The Practice of Men and the Enactments of Emperors: Dynamics of Change in the Mechanics of Testaments

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Abstract – This paper analyses the historical accuracy of a statement made in Justinian's *Institutes* about the development of the late-antique tripartite will, and finds that the enactments of emperors are given too much credit, and the practice of men too little. The paper follows the chronologically uneven and geographically disparate ways in which writing came to be used in wills, and notes the ways in which the problems writing could pose were systematically ignored by imperial enactments until very late.

> Justinian, *Institutes* 2.10.3. Sed cum paulatim tam ex usu hominum quam ex constitutionum emendationibus coepit in unam consonantiam ius civile et praetorium iungi, constitutum est, ut uno eodemque tempore, quod ius civile quodammodo exigebat, septem testibus adhibitis et subscriptione testium, quod ex constitutionibus inventum est, et ex edicto praetoris signacula testamentis imponeretur ... subscriptiones autem testatoris et testium ex sacrarum constitutionum observatione adhibeantur ....
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> But since gradually, as much from the practice of men as from the emendations of enactments, there came to be a joining of the civil and praetorian *ius* into one harmonious unit, it was

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> enacted that with seven witnesses attending at one and the same time, which the *ius civile* in a certain sense demanded, and the subscription of the witnesses, which is discovered from the enactments, and that, from the edict of the praetor, seals should be placed on testaments. . . . [This is how the so-called "tripartite" will is to be made.] The subscriptions of the testator and the witnesses, however, are to be present, from the scrupulousness of the sacred constitutions.

In early 2016, a spectacular find came on to the antiquities market. It was a well-preserved wooden tablet dated to 340, written on in black ink, and it constituted the first interior *pagina* of a Roman will.[1] More such tablets graced the on-line market over the next fifteen months, the set eventually totaling eight, five of which were (fragments of) wills that all dated to the late third and fourth centuries.[2] These five tablets are invaluable: they are the only original testaments to survive from the western half of the late Empire, thus the only direct examples of the *usus hominum* referred to by Justinian not found in Roman Egypt.[3] Indeed, all of these wills, both those from the Greek East and those from the Latin West, suggest that the *Institutes*' history should be rewritten. For although the complex history of will-making did involve the

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[1] Presented by Timeline Auctions on February 25, 2016, no. 245, on the website for Sixbid, and subsequently published by P. Rothenhöfer and J. Blänsdorf, "*sana mente sana memoria testamentum feci.* Eine testamentarische Verfügung vom 12. April 340 n. Chr.," *Gephyra*, 13 (2016) 153–63 and *AE* 2016.2033.

[2] See *AE* 2016.2029–36, using the published photographs to improve the texts offered by the auction house and recording information about the auctions; *AE* 2016.40 relates the tablets' provenance (in the hands of a Belgian collector in 1950) and identifies the eight as a probable family archive (with documents from 274 to 371) from North Africa. The wills are *AE* 2016.2031–3 and 2035–6, none complete, and four of the five are the beginnings rather than the ends of a will. Note that *AE* 2016.2036 did not come on to the market but was presented at a conference by C. Masi Doria, its text presented also by *AE* but not checked against any photographs or reporting any physical characteristics (beyond the dimensions of the tablet); *AE* identifies it as clearly belonging with the others. There has so far been no suggestion that any of these tablets is not authentic. Because they have disappeared back into private hands, there is only a small chance that there will be autopsy-readings that will improve on what *AE* has been able to do, so it is *AE*'s readings on which I necessarily rely.

[3] The will of Gregory of Nazianzus (in Cappadocia) survives in a manuscript copy only, and is not an original; see J. Beaucamp, "Le testament de Grégoire de Nazianze," in J. Beaucamp, *Femmes, patrimoines, normes à Byzance* (Paris 2010), 183–264. In the West, some early medieval wills survive, and records of will-openings in the *acta* of the city of Ravenna, but no actual late-antique wills.

components Justinian mentioned, the *Institutes*' dynamic of legal change, a dance of law and practice that combined "*usus* of men" and "emendations of *constitutiones*" into the "tripartite will" of the fifth century and after, is not correct in its specifics.

