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LAW AND IDENTITY. CONSIDERATIONS ABOUT CITIZENSHIP AND SUCCESSION IN PROVINCIAL PRACTICE

Abstract: There is evidence to assume that legal intercourse between different classes of provincial populace was more intensive than commonly assumed in scholarly literature. Focused on the period before the *Constitutio Antoniniana*, a response of Scaevola will be introduced regarding a Greek *parakatatheke* inter vivos but employed in inheritance context (D. 32.37.5 18 *dig.*). Upon the paradigmatic case it can be argued that the 'choice of law' was not only based on status, but also on personal considerations, even among Roman citizens in a provincial environment.

Keywords: Roman law and indigenous law, principle of personality, inheritance, *parakatatheke*, Gnomon of the Idios logos

Most authors engaged in the topic of "Reichsrecht" and "Volksrecht" in the Roman Empire took a close look at the period after the *Constitutio Antoninana* in order to trace with Mitteis the "fortschreitende Romanisierung" of provincial populace. Mitteis even spoke of a "struggle of two worlds": although "Volksrecht" persisted for a long time, "Reichsrecht" (the law of Rome) penetrated into the provinces, until the antagonism between local and Roman law ended up in the victory of the last one.[1] My contribution is focused on the period before 212, when Romans were still clearly separated (according to their status) from the large masses of *peregrini*. It is generally believed that Romans lived under Roman law while *peregrini* settled their transactions under their indigenous law. For this phenomenon, Wolff developed the concept of "getrennte Rechtsmassen… die sich jede für sich und in der Hauptsache unbeeinflusst durch die andere entwickelten."[2]

I raise the question whether the strict separation between the classes (set out by public law) is established by documents of everyday legal life. Was there really no 'tightrope walk' between these very different legal cultures? Were the "separate legal masses" really completely isolated and unaffected by each other?

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[1] Mitteis 1891, 151–4.

[2] Wolff 1979, 47; see also Mélèze Modrzejewski 2014, 241–5; Rupprecht 2005, 18–20; Alonso 2015, 351–6.

Recently, I considered sales documents from this point of view.[3] The detailed investigation led to the result that the choice of law (preserved in sales formulas) was not necessarily based on citizenship. However, sales documents are strongly linked with trade, and trading was a highly 'globalized' phenomenon in the Mediterranean world, too.

Inheritance poses new challenges. While trade was largely left to private autonomy, status, family and succession always meant instruments of political power. Targeted state interventions shaped the legal norms epoch by epoch. First of all, strict orders set the limits of capacity, of making wills and undertaking a will.[4] Wills of the Greek-speaking populace were very different from those of Romans[5]: 'local' wills followed Greek-Hellenistic patterns, while the 'Roman' ones had to fulfill the rigorous formal and internal prescriptions of *ius civile*. It is a common view, that the 'principle of personality' determined the choice of law: Romans and *peregrini* acted within the scope of their own laws, respectively.

1) Greeks and Romans in the Roman Empire

In the ancient world, basically the principle applied that "Angehörige einer *civitas* … das von deren Bürgern als für sich maßgeblich angesehene Recht als ihr Personalstatut besaßen".[6] 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 century AD. A valuable source from Roman Egypt confirms that Roman authorities mercilessly opposed any intercourse between the classes, especially in succession. This brings to mind the *Gnomon* of the *Idios Logos*, whose prohibitions and commands show a tendency that can also been transferred to other eastern provinces.[7] The *Gnomon* reflects provincial life as viewed by Roman fiscal administration. The text, edited by Wilhelm Schubart in 1919[8], 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.[9] The text itself traces the records back to Augustus; but later constitutions and other legal sources have also been carefully inserted.[10] Of the 114 preserved paragraphs of the *Gnomon* 34 (about

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3 Jakab 2018, 493–505.

4 Kreller 1919, 328–36; Strobel 2014, 18–54; Nowak 2015, 19–41.

5 Kreller 1919, 313–28; Voci 1963, 64–73; Amelotti 1966, 111–22; Migliardi-Zingale 1997, 305–7.

6 Wolff 2002, 148.

7 For dating see Schubart 1919, 3–5 and 8; recently also Dolganov 2020 (forthcoming).

8 Schubart 1919; Plaumann 1919; Lenel, Partsch 1920; Reinach 1920; Riccobono 1950; Mélèze-Modrzejewski 1977, 520–57.

9 Recently Babusiaux 2018, 109–15.

10 See e. g. P.Oxy XLII 3014; with Jakab 2020 (forthcoming) at n. 7.

30%) relate to inheritance (§§ 3–36). This special guide has been collected, copied, distributed within the province and applied by the Imperial fiscal administration.[11]

The significant differences in status (so typical for ancient societies) are particularly apparent in the *Gnomon*. Romans, Alexandrians, Egyptians and foreigners made up the mixed populace of the Roman province of Egypt. As mentioned above, family and inheritance law were strongly linked to status[12] 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 πινα̣κ̣ίδας Ἑλληνικὰς κύρια ἔστω, οὐ παραδεκτέα | [ἐ]στίν, οὐ γὰρ ἔ[ξ]εστιν Ῥωμαίῳ διαθήκην Ἑλληνικὴν γράψαι.[13]

The authorities made sure that Romans write their wills exclusively under the formal and internal rules of *ius civile*.[14] According to § 7 (l. 33–34), Roman wills must follow the strict rules laid down by public law. § 8 extended these prescriptions also to codicils: if supplements in Greek were added to a regular Roman testament, they should remain ineffective.[15] In their last wills, Romans must strictly observe *ius civile* as developed in the city of Rome. The severe 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 *codicillus*) to hand over some property to a beneficiary. Anyone could be benefitted by *fideicommissum*, even if he or she belonged to a different status group.[16] At the beginning, the limitations of *incapacitas* (laid down in Augustan marriage laws) or that of the *lex Falcidia* did not apply for *fideicommissa*. Gaius emphasized that originally *fideicommissa* were mostly used for the benefit of *peregrini* (2.285): *ut ecce peregrini poterant fideicommissa capere et fere haec fuit origo fideicommissorum*. The jurist saw the aim of recognizing this free-form type of disposals as being exactly the special assistance that Romans often wanted to benefit *peregrini* or vice verso.

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11 Swarney 1970, 77–81 underlined that the *Idios Logos* acted as sales agent, administrator, investigator and judge.

12 As already pointed out by Mitteis 1891, 102–10.

13 "8: If to a Roman will is added a clause saying, "whatever bequests I make in Greek codicils shall be valid," it is not admissible, for a Roman is not permitted to write a Greek will." Translation A. S. Hunt.

