Some Thoughts on Succession in Provincial Context

Eva Jakab
University of Szeged
jakabeva@juris.u-szeged.hu

Abstract

The Roman law of succession was ruled by strict prescriptions set out by public law – strongly linked to status and citizenship. In Roman Egypt, the *Idios Logos* regularly interfered to enforce the severe separation of classes, applying the special tools of fiscal administration. The remarkable dynamic of privileges and restrictions mirrors changing imperial policy.

The present contribution is focused on soldier's wills, on the interaction between Roman law and Graeco-Egyptian legal culture in the light of documentary texts.

Keywords

Inheritance, soldier's wills, citizenship

The law of succession is about acquisition of things in mass (*per universitatem*), that is of succession on death – to the whole of a man's patrimonial position. In classical Roman law, the rules of succession (whether by will or intestate) were considered as one of the most important part of legal order. For instance, in the *Institutiones* of Gaius 279 fragments deal with inheritance, while contract law is only discussed in 93 fragments. Looking at the Digest, one gets a similar result: eleven of the fifty books are concerned with decisions in inheritance trials.[1] This immense quantity and importance of inheritance norms surprise modern scholars of the 21st century. However, one should keep in mind that ancient societies, especially that of the Romans, was shaped by a different mentality. Already Champlin pointed out that «the Roman people were obsessed with the making of wills, both their own and others, to a degree and for reasons which may be hard to grasp today».[2] Some scholars argue, that approximately 60 to 70% of all legal disputes related to inheritance in ancient Rome.[3] Pliny the Younger began one of his *epistulae* by stating: «falsum est nimirum, quod creditur vulgo, testamenta

[1] Crook 1967, 11; Jakab 2018, 67-68.
[2] Champlin 1991, 6-8; Jakab 2016, 498.
[3] Kelly 1985, 37-38.

hominum speculum esse morum […]».[4] Pliny reports of the case of a certain Domitius Tullus who turned out much better on his death as he was in his life. His witty remark is based on the widely spread assumption that the testament of a Roman citizen is the true mirror of his character.

My contribution examines the inheritance provisions of the *Gnomon* of the *Idios logos* from the perspective of soldiers. It is known that active soldiers of the Roman army formed a privileged layer, also in provincial populace.[5] The guidelines of the *Idios logos* consistently strive to substantiate these privileges on several sides. However, certain tensions can be observed between the personal freedom of making wills, the sever control of Roman fiscal administration and concerns of imperial politics.

Since Augustan times, some strict prescriptions of succession have been broken for political reasons, especially for granting significant privileges to soldiers.[6] Rome's lawyers were also concerned with this phenomenon; they especially tried to integrate the newly released exceptions in the strictly systematized order of Roman law. In this sense, for instance, Modestinus underlined: «Privilegia quaedam causae sunt, quaedam personae. Et ideo quaedam ad heredem transmittuntur, quae causae sunt: quae personae sunt, ad heredem non transeunt».[7] The quotation comes from title 50. 17 of the Digest *De diversis regulis iuris antiqui.* This title included some typical rules and definitions worked out in Roman legal thought. Briefly formulated *regulae* endowed the «case law» of Rome (Kautelarjurisprudenz) with elements of a systematized legal thinking – as Paulus also stressed: «regula est, quae rem quae est breviter enarrat».[8] Nevertheless, Paulus also emphasized that Roman law should not be found in short *regulae*, but in detailed casuistic decisions of lawyers.[9] Modestinus' reasoning on privileges has to be understood in this context.

Privilegia, dispensations are exceptions and prerogatives which set exemptions from general rules of law. Such special rights are known in every legal order; they mostly represent important political aims supported by legislation. In the fragment quoted above, Modestinus tries to systematize the considerable mass of privileges in inheritance law. According to him, some dispensations relate to things (to a special legal ground), some to persons, it means to a special social group. It is well known that soldiers and veterans of the Roman army had also privileges under civil law, especially since the outgoing republic. However, soldiers represented a contradictory social group in the Roman Empire, including the province of Egypt. They served as the most important tool of Roman political power, although just a certain part of them was furnished with Roman citizenship. The armed forces of the Roman state counted quite a lot of *peregrini* in their ranks.[10] However, it can be observed in several sources that soldiers of provincial origin soon sought a «Roman identity» in their social life, although

[4] Plin., *Ep*. 8. 18.
[5] Alston 1995, 139-142; Sänger 2010, 125-130; Jung 1982, 947-963.
[6] Stagl 2014, 130-131; Lovato 2011, 257-265; Babusiaux 2018, 162-163.
[7] D. 50. 17. 196 Mod.
[8] D. 50. 17. 1 Paul.
[9] D. 50. 17. 1 Paul.: «non ex regula ius sumatur, sed ex iure quod est regula fiat».
[10] See Lavan 2019, 39-41 for non-citizens in the legions and Lavan 2019, 37-38 for citizens in auxiliaries; cf. also Palme 2011, 1-10; Alston 1995, 52–63; Jung 1982, 902-904.

the legal requirements for it were not (or not yet) fulfilled.[11] This strange social situation, the gap between legal status and legal identity as it was felt, can also be grasped in theory and practice of making wills.

In addition, since the outgoing republic, the Roman government has deliberately set out to secure soldiers a privileged position also in their private affairs.[12] In inheritance, special rules applied to last wills, and dispensations were secured by an *epistula Hadriani* also for intestate succession.[13] Precarious family relationships – due to long-standing marriage bans for soldiers – caused further difficulties in succession.[14]

Inheritance affairs in provincial context

In the ancient world, the principle generally applied that «Angehörige einer *civitas* […] das von deren Bürgern als für sich maßgeblich angesehene Recht als ihr Personalstatut besaßen».[15] Wolff underlined that originally it was a consequence of the «personal und gentilizisch bestimmten Struktur des politischen Gemeinwesens»; it prevailed not only in Greek *poleis* but also in republican Rome. This principle was undoubtedly valid and also well documented even in the golden age of the Roman Empire, in the first and second centuries of *principatus*.