Instead, the changes in the mechanics of will-making show that, over time, writing infiltrated what was a complicated mix of oral, performed, and written components; that interventions of emperors came only late in the process, when practice in the East had already started to change, although in the West there was a lingering popular or scribal respect for traditional practice even after imperial law modified it; and that some interventions reveal striking and long-lasting blind spots in the imperial and juristic understanding of practice. In this long history, *usus* was actually much more important than the *Institutes* acknowledged, and there were perceptible differences between East and West.

I. The infiltration of writing

The Roman law of testaments is complex and centuries-long, and reveals the increasing involvement of writing. Romans imagined that wills had once been oral – made "in convoked assemblies" or "in readiness for battle"[4] – and recognized that the next step was that of the mancipatory will, "the will by bronze and balance" (*per aes et libram*).[5] By the middle of the second century AD, when the jurist Gaius offers a description of it (*Institutes* 2.104), the act of making such a will still included performed, spoken, and written elements: the purchase of *familia* and *pecunia* by the *familiae emptor* with actions and words, the spoken confirmation and activation of the terms of the (written) will by the testator (called the nuncupation), and the written tablets of the will itself. All this activity was performed before five witnesses, on whom the testator called to "bear witness to me (of this) statement."[6] Gaius then goes

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[4] *In comitia* and *in procinctu*, G.2.101; see W. W. Buckland, *A Textbook of Roman Law from Augustus to Justinian*, 3rd ed. P. Stein (Cambridge 1963), 283–84 and M. Nowak, *Wills in the Roman Empire. A Documentary Approach* (Warsaw 2015), 19–20 n.2 for literature.

[5] Already the only form in Cicero's time, and recognizable in his phrase *libra atque tabulae* (*de or.* 1.228), and characteristically in writing (Cic. *Top.* 26).

[6] *Testimonium mihi perhibetote*, G.2.104. The testator, "with five witnesses who were Roman citizens of adult age and the *libripens* [scale-weigher] . . . mancipates," which suggests that the *libripens* did not obviously fall into the category of only a witness, although Gaius later includes the *libripens* "among the witnesses" (*nam et is testium numero est*, 2.107); see below note 26.

on to say that a will made with all of these formalities *non tamen . . . valeat* if there is no institution of the heir made *solemni more*, for which only certain words, *Titius heres esto* and *Titium heredem esse iubeo*, were approved (*Institutes* 2.115–117).[7] By Gaius' time, that institution of the heir was clearly not usually part of the nuncupation, since his formula does not include it and he says that without the *institutio heredis* the will, the purchase, *and* the nuncupation are not enough.[8] So already the most necessary element of this type of will, an element that was probably once oral,[9] had migrated into the tablets and was kept secret from the witnesses.[10] Other required elements of formulaic language, such as that for legacies (*do lego*), were included in the tablets as well.[11]

Moreover, starting in Augustus' time,[12] if a testator wanted subsequent codicils to be valid also, he had to include a statement of this in the will and write the codicils out himself, in his own hand. The will-formulary *P.Hamb.* I 72 = *ChLA* XI 496 (second-third century) accordingly gives as its paradigm for this kind of codicillary clause "[---] *scrip*[*tum signatumque re*]*li*[*quero*]," a lacunose version confirmed, however, by every surviving example of this clause until 552.[13] Indeed, the one surviving copy of a set of

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[7] Gaius also states that a son *in potestate* must be disinherited by name if he is not an heir (G.2.123, 127) or the will is invalid.

[8] Jurists played with scenarios in which (only) the institution of the heir was nuncupated, and what it meant for the tablets: D.28.1.21 pr. (Ulpian), 28.1.25 (Javolenus), 28.5.1.1 (Ulpian), 28.5.59(58) pr. and 29.7.20 (both Paul); and see below note 63. Nowak (note 4), 20 n.3 considers these opinions proof that the "full text of the will" was or could be nuncupated, but this would only be the case if the will consisted only of the institution of the heir (which was possible).

[9] Nowak (note 4), 20 n.3.