14 Rüfner 2011, 1–26; see already Kreller 1919, 328–37; Riccobono 1950, 119–23.

15 Riccobono 1950, 35–6; Reinach 1920, 52–4; Strobel 2014, 30–1; Nowak 2015, 194–9.

16 Kaser, Knütel, Lohsse 2017, 423.

However, the initial generosity was soon curtailed. Under Vespasian and Hadrian, *Senatus consulta* prohibited every form of acquisition on death between different classes.[17] The new regulations soon appeared in the provincial guide of the *Gnomon*. § 18 quoted the Vespasian rule extending the limits of capacity for *fideicommissa*; any type of last will against the law had to be sanctioned with confiscation (BGU V 1210, l. 56–58, § 18):

> ιη τὰ\ς/ κατὰ πίστιν γεινομένας κληρονομίας ὑπὸ Ἑλλήνων \εἰς/ [[ὑπὸ]] Ῥω|μαίους ἢ ὑπὸ Ῥωμαίων \εἰς/ Ἕλληνας ὁ θεὸς Οὐεσπασιανὸς [ἀ]νέλαβεν, | οἱ μέντοι τὰς πίστεις ἐξωμολογησάμενοι τὸ ἥμισ[υ ε]ἰ̣λήφασι.[18]

The restrictions imposed by *Senatus consulta* also for alternative forms of final disposals between *peregrini* and Romans must have been observed. In the case of violations, the *Idios Logos* confiscated the entire estate; the only exception was a voluntary self-disclosure.[19] However, the need for such bans on writing Greek wills and on trusts for *peregrini* gives the impression that local forms of disposals must have been used in everyday life. Since contracting parties were free to choose between Roman and local custom, the strict formalities in succession must have been rather unpopular.

While Roman authorities were generous and compliant in the law of commerce they took strict, consequent actions in matters of status and inheritance. Public interest, such as transparency in citizenship and protection of family structures, required mandatory standards. The so-called *testamenti factio*, the capacity to make wills and to take under a will, became strictly linked to status: any type of succession was forbidden between Romans and *peregrini*.[20]

It was a desirable aim to test the effectiveness of the hard guidelines of the *Gnomon*. For this, one should re-analyze all Roman and local wills, including also the alternative forms of disposals on death. Not merely the documentary texts, but also literary evidence should be considered. Among them, also *responsa* of Roman jurists include valuable testimonies about the wording of wills, Roman and local as well. Especially the evaluation of this group of sources seems to me largely neglected.

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[17] Gai. 2.285; see for it Mélèze-Modrzejewski 1977, 526; Riccobono 1950, 135; Johnston 1988, 19–20; Babusiaux 2018, 142–3. Recently to enforcing *fideicommissa* Babusiaux 2019, 149–55.

[18] "18: Inheritance left in trust by Greeks to Romans or by Romans to Greeks were confiscated by the deified Vespasian; nevertheless, those acknowledging their trust have received the half." Translation A. S. Hunt.

[19] Johnston 1988, 19–20.

[20] There were exceptions and privileges for some social groups; see for reference recently Jakab 2020 (forthcoming) at n. 19; Lovato 2011, 162–3; Stagl 2014, 130–1.

Such a comprehensive study is beyond the scope of this article. Not even all texts, which can demonstrate a regular intercourse between the different classes (confirming a kind of 'Hellenization' of Romans living in the provinces) can be scrutinized here. Therefore, I restrict my analysis to one single legal dispute preserved from the 2nd century AD. In my opinion, it sheds a new light on the possibility of mutual influences between Roman law and local custom of the provinces. As a working hypothesis I would like to put forward that 'principle of personality' was not even fully applied in succession.

2) A remarkable case

The complexity of the problem requires special analyses, really detailed exegeses of the relevant sources. That is why I concentrate merely on the interpretation of a central text, delivered in D. 32.37.5 Scaevola (18 dig.):

> *Codicillis ita scripsit*: "Βούλομαι πάντα τὰ ὑποτεταγμένα κύρια εἶναι. Μαξίμῳ τῷ κυρίῳ μου δηνάρια μύρια πεντακισχίλια, ἅτινα ἔλαβον παρακαταθήκην παρὰ τοῦ θείου αὐτοῦ Ἰουλίου Μαξίμου, ἵνα αὐτῷ ἀνδρωθέντι ἀποδώσω, ἃ γίνονται σὺν τόκῳ τρὶς μύρια, ἀποδοθῆναι αὐτῷ βούλομαι· οὕτω γὰρ τῷ θείῳ αὐτοῦ ὤμοσα." *Quaesitum est, an ad depositam pecuniam petendam sufficiant verba codicillorum, cum hanc solam nec aliam ullam probationem habeat. respondi: ex his quae proponerentur, scilicet cum iusiurandum dedisse super hoc testator adfirmavit, credenda est scriptura.*[21]

Q. Cervidius Scaevola discussed a rather unique disposal on death. The testator directed his heirs to hand over a certain amount of money to a beneficiary; his order was recorded in an informal document, probably a letter, not in a formal will.[22] The testator began with a *kyria*-clause: "I wish all that is written below to be valid." Such a clause was widespread in notary practice, drawing up legal transactions in Graeco-Egyptian documents both *inter vivos* and *mortis causa*.[23] Therewith, the testator wanted to emphasize that his heirs should follow his will without any delay or contradiction.

The legal dispute which Scaevola had to settle flared up between the heirs of the testator and the beneficiary. The case became even more complicated because the

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[21] D. 32.37.5 Scaev.: "Someone wrote in a codicil: "I wish all that is written below *kyria einai* (to be valid). To my *kyrios* Maximus I wish to be restored the fifteen thousand denarii which I received as *parakatatheke* from his uncle Julius Maximus with the agreement to give to him on his reaching puberty. These with the interest come to thirty thousand. I made this promise on oath to his uncle." The question was whether the words of the codicil are adequate for a claim for the deposited money, when the claimant has this proof only and no other. I replied: Upon the case as put, since the testator in addition declared that he had sworn an oath, the writing must be believed." Translation A. Watson, with some modifications.

[22] Actually just the Roman jurist called it codicil.