A valuable source from Roman Egypt confirms that Roman authorities mercilessly opposed any intercourse between the classes, especially in succession. I think of the *Gnomon* of the *Idios logos*, whose prohibitions and commands show a tendency that can serve as a guideline also for other provinces.[16] The *Gnomon* reflects provincial life as viewed by Roman fiscal administration. The text, edited by Wilhelm Schubart in 1919,[17] is a presumably incomplete copy, written down on the verso of a list of accounts from the small village of Bernikis. It is a collection of guidelines, closely related to imperial orders and provincial precedents.[18] The text itself traces the records back to Augustus; but later constitutions and additional legal sources have also been carefully inserted.[19] Of the 114 preserved paragraphs of the *Gnomon* relate 34 to inheritance (§§ 3–36, about 30%). This special guide has been collected, copied, and sent around in the province – to be applied by the Imperial fiscal

[11] Lavan 2019, 36.
[12] Stagl 2014, 131-139; Kreuzsaler 2011, 34-36.
[13] FIRA I^2 78, A.D. 119; cf. Schiemann 1986, 233-244; Stagl 2014, 130-132; Arangio-Ruiz 1906, 157-158; Bolla 1950, 1-24.
[14] Friedl 1996, 239-244; recently Nowak 2014, 13-15.
[15] Wolff 2002, 148.
[16] For dating see Schubart 1919, 3-5 and 8; recently also Dolganov 2020.
[17] Schubart 1919; Plaumann 1919; Lenel / Partsch 1920; Reinach 1920, 5-134; Riccobono 1950; Mélèze-Modrzejewski 1977, 520-557.
[18] Recently Babusiaux 2018, 109-115.
[19] For instance P.Oxy. XLII 3014; see for it Jakab 2020, at Fn. 7.

administration.[20]

The significant differences in status, so typical for ancient societies, are particularly evident in the *Gnomon*. Roman citizens, Alexandrians, Egyptians and foreigners made up the colorful populace of Roman Egypt. As mentioned above, family and inheritance law were strongly linked to status[21] – and the *Idios logos* interfered to enforce the special needs of taxation (BGU V 1210, l. 35-37, § 8):

η ἐὰν Ῥωμαικῇ δια⟦κ⟧θήκῃ προσκαίηται ὅτι ὅσα δὲ ἐὰν διατά|[ξ]ω κατὰ πινᾰκίδας Ἑλληνικὰς κύρια ἔστω, οὐ παραδεκτέα | [ἐ]στίν, οὐ γὰρ ἔ[ξ]εστιν Ῥωμαίῳ διαθήκην Ἑλληνικὴν γράψαι.

The authorities took care that Romans write their wills exclusively under the formal and internal rules of *ius civile*.[22] According to § 7 (l. 33-34), Roman wills must follow the strict prescriptions laid down by public law. § 8 extends these prescriptions also to codicils: if supplements in Greek were added to a regular Roman testament, they should remain ineffective.[23] Romans must strictly observe *ius civile* in their last wills – as developed by praetors, lawyers and Emperors in the city of Rome. The sever rules of capacity excluded many persons whom a testator might wish to benefit.

The partly archaic formalities of *ius civile* were to some extent relaxed with recognizing fideicommissa, especially since Augustan times. It became a common practice to order a reliable person (by will or in a separate document called codicil) to hand over property to a beneficiary. Initially, anyone could be benefitted by a fideicommissum, even if he belonged to a different status group;[24] and not even the limitations of *incapacitas* (set by Augustan marriage laws) or that of the *lex Falcidia* did apply. Gaius underlined that actually fideicommissa came into use for the benefit of peregrines (2. 285): «ut ecce peregrini poterant fideicommissa capere et fere haec fuit origo fideicommissorum». The wise lawyer saw the aim of recognizing this form-free type of final disposals exactly in the special need that Roman citizens often wanted to benefit peregrines or peregrines Romans.

But initial generosity was soon curtailed. Under Vespasian and Hadrian, Senatus consulta prohibited every form of acquisition on death between different classes.[25] The new regulations appeared soon in the provincial guide of the *Gnomon*. § 18 quoted the Vespasian rule extending the limits of capacity for fideicommissa;[26] any type of last wills against the law had to be sanctioned with confiscation (BGU V 1210, l. 56-58, § 18):

[20] Swarney 1970, 77-81 stressed that the *Idios logos* acted as sales agent, administrator, investigator and judge.
[21] As already pointed out by Mitteis 1891, 102-110.
[22] Rüfner 2011, 1-26; see already Kreller 1919, 328-337; Riccobono 1950, 119-123.
[23] Riccobono 1950, 35-36; Reinach 1920, 52-54; Strobel 2014, 30-31; Nowak 2015, 194-199.
[24] Kaser / Knütel / Lohsse 2017, 423.
[25] Gai. 2. 285; see for it Mélèze-Modrzejewski 1977, 526; Riccobono 1950, 135; Johnston 1988, 19-20; Babusiaux 2018, 142-143.
[26] Later on, this rule was strengthened again by Hadrian.

ιη τὰ\ς/ κατὰ πίστιν γεινομένας κληρονομίας ὑπὸ ῾Ελλήνωϊ \εἰς/ ⟦ὑπὸ⟧ ῾Ρω|μαίους ἢ ὑπὸ ῾Ρωμαίων \εἰς/ ῞Ελληνας ὁ θεὸς Οὐεσπασιανὸς [ἀ]νέλαβεν, | οἱ μέντοι τὰς πίστεις ἐξωμολογησάμενοι τὸ ἥμισ[υ ε]ἰλήφασι.

