THE FUNCTION OF WITNESSES IN THE WILLS FROM LATE ANTIQUE EGYPT

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Introduction

The purpose of this paper is to discuss the role of witnesses in the establishment of a will as it may be found in sources of written law and documents of legal practice, preserved mostly in Egyptian papyri. Consequently, the evidence presented here deals largely with wills preserved in writing[2].

Civil Law

A discussion of the role of witnesses in Roman wills must start with the mancipatory will, as it was the earliest type of Roman testament witnessed by private witnesses[3]. The function of witnesses in mancipatory wills was rather secondary ; they witnessed a ficti-tious *mancipatio* which was a required element of the will[4] ; Gaius *Inst.* 2, 104 : *eaque res ita agitur : qui facit testamentum, adhibitis, sicut in ceteris mancipationibus, V testibus ciuibus Romanis puberibus et libripende, postquam tabulas testamenti scripserit, mancipat alicui dicis gratia familiam suam*.

Witnesses are traceable in documentary sources from the moment when the first written Roman wills appear in papyri in the first century AD[5]. In wills on papyri from the period prior to the issue of the *Constitutio Antoniniana*, there are two elements related to the function of witnesses in written wills – witnesses' clauses and mancipatory clauses.

The witnesses' clauses are attested in both the Latin originals, and in the Latin and Greek copies of those originals – composed as either an αὐθεντικόν required by law at the moment of the official opening of the will, or as an ἀντίγραφον written for other reasons at any time after the opening[6]. They were based on a simple repetitive model which contained solely information about who the witnesses were, as in a will of the Roman knight Antonius Silvanus[7]. FIRA III 47 (CPL 221 ; Alexandria, AD 142) : *Nemonius --- duplicarius turmae Mari signavi*. There are six more, probably holographic signatures. As the entire text of the will is preserved, one can compare the signatures with the mancipatory clause : *familiam pecuniamque testamenti faciendi causa emit Nemonius duplicarius*

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2 Originally, a mancipatory will was an oral act, only voluntarily accompanied by writing. In oral wills, the content of dispositions was expressed openly in front of all persons taking part in the act of completion and this was called *nuncupatio*. However, in the case of secret wills – expressed in writing – *nuncupatio* was reduced to the formula ; see Gaius *Inst.* 2, 104 : *haec ita ut in his tabulis cerisque scripta sunt, ita do ita lego ita testor, itaque vo, Quirites, testimonium mihi perhibetote* ; also Guarino (1956) 58–64 ; Archi (1955) 293–294 ; Kaser (1971) 679. Already in the early classical period the original *nuncupatio* expressing the full content of a will must have been very rare since only one example of its application is preserved ; see Suet. *Vit. Hor.* 75 ; Amelotti (1966) 13 ; Meyer (1988) 273. In postclassical Roman law two separate forms of a will were recognised – the oral and the written one ; see Kaser (1975) 481.

3 About *testamentum calatis comitiis* and *in procinctu*, see Arangio Ruiz (1947) 21 ; Biondi (1955) 33 ; Biondi (1966) 116–117 ; Scherillo (1995) 182.

4 We do not know when the *mancipatio* became fictitious ; it evolved, however, from the *mancipatio familiae*, which consisted of two acts *inter vivos* (two effective *mancipationes*) by which the effect was achieved *mortis causa* : see Biondi (1966) ; Gandolfi (1962).

5 The earliest example is ChLA IX 399 (Alexandria, AD 91).

6 See Lewis (1990) 37.

7 The subscriptions in other five originals were not preserved : BGU VII 1695 (= CPL 223 ; Alexandria, AD 157) ; 1696 (= CPL 224 ; Philadelphia, II AD) ; P.Mich. VII 437 (= CPL 225 ; provenance unknown, II AD) ; 446 (= CPL 226 ; provenance unknown, II AD) ; and a will from nowadays Wales, see Tomlin (2001).

turmae Mari, libripende M. Iulio Tiberino sesquiplicario turmae Valeri, antestatus est Turbinium signiferum turmae Proculi.