[23] Wolff 1978, 155–62.

testator's request referred to a past transaction in which three people were involved: the testator, a certain Maximus whom the testator calls his *kyrios*[24], and his uncle, Julius Maximus. That Julius Maximus made an agreement with the testator during his lifetime; it is called *parakatatheke* in the Greek text. Julius Maximus handed over 15,000 denarii to the testator's custody and agreed that it should not be paid back to himself but to a third party. This third person was young Maximus, the depositor's nephew. In addition, the depositary's obligation was conditional: the money was only due when young Maximus came of age (the age of maturity with full ability to act on his own account). Additionally, it was agreed that the 15,000 should be paid with interest. The writing quoted mentions 30,000 denarii (this was double the amount deposited), it is obvious that the interest had already been set in advance; in my view, it was agreed as a flat rate.[25] In this sense, the testator instructs his heirs to pay young Maximus 30,000 denarii from his estate. In the end, there was also a hint to an oath: concluding the *parakatatheke* with Julius Maximus in the past, the testator stated (guaranteed) to him his fair future behavior in an oath.

In all likelihood the uncle died long before and the testator was probably also on his deathbed. Quintus Cervidius Scaevola, the leading lawyer of the Emperor Mark Aurel[26] was asked whether this evidence could be used in a lawsuit brought for the 30,000 denarii.

It is obvious that young Maximus (named as beneficiary in the *parakatatheke*) wanted to file a lawsuit against the heirs of the testator. It is also certain that Maximus could not provide any evidence of his claim other than this *scriptura*. Apparently, the peculiar legal transaction left no traces neither in Julius Maximus' will nor in his documents and accounts.

Scaevola decided the case in favor of young Maximus. He judged that there should be a possibility to claim against the heirs. However, as basis of a future trial he did not propose any *actio* based on the Greek *parakatatheke* (as described by testator), nor on *depositum* (its closest Roman pendant), and not even on the codicil; he suggested to claim merely on the oath mentioned incidentally by the (deceased) depositary.

Most scholars interpreted the transaction between Julius Maximus and the testator as a *depositum* under Roman law (known as 'open depositum' or *depositum irregulare*).[27] The text even served as vital evidence to support the fact that 'open

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[24] Some scholars assume that the depositary must be the freedman of Julius Maximus or of his young nephew; e.g. Spina 2012, 244–5 and 248. However, the word *kyrios* could also denote an undefined proximity to the family.

[25] Spina 2012, 249–50 meant that the interest rate was exactly calculated in advance for the whole period. In my opinion, the round amount indicates rather that the interest was fixed at a flat rate.

[26] Kunkel 2001, 217–8; Liebs 1976, 294–6; Spina 2012, 13–22; Parma 2007, 4024–5.

[27] The treminology *depositum irregulare* comes from the Middle ages, cf. Scheibelreiter 2015, 354–5; idem 2017, 443 n. 2.

custody' was already recognized in Rome in the 2nd century AD.[28] Only a few studies approached the case concerning Greek contractual practice.[29]

Recently, the main theories were summarized by Spina. She also underlined that Scaevola's case is an important proof for the existence of the open *depositum* in Roman law, and that interest could be charged as an integral part of the transaction.[30] Spina also recognized the provincial origin of the case: "Si potrebbe pensare che le fattispecie sottoposte a Scevola si riferissero a figure contrattuali tipiche dei diritti greci, sconosciute al mondo romano."[31] From all this, however, she drew the conclusion that Rome's lawyers absorbed this Greek type agreement into Roman law–and Scaevola gave also in the present case an *actio depositi* with a formula *in ius concepta ex fide bona*.[32]

However, this opinion can be opposed by the fact that Scaevola (if I understand the case properly) did not award the beneficiary with any claim from a *depositum*. Although he transferred the Greek terminology of the document into the narrative of Roman law (*ad depositam pecuniam, codicillis*), he spoke nowhere of an *actio depositi*. Most scholars (and also Spina) overlooked that Scaevola switched elegantly from *depositum* to *iusiurandum*! Nevertheless, the scholars did not attach any importance to the depositary's oath.

Some scholars considered also the possibility of filing a *petitio fideicommissi*.[33] In fact, Scaevola dealt with *fideicommissum* in the neighboring texts, in his extensive books *De legatis et fideicommissis*. Despite this, in the present case he did not suggest to bring any action from the testator's disposal on death.

A few years ago, Bürge assumed guardianship as the key point in background.[34] His main argument was the depository's obligation to pay interest on the deposited money. In his opinion, to pay interest could not be charged at that time for an 'open *depositum*' under Roman law. Therefore, the depositary's task of returning 30,000 (instead of the deposited 15,000) should be explained with a fiduciary mandate for money administration. In my view, however, merely the agreement of paying interest cannot convincingly prove a guardianship relation. Through shifting the case to *tutela*, Bürge completely excluded any provincial context (any possibility of non-Roman ideas).[35]

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28 Litewski 1974, 242; idem 1975, 308; also Walter 2012, 133 and Spina 2012, 246–9.

29 Kübler 1907, 188; Frezza 1956, 151; Simon 1965, 66. De Churruca 1991, 322 emphasized that the text deals with a Greek *parakatatheke*. Recently, Scheibelreiter 2015, 359–364; idem 2017, 451–458 demonstrated that several decisions of the Roman lawyers, preserved in the Digest, discuss actually Greek transactions.

30 Spina 2012, 247–53.

31 Spina 2012, 251.

32 Spina 2012, 251–2. But later, also Spina 2015, 253–6 and eadem 2013, 562–3 underlines the Greek character of the transaction.

33 Spina 2012, 253.

34 Bürge 1987, 540.

35 Followed by Häusler 2016, 431–2; Walter 2012, 446.

An obligation to pay interest can be attributed to a variety of *causae*. Of these, first of all the concrete agreement (*lex contractus*) comes into consideration as it also appears in the letter (codicil) of the depositary. Scaevola seems to have respected the agreement among the parties (recognizing private autonomy). In any case a *lex contractus* like this sufficed for filing a lawsuit–and put aside the principles of *bonae fidei iudicia*.[36]

Without any doubt, Julius Maximus is called the uncle of young Maximus; there was a relationship between them. However, I cannot see any hint of the uncle's being the nephew's tutor. The only link to *tutela* could be the condition of future maturity. In my opinion, the phrase ἵνα αὐτῷ ἀνδρωθέντι marked only the future deadline of ἀποδώσω (repayment of the deposited amount with interest), without any guardianship relation.[37]

In summary, it can be concluded that Scaevola's case was always considered controversial in modern scholarly literature. The Greek language of the codicil, the peculiar *parakatatheke* and the surprising decision of the lawyer make a smooth interpretation under Roman law hardly possible. In my view, these obvious tensions move the case into a provincial context.[38] Just as a reminder, Johnston has already assumed a provincial origin due to the *kyria*-clause: "as for Roman practice, there appears to be no evidence that clauses of the sort were ever used."[39] Trying a new exegesis, the link to provincial (Greek) practice must be taken into account as suggested already by Kübler.[40]

3) Some considerations of the context

Scaevola's case can be interpreted as an attractive example for regular intercourse between Roman law and local custom as practiced in everyday business connections in the provinces of the Roman Empire. Scaevola's response was affirmative but legally evasive; it gives the impression that the case seemed to him rather problematic. The technical words *codicilli* and *testator* indicate that Scaevola translated the Greek terminology of the depositary's final disposal into the narrative of Roman law. Nevertheless, the original document was faithfully included in his summary of the case. This is a sign of his respect for peculiar legal ideas coming from a province even if it partly contradicts Roman legal norms.