The tightening imposed by Senatus consulta also for alternative forms of final disposals must have been observed. In the case of violations, the *Idios logos* confiscated the entire estate; the only exception was a voluntary self-disclosure.[27] However, the need for bans on writing Greek wills and on trusts for non-Romans gives the impression that local forms of bequeathing must have been used sometimes also by Roman citizens. Since in everyday business, contracting parties were rather free to choose between Roman and local templates, the strict formalities in succession must have been rather hard and unpopular. Regarding that Roman authorities were generous and compliant in the law of exchange – it was hard to grasp their strict actions in matters of status and inheritance. However, public interest, such as transparency in citizenship and protection of family structures, required mandatory standards. Therefore, the capacity to make wills and to take under a will, was anew strictly linked to *status*: any type of succession was forbidden between Roman citizens and non-Romans by the Senatus consulta quoted above.[28]

What was asked of Romans making their wills? The traditional Roman testament followed archaic patterns.[29] The so called mancipatory will (*testamentum per aes et libram*) was used still in classical age, and many of its formalities applied to later types of Roman wills.[30] Gaius gives us a basic account about its development (Gai. 2.104). According to the external form, such documents were mostly recorded on *tabulae* (on wooden tablets); the writing was carved into a thin layer of wax with a metal pen (*stylus*); even the writing material may have had archaic, sacral roots.[31] All these sever formalities must have been observed all over the Roman Empire, although wooden tablets were surely scarce and costly in the sand of Egypt.[32]

Final disposals were expressed in solemn words to equip a document with respect and authority, making the last will of the testator of high standing after his death. In the 2nd century, Gaius still pedantically taught his readers what the required wording should be: «TITIVS HERES ESTO» or «TITIVM HEREDEM ESSE IVBEO».[33] The compulsory use of Roman writing material, of Roman style and of Latin language suggests that scribes or notaries with special training were required to

[27] Johnston 1988, 19-20.
[28] There were exceptions and privileges for some social groups; see for it recently Jakab 2020, at Fn 19; Lovato 2011, 162-163; Stagl 2014, 130-131.
[29] Rüfner 2011, 4-6; Strobel 2014, 18-21; Voci 1967, 11-13.
[30] Buckland 1925, 174-175.
[31] Meyer 2004, 112-115 and 165-168; Camodeca 1993, 355–359. As for the formalities see also Suet. Nero 17; PS 5.25.6.
[32] For waxed tablets in Egypt, see Amelotti 1966, 31–173.
[33] Gai. 2. 116. Cf. Alston 1995, 57-63.

draw up a proper Roman will.[34] It was not until much later, in 235, that Severus Alexander allowed the Romans to write their testaments also in Greek. But by that time, the Constitutio Antoniniana basically changed the rules of capacity.[35]

The fiscal administration's strength and need for money have always shaped the jurisdiction of the *Idios logos*. Therefore, the strict formalities of succession seem to have served for raising difficulties to exercise the freedom to testify. In this context, the liberality of the *Gnomon* towards soldiers appears in a special light (BGU V 1210, l. 96-98, § 34):

> λδ τοῖς ἐν στρατείᾳ καὶ ἀπὸ στρατείας οὖσι ϛυνκεχώρηται διατίθεσθα[ι] | καὶ κατὰ Ῥωμαικὰς καὶ Ἑλληνικὰς διαθήκας καὶ χρῆσθαι οἷς βού-|λωνται ὀνόμασι, ἕκαστον δὲ τῷ ὁμοφύλῳ καταλείπειν καὶ οἷς ἔξ[εσ]τ̣ι̣ν̣.

The generous provision undoubtedly affected soldiers, although scholarly literature interpreted the phrase ἐν στρατείᾳ rather controversially. Some authors understood it as persons belonging to the Roman army; others only active soldiers in campaign.[36] The interpretation becomes even more difficult for the second phrase, which extends the privilege also to persons ἀπὸ στρατείας. If one understands this wording as a hint to honorable discharge (*honesta missio*), the free choice of form and language is to relate also to veterans. However, it contradicts imperial constitutions limiting the privilege of form-free testaments to one year after being released.[37] Therefore, some authors assume a scribal failure in the text.[38]

Scholars of legal history, such as Bolla, suggested another interpretation regarding the phrases ἐν στρατείᾳ / ἀπὸ στρατείας, identifying them with the Latin terminology *in castris / extra castra*. Soldiers on leave or otherwise removed from military camp should be regarded as persons *extra castra*.[39] Following this trail, recently Babusiaux stressed that persons ἀπὸ στρατείας should be those who are not in service with arms but do any activity useful for the army; according this thesis also civilians could be privileged by § 34.[40] However, in my view, such an interpretation would expand the group of privileged people almost to infinity. Therefore, I suggest to restrict the circle of persons affected by § 34 (with the consensus view) to active soldiers and honorably discharged veterans. This group is granted the privilege of making wills not only of Roman but also of Greek style (*Rhomaikai*

[34] Amelotti 1980, 397-399.
[35] P.Oxy. VI 907, 2 and 990; see to it Kreller 1919, 331.
[36] Schubart 1919 translated «die auf dem Feldzuge sind»; Reinach 1920, 93-95 interpreted «soldats en campagne»; differently Riccobono 1950, 163. Uxkell-Gillenband 1934, 44 argues for being in active service; similarly Meyer-Herrmann 2012, 114.
[37] D. 29. 1. 38 Paul. 8 *quaest*.; D. 29. 1. 26 Macer 2 *milit*.
[38] Meyer-Herrmann 2012, 132-133.
[39] Bolla 1950, 16-18.
[40] Babusiaux 2018, 165-167.

kai Hellenikai diathekai). Most scholars refer the phrase merely to the choice of language, although the choice of the appropriate *formula* (deed) should also be considered.[41] The privilege seems to be extended to veterans without any time limit. On this point the Egyptian *Idios logos* seems to have been more generous than Trajan's constitution for other provinces.