Pasquale Voci observed that these signatures belong to the persons involved in *mancipatio*, that is to the five witnesses (starting from the honorary one called *antetestatus*), the *familiae emptor* and the *libripens*[8]. In other documents, mostly copies of original wills, the same pattern is visible[9]. After comparing this practice with the Gaian text we may conclude that the original function of witnesses was their physical presence at the very act of *mancipatio* and witnessing thereto, but not to the will as such, and that the witnesses' role was to witness the act, but not the content of the will[10].

This function is also made evident by the catalogue of persons excluded from the function of witnesses to mancipatory wills (Gaius *Inst.* 2, 105–107, *Tit. Ulp.* 20, 1). Those who were not capable of acting as witnesses at the act of making a will were men connected to either the *testator* or the *familiae emptor* through *patria potestas*. However, an heir himself could easily play the role of witness to a testament which appointed him an heir[11].

Nevertheless, the papyri do not allow us to conclude that this was the only role of Roman citizens who took part in the composition of wills. The examination of the aforementioned documents, composed during will-opening ceremonies, indicates that the function of witnesses was also related to the very act of sealing (but not subscribing)[12]. In almost all Roman wills in Egypt written before the *Constitutio Antoniniana* testamentary witnesses are called cφραγισταί or *signatores*.

Moreover, in the documents of the opening, their role is to recognise seals. A record would first make known that a will had been opened and read out in front of sealers who had recognised their seals, and would then be followed by a list of those who identified their seals.

– P.Diog. 10 (= ChLA XLVII 1403 = P.Coll.Youtie I 64 ; Ptolemais Euergetis, AD 211) : *apert(um) et rec(itatum) (...) praes(ente) pl(urima) part(e) signat(orum) f(igentium) sig(na), L(ucius) Vạlẹrius Lucretianus ạdg(noui). M(arcus) L*[. . . .]*nus adg(noui). Fl(avius) Diogenes adg(noui). Arrius Nigerus ạdg(noui) M(arcus) Aurel(ius) Anubion. L(ucius) Ạ*[. . . .] *Cottarus*.
– BGU I 326 (= FIRA III 50 = M.*Chr.* 316 = Sel.Pap. I 85 = Jur. Pap. 25 ; Arsinoite nome, AD 194) : ἠνύγη (l. ἠνοίγη) καὶ ἀνεγνώcθη (…). οἱ λοιποὶ cφρα(γισταὶ) Γαῖος Λογγῖνος Ἀκύλας, ἐπέγνοι (l. ἐπέγνω), Ἰούλιος Βολύccιος, Μᾶρκος Ἀντίστιος Πετρωνιανὸ<c Ἰούλιοc> <Γεμέλλος οὐετρ[α]νόc>[13].

A document published as BGU I 361 (= FIRA III 57 = M.*Chr.* 92 ; Philadelphia, AD 184) reports a family dispute regarding an opening of a will which took place in the presence of Apollonios, the *strategos* of the district. As the son of a *testator*, supported by his half-brother, tried to stop the opening of his father's will, he questioned the authenticity of the

[8] See Voci (1967) 330 ; Kaser (1971) 679–680.

[9] ChLA IX 399 (= P.Yale inv.1547 ; provenance unknown, AD 91) ; ChLA X 412 (= P.Berol. inv. 7124 ; Ptolemais Euergetis, AD 131) ; FIRA III 47 (Alexandria, AD 142) ; BGU VII 1695 (Alexandria, AD 157) ; PSI XIII 1325 (= SB V 7630 ; Alexandria, AD 172–174) ; BGU XIII 2244 (= P.Berl.Brash. 3 ; Alexandria, AD 186) ; BGU I 326 (= FIRA III 50 ; Karanis, AD 194) ; P.Diog. 10 (= P.Coll.Youtie 64 ; Ptolemais Euergetis, AD 211) ; P.Oxy. XXII 2348 ; Oxyrhynchus, AD 224) ; perhaps P.Laur. I 4 (provenance unknown, AD 246).