The depositary, who drew up the document for his heirs, was undoubtedly brought up in Greek (legal) culture. He lived very likely in one of the eastern provinces. However, it remains uncertain whether Julius Maximus and young Maximus were also based in the same province. Indeed, they seem to have been

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36 The principles of *bonae fidei iudicia* belonged to dispositive law, which only took effect if there was no *lex contractus*.

37 Not even Scaev. D. 32.37.5 can substantiate Bürge 1987, 545.

38 Frezza 1956, 143; and carefully also Spina 2012, 247 and 251.

39 Johnston 1985, 260.

40 Kübler 1907, 183–4.

Roman citizens (if one can rely on anonymized stock names as prosopographical evidence).[41] The *nomen gentile* Julius probably indicates that the uncle (or one of his antecessors) was a freedman; however the high amount at stake suggests an upscale in social class. The protagonists must have belonged somehow to a provincial elite.

Although uncle and nephew seem to have been Romans, they obviously conducted their affairs (at least partly) according to local legal and notarial custom. The fact that their legal dispute was brought to Scaevola (the leading jurist of the Emperor) can be seen as evidence of their wealth and their *de iure* affiliation with Roman law.[42]

Scaevola quoted a Greek document (most probably a letter[43]) referring to a *parakatatheke*. Anyway, this was a contract *inter vivos*. I see no reason to doubt this phraseology and to replace the highly technical Greek terminology with the very Roman institution of a *depositum irregulare* or 'open *depositum*' as it was mostly done by scholars. A well-founded exegesis, taking into account the provincial context could expose new facets of the case that have until now remained hidden in forced interpretations under Roman law.

4) Parakatatheke, a Greek legal institution and its way to Rome

Simon has convincingly argued that the *quasi-parakatatheke* is by no means equal with the *depositum* of Roman law. The words παρακατατίθεσθαι, παρατίθεσθαι, παρακαταθήκη, παραθήκη mark a fiduciary handing over into custody, "den Vorgang des Anvertrauens zur Obhut, die treuhänderische Übergabe".[44] Handing over of goods into possession or ownership of the taker is a common feature of loan and deposit, in Greek and Roman law as well. The economic element of usage ("Nutzen, Gebrauchmachen") was present in each of these legal transactions.[45] However, there were no clear boundaries between *daneion*, *chresis* and *parakatatheke* in Greek law. If fungible things were provided, a legal classification can only be based on the special economic interest that prevailed in the specific legal transaction. If money was handed over in the interest of the debtor, the *daneion*-formula was used to record the key points of the agreement. If money was provided to custody (trust), the *parakatatheke*-formula was taken.

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[41] For their Roman citizenship argued Talamanca 2000–2001, 550. Kübler 1907, 184 considers them Romans of 'Greek nationality'.

[42] The writing of the depositary (testator) was classified by the Roman lawyer as *fideicommissum*. According to Gaius 2,278 *fideicommissa* could be prosecuted before the prefect in the provinces. For the high costs of litigation see Haensch 2015, 255–7.

[43] The classification of the document as *codicillus* took place only in the course of the interpretation by the lawyers of Rome.

[44] Simon 1965, 44. Scheibelreiter 2020, 42–74; my sincere thanks to the author for providing the manuscript. See also Scheibelreiter 2010, 349–352; idem 2015, 359–364; idem 2017, 451–8; Rupprecht 1994, 121.

[45] Scheibelreiter 2020, 43; Simon 1965, 41, see Kübler, 1908, 196–9.

No Greek source ever contested the depository's right of use.[46] If the entrusted objects consisted of consumable items, particularly in money, the depositary was always allowed to use it; even temple deposits were economically used in the Greek world.[47] Additionally, *parakatatheke* agreements covered a much wider circle than the Roman or modern concept of *depositum*. Simon emphasized that the depositary's right to use resulted from the type of the objects deposited, and not from contractual considerations.[48]

Nevertheless, the differentiation between the Roman contracts of loan (*mutuum*), *depositum*, and "open depositum" (*depositum irregulare*) was based on the clearly defined boundaries between ownership and possession. A similar differentiation was unknown to Greek law.[49] Our modern terminology is largely unsuitable for capturing the legal nature of *parakatatheke*, because it had "no unchangeable substantive structure" ("keine unveränderliche materiellrechtliche Struktur").

Parakatatheke agreements were applied for various purposes, such as transferring dowry, relinquishing money into custody, and disposing on death. In all these transactions, the fiduciary aspect prevailed. Interpreting Greek *parakatathekai*, one should be aware of the blurred lines of the contract.[50] This is why even the recovery at any time was not considered an essential element of every *parakatatheke*. The classification of a transaction took place according to a "Phänotyp", even if essential parts were excluded in a specific agreement. Therefore, money entrusted for security reasons was always called *parakatatheke* even if the depositor stipulated a deadline or granted usage for interest.[51]

Amazingly, Scaevola did not question the validity of the *parakatatheke* in D. 32.37.5, although it was based on Greek legal concepts. Instead, he looked for suitable procedural tools to make the consent of the parties enforceable even under Roman law.

Several passages of the Digest confirm that Cervidius Scaevola was familiar with *parakatathekai*, these omnipresent transactions of Greek legal practice.[52] Also these parallel cases illustrate his consistent efforts for recognizing legal institutions of provincial local custom under Roman law.

Recently, Spina and Scheibelreiter have dealt with some of these sources; I rely on their results.[53] Scheibelreiter emphasized that depositing fungible things with a

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46 Simon 1965, 46 and 55.

47 Jakab 2003, 506–7; Scheibelreiter 2020, 97–9.

48 Simon 1965, 46: "Die Nutzungsbefugnis sei ‚in erster Linie eine Funktion der hingegebenen Sachart' und nicht des 'schuldrechtlichen' Geschäftstyps."

