the second letter by Demosthenes to the city-council and the assembly: *ἔστι δ' ἡ Τροζηνίων αὕτη, ᾗ μάλιστα μὲν οἱ θεοὶ καὶ τῆς πρὸς ὑμᾶς εὐνοίας εἵνεκα καὶ τῆς εἰς ἔμ' εὐεργεσίας εὖνοι πάντες εἴησαν, εἶτα κἀγὼ σωθεὶς ὑφ' ὑμῶν δυνηθείην ἀποδοῦναι χάριτας.*[130]

The main question regarding this expression in a slave context is: how can a master repay a slave's kindness? The answer may be found in Latin literature and legal sources rather than Greek literature and papyrological sources. In Dig. 40.5.39.1 the Greek *χάριτας ἀποδίδωμι* is used as a calque of the Latin *beneficium dare*[131]. Paul hinted on this by writing *circa benefaciendum*. In a slave context this *beneficium* must be understood as the manumission of a

127 TM Name ID 5406. In the Trismegistos database the name is mentioned more than 1200 times.

128 According to Gaius controversies concerning fideicommissary manumissions must be handled by the office of the *praeses provinciae*. See Gaius, *Inst.* II 278. If slaves were granted their freedom by the provincial governor, they became *liberti orcini* meaning that the heir did not become the *patronus* of the freedmen. See Dig. 40.5.26.7 (Ulpian. 5 *Fid.*) on the *senatusconsultum Rubrianum* (103 AD).

129 It is true, that onomastics can be unreliable in determining the geographical or ethnical background of persons.

130 Demosthenes Letters II 19: It is this city of the people of Troezen, to which, first and foremost, may all the gods be well-disposed both because of its goodwill to you and because of its well-doing to me, and secondly may I, having been saved by you, be able to repay you.

131 In addition to the Roman name Martialis, the fact that the Greek is a mere calque of a Latin expression and had to be interpreted as such is also an argument in favour of the proposition that the testator and his family were in fact Roman citizens.

slave. This is evidenced in sources ranging from the first century BC until the third century AD. In, for example, Cicero's second Verrine oration, Cicero mentioned manumission as *summum beneficium* (*in Verrem* II. 1, 47, 124) and in the *Lesser Declamations* (259) ascribed to Quintilian, (pseudo-) Quintilian wrote: *non libertus tam beneficio obligatus manumittentis*[132]. In legal sources from two contemporaries of Paul, namely Ulpian and Papinian *beneficium* is also mentioned as manumission. In a *quaestio* in Dig. 48.19.33 (Papinian. 2 *Quaest.*), Papinian called manumission a *beneficium libertatis* and Ulpian mentioned *beneficium manumissionis* in Dig. 1.1.4 (Ulpian. 1 *Inst.*). In Dig. 38.2.1*pr* (Ulpian. 42 *ad Ed.*), Ulpian cited the Late Republican jurist Servius Sulpicius Rufus:

> Dig. 38.2.1*pr*
>
> Hoc edictum a praetore propositum est honoris, quem liberti patronis habere debent, moderandi gratia. Namque ut Servius scribit, antea soliti fuerunt a libertis durissimas res exigere, scilicet ad remunerandum tam grande beneficium, quod in libertos confertur, cum ex servitute ad civitatem Romanam perducuntur.
>
> This edict is promulgated by the praetor to mitigate the honour, which freedmen must have for their patrons. Indeed, as Servius writes, in the old days they used to demand the harshest tasks from their freedmen, that is to remunerate so great a favor, which was conferred on the freedmen, when they were led from servitude to Roman citizenship.

From all these examples, it can be seen that Paul must have interpreted *χάριτες* as *benificium* in line with Roman literal and legal sources on manumission of his time.

In Dig. 40.5.39.1 Paul advised the provincial governor (*praeses provinciae*) to grant the claim to freedom of Zoïlus and his children. A scenario for Dig. 40.5.39.1 is that Zoïlus, as a fideicommissary beneficiary, requested the manumission of himself and his children at the office of the provincial governor. A similar procedure can be seen in Dig. 40.5.19 (Scaev. 24 *Dig.*), in which slaves who were ordered by *fideicommissum* to be manumitted by the heir, requested their freedom from the *praeses provinciae* during the absence of their new master. On the authority of the *praeses provinciae,* the slaves were released. The difference between Dig. 40.5.39.1 and Dig. 40.5.19 is that in the latter the new master is absent and in the former the master seems to be unwilling to manumit his slaves.