[10] It must be remembered that in the case of a mancipatory will performed orally witnesses of *mancipatio* had to play the role of witnesses to the content of the will as well, in case any legal dispute concerning such a will arose. On the witnesses' role, see also Kaser (1971) 679.

[11] See Scherillo (1995) 229–230.

[12] In classical times, the signatures were not an obligatory element required for validity of testamentary tablets. They might have been introduced into the law in Constantine's time ; see Meyer (1988) 36–38. The signatures were perhaps adapted from legal practice ; see Kaser (1975) 481.

[13] See also P.Berol. inv. 7124 (= ChLA X 412 ; Karanis, AD 131) ; PSI XIII 1325 (Alexandria, AD 172–174) ; P.Oxy. XXII 2348 (Oxyrhynchus, AD 224) ; BGU XIII 2244 (= P.Berl.Brash. 3 ; Alexandria, AD 186).

seals, as well as their recognition and, consequently, the authenticity of the document itself[14].

– BGU I 361 (= FIRA III 57 = M.*Chr.* 92 ; Ptolemais Euergetis, AD 184) : καὶ περὶ τῆς διαθήκης δὲ ἀποκρείνομαι (l. ἀποκρίνομαι), ὅτι ἐν πάσαις τ[αῖς δια]θήκαις ἑπτά εἰσιν σφραγισταί. εἰ οὖν ἐκῖ (l. ἐκεῖ) ἐν ταύτῃ ἑπτὰ ἐ̣ς̣[φράγι]σαν, ἡκέστωσαν καὶ τὰς σφραγῖδας αὐτῶν πρότερον ἐπιγν[ώτω]σαν. εἰ δὲ ἀπὸ τῶν ἑπτὰ τέσσαρες ἐνθάδε εἰσὶ καὶ νομικὸ̣[ς (…) βή]μ̣ατος ἔρχεται ἀξιῶν λυθῆναι τὴν διαθήκην, οὐκ ἐν ὀλίγῃ ὑπ̣[οψίᾳ] γε[ί]νομαι[15].

These passages illustrate how the function of witnesses evolved from the secondary role of testifying to the act of *mancipatio* to the primary role of guarantors of the authenticity of documents, composed in secret in order to preserve the content of a testator's disposition (expressed on tablets accompanying the mancipatory will). As no other proof of the authenticity was used, this function seems to be particularly important.

On the other hand, there is no way of ascertaining whether the act of *mancipatio nummo uno* was ever performed in Egypt. It seems improbable, as there is not much evidence of the application of any kind of *mancipatio* in papyri, except for mancipatory clauses in wills[16]. Also outside of Egypt the practice of both a symbolic and a real *mancipatio* is unsatisfactorily attested[17]. As the *mancipatio* was a very Roman act of archaic origin, it should have been incomprehensible to provincials of a much later period, who were rooted in a different legal culture. It is therefore hardly plausible that this act was effectively performed during the composition of wills. This makes more credible the supposition that, at least in Egypt, the sole role performed by the witnesses was effectively to guarantee the authenticity of documents composed, in order to preserve the content of wills.

This conclusion is further supported by the fact that no local will, composed orally, existed in Roman Egypt[18]. Moreover, a valid will had to be sealed by witnesses and no other requirements were applied. In a papyrus recording a family dispute there is a statement that a valid will was one witnessed by a proper number of witnesses[19]. Documents concerning opening of wills prove the same : a legally valid will was one sealed by witnesses[20]. Therefore, one can conclude that Roman wills were performed in the local way, even though they were framed on the Roman formulary[21].

[14] See Schubert (2005) 232–235 ; Crook (1995) 86.

[15] In other sources one may see that wills were opened in the presence even of a smaller number of witnesses. See Paul. *Sent.* 4, 6, 1 ; *Dig.* 29.3.6 ; P.Hamb. I 73 (= SB III 6273 ; Philadelphia, II AD) ; BGU VII 1655 (Philadelphia, AD 169) ; FIRA III 50 ; P.Diog. 10 ; P.Oxy. XXII 2348 (Oxyrhynchus, AD 224) ; P.Ital. I 4–5 (Ravenna, VI AD) ; Kreller (1919) 396–401 ; Ferrari (1929) 633–644 ; Amelotti (1966) 186–187 ; Martini (1968) 483–495.