Anyway, the generosity of the *Idios logos* had its historical roots and traditions. Form-free soldier's wills were already highly supported by Julius Caesar,[42] later on Augustus and Trajan have granted further freedoms for the army (D. 29. 1. 1 pr. Ulpian): «secutus animi mei integritudinem erga optimos fidelissimosque commilitones simplicitati eorum consulendum existimavi, ut quoquomodo testati fuissent, rata esset eorum voluntas. Faciant igitur testamenta quo modo volent, faciant quo modo poterint sufficiatque ad bonorum suorum divisionem faciendam nuda voluntas testatoris». Unlike in general rules, peregrines and Latins could also be appointed as heirs or legatees in soldier's wills (it means also persons without or with reduced capacity). As a further peculiarity a soldier could appoint an heir also with a time limit, and also just for some part of his assets. For soldiers, even testamentary and intestate succession were not mutually exclusive. Furthermore, the otherwise mandatory provisions of *exheredatio*, *lex Falcidia* and *lex Iulia et Papia* did not apply.[43] These privileges appear to have been extended in Egypt, especially abandoned the time limit.[44] Anyway, the *Idios logos* seems to have regularly examined whether a soldier's estate can be confiscated due to the invalidity of his will. According to § 34, the non-observance of the archaic and strict Roman testamentary formalities was in no way a sufficient reason for confiscation of the entire estate of active soldiers or veterans.

However, the generosity in the choice of formulas (if Roman or Greek) lost its true value by a significant restriction: ἕκαστον δὲ τῷ ὁμοφύλῳ, everyone may only consider the *homophyles*. Capacity was strictly based on status: no succession was permitted between different classes, between Roman citizens and non-Romans. This rule, rooted in the *ius proprium Romanorum*, meant a particular sharpness in provincial context. In Egypt, mixed marriages and unlawful marriages between Roman citizens and locals (Greeks or Egyptians) are richly documented, especially in soldiers' families.[45] It is commonly known, that soldiers were forbidden to marry while on service, but they could live in a *concubinatus* with a woman being usually of lower rank. However, a peregrine woman as an unlawful wife was not allowed to take under the will of her partner in life if he was (already) Roman citizen.[46] That is the fundamental point why § 34 found a place in the *Idios logos*' guide.

[41] In the sense of D. 29.1.1 pr. Ulp. 45 ed.; Gai. 2.114. Differently Babusiaux 2018, 167-168.
[42] Jung 1982, 917-918.
[43] Kaser / Knütel / Lohsse 2017, 399-400; Stagl 2014, 133-137.
[44] D. 29. 1. 29. 1; C. 6. 21. 5; BGU I 326; see Meyer 1920, 66-71.
[45] Friedl 1996, 169 and 239-245.
[46] Alston 1995, 54-56.

A soldier's will from Roman Egypt

Undisguised financial interests of the state appeared in regulations as discussed above. Documentary texts, such as wills of active soldiers or veterans show how people tried to arrange their affairs in this normative environment.[47] An almost completely preserved final disposal from the 2nd century confirms the high professionality in drawing up documents, also in a remote province (FIRA III^2 47): «Antonius Siluanus eq(ues) alae I | Thracum Mauretanae, stator praef(ecti),| turma Valeri, testamentum | fecit. Omnium bonor[um meo]|rum castrens[ium et d]omes|ticum M. Antonius Sat[ri]anus | filius meus ex asse mihi heres | esto: ceteri alii omnes exheredes | sunto […]». The document, dating from A.D. 142, comes from Philadelphia in Fayum, where veterans of the Roman army were regularly settled.[48] However, the text was initially drawn up in a military camp of the first Thracian Equestrian Legion near Alexandria. The document is composed of five thin wooden tablets (approx. 13 x 10.5 cm) which were perforated and tacked together with a small string.[49] The writing run parallel to the long side, and a single *pagina* was left blank. The whole document was made up nicely, for instance the signatures and seals of witnesses were protected by a small metallic bolt.[50]

«Antonius Silvanus [...] testamentum fecit». These solemnly words open the will of an equestrian soldier who served as *stator praefecti*.[51] It is an objectively styled *testatio*, written in the third person singular, set up by a third party, very likely by a professional scribe.[52] In lines 1-3 the testator, Antonius Silvanus, introduced himself with full rank and dignity. It was common with Roman citizens to pay special attention to reputation and honor of those who had orders on death. Testaments were not only the «mirror of the testator's character»[53] but also the mirror of his social status. Usually the testator presented himself in a somewhat formalistic way, as he wished to live on in the memory of his offspring.[54]

The will follows archaic Roman patterns: in lines 38-39 a *familiae emptor* is appointed, which is the main characteristic of a *testamentum per aes et libram*. The language is Latin, the wording is borrowed from archaic texts, also recommended by Gaius – although the testator's *subscriptio* was entered in Greek. In terms of form, this last will corresponds to all rules and expectations of Roman law: written on *tabulae*, in Latin, with the traditional *sollemnia verba*, and closed with seals of witnesses.