132 [Quintilian], *Min. Decl.* 259: … and no freedman so bound by the benefaction of his manumittor.

III.2 Conclusion

In Dig. 40.5.39.1 the unnamed testator and his son Martialis seem to be Romans, while Zoïlus and his children presumably were local slaves living with their masters in the Roman East. This can be deduced from their names and by the choice for the Greek language. The Roman interpretation of the Greek words of the testator by Paul led him to the advice that Zoïlus and his children, if they were slaves, had to be manumitted by the provincial governor. There are no indications of influence of Hellenistic legal culture in this reply, as it focuses on the purely Roman relationship between a master and his slaves.

IV One bilingual responsum by Modestin on testamentary provisions regarding freedmen

In the *Responsa* by Modestin four bilingual replies can be found, three of which have been analysed previously. These were Dig. 31.34.1 on the estate 'Gaza' on pp. 194*sqq*, Dig. 31.34.7 on *parakatatheke* (fr. 318) on pp. 124*sqq* and Dig. 50.12.10 (Mod. 1 *Resp.*) on a promise to organize a thymelic festival on pp. 144*sqq*. The first two are from the tenth book of Modestin's replies, as is Dig. 34.1.4*pr*, to be discussed in the following section.

IV.1 Dig. 34.1.4*pr* (Mod. 10 *Resp.*): Usufruct or *dominium*

Dig. 34.1.4*pr* is fragment 321 in Lenel's *Palingenesia* and is there part of a section on *fideicommissa*. In the Justinianic Digest the compilators added it to a section on *legata* concerning *alimenta* or supplies. The section contains many Greek names such as Prothymus, Polychronius and Hypatius in Dig. 34.1.5 (Mod. 11 *Resp.*), which is to be expected when the texts concern slaves and freedmen.

> Dig. 34.1.4*pr* (Mod. 10 *Resp.*):
>
> 'Τοῖς τε ἀπελευθέροις ταῖς τε ἀπελευθέραις μου, οὓς ζῶσα ἔν τε τῇ διαθήκῃ ἔν τε τῷ κωδικίλλῳ ἠλευθέρωσα ἢ ἐλευθερώσω, δοθῆναι βούλομαι τὰ ἐν Χίοις μου χωρία, ἐπὶ τῷ καὶ ὅσα ζώσης μου ἐλάμβανον στοιχεῖσθαι αὐτοῖς κιβαρίου καὶ βεστιαρίου ὀνόματι'. Quaero, quam habeant significationem, utrum ut ex praediis alimenta ipsi capiant an vero ut praeter praedia et cibaria et vestiaria ab herede percipiant? Et utrum proprietas an usus fructus relictus est? Et si proprietas relicta sit, aliquid tamen superfluum inveniatur in reditibus, quam est in quantitate cibariorum et vestiariorum, an ad heredem patronae pertinet? Et si mortui aliqui ex libertis sint, an pars eorum ad fideicommissarios superstites pertinet? Et an[133] die cedente fideicommissi morientium libertorum portio-

133 Mommsen adds as a suggestion *an ante diem cedentem* in his *Editio Maior.*

> nes ad heredes eorum an testatoris decurrant? Modestinus respondit: videntur mihi ipsa praedia esse libertis relicta, ut pleno dominio haec habeant et non per solum usum fructum et ideo et si quid superfluum in reditibus quam in cibariis erit, hoc ad libertos pertineat. Sed et si decesserit fideicommissarius ante diem fideicommissi cedentem, pars eius ad ceteros fideicommissarios pertinet: post diem autem cedentem si qui mortui sint, ad suos heredes haec transmittent.
>
> 'I want that to my freedmen and freedwomen, whom I have manumitted or will manumit while living, by testament and by codicil, my lands on Chios are given, from which they should be provided with food and clothes, as much as I gave them while I was alive. I ask what meaning these words have, whether they mean, that they themselves must take the supplies from the estates or that apart from the estates they also receive food and clothing from the heir? And is ownership bequeathed or usufruct? And if ownership is bequeathed, yet some surplus is found from the revenue which exceeds the quantity of food and clothes, does it belong to the heir of the patroness? And if some of the freedmen would have died, whether their share belongs to the remaining beneficiaries of the *fideicommissum*? And whether upon lapse of the term of the *fideicommissum* the shares of the deceased freedmen befall their heirs or those of the testator? Modestinus responded: it appears to me that the landed estates themselves are left to the freedmen to have these in complete ownership and not just in usufruct, and therefore if there shall be a surplus from the revenues, over and above the amount of the supplies, this will belong to the freedmen. But even if the beneficiary to the *fideicommissum* has died before the term of the *fideicommissum* has lapsed, his share belongs to the other beneficiaries to the *fideicommissum*. Those who die after that day has come, however, pass these on to their own heirs.