[16] ChLA XII 521 = FIRA III 14 = CPL 206 = Jur.Pap. 9 (Oxyrhynchus, later than AD 212).

[17] Cf. Tabula Fortunatae (Britain, I–III AD). The tablets from Transylvania : FIRA III 87–90 (AD 139–160) ; the *Mancipatio Pompeiana* FIRA III 91 (AD 61) ; the *Formula Baetica* FIRA III 92 (I/II AD) ; three *mancipationes donationis causa* FIRA III 93–95 (II/III AD), and also much later documents from Ravenna : P.Ital. I 13 ; 20 ; 21 ; II 30 ; 35 ; 48/41 (VI and VII AD). However, in the case of these last documents, one cannot be sure whether their authors had any understanding of the applied terminology concerning *mancipatio*. Elisabeth Meyer (2004) 114 claims that *mancipatio* continued to be performed in acts such as wills, adoptions, emancipations, *coemptio*, *nexum* and noxal surrender of an erring child or slave until the time of Justinian or as long as these acts themselves continued to be used. I was, however, unable to find sources supporting this statement.

[18] See Kreller (1919) 314.

[19] CPR I 18 = M.*Chr.* 84 = SPP XX 4 = Jur.Pap. 89 (Ptolemais Euergetis, AD 124).

[20] Petitions : P.Fouad. I 32 (Oxyrhynchus, AD 174) ; P.Mert. II 75 (Oxyrhynchus, AD 185) ; P.Oxy. XLIV 3166 (Tholthis, AD 187). Protocols : P.Köln II 100 (= SB X 10500 = 10756 ; Oxyrhynchus, AD 133) ; P.Oxy. III 494 (= M.*Chr*. 305 ; Oxyrhynchus, AD 165).

[21] See Avenarius (2009) 16–20.

Praetorian Law

In the doctrinal sources of Roman law, one can find information about how praetorian law maintained the validity of wills which were not composed according to one or more requirements concerning the external form of a will[22]. A brief summary of the rules can be read in the classical source *Tituli ex corpore Ulpiani*.

> *Reg.Ulp.* 33 : *si septem signis testium signatum sit testamentum, licet iure civili ruptum vel irritum sit, praetor scriptis heredibus iuxta tabulas bonorum possessionem dat, si testator et civis Romanus et suae potestatis, cum moreretur, fuit ; quam bonorum possessionem cum re, id est cum effectu, habent, si nemo alius iure heres sit*.

The described practice might be applied to the tablets composed according to civil law. The seals of five witnesses to *mancipatio*, plus those of *familiae emptor* and *libripens* seem to have been the seven seals required by praetorian law in order to make valid a defective will[23]. This is the case of Antonius Silvanus' will, since among the sealers there are persons who were mentioned, in a mancipatory clause, as those who played the role of the fictitious acquirer of the inheritance and the scale-holder.

The statement is also supported by documents of opening[24]. Thus the witnesses known from Egyptian wills played a double role of witness to both a *mancipatio* and to the document itself[25]. Moreover, praetorian law conferred authority only upon wills accompanied by tablets and, as the validity of a document depended on the presence of seals affixed to the document, witnesses to wills became an element guaranteeing the entire existence of a will, at least at the level of *ius honorarium*.

The conclusion to be drawn is that there is a dualism in the role of witnesses in the process of making wills in the classical period. It is a dualism of acting as witness to the act and, at the same time, to the document accompanying this act[26]. It is a dualism of – to use modern terminology – the probationary and the constitutive character of witnessing. Though witnesses gave an expectation of the validity of an act under praetorian law, it was not an absolute expectation. In the above quoted passage of the *Tituli* we read : *quam bonorum possessionem cum re, id est cum effectu, habent, si nemo alius iure heres sit*.