[47] Phang 2001, 218-221; Nowak 2015, 34-41; Migliardi Zingale 1997, 303-312; Strobel 2014, 22-36.
[48] Sänger 2010, 122-125 underlines the significance of Fayum; Alston 1995 mainly focused his study on Karanis; cf. also Mitthof 2000, 380-382.
[49] Liebs 2000, 114.
[50] Arangio-Ruiz in FIRA III^2 p. 129-130 and Liebs 2000, 113-114.
[51] Cf. Kayser 1990, 242 with a list of the relevant sources of *statores*. See also Liebs 2000, 118; Haensch 1995, 275-276.
[52] Paulus D. 29. 1. 40 pr.
[53] See already above Plin., *Ep*. 8. 18.
[54] Champlin 1991, 82–87; Jakab 2014, 216.

Antonius Silvanus appointed his son, Marcus Antonius Satrianus, as a sole heir (*ex asse*). He used the slightly unusual terminology *domesticum* and *castrense* to precisely classify the disposition of his entire estate. In my view, the technical word *castrense* refers not only to his *peculium castrense*, but in a broader sense to all his wealth acquired in military service. On the other hand, *bona domestica* meant the assets belonging to him in civilian life. The son, Marcus Antonius Satrianus, bears the full Roman *tria nomina*, while Antonius Silvanus appears without a *praenomen*. Nevertheless, no reliable conclusions can be drawn from their names as to the absence or existence of Roman citizenship; not even the fact that the testator served in an auxiliary force indicates his status with certainty.[55] Drafting a will according to Roman law is by no means evidence for status; many soldiers who just expected to become Roman citizens tried soon to arrange their affairs according to Roman law.[56]

«Ceteri alii omnes exheredes sunto» «everyone else should be disinherited». This solemn *exheredatio* excluded all further possible persons who might happen to claim inheritance. It is controversial whether the clause had any concrete legal consequence, for instance to preclude any claim of illegitimate children. Afterwards, a substitution follows: the testator instituted a second person for the case in which the appointed heir from any cause did not take (l. 11-14). There were two basic types of *substitutiones* recognized by Roman law: *substitutio pupillaris* and *substitutio vulgaris*. In the first case the father who has an *impubes* child provides a substitute for him if he died too young to make a will for himself.[57] Only much later did the other form of *substitutiones* prevailed, the *substitutio vulgaris*; it established a replacement heir in the event that the former could not or did not want to inherit.[58] In his will, Antonius Silvanus ordered a *substitutio pupillaris*: as a substitute for his son, he appointed his brother (or cousin), Antonius R ... (his name is not preserved); it was meant for the case if his son died before coming to age. According to common practice the heir was given a strict deadline to take up the inheritance: one hundred or sixty days. With this, testators wanted to prevent undesirable tricks against legatees.[59]

As a typical feature of soldiers' financial affairs, the testator ordered that his *bona castrensia* should be compiled by a comrade named Hierax (son of Behex or Behes[60]). This Hierax should look after his assets and hand them over to Thermutha, the heir's mother. The testator called Hierax a procurator, an asset manager.[61] Thinking in legal terms, the relationship between the testator and

[55] Lavan 2019, 37-40 about citizen auxiliaries and non-citizens in the legions; Strobel 2014, 72-76; Liebs 2000, 118-119.
[56] Mócsy 1986, 437-66.
[57] Kaser / Knütel / Lohsse 2017, 404.
[58] Jakab 2018, 83-84.
[59] Crook 1967, 124; Jakab 2016, 503.
[60] Liebs 2000, 118.
[61] Liebs 2000, 126-127: «Überwieged kam man jedoch [...] zu dem [...] Ergebnis, dass der kleine Auftrag an den Kommilitonen Hierax kein Rechtsinstitut spiegelt».

Hierax cannot be classified as mandate because it was not a contract *inter vivos*; it is rather a modus (so-called), a unilateral disposal for taking care.[62]

The very fact that the testator entrusted the administration and collection of his *bona castrensia* to a comrade shows the considerable difficulties of the matter. As it is known, the regular pay was not cashed in full to the soldiers but managed in the legion's fund; a billing took place only after leaving service, when claims had to be collected and debts had to be paid. Outsiders who were unfamiliar with military life and soldiers' affairs would hardly have access to it.[63]

Antonius Silvanus also ordered a legacy to his army superior, a prefect – surprisingly his name is not mentioned in the will. Furthermore, a testamentary manumission followed: the testator wished that his slave, Kronion, would be freed on the condition that he gives account of the assets he had administered.[64] Antonius Silvanus also bequeathed a considerable sum of 500 silver denarii to a certain Antonia Thermutha, whom he called his son's mother. From this, it can be concluded that Antonius Satrianus was the biological son of the testator. For the father still served as an active soldier, he was not able to marry the mother of his son.[65] Likely, Antonius Silvanus and Thermutha lived in a marriage-like relationship, in which the son, Antonius Satrianus, was conceived. Thermutha is an unusual name, it indicates an Egyptian origin; maybe the name was a «Latinized form of the Egyptian snake goddess Thermuthis».[66] Her gentile name Antonia may refer to the clan of the testator which she perhaps joined by manumission.[67] Some scholars suggested that Thermutha was acquired as a slave, later freed and kept as a concubine.[68] Maybe the marriage-like relationship between her and the testator was established during service and continued in a non-legalized state that was to be cured for marriage after the *honesta missio*.[69] This understanding of their relationship can be backed up by § 14 of the *Gnomon*, according to which a Roman may not bequeath more than 500 to a female freed woman; the legacy bequeathed to Thermutha corresponds exactly to the 500-limit set by the *Idios logos*.