49 Kränzlein 1963, 89–90; Simon 1965, 47.

50 Simon 1965, 52–3.

51 Simon 1965, 64–5.

52 D. 46.3.89 pr.; D. 13.5.26; D. 14.3.20.

53 See first of all Scheibelreiter 2020, 42–74; idem 2015, 353–385; idem 2017, 443–65; Spina 2013, 562–3; eadem 2015, 248 and 253–6.

permission to use them was already well known in Republican Rome; the comedies of Plautus, and also legal texts of Alfenus Varus provide sufficient evidence for it.[54] The second typical element of Greek *parakatathekai*, the depositor's claim for interest became much later an integral part of a *depositum irregulare*.[55]

The disagreements amongst Roman lawyers for and against the enforceability of interest will be omitted from this paper. It is sufficient, with regards to the current topic to emphasize that Rome's leading jurists knew and regularly discussed *parakatatheke* deeds, seeking to enforce their terms also under Roman law.[56]

Scheibelreiter has already stressed that the problem of handling with *parakatathekai* fits also into a "larger context" because such legal transactions laid "at the intersection between Greek and Roman law". Scaevola and his colleagues were confronted with the problem of "foreign law", they frequently tested if certain Greek type agreements could be enforced even under Roman law.

Not only Scaevola but also Papinian and Paulus responded repeatedly to inquiries with *parakatatheke* background. Sometimes also the wording of the agreements was quoted in the original Greek, sometimes it was translated into Latin but the essential element of *parakatathekai*, trust for security, was always an essential element. As Simon has already shown, the depositary's right to use the things depended on the nature of the objects deposited. In the case of fungibles, such as money, an equivalent (not the same things) was returned; from this resulted the duty to pay interest.[57]

To summarize, *parakatatheke* agreements originated in Greek law, but in the 2nd century AD, they had been for long recognized also in Rome. Scaevola was familiar with such kind of transactions when he delivered his response in D. 32.37.5. Occasional controversies among the lawyers were limited to the problem whether interest is owed even if an explicit clause was missing. From this point of view, the transaction between Julius Maximus and the anonymous testator seems unproblematic, since the interest clause was explicitly included in the deed and confirmed also in the codicil of the depositary.

5) Conflicts with the third person

In concluding the *parakatatheke* Julius Maximus agreed that repayment should not be made to him (the depositor) but to his nephew. Contracts in favor of third parties were mostly ineffective under classical Roman law,[58] but it was rather common in

[54] Plaut. *Bacch*. 249–75 bzw. 327–41; Alfenus Varus in D. 19.2.31; Scheibelreiter 2015, 355–6.

[55] Scheibelreiter, 2015, 356.

[56] Scheibelreiter 2017, 451–2.

[57] In the same sense Scheibelreiter 2017, 460.

[58] Finkenauer 2018, 248–54.

Greek *parakatathekai*. Such transactions are well documented in Attic oratory; they mostly concern money deposits with bankers (*trapezitai*).[59]

Among others, also the pseudo-Demosthenic speech against Kallipos (or. 52) is focused on a *parakatatheke* with a banker.[60] Apollodoros, whose father Pasion ran a well-known bank in Athens, defends himself as Pasion's heir against the claims of a depository's heirs. One of Pasion's customers, Lykon from Herakleia, deposited 1,640 drachmas with him before embarking on a long sea voyage to Libya. The deposit was made on the condition that the amount would be paid to his business partner, Kephisiades, as soon as he returns to Athens.[61] Lykon even named a witness who would identify Kephisiades for the banker.[62] The speech quotes the entry in the accounts of the bank (52.6):

> 'Λύκων Ἡρακλεώτης χιλίας ἑξακοσίας τετταράκοντα·Κηφισιάδῃ ἀποδοῦναι δεῖ· Ἀρχεβιάδης Λαμπτρεὺς δείξει τὸν Κηφισιάδην.'[63]

Apollodoros' defense speech refers as evidence to Pasion's correct bookkeeping and emphasizes that it properly answered commercial custom of his time (52.4):

> εἰώθασι δὲ πάντες οἱ τραπεζῖται, ὅταν τις ἀργύριον τιθεὶς ἰδιώτης ἀποδοῦναί τῳ προστάττῃ, πρῶτον τοῦ θέντος τοὔνομα γράφειν καὶ τὸ κεφάλαιον τοῦ ἀργυρίου, ἔπειτα παραγράφειν 'τῷ δεῖνι ἀποδοῦναι δεῖ.[64]

We learn from Apollodoros' reasoning that cash deposits with bankers were quite common in Greek business practice. It also seems commonplace that a third person was entitled to withdraw the money, and this third party was designated by the depositor. The bank's records and entries in its account books were called *grammata*; such *grammata* registered the name of the depositor, the amount

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59 See IPArk. 1 (5th cent. BC) with money deposit at the temple of Tegea, in case of death in favor of third parties; cf. Thür, Taeuber 1994, 1–11. Repayment to a third person is also recorded in literary sources: e.g. Herodot 6.86; cf. Scheibelreiter 2020, 47–49; Mitteis 1889, 244–8.

60 Bogaert 1983, 212–5; Bogaert 2000, 221.

61 Scheibelreiter 2020, 65; Mitteis 1889, 244–5; Rabel 1937, 213–4.

62 Rabel 1937, 214–5.

63 Dem. 52.6: "Lykon of Heraclea. Sixteen hundred and forty drachmas. To be paid out to Kephisiades. Archebiades of the deme Lamptrae will introduce Kephisiades." Translation V. Bers.

64 Dem. 52.4: "All bankers have a fixed procedure, whenever some private citizen deposits money with them and directs that it be given to a representative, first to write down the name of the man making the deposit and the sum of the account and then to write next to it 'To be paid to so-and-so.'" Translation V. Bers.

deposited, and the person authorized to withdraw (and possibly also somebody else to identify the beneficiary).[65]

Apollodoros claims that Lykon expressly ordered that the amount should be paid to Kephisiades, and not to his heirs, even after his death.[66] In our modern terminology we would say that the transaction was carried out in a three-person relationship. Such money transfers seem to have been part of everyday commercial life among Greeks; the legal transaction fits the loose structure of *parakatathekai*.[67] It must be said that this structure remained constant over the centuries: it was widely used even in Greek papyri of Roman Egypt.[68]

However, one should consider the ownership issue of such transactions. Although there was no clear theoretical distinction between property and possession in Greek legal thought, still a certain differentiation can be made in sharing property rights among the parties. In a *parakatatheke*, the depositary (recipient) is considered *kyrios* of the objects given. Indeed, his *kyrieia* is a necessary requirement (and legal ground) for his right to dispose of them.[69] Although *kyrieia* (as a right to dispose of and use) is handed over in a *parakatatheke*, the depositor still keeps the so-called *kratesis*, the right of access ("Zugriffsrecht"); he even has the better title.[70]

Simon emphasized that the enjoyments of property rights among the contracting parties were considered "from the aspect of their procedural enforceability", whereby the "Beweisbarkeit einer beanspruchten Berechtigung" came to the fore. The changes "in der dinglichen Zuordnung der Sachen" are understood as "Verlust oder Gewinn von Beherrschungsbefugnissen und nicht als Übertragung abstrakt vorgestellter materieller Rechte".[71] If the depositor appointed a third person as beneficiary to withdraw the money, through his act he also assigned his right of access to this third party; thereby the deposited money was attributed to the property of the appointed party.