However, together with a constitution issued by Antoninus Pius, which made such *bonorum possessio cum re*, the need for the dualism disappeared.

> Gaius *Inst.* 2, 120 : *sed videamus, an etiam si frater aut patruus extent, potiores scriptis heredibus habeantur ; rescripto enim imperatoris Antonini significatur eos, qui secundum tabulas testamenti non iure factas bonorum possessionem petierint, posse aduersus eos, qui ab intestato uindicant hereditatem, defendere se per exceptionem doli mali*.

By granting an exception against the *hereditatis petitio* to heirs instituted in *tabulae*, their position was safeguarded ; otherwise an intestate heir would have been able to take precedence over an heir instituted in a civil will valid solely *iure praetorio*. The Emperor thus abolished the need for the performance of the act *per aes et libram*. From the moment this constitution was issued the position of heirs only written down in tablets was as solid as the position of heirs instituted through the proper civil act.

[22] Cic. *Verr.* 2, 1 ; 45 ; 117 ; *Dig.* 37, 11, 1, 2 ; 28, 1, 23.

[23] See Voci (1967) 330.

[24] PSI XIII 1325 ; BGU XIII 2244 ; BGU I 326 ; P.Oxy. XXII 2348.

[25] Voci's observation of a double function of witnesses is correct. One may, however, not agree with the statement suggesting the existence of two parallel types of wills in classical Roman law : see Voci (1967) 330–333. A « praetorian will » may not be distinguished as the independent form of a testament, since the tablets as the instrument of keeping content of a will secret was the very idea of civil law. The tablets might accompany an act of *testamentum per aes et libram*, yet not necessarily ; see Archi (1955) ; Guarino (1956). The praetorian law, however, gave *bonorum possessio secundum tabulas* to heirs instituted in a civil will void because of the defect of external form, but only if the tablets completed according to civil law existed ; see Amelotti (1966) 191–215.

[26] See Kaser (1975) 478.

Late Antiquity

What consequences did this constitution have for the function of testamentary witnesses ? First of all, it meant the disappearance of a mancipatory will. Since *bonorum possessio secundum tabulas* became *cum re*, at least at the level of legal practice *mancipatio nummo uno* was no longer necessary. Nonetheless, the wills including mancipatory clauses remained standard in the papyri until the second quarter of the third century. The factual disappearance of a mancipatory will takes place when Alexander Severus issued the constitution on the language of wills[27]. The decay of mancipatory wills meant also the disappearance of *mancipatio* witnesses in testamentary practice[28]. It is worth stressing that a perfectly effective will had to be sealed by seven persons and composed according to the requirements concerning their inner form – the *ordo scripturae*.

Still, together with both the progressive decay of *testamentum per aes et libram* and the disappearance of the distinction between civil and praetorian testamentary succession, the function of witnesses started to become more and more significant and uniform[29]. Justinian's *Institutions* 1, 2, 10, 10 include a list of persons excluded from being witness to a will[30]. The persons who were not allowed to play the role of witnesses were heirs to a will in which they were instituted and men connected with them through parental power, whereas before, this role could not be played by people related to the *testator* and the *familiae emptor*. This is to be interpreted as a change in the function of witnesses. They now acted as witnesses to the will itself, not to the act on which the will was framed.

The function of witnesses became more significant. The more constitutions abolished the inner formalities, the more they emphasised the importance of witnesses in wills. This tendency is visible in the dogmatic sources as well as in the papyri. Since the earlier requirements, as solemnity of *heredis institutio* and *exhereditatio* or the presence of *mancipatio* and *nuncupatio* disappeared either through formal abrogation, as in the case of *heredis institutio* (*C.* 6, 23, 15, possibly AD 320), or through disuse, as in the case of *mancipatio* and *nuncupatio*, witnesses became the sole element required for the validity of wills[31]. The constitutive function of witnesses is literally and repetitively expressed in the constitutions starting from the beginning of the fourth century[32].