The Greek text quoted begins with a formulaic sentence from a Roman legal context which is a calque of the Latin formula (*τοῖς τε … ἢ ἐλευθερώσω*)[134]. By using this formula, the testatrix ensured that all her freedmen and future freedmen were included in the bequest. The same formula can be seen in Dig. 34.1.16.1 (Scaev. 18 *Dig.*)[135].

The testatrix and the freedmen must be situated in the Roman East, because besides writing in Greek, the testatrix mentioned her lands on the island of Chios. Chios was located in the Roman province of *Asia*. As the bequests for the slaves concern an estate in Chios, it is plausible that these slaves were connected to these lands. Already in the times of the Greek city-states, Chios was known for its large population of slaves. Thucydides even wrote that the Chians had more slaves than any Greek city-state with the exception of Lacedaemon[136].

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134 For the use of this formula in Roman epigraphy, See Incelli 2016, 33.

135 This *responsum* in which the testatrix Rufina made the same distinction of these three types of freedmen, to whom she bequeathed the supplies she gave them while she was alive, and epigraphic attestations of this formula, are discussed above in this chapter on pp. 222*sqq*.

136 See Thucydides VIII, 40.2.

Regardless of the Greek language used, it cannot be proved that the testatrix herself was from the Roman East. On the contrary, the use of the formula at the beginning of the Greek document (*τοῖς τε … ἢ ἐλευθερώσω*) is an indication of the Roman ethnicity of the testatrix. Kübler, however, states that the woman is a *Griechin*. This, however, is not warranted by the information in the text. She may have been a Roman owning land in the Achaean East .[137] She, or at least her notary, seems to have been versed in Roman law[138], distinguishing testament from codicil and even using a transliteration of the Latin *codicillis* (*ἔν τε τῷ κωδικίλλῳ*)[139]. She employs the same formula of *δοθῆναι βούλομαι* (*dari volo*) for the bequests as found in Dig. 34.4.30.1 and Dig. 40.4.60, where the testators both were Roman citizens, discussed on pp. 232*sqq* and pp. 237*sqq*.

The testatrix transcribed *cibarii et vestiarii nomine* as *κιβαρίου*[140] *καὶ βεστιαρίου ὀνόματι*[141]. With such a formula a testator burdened his heirs with the task to provide food and clothes to the testator's former slaves. In papyrological sources a similar expression can also be found as early as the second century BC, with the verbs *τρέφω* (to feed) and *ἱματίζω* (to clothe). The use of these particular Greek verbs seems to originate from a Ptolemaic legal context[142]. The expression is still used in Roman times, for example, in P. Strass. VII 684, 20 (provenance unknown, 117-138 AD): *τρέφο*]*υσα* \ *καὶ ἱματίζουσα/ τοὺς τέσσαρες ἀπελ*[*ευθέρους* (feeding and clothing the four freedmen). In this papyrus the testator Lysimachus bequeathed some legacies (l. 22: *τὰ προκεί*]*μενα ληγᾶτα*) to beneficiaries and included an obligation to feed and clothe four of his freedmen[143]. Another example is the local will of Dionysius in P. Oxy. III 489, 9 (Oxyrhynchus, 117 AD), in which he burdened his wife with the task to feed and clothe a slave-girl and her children. There is

137 Kübler *SZ* 28 (1907), 177.

138 Häusler mentions that the testatrix had some knowledge of Roman legal vocabulary. Häusler *SZ* 133 (2016), 443.

139 The document, which is drawn up in a subjective style, could itself be either the testament of the *patrona* or a codicil. From the text quoted it cannot be said with certainty.

140 The vast majority of cases in which *τὸ κιβάριον* is attested originates from the Roman quarry of *Mons Claudianus* in Roman Egypt. The word there is strongly connected to a Roman military presence. The word does not seem to be used much in a local Roman-Egyptian or Hellenistic context. See Cuvigny 2010, 40-41.