This information significantly contributes to our topic with additional observations. In the Greek world, it was common practice to conduct *parakatathekai* in a three-person relationship. By appointing a third person to withdraw, the deposited money was actually parted from the assets of the depositor: with this disposal, access and title passed to the third party.

Furthermore, the difficult proof that Apollodoros had to master as Pasion's heir draws attention to the fact that *parakatathekai* were a matter of trust; and they could be poorly documented.

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65 Thür 1986, 126. Wolff 1957, 46.
66 Rabel 1937, 214.
67 Jakab 2003, 507–8.
68 Kübler 1908, 193–4; Scheibelreiter 2017, 453–4; idem 2020, 100–2.
69 Simon 1965, 48.
70 Simon 1965, 49. Wolff 1957, 44–5; Pringsheim 1916, 35–7; Kränzlein 1963, 90.
71 Simon 1965, 49.

Monetary transactions in 4th century Athens B.C. seem far away from 2nd century AD deposits in the Roman Empire. Nevertheless, the gap could be filled through papyrological evidence. After examining the documentary sources, Wolff came to the conclusion that the terminology known from Athens had not changed in Egypt during the first three centuries of Roman rule; scribal practice kept "die hergebrachten Termini κράτησις und κυριεία".[72] In a few official documents of the Roman authorities a hesitation with converging genuine Roman terminology can be noted. Scattered amongst documents there can be found translations equating *possessio* with νομή and *dominium* with δεσποτεία.[73] However, a legal language like this became established not before the end of the 3rd, under Diocletian and later under Constantine.

In D. 32.37.5, Scaevola reports of a *parakatatheke* in favor of a third party; the transaction was styled according to the patterns of Greek money deposits. The question arises whether similar transactions (money deposits with repayment to a third party) could be effective under Roman law. Checking the scripts of the classical Roman jurists in the Digest one has the impression that the problem was rarely addressed by them. The few sources preserved were based on different facts.[74]

Actually, only a single constitution from the end of the 3rd century seems to deal with a similar case (C. 3.42.8 pr.-1): *Si res tuas commodavit aut deposuit is, cuius precibus meministi, adversus tenentem ad exhibendum vel vindicatione uti potes.* § 1 *Quod si pactus sit, ut tibi restituantur, si quidem ei qui deposuit successisti, iure hereditario depositi actione uti non prohiberis*.[75] In 293, a response was addressed by the Emperors Diocletian and Maximian to a certain Photinus. It concerned a deposit in which three persons were involved: according to the starting statement, someone deposited objects belonging to Photinus but without being commissioned by him. In my view, the constitution considers three different versions of the same case.[76] In the first, somebody deposited objects which belonged to Photinus (*si res tuas deposuit*). In this version, Photinus can claim upon his ownership: he has an *actio ad exhibendum* and also a *rei vindicatio*. However, he cannot file a lawsuit based on *depositum* because he was not a party to the *depositum*.[77] In the second

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72 Wolff 2002, 193.

73 Wolff 2002, 192–5, e.g. P.Strasb. I 22 (MChr. 374, FIRA I 85), P.Tebt. II 286 (MChr. 83, FIRA III 100), BGU I 267 (FIRA I 84).

74 PS 2 Coll. 10.7.8 and D. 16.3.16.

75 C. 3,42,8 pr. –1: "If the person whom you mentioned in your petition has loaned or deposited your property, you can bring either the *actio ad exhibendum*, or the *rei vindicatio* against whomever has possession of it. § 1 But if an agreement was made that the deposited things should be restored to you, and you have succeeded him who deposited it, you cannot be prevented from filing the *actio depositi* on the ground of hereditary right."

76 Finkenauer 2018, 248–9; Walter 2012, 430.

77 Finkenauer 2018, 249 pointed out that the *actio depositi* could only have used if he had explicitly instructed the person to deposit it. See also Walter 2012, 430–4.

version, somebody deposited some objects (of which Photinus was not owner) and agreed to return them to Photinus.[78] The facts of this version correspond to the structure of the *parakatatheke* which we are discussing upon D. 32.37.5. For this state of facts, the Emperors considered two possible options: a) although Photinus was not the owner at the time of deposit, he later became heir to the depositor and thereby also inherited the *actio depositi*; b) Photinus was neither owner nor heir, just a beneficiary; if so, he could not claim with any action based on *depositum*. The Emperors (and their lawyers) insisted on the relative structure of *obligationes* and refused to give an *actio depositi* to somebody who was not party to the contract.[79] Nevertheless, the case still had a happy end: the response proposed a just (though strictly speaking unlawful) decision upon equity, promising an *actio depositi utilis propter aequitatis rationem* [§ 1].

C. 3.42.8 pr.–1 is an important piece of evidence which testifies that the Greek structure of deposit in favor of a third party was not even recognized at the end of the 3rd century in Roman law.[80] In some other cases in the Digest, deposits for a third person have been acknowledged also under Roman law as fiduciary disposals on death[81]; but this interpretation cannot apply for D. 32.37.5 because the facts are different.

As an interim issue it can be stated that the agreement between Julius Maximus and the depositary about returning the deposited money (with its interest) to young Maximus should be considered ineffective under Roman law. Among others, also the imperial constitution preserved in C. 3.42.8 pr.–1 confirmed that young Maximus could never have obtained his money with an *actio depositi*. Despite this, Scaevola seems not really concerned with this problem; he made rather a wide circle around it and looked for alternative possibilities to enforce Maximus' claim. It seems, that Rome's skilled lawyer did not want to attack a commonly used Greek type contract with strict arguments based on procedural and material rules of the *ius proprium Romanorum*. On the contrary, he highly tolerated private autonomy, even expressed in a '*lex contractus*' of a Greek transaction. He also looked for legal tools to make the depositor's disposal by will valid, even before a Roman court.