This trend is underlined in the documents of practice as well :

– SPP I, p. 6–7 (= FIRA III 52 ; Antinoopolis, V AD) : κυρίαν δὲ οὖσαν καὶ βεβαίαν αὐτὴν ἐθέμην ἐφ' ὑπογραφῆς ἐμῆς καὶ τῶν αὐτῶν ἑπτὰ νομίνων μαρτύρων ὁμο῾ῦ´ συνηγμένων καὶ σφραγιζόντων κατὰ τὴν θείαν διάταξιν.
– P.Oxy. XVI 1901 (Oxyrhynchus, V/VI AD) : ταύτης μου τῆς διαθήκης κ̣α̣λ̣ῷ̣ς̣ [ἐχούσης, ποιηθείσης] ὑπάτοις τοῖς προκειμένοις, καὶ ἠξίωσα τοὺς ἑξῆς ἀξιοπίς[τους μάρτυρας] ἐνθεῖναι τὴν αὐτον μαρτυρίαν καὶ σφραγῖδα μετὰ τὴν ἐμὴν̣ [ὑπογραφὴν πρὸς] ἀσφάλειαν καὶ βεβαίωσιν τῶν ἐμοὶ παραστάντων.
– P.Cair.Masp. III 67324 (Aphrodito, ca. AD 525) : ἥνπερ δι̣[αθ]ήκην ὑπεγόρευσα (l. ὑπηγ-) καὶ παρεσκεύ[α]σα α(ὐ)τὴν γραφῆναι κ(αὶ) ὑπογραφ[ῆναι δ]ι[ὰ τ]ῶν ἑξῆς ὑπογραφόντων μαρτύρων ἑπτὰ τὸν ἀριθμόν, οὕσπερ μάρτυρας προσεκαλεσάμην, κ(αὶ)

[27] See Rochette (2000). The last will known to us which was based on at least a distant memory of mancipatory will appeared in the thirties of the fourth century and it must have been a curiosity at that time : P.NYU II 39 (= SB V 8265 ; Karanis [?], AD 335).

[28] See Kaser (1975) 478.

[29] In this paper I shall not discuss the passages of the *Theodosian Code* where the information about civil and praetorian wills appears ; see David (1931) ; Archi (1955) ; D'Ors (1955) ; Voci (1967).

[30] See also *C.Th.* 4, 4, 3 ; *C.* 6, 23, 22 ; Voci (1982) 76. The legatees could easily play the role of witnesses, which is attested also by the texts of practice ; see Amphilophos in the will of Gregory of Nazianzus.

[31] On the date of *C.* 6, 23, 15, see Tate (2008) 241–242 ; on the witnesses, see Kaser (1975) 479.

[32] *C.Th.* 4, 4, 1 (AD 326 [?]) ; *C.Th.* 4, 4, 3 (AD 396) ; *C.* 6, 23, 31 (= *Nov.Th.* 16, 1 ; AD 439) ; *C.Th.* 4, 4,7 (AD 424).

παρανέγνων αὐτοῖς τὴν δύναμιν τῆς διαθήκης καὶ πέπεικ[α] κατὰ τοὺς ν[όμους] ὑπογράψαι[33].

– P.Cair.Masp. III 67312 (Aphrodito, AD 567) : ταύτην τὴν διαθήκην τίθημι, ἐπὶ παρουσίᾳ τῶν κατὰ παράκλησιν ἐμὴν προσκληθέντων καὶ ἐπὶ τὸ αὐτὸ συνηγμένων ῥογάτων νομίμων ἑπτὰ μαρτύρω(ν), πολιτῶν ὄντων Ῥωμαίων, ἐφήβων, καὶ ὑπολήμψεως ἀντιποιο(υ)μένων, τῶ᾽ν κ(αὶ) ἐξῆς ὑπογραφόντων ταύτῃ μο(υ) τῇ δ[ιαθ]ήκῃ καὶ σφραγιζόντων αὐτὴν ἐν μιᾷ συνόδῳ καὶ ῥοπῇ καὶ ὥρᾳ, μηδεμιᾶς ἑτέρας πράξεως μεσολαβούσης, κατὰ τὴν τῶν νόμων δύναμιν.