It is worth to observe that Thermutha's legacy can serve as a strong argument for Antonius Silvanus' lacking citizenship. If the testator had been a Roman citizen while Thermutha still a peregrine woman, she had been not able to take under his will: as mentioned above, § 34 of the *Gnomon* prohibited any type of succession among persons belonging to different status groups. The

[62] Kaser / Knütel / Lohsse 2017, 82-83: «Die Auflage [...] schränkt eine [...] testamentarische Zuwendung dadurch ein, dass sie dem mit diesem Geschäft Begünstigten ein bestimmtes Verhalten vorschreibt». Cf. also FIRA III^2 159 (BGU I 300), a Greek papyrus from A.D. 148, which was called by Arangio-Ruiz *procuratoris bonorum nominatio*.
[63] Strobel 2014, 98; Sänger 2011, 26-31.
[64] Liebs 2000, 125-126.
[65] Phang 2001, 197 ff.; Evans Grubbs 2002, 158-159; Nowak 2014, 21-22.
[66] Liebs 2000, 121.
[67] Friedl 1996, 264-266 and 214-228.
[68] Liebs 2000, 120-121.
[69] Mirkovic 1986, 249-257.

testator's explicit statement that Thermutha is the mother of his son had also legal consequence. According to § 30 of the *Gnomon*, assets left to childless women will be confiscated by the *fiscus*. This was a further limitation of capacity at the expense of women.

Conclusion

A.D. 142, in a military camp near Alexandria, a regular Roman will happened to be made for Antonius Silvanus, a soldier in active service in the first Thracian Legion. The choice of writing material, the solemn Latin wording with its correctly used Roman legal terms, and its sealing by witnesses confirm that the testament fulfilled every expectation of classical Roman law. The notary has made every effort to ensure the validity of the document before a Roman court.

Silvanus' last will was an exemplary Roman testament – although it is rather doubtful if the testator did have a Roman citizenship at the time the document was drawn up. Indeed, he might have expected to be rewarded with the Roman citizenship after his *honesta missio*. Although the testator lived and served in the Roman army in a far province of the Empire, he found it important to possess a fair Roman testament; his main motive might have been to secure access to Roman courts. Therefore, he opted for an expensive and complicated *formula*, although its Latin language seems to have been difficult for him to understand. His rather poor knowledge of the chosen language can be assumed upon his Greek handwritten *subscriptio*.

The nicely preserved testament let us raise the question: why were the privileges discussed above issued at all? If Antonius Silvanus, a soldier of peregrine status, insisted on having a Roman will – it can be assumed that Roman citizens in active service were able to set up Roman wills as well. Why did § 34 of the *Gnomon* order that soldiers (ἐν στρατείᾳ / ἀπὸ στρατείας) can make wills in any form and in any language?

Obviously, the *Gnomon* introduced Trajan's constitution in the province of Egypt. It is widely assumed that the Emperor was aware of the soldiers' poor experience in everyday life and paid special attention to their final disposals. However, it seems to me a stronger argument that the Emperor was aware of the mixed personal status and culture of his troops. He took a firm action against disadvantageous rules of archaic Roman law and decreed that last wills of soldier's should be effective, whatever form or language they chose.[70] Trajan granted personal privileges, which should have been directed to a wide range of soldiers serving mainly in auxiliary troops (although recent research showed that not even the legions were exclusive to Roman citizens). Probably it was meant

[70] D. 29. 1. 1 pr.

to integrate large groups with a migration background, soldiers and veterans who sooner or later acquired Roman citizenship.

§ 35 of the *Gnomon* regulates the intestate succession after soldiers (BGU V 1210, l. 99-100, § 35): λε τοὺς στρατευομένους καὶ ἀδιαθέτους τελευτῶντας ἐξὸν τέκνοι[ς] | καὶ συνγενέσει κληρονομεῖν, ὅταν τοῦ αὐτοῦ γένους ὦσι οἱ μετερχ[όμε]νοι. Those who are serving in the army and die without a will may inherit children and relatives if the claimants are of the same social class. This order is backed up with a fragmentary piece of the *Gnomon* which was found much later (P.Oxy. XLII 3014, l. 1-3): [τοὺς στρατευομένους] κ[αὶ] ἀδιαθέτους τελευτῶντας [ἐξὸν τέκνοις καὶ συγγεν]έσ[ιν] κληρονομεῖν ὅταν του [αὐτοῦ γένους ὦσιν ο]ἱ μετερχόμενοι. The assets of soldiers who die without a will and without legitimate heirs *eiusdem generis* (αὐτοῦ γένους) are said to inherit their military unit. From it follows that children born during service of unlawful unions (*concubinatus*) had an inheritance claim as blood relatives. This claim was expressly confirmed by an *epistula* of Hadrian.[71] Also D. 28. 3. 6. 7 quotes a constitution of Hadrian which was issued in a special case concerning the suicide of a soldier (D. 28. 3. 6. 7 Ulp.): «Nam eorum, qui mori magis quam damnari maluerint ob conscientiam criminis, testamenta irrita constitutiones faciunt, licet in civitate decedant: quod si taedio vitae vel dolore, valere testamentum, aut si intestato decessit cognatis, aut, si non sit, legione ista sint vindicanda ... quam distinctionem in militis quoque testamento divus Hadrianus dedit epistula».[72] It is remarkable that the *Idios logos* recognized the intestate succession of blood relatives (*cognatio*) exactly in this sense; for the fiscal administration it meant that the estate of a soldier who died without a valid will could not be easily confiscated. The rule corresponds to Roman inheritance law, as it was laid down in praetorian edicts for the *ordo* of *bonorum possessio unde cognati* (D. 38. 6. 1. 1 Ulp. 44 ed.): «Sed successionem ab intestato in plures partes divisit: fecit enim gradus varios, primum liberorum, secundum legitimorum, tertium cognatorum, deinde viri et uxoris». The praetor ordered that descendants (children and children's children), ascendants and relatives up to the sixth degree can claim the inheritance for themselves – upon the principle of proximity. As a privilege for soldiers' children, Hadrian introduced that biological (illegitimate) children can also claim among *cognati*.[73] The only restriction was their belonging to the same status group (*homophyles*).[74]