141 See Kübler *SZ* 28 (1907), 177. Kübler also cites Dig. 34.1.15.1 (Scaev. 17 *Dig.*): '*… cibarii nomine ab heredibus meis praestari volo, quae me vivo accipiebant*'. Also see Dig. 34.1.18 (Scaev. 20 *Dig.*): *cibariorum nomine et vestiarii.*

142 See line 10 of a petition from Oxyrhynchus to the Archidicastes (156-125 BC) in Claytor *ZPE* 176 (2011), 213: *καὶ οὐ τρέφει οὔτε ἱ*[*ματίζει ἡμᾶς* (and he neither feeds us nor clothes us). Such a clause could also be added to marriage contracts. One of the duties of a husband was to feed and clothe his wife, for instance in SB XXIV 16073, 18 (Alexandria, 12 BC). See Claytor *ZPE* 176 (2011), 219.

143 See also P. Fouad 25 (provenance unknown, II AD), which is the (fragmentary) documentation of a trial concerning a testament. From the documentation it appears that one of the legatees had to provide food and clothing to 'us'. See the verso of P. Fouad 25, 2 fr.C line 9; *ἔτρε*]*φε καὶ ἱμάτιζε ἡμᾶς* (he fed and clothed us). In the Basilica, it can be seen as a legacy *ὑπὲρ τροφῆς καὶ ἐσθῆτος*. See Bas. 44.14.4.

a major difference between the testamentary provision in the local wills and the provision in Roman wills. In local wills persons were given the duty to feed and clothe (verbial) certain beneficiaries, whereas in Roman testaments food and clothes (substantive) were bequeathed to the beneficiaries. The fact that the testatrix in Dig. 34.1.4*pr* did not employ an original Greek verbial expression, but used the Roman substantive expression instead, is an indication that her testament stems from a Roman legal context in the East.

The Greek text gave rise to four legal questions. The first question was whether the clothing and food bequeathed be sourced from the landed estates on Chios or provided by the heir of the testatrix. An example of the latter can be found in a papyrus with the translation of a Roman testament from Philadelphia (186-224 AD), P. Diog. 9, 14. From this (incomplete) papyrus it appears that the wife of the testator was burdened with the duty to provide food and clothing and she had to pay for it from her own money. She was even required to do so, otherwise she could not claim other legacies bequeathed to her in the will. The Greek text in Dig. 34.1.4*pr*, however, especially the words *ἐπὶ τῷ*, hinted toward an interpretation that food and clothes were part of the bequest of the estate. Modestin's answer seems to imply this, as from the words *quid superfluum in reditibus quam in cibariis erit* it follows that there must have been revenue from the estate which fell into the category '*cibarium*' if there was revenue that exceeded the amount of *cibarium.*

The second question to Modestin concerned the nature of the bequest, namely whether full ownership was bequeathed or only the usufruct of the landed estate[144]. The Greek in Dig. 34.1.4 does not mention usufruct. It is, however, illogical to assume ownership in light of the fact that the testatrix commanded food and clothing to be taken from the revenue of the land. If the former slaves had ownership, the profits taken from the land would also be theirs without the *fideicommissum* of food and clothing. Therefore, in the perspective of this *fideicommissum* a right of usufruct is more logical to assume. Modestin, however, replied that full ownership (*plenum dominium*) was bestowed upon the freedmen, because it appeared to him that the estates themselves were left (*praedia ipsa relicta*).

In the follow-up question, based on the hypothetical ownership by the former slaves, the author asked whether, in case the profits of the land exceeded the costs of food and clothing of the former slaves, the remainder should befall the heir(s) of the deceased patroness. The question seems uninteresting when assuming that ownership was transferred to the former slaves, because following Roman legal doctrine full ownership of the land implies full ownership of all the fruits and revenues from that land. The author of the

144 A similar question can be seen in Dig. 34.2.15 (Scaev. 15 *Dig.*). In this reply, a woman named 'Seia' is bequeathed with gold and silver artifacts. She was asked to leave these artifacts to two slaves after she died, because, so says the testator, usufruct of the artifacts sufficed for her (Seia). The question was asked whether Seia was bequeathed with *dominium* of the property or usufruct, and Scaevola replied that ownership was bequeathed burdened with a *fideicommissum*.