6) Scaevola's responsum

I have already stressed above that Scaevola did not consider to base his response on the rules of a Roman *depositum*-contract or on those of a Roman *fideicommissum*. As a suitable basis for enforcement, he proposed (rather surprisingly) the depositary's oath. Indeed, Julius Maximus took an oath on the deposit of the 15,000

[78] I would like to emphasize that this agreement can only be assumed in the second version.

[79] See Finkenauer 2018, 248–54; Walter 2012, 429 ff.

[80] The communis opinio finds the *actio depositi utilis* interpolated, see Walter 2012, 429–37.

[81] Walter 2012, 441–8.

denarii, stating in it the depositary's obligation to repay the doubled amount to his nephew at a future date.

Before we think about Scaevola's possible arguments, we should consider why he did not want to grant young Maximus an *actio* from the codicil cited. At first glance, it is really surprising because the fragment is in the middle of a longer, coherent textile in Lenel's Palingenesia surrounded with cases of *fideicommissa*.[82] In several other fragments, Scaevola responded to inquiries which were based on deeds in Greek, rooted in local legal tradition of the provinces. We should take a closer look at one of them, D. 32.37.6:

> *Titia honestissima femina cum negotiis suis opera Callimachi semper uteretur, qui ex testamento capere non poterat, testamento facto manu sua ita cavit:* "Τιτία διεθέμην καὶ βούλομαι δοθῆναι Καλλιμάχῳ μισθοῦ χάριν δηνάρια μύρια": *quaero, an haec pecunia ex causa mercedis ab heredibus Titiae exigi possit. Respondi non idcirco quod scriptum est exigi posse in fraudem legis relictum.*[83]

The jurist was confronted also in this case with a Greek document which contained an unusual disposal. It is about the last will of a *testatrix* who was, without any doubt, a Roman citizen. This Roman lady also employed provincial legal tradition to leave some money to her long-time servant, a certain Kallimachos. Obviously with an intent to evade the strict inheritance provisions of Roman law, the *testatrix* ordered the heirs in her codicil to hand over the sum as *misthos* (*merces*), as if it were an unpaid debt for previously done services.

I see a common feature with D 32.37.5 because a legal transaction *inter vivos* is applied (pretended) as a basis for the heirs' obligation to provide benefits. In the Kallimachos-case, already the stock names indicate that the protagonists did not belong to the same status group (class). The *testatrix* called Titia was obviously a Roman citizen with *testamenti factio*[84], while the beneficiary with the Greek name Kallimachos did not have capacity under Roman law. In this case, Scaevola shows

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[82] E.g. D. 32.32 Scaev. 14 dig.; D. 32.33 pr.–2 Scaev. 15 dig.; D. 32.34 pr.–3 Scaev. 16 dig.; D. 32.35 pr.–3 Scaev. 17 dig.; D. 32,36 apud Scaevolam libro octavo decimo digestorum Claudius notat; D. 32.37 pr.–7 Scaev. 18 dig.; D. 32.38 pr.–8 Scaev. 19 dig.; D. 32.39 pr.–2 Scaev. 20 dig.; D. 32.40 pr.–1 Scaev. 21 dig.; D. 32.41 pr.–14 Scaev. 22 dig.; D. 32.42 Scaev. 23 dig.; by Lenel 1889, 227–59 all under the title *De legatis et fideicommissis.*

[83] D. 32.37.6: "Titia, a lady of the highest respectability, had in her business affairs always made use of the services of Kallimachos, who was not entitled to take under will. When making her will she provided in her own handwriting as follows: 'I, Titia, have made this will, and wish that Kallimachos be given ten thousand denaria as *misthos*.' Question: Can this money be exacted from Titia's heirs as wages? I replied that this being in writing does not make it possible to exact what was left in fraud of the law." Translation A. Watson.

[84] Scheibelreiter 2014, 258–61.

no understanding towards provincial custom adopted in the Greek codicil of the honorable lady. He stressed the compliance with mandatory regulations prohibiting any succession between Romans and *peregrini*.[85]

Despite the controversial history of Scaevola's works[86], certain points of intersections, even a certain symmetry, can be discovered in these two cases (D. 32.37.5 and D. 32.37.6). In both, Greek style wills were presented to the lawyer with considerable interpretation difficulties. The troubles arose from a clash of different legal traditions: everyday provincial practice was confronted with prohibitions and prescriptions of Roman law. In both cases, a testator/testatrix imposed an obligation on his/her heirs; but as a legal ground (*causa*) a real or fictional contract *inter vivos* was specified.

However, the two legal transactions also differ in some (not insignificant) ways. In D. 32.37.6, the *testatrix* stated that a *misthosis* (service or work contract) existed between her and Kallimachos. Kallimachos was said to have made a "Vorleistung" which consisted of certain services. In D. 32.37.5, the testator declared that Julius Maximus had deposited with him some money (*parakatatheke*) for a third party. I see the striking difference in the fact that in D. 32.37.5 the advance payment ("Vorleistung mit Zweckbestimmung") consisted of money; the testator held possession of third-party money.

Remembering the peculiar real effects of Greek *parakatatheke*-agreements (sharing *kyrieia* and *kratesis*), one wonders whether any recourse to Greek legal thinking could have influenced Scaevola's decision. Julius Maximus undoubtedly owned the 15,000 denarii as he handed over the sum to the depositary. Through relinquishing them into custody, he transferred also *kyrieia* (the right to use and dispose of it) to the depositary. The outlines of his transaction were marked by the commonly applied *parakatatheke*-formula: his "entrusting" was limited in time and subject to repayment. The depositary became *kyrios* of the money, but the *kratesis* (title to access) remained with Julius Maximus though he assigned it to young Maximus by appointing him as beneficiary.[87]

Let us briefly return to the comparison of the two cases (D. 32.37.6 and D. 32.37.5)! The juxtaposition of similar though slightly diverging facts seems to indicate a certain symmetry–with consequences also for the interpretation of our case, D. 32.37.5. Taking Scaevola's stock names as evidence[88], we find in D. 32.37.6 an honorable Roman lady who wanted to leave something by will to Kallimachos, a peregrine. The protagonists belonged to different status groups, Kallimachos lacked capacity, therefore the codicil violated *ius cogens*. In D. 32.37.5, we have the Greek codicil of a depositary, favoring young Maximus, a Roman

[85] Although, according to Gai. 2.281, a *legatum* in Greek was void, however a *fideicommissum* was initially valid.