– Will of Gregorius in P.Ital. I 4–5 (= ChLA XVII 653 ; Ravenna, AD 552) : *testium quoque rogatorum numero competenti ad hanc tantum causa, scientium quur venirent, uno tempore eundeque in loco sub meorum visione conspectuum suscribtionibus signaculisque firmavi, quem claudi signarique praecipi, et valere iussi*.

The important question in this context is the scope of the witnesses' act, namely, whether it was either the act of composition of the document, or the contents of the will. In the documents, both the presence of witnesses and physical signs of this presence – seals and signatures – are stressed. This is what one observes in the already quoted examples ; however, in the doctrinal sources the differentiation is clear.

> *C.* 6, 23, 21 (= *Nov. Th.* 16, 1) : *hac consultissima lege sancimus licere per scripturam conficientibus testamentum, si nullum scire volunt quae in eo scripta sunt, signatam vel ligatam vel tantum clausulam involutamque proferre scripturam vel ipsius testatoris vel cuiuslibet alterius manu conscriptam, eamque rogatis testibus septem numero civibus Romanis puberibus omnibus simul offerre signandam et subscribendam, dum tamen testibus praesentibus testator suum esse testamentum dixerit quod offertur eique ipse coram testibus sua manu in reliqua parte testamenti subscripserit : quo facto et testibus uno eodemque die ac tempore subscribentibus et consignantibus valere testamentum nec ideo infirmari, quod testes nesciant quae in eo scripta sunt testamento*.

The moment a will was completed was the moment it was sealed and subscribed and, therefore, became a valid will. Thus, witnesses played a role which, according to modern terminology, might be named the constitutive function, as their seals and signatures together with testators' subscription constituted the will[34]. As the authors of the *Institutions* 1, 2, 10, 3 rightly observed, this concept had been adopted from the praetorian law by legal practice (approved by imperial constitutions).

The above statement is also supported by the documents recording ceremonies of opening. The first one is a dialogue between an official responsible for the opening of wills, *logistes*, and a party claiming the opening.

> P.Oxy. LIV 3758 (Oxyrhynchus, AD 325) : ὁ λογι(στὴς) εἶ(πεν) · πόσοι εἰσ[ὶ] σφραγισταί ; Διογένης εἶ(πεν) · ἑπτά , τέσσαρες δὲ πάρεισι. ὁ λογι(στὴς) εἶ(πεν) · ὑπογ[ρ]α[ψάτωσαν] [οἱ] τ̣ές̣[σα]ρ̣[ε]ς̣ ἐ̣[πεγνω]κ̣έ̣ναι ἑ̣[α]υ̣τ̣ῶν̣ τ̣ὰς̣ σφραγῖδας. καὶ τῶν̣ π̣α̣ρ̣όν̣τ̣[ων] σφραγιστῶν̣ ὑποσημιωσαμένων (l. -σημειω-) ἐπεγνωκέναι ἑαυτῶν τὰς σφραγῖδας, ὁ λογι(στὴς) εἶ(πεν) · λυθήτω τὸ γραμμάτιον κ̣[αὶ] ἀναγνωσθήτω.

The second one also records the procedure of opening. The text of the opening of five wills from Ravenna was based on one scheme[35]. After a depositary's petition for the opening of a will, the offical said : *suscipiatur carta testamenti, quae offertur, et testibus praesentibus ostendatur*. Then follows : *cumque carta testamenti suscepta fuisset et testibus praesentibus ostensa*. (A witness) responded : *constat me in hoc testamento interfuisse, in quo*

[33] Cf. P.Vat.Aphrod. 7 (Aphrodito, AD 546/547).
[34] See Kaser (1975) 480.
[35] Reconstructed in P.Ital. I, p. 196–197.

agnosco signaculum anuli mei, superscribtionem meam, et infra subscribi. Then, other witnesses present at the ceremony repeated the same formula. Thereafter, the official said : *quid de alio teste, cuius signaculum superscribtionem inprexam vidimus ?* In response, the witnesses present said : *constat* (name of a witness / witnesses) *una nobiscum in hoc interfuisse testamento, in quo agnoscimus anuli eius signacula, superscribtionem, sed nunc absens est*. The narration : *quoniam de agnitis signaculis vel supersubscriptionibus testium responsio patefecit, nunc carta testamenti resignetur, linum incidatur, aperiatur et per ordinem recitetur*.