Comparing the intestate succession as testified in § 35 of the *Gnomon* with the will of Antonius Silvanus, one can find interesting coincidences. Antonius Silvanus made his will, as far as the blood relatives are concerned, exactly in the sense of § 35. The rules of intestate succession were set up by law, it was a public choice. However, the relevant laws were basically based on social expectations of the time. Changing moral, changing family structure have initiated new rules, dispensations, as

[71] M.Chr. 373.
[72] See the SC Orfitianum; Ulp. D. 40. 5. 4. 17; C. Th. 5.6.1 = C. Just. 6. 62. 2.
[73] BGU 140 = M.Chr. 373.
[74] Relating court proceedings are preserved e.g. in VBP 72, and in BGU I 114 (= FIRA III Nr. 19 Col. IV 1-15).

represented by Hadrian's epistula. Legal norms were mapped out by social realities. Moral and social expectations have also relativized the testator's freedom in making his will. Antonius Silvanus appointed his heir precisely in the sense of Roman intestate succession, as it was laid down in praetorian edicts and imperial constitutions. Just his legacies and manumissions expressed individual wishes.

Bibliography

Alston, R. 1995, *Soldier and Society in Roman Egypt. A Social History*, London.

Amelotti, M. 1966, *Il testamento romano attraverso la prassi documentale*, Firenze.

– 1980, "Notariat und Urkundenwesen zur Zeit des Prinzipats", ANRW II 13, Berlin / NewYork, 386-399.

Arangio-Ruiz, V. 1906, "L'origine del 'testamentum militis' e la sua posizione nel diritto romano classico", BIDR 18, 157-196.

Babusiaux, U. 2018, "Römisches Erbrecht im Gnomon des Idios logos", ZRG RA 135, 108-177.

Bolla, S. 1950, "Das römische Soldatenerbrecht in der Zeit der klassischen Juristen", in Bolla, S. (Hg.), *Aus römischem und bürgerlichem Erbrecht*, Wien, 1-24.

Buckland, W. W. 1925, *A Manual of Roman Private Law*, Cambridge.

Camodeca, G. 1993, "Nuovi dati dagli archivi campani sulla datazione e applicazione del'SC. Neronianum", Index 21, 353-364.

Champlin, E. 1991, *Final Judgements. Duty and Emotion in Roman Wills, 200 BC – AD 250*, Berkeley.

Crook, J. A. 1967, *Law and Life of Rome, 90 B.C.-A.D. 212*, Ithaca.

Dolganov, A. 2020, "Imperialism and social engineering: Augustan social legislation in the Gnomon of the Idios Logos", in Kruse, Th. (Hg.), *Dienst nach Vorschrift: Vergleichende Studien zum Gnomon des Idios-Logos*, Wien, 1-40.

Friedl, R. 1996, *Der Konkubinat im kaiserzeitlichen Rom*, Stuttgart.

Evans Grubbs, J. 2002, *Women and the Law in the Roman Empire*, London / New York.

Haensch, R. 1995, "A commentariis und commentariensis: Geschichte und Aufgaben eines Amtes im Spiegel seiner Titulaturen", in Le Bohec, Y. (éd.), *La hiérarchie (Rangordnung) de l'armée romaine sous le Haut-Empire*, Paris, 267-284.

Jakab, É. 2014, "Methoden der Identifikation in römischen tabulae", in Depauw, M. / Coussement, S. (eds.), *Identifiers and Identification Methods in the Ancient World*, Leuven / Paris, 209-231.

– 2016, "Inheritance", in Du Plessis, P. J. / Ando, C. / Tuori, K. (eds.), *The Oxford Handbook of Roman Law and Society*, Oxford, 498-509.

– 2018, "Ein fideicommissum aus der Praxis des Javolenus Priscus: D. 36,1,48(46) 11 epist.", in Finkenauer, Th. / Sirks, B. (Hgg.), *Interpretationes Iuris Antiqui (FS Nishimura)*, Wiesbaden, 67-84.

– 2020, "Testamente, Soldaten und der Idios logos", in Kruse, Th. (Hg.), *Dienst nach Vorschrift: Vergleichende Studien zum „Gnomon des Idios-Logos"*, Wien (forthcoming).

Johnston, D. 1988, *The Roman Law of Trusts*, Oxford.

Jung, J. H. 1982, "Die Rechtsstellung der römischen Soldaten. Ihre Entwicklung von den Anfängen Roms bis auf Diokletian", ANRW II 14, Berlin / New York, 882-1013.

Kaser, M. / Knütel, R. / Lohsse, S. 2017, *Römisches Privatrecht*[21], München.

Kayser, F. 1991, "Les «statores» en Égypte", BIFAO 90, 241-246.

Kelly, J. M. 1967, *Studies in the Civil Judicature of the Roman Republic*, Oxford.

Kreller, H. 1919, *Erbrechtliche Untersuchungen aufgrund der Graeco-aegyptischen Papyrusurkunden*, Leipzig / Berlin.

Kreuzsaler, C. 2011, "Zwischen Privilegierung und Diskriminierung. Die Sonderstellung der Soldaten im römischen Recht", in Palme, B. (Hg.), *Die Legionäre des Kaisers. Soldatenleben im römischen Ägypten*, Wien, 27-39.

Lavan, M. 2019, "The Army and the spread of Roman Citizenship", JRS 109, 27-69.

Lenel, O. / Partsch, J. 1920, *Zum sog. Gnomon des Idios Logos*, Berlin.