[86] S. Liebs 1997, 113–4; idem 2017, 594–6; Lamberti 2007, 2736–42; Samter 1907, 154–5.

[87] Simon 1965, 52; Wolff 2002, 192–5; Kränzlein 1963, 90–2.

[88] Scheibelreiter 2014, 258–61.

citizen. Maximus was having trouble with his claim against the depositary's heirs. The Greek language of the document could hardly have been the problem because Scaevola declared in other cases that codicils in Greek were also valid under Roman law.[89] In all likelihood (and also confirmed through the symmetry with D. 32,37,6), the depositary of our case lacked capacity, he was not a Roman citizen. This constellation would explain why Scaevola did not support any inheritance lawsuit.

Indeed, the problem of capacity was addressed in both cases although the technical phrase is not present in D. 32.37.5. A further argument can be found in the circumstance that Scaevola did not award an inheritance *actio* neither to Kallimachos nor to Maximus. In D. 32.37.6, he judged the codicil's *misthosis* a mere circumvention, *in fraudem legis relictum*. Indeed, in D. 32.37.5 he finally supported Maximus' claim although a third-party effect was void under Roman law (maybe upon the Greek concept of shared *kyrieia* and *kratesis*).

Scaevola's decision is amazing, since neither a deposit for a third party nor the depository's will could be valid under Roman law. However, the lawyer looked for an enforceable plea and found it in the depositary's oath. The Greek codicil served as sufficient evidence for this, although the very codicil failed to have any effect as a disposal on death. Anyway, an oath, a solemn promise to fulfill the last will of somebody was respected and enforceable also under Roman law.[90] The depositary's oath confirmed that 30,000 denarii were owed, Scaevola admitted it as evidence (and avoided to consider openly any strange provincial ideas regarding deposit and atypical last wills, rooted in Greek law).[91]

7) To conclude

Scaevola's complicated case introduced a peculiar legal transaction. It is characteristic for the legal life of the Roman Empire where Roman citizens and *peregrini* lived side by side, enjoying the advantages of a flourishing economy in the provinces. Not only documentary texts (*tabulae*, papyri or inscriptions) inform us about "law in action" but also cases discussed by Roman jurists provide valuable information about law and custom. Scaevola's response symbolizes that Roman lawyers were fundamentally open to foreign legal ideas; they often provided a creative approach for the judgments of the Emperors, governors or other magistrates.

The case discussed in D. 32.37.5 deals with a Greek legal document, likely a will which was drawn up in an eastern province. Persons of different status groups are involved in it. Obviously, the plaintiff wanted or maybe needed a decision under Roman law. The facts summarized by the jurist relate to two transactions: an inheritance case which is explicitly discussed by Scaevola and another one, a Greek

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[89] E.g. D. 31.88.15; D. 32.37.6; D. 32.101 pr.; D. 33.4.14; D. 33.8.23; D. 34.4.30.1; D. 34.4.30.3; D. 40.4.60; D. 40.5.41.1. See Häusler 2016, 426–39.

[90] Gai 3.96; Cic. Verr. 2.1.123-4; to oaths cf. Kübler 1907, 185–6; Gröschler 2002, 145–52.

[91] For interpolations see Kübler 1907, 186–187. *Scriptura* reminds *grammata* in Greek sources, see Kübler 1908, 198–9.

type deposit concluded previously. A Roman citizen wanted to leave some money to his nephew upon his death; he happened to apply a locally widespread Greek formula for realizing his intention. Since the beneficiary was also a Roman citizen, the litigation seems to have been brought before a Roman court. The uncle's primary transaction was a conditional Greek deposit called *parakatatheke* in favor of a third party, his nephew. However, the beneficiary could not provide any evidence to support the past agreement except the depositary's letter (called a codicil by Scaevola). Depositary and beneficiary may have belonged to different status groups (classes) because Scaevola apparently did not consider any inheritance lawsuit (such as a *actio fideicommissi*) to be admissible. Not even from the basic transaction (*parakatatheke*) between uncle and the depositary could an action be brought before a Roman court because neither *ius civile* nor *ius honorarium* knew of a deposit in favor of third persons. However, Scaevola managed to master the difficult task. He proposed enforcement on the ground of the depositary's oath; just this fiduciary promise made it possible to file an action upon the strictly speaking void disposal under Roman law.

Putting it into context, it can be stated that formal wills (*diathekai*) were merely one of the possible types of *mortis causa* disposals in provincial local tradition.[92] People from the provinces (Greeks, Egyptians or of other nations) used numerous alternative forms to determine the fate of their assets after death. The choice made by the testator was based not only on legal considerations, but also on the notarial infrastructure within reach.[93] The principle of personality did not seem to be always decisive in personal choices.

In fact, Wolff has already resisted the restrictive view of hermetical separation between Romans and *peregrini*: "Eine frühere Meinung, die in der Bindung der *cives Romani* an das Recht der eigenen Gemeinde in der dieser an sich nicht unterworfenen Provinz einfach ein doktrinäres *Personalitätsprinzip* am Werk sah, wurde ihrem soziologischen, geistigen und juristischen Hintergrund allerdings ebensowenig gerecht wie eine entsprechende Lehre das verwandte Phänomen der Koexistenz ägyptischen und griechischen Rechts zu erklären vermochte."[94] However, Wolff was referring mainly to 'Romanisms', of legal institutions of Roman law taken up by *peregrini*. He assumed that Roman type legal transactions were already applied early by local people, long before the *Constitutio Antoniniana*, although Roman law still represented at that time a "Sondergut einer auch nach Generationen überdauernder Ansässigkeit noch landfremden oder wenigstens, soweit sie aus eingebürgerten Peregrinen, vornehmlich Veteranen und deren Abkömmlingen, bestand, rechtlich und sozial abgehobenen Oberschicht".[95]

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[92] Kreller 1919, 202–3.

[93] *Diathekai* were used mostly in large cities, while villages preferred alternative models, Yiftach-Fíranko 2002, 149–64.

[94] Wolff 2002, 149–50.

[95] Wolff 2002, 151.

Following Wolff and perhaps even supplementing his arguments, I drew attention to the fact that legal intercourse between Romans and *peregrini* was much more intensive than commonly thought. Roman citizens, whether genuine or new, did not seem always ready to use their "Sonderrecht" when drafting their legal transactions. On the contrary, there is sufficient evidence even in the law of succession (although it was mainly ruled by *ius cogens*) that Romans applied local legal formulas. Apparently, they followed provincial legal traditions, too.

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