This text clearly illustrates that a valid will was a document with authentic seals, which is indicated by the fact that the recognition of the seals resulted in the opening of a will, in other words, with the recognition of the authenticity. Thus, witnesses in late Roman law played two roles : they made a will valid (through a seal and a signature) and guaranteed the correctness of the very act of completion which was secured by all of the conditions imposed on it in the imperial constitutions, like the obligation of *unitas actus*[36]. The need for securing the act of completion of a will is also visible in the deeds of practice, which constantly mention the fact that the presence of some witnesses fulfilled the legal requirements, or at least that some witnesses were present during the act of completion.

- P.Col. VII 188 (= SB XX 14379 ; Karanis, AD 320) : Οὐ]αλέριος Ἰσίδωρο[ς ἑκατόνταρχος συγκολλήγας συνέστηκα καὶ μαρτυρῶ.
- A will of Gregory of Nazianzus : Ἀμφιλόχιος ἐπίσκοπος τῆς καθολικῆς ἐκκλησίας τοῖς ἐν Ἰκονίῳ παρὼν τῇ διαθήκῃ τοῦ αἰδεσιμωτάτου Γρηγορίου καί παρακληθεὶς παρ᾽ αὐτοῦ ἐπέγραψα χειρὶ ἐμῇ.
- P.Oxy. XVI 1901 : Φοιβ[άμμων υἱὸς] Θεοτίμου μαρτυρῶ τῇδε τῇ διαθήκῃ ἀκούσας παρὰ Ποῦσι κούρς[ορος τοῦ διαθεμένου] ὡς πρόκ(ειται).
- P.Cair.Masp. III 67324 : ⳨ Ψενθαῆσις Ὀλλοτος πρεσβ(ύτερος) μαρτυρῶ τῇ διαθήκῃ ἀκούσας παρὰ τοῦ θεμένου[37].
- P.Ital. I 6 (= ChLA XXI 714 ; Ravenna, AD 575) : *huic testamentum rogatus a Mannae viro devoto, filio quondam Naderit, ipso praesente et subscribente, atque ei testamentum relictum, per quo constituit heredem sanctam catholicam ecclesiam Ravennate, testis suscribi*.

The quoted subscriptions have a double meaning. First of all, they attest the formal correctness of the act of completion. Secondly, they inform us – especially in the later documents – that witnesses heard the will when it was dictated : μαρτυρῶ τῇ διαθήκῃ ἀκούσας παρὰ τοῦ θεμένου. Thus, they might confirm that the written content was in accordance with what a *testator* dictated. They could probably testify if any legal dispute arose or if the document was lost. Despite the constitution (*C.* 6, 23, 21 = *Nov.Th.* 16, 1, AD 439) reminding us that there was no legal necessity to disclose the content of a testament in front of the witnesses, the practice of making the content of wills known to witnesses was wide-spread in both East and West[38].

To conclude, the role of witnesses as recorded in papyri and sources of written law underwent a visible process of evolution. Initially, their function was to witness the formal act of *mancipatio* ; however, as the last institution was never perfectly performed (at least in Egypt) the character of witnessing evolved into the constitutive one. The witnesses *de facto* guaranteed the correctness of the document, since the document replaced the act *per aes et libram*. The final stage of the evolution was the acceptance of this function by imperial law.

[36] See Kaser (1975) 480.
[37] Cf. P.Vat.Aphrod. 7 ; P.Köln X 421 (= P.Michael. 53 ; Aphrodito, AD 524/525).
[38] The secrecy of the content of the will – if written – was guaranteed at least from the moment of issuing the *senatus consultum Neronianum* ; see Arangio Ruiz (1974).

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