Liebs, D. 2000, "Das Testament des Antonius Silvanus, römischer Kavallerist in Alexandria bei Ägypten, aus dem Jahr 142 n. Chr. ", in Märker, K. / Otto, Ch. (Hgg.), *Festschrift für Wedding Fricke zum 70. Geburtstag*, Freiburg i. Br., 113-128.

Lovato, A. 2011, "Testamentum militis, Sull consodilamento giuridico di un privilegio", in Chelotti, M. (ed.), *Scritti die storia per Mario Pani*, Bari, 257-266.

Mélèze-Modrzejewski, J. 1977, "Gnomon de l'idiologue", in Giuffrè, V. (éd.), *Les lois des Romains*, Milano, 520-557.

Meyer, E. A. 2004, *Legitimacy and Law in the Roman World. Tabulae in Roman Belief and Practice*, Cambridge.

Meyer, P. M. 1920, *Juristische Papyri. Erklärung von Urkunden zur Einführung in die juristische Papyruskunde*, Berlin.

Meyer-Herrmann, J. 2012, *Testamentum militis, Das römische Recht des Soldatentestaments*, Aachen.

Migliardi Zingale, L. 1997, "Dal testamento ellenistico al testamento romano nella prassi documentale egiziana: cesura o continuità?", in Thür, G. / Vélissaropoulos-Karakostas, J. (Hgg.), *Symposion 1995. Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, Köln / Wien, 303-312.

Mirkovic, M. 1986, "Die römischen Militärdiplome als historische Quellen", in Eck, W. / Wolff, H. (Hgg.), *Heer und Integrationspolitik*, Köln, 249-257.

Mitteis, L. 1891, *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs*, Leipzig.

Mitthof, F. 2000, "Soldaten und Veteranen in der Gesellschaft des römischen Ägypten (1.-2. Jh. n. Chr.) ", in Alföldy, G. (Hg.), *Kaiser, Heer und Gesellschaft in der römischen Kaiserzeit*, Stuttgart, 377-405.

Mócsy, A. 1986, "Die Namen der Diplomempfänger", in Eck, W. / Wolff, H. (Hgg.), *Heer und Integrationspolitik*, Köln, 437-466.

Nowak, M. 2014, "The Hereditary Rights of the Extramarital Children in Light of the Law of the Papyri", in Caseau, B. / Huebner, S. R. (eds.), *Inheritance, Law and Religions in the Ancient and Mediaeval Worlds*, Paris, 11-24.

– 2015, *Wills in the Roman Empire. A Documentary Approach*, Warszawa.

Palme, B. 2011, "Die Armee in der römischen Kaiserzeit in ihrer historischen Entwicklung vom 1-7. Jh. n. Chr. ", in Palme, B. (Hg.), *Die Legionäre des Kaisers. Soldatenleben im römischen Ägypten*, Wien, 1-10.

Phang, S. E. 2001, *The Marriage of Roman Soldiers (13 B.C. - A.D. 235). Law and Family in the Imperial Army*, Leiden / Boston / Köln.

Plaumann, G. 1919, *Der Idioslogos. Untersuchung zur Finanzverwaltung Ägyptens in hellenistischer und römischer Zeit*, Berlin.

Reinach, Th. 1920, "Un code fiscal de l'Égypte romaine: Le Gnomon de l'idiologue II", Nouvelle revue historique de droit français et étranger 44, 5-134.

Riccobono, S. 1950, *Il Gnomon dell'idios Logos*, Palermo.

Rüfner, Th. 2011, "Testamentary formalities in Roman law", in Reid, K. G. C. / de Waal, M. J / Zimmermann, R. (eds.), *Comparative succession law, I: Testamentary formalities*, Oxford, 1-26.

Sänger, P. 2010, "Römische Veteranen in Ägypten (1.-3. Jh. n.Chr.): Ihre Siedlungsräume und sozio-ökonomische Situation", in Herz, P. / Schmid, P. / Stoll, O. (Hgg.), *Zwischen Region und Reich. Das Gebiet der oberen Donau im Imperium Romanum*, Berlin, 121-133.

– 2011, *Veteranen unter den Severern und frühen Soldatenkaisern. Die Dokumentensammlungen der Veteranen Aelius Sarapammon und Aelius Syrion*, Stuttgart.

Schiemann, G. 1986, "Zur Rechtsstellung der Soldatenkinder in vor-severischer Zeit", in Benöhr, H.-P. / Hackl, K. / Knütel, R. (Hgg.), *Iuris Professio. Festgabe für Max Kaser zum 80. Geburtstag*, Wien / Köln / Graz, 233-244.

Schubart, W. 1919, *Der Gnomon des Idios Logos, BGU V 1210*, Berlin.

Stagl, J. F. 2014, "Das Testamentum militare in seiner Eigenschaft als ius singulare", Revista de Estudios Histórico-Jurídicos 36, 129-157.

Strobel, B. 2014, *Römische Testamentsurkunden aus Ägypten vor und nach der Constitutio Antoniniana*, München.

Swarney, P. S. 1970, *The Ptolemaic and Roman Idios logos*, Toronto.

Uxkull-Gillenband, W. 1934, *Der Gnomon des Idios Logos*, Berlin.

Voci, P. 1967, *Diritto ereditario romano I-II*, Milano.

Wolf, J. G. 2010, *Neue Rechtsurkunden aus Pompeji. Tabulae Pompeianae Novae*, Darmstadt.

Wolff, H. J. 2002, *Das Recht der griechischen Papyri Ägyptens in der Zeit der Ptolemäer und des Prinzipats, I: Bedingungen und Triebkräfte der Rechtsentwicklung (HAW X. 5. 1)*, München.