question, however, could have interpreted *ἐπὶ τῷ* as 'in order to', meaning that the profits from the estate which would befall the former slaves were limited to the costs of food and clothing[145]. Kehoe argues that the testatrix had a 'fairly exact idea about the income that her estates regularly produced'. She therefore bequeathed this part of her estate, because it sufficed for food and clothing for the *liberti*. This could explain the question regarding the surplus. In the testament P. Oxy. III 491 (Oxyrhynchus, 126 AD), 13-14 the same form of bequest is attested with *ἐπὶ τῷ*[146]. In this testament, the testator left the remainder of his property to his wife in order that (*ἐπὶ τῷ*) she would pay his debts. It is not clear from the testament whether the beneficiary could keep the surplus, should there be any, after the debts were paid. Modestin followed Roman legal doctrine. As the estate belonged to the former slaves in full, all the revenues from it would befall them.

The third and fourth question concern the (potential) death of the beneficiaries of the *fideicommissum* before and after the moment that the *fideicommissum* came into effect. The author asked whether the possible time of death of a *libertus* had an effect on the shares of the remaining *liberti.* Modestin answered that if one of the *liberti* died before the date on which the *fideicommissum* came into effect, the shares of the remaining *liberti* would increase in proportion. If a *libertus* died after the *fideicommissum* came into effect, his share of the inheritance would be conveyed to his own heirs (*ad suos heredes*).

To conclude, even though the case to which Modestin replied must be situated in the Roman East and more specifically in the Roman province of *Asia,* it is more than likely that the testatrix is to be placed in a Roman context. The Greek text is full of transcribed Latin and calques of Roman legal language. The methodical way in which the questions are organized by the author suggest that this person was experienced in Roman law. The level of the questions, however, especially of the third and fourth question seems to be basic from a Romal legal point of view. This suggests some influence from a Hellenistic legal context in which there was no abstract concept of *dominium* comparable to Roman law and to which Roman concepts as *fideicommissa* were foreign.

V Conclusion based on the bilingual replies of Scaevola, Paul and Modestin on freedmen

Most documents examined in this chapter originate from Romans living in the East, who applied Roman law in their testaments, codicils and letters. Three of the five Scaevola texts discussed, namely Dig. 33.8.23.2-3, Dig. 34.1.16.1 and Dig. 40.4.60 must be placed in this category. The fragment of Paul, Dig. 40.5.39.1, and the reply by Modestin from Dig. 34.1.4*pr* also belong

145 Kehoe 1994, 50.

146 The testament is discussed on p. 234.

in this category of 'Romans applying Roman law using the Greek language'. These five bilingual fragments on *liberti* and *libertae,* show no influences from Hellenistic legal context, as they mostly concern the relationship between Roman masters (testators and their heirs) and their slaves or freedmen to be. An exception to this is the author of the questions in Dig. 34.1.4*pr.* Even though he is – at least basically – versed in Roman law, he seems to be influenced by the Hellenistic legal culture in which he lived. Furthermore, in the bilingual reply of Dig. 40.5.41.4 (Scaev. 4 *Resp*.) on the fideicommissary manumission of two slaves[147], no influences of Hellenistic legal culture can be found.

Two fragments examined in this chapter, both from Scaevola's Digest, feature elements that belong to a Hellenistic legal context. In Dig. 34.4.30.1 the testatrix, a Roman citizen, used a Hellenistic legal formula in her codicil. The formula, however, was ignored by Scaevola. In Dig. 34.4.30.3 a testament is cited which is not a traditional Roman testament, but a testament from a Hellenistic legal culture. Unfortunately, the names (*Prima* and *Secunda*) in the document are anonymized and therefore the question whether the testator was a Roman or not cannot be answered with certainty as the fragment lacks other indications. Furthermore, whether difficulties concerning this Hellenistic testament arose precisely because of the local legal culture remains uncertain.

It appears, that, even though these documents concerning *liberti* and *libertae* were all in Greek, the topic of manumission via testament or codicil concerned mostly Romans applying Roman law. In none of the cases presented, the Roman jurists find it necessary to deviate from Roman law. Paul and Modestin were not confronted with Hellenistic cases. Scaevola did have the choice to account for the Hellenistic legal context of the parties in his advice. He did not opt for this decision.

147 This *responsum* is discussed in chapter II pp. 119*sqq*.