[10] Although Ulpian thought the *institutio should* be in the nuncupation (*nuncupandi sint*), D.28.1.21 pr., Gaius (G.2.181) assumes that "of course" (*scilicet*) the terms of a will are unknown in the testator's lifetime.

[11] Legacies, G.2.193, 2.201, 2.209, 2.216; *cretio*, 2.165; and disinheritance, 2.127 and 132; see (in general) M. Amelotti, *Il testamento romano attraverso la prassi documentale* [I. *Le forme classiche di testamento*] (Florence 1966), 111–90; E. A. Meyer, *Legitimacy and Law in the Roman World.* Tabulae *in Roman Belief and Practice* (Cambridge 2004), 269 n.52.

[12] J.2.25 pr. (an agreement between the dying Lucius Lentulus and Augustus; E. Champlin, "Miscellanea Testamentaria," *ZPE*, 62 (1986), 249–51 questioned the usually accepted date); before this, "it is agreed that there was no *ius codicillorum*" (*constat ius codicillorum non fuisse*).

[13] G.2.270a (*quidquid in codicillis scripserit*), with others, assumes that the testator will be writing the codicils: D.29.7.8.2 (Paul; although A. Guarino, "*Pauli de iure codicillorum liber singularis*," *ZSS* (RA), 62 (1942), 243 judges this sentence interpolated), D.29.7.13.1 (Papinian). Other wills:

codicils states that they were written in the testator's own hand.[14] Similarly, if his *tabulae testamenti* were written by either an *extraneus* or a person in the testator's power, special steps had to be taken. For according to the *senatusconsultum Libonianum* of the year 16 and an edict of Claudius (both of which punished fraud in will-writers), the testator was required to write an endorsement of the document in his own hand, in specific terms for the *extraneus* (*quod illi dictavi et recognovi*) or in general terms for those in power.[15] Writing was thus increasingly important, both as part of the will-making ceremony and in the contents of the *tabulae* themselves, and additionally for situations (scribes *extranei* or *in potestate*) or elements (codicils) that would not be part of every testator's experience.

In the fourth century, Constantine removed the requirement for specific words and specific materials (i.e. wooden tablets) in

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ChLA IX 399 (the formula, but entirely restored [91]), *FIRA*, 3, 48, line 120 ("*scriptum sig*[*natumque reliquero*]," the will of "Dasumius" [108], with Champlin (note 12), 51–55), and restored in a newly published Latin will-opening, H. Halla-aho, "Two New Latin Papyri from the Tebtynis Temple Library," *ZPE*, 213 (2020), 222–25 (second century). Noting in their own hand as well: *P.Oxy.* XXXVIII 2857 [134], *P.Mich.* VII 439 [147] (corrected and improved by L. C. Colella, "Notes on Some Roman Wills of the 2nd Century from Egypt," *ZPE*, 220 (2021), 220), *P.Hamb.* I 73 [second century], *PSI* XIII 1325 [172–5], *BGU* I 326 = *FIRA*, 3, 50 [194], *P.Ital.* I 5 BVI 12–VII 11, "If I being about to write [*conscribturus*] shall leave codicils" [before 552]. This apparent requirement for writing in person (like the practice of codicils itself) does not come from Greek practice, Nowak (note 4), 198. The last two late wills that note codicils refer more generally to "bringing into being" (*P.Cairo Masp.* III 67312 [567]) or "making" (*P.Cairo Masp.* II 67151 [570]) codicils; *P.Oxy* XX 2283 [586] specifically refers to dictating the codicil.

[14] And the preparatory clause in the will specified "in my own hand" as well, *BGU* I 326 = *FIRA*, 3, 50 [194], a protocol of a will- and codicil-opening; this codicil was undersealed by two men and sealed shut by five. It is odd that the late-classical jurist Marcian (D.29.7.6.1–2) firmly denied that the codicils themselves had to be in the testator's own handwriting or sealed by him, a sentiment partially paralleled by Scaevola (D.31.89 pr., allowing an unsealed letter "if it had *fides*" to count as a codicil). These opinions are not considered interpolations. They possibly anticipate late-antique legal changes, which required subscribing witnesses for codicils and therefore (may have) made writing in one's own hand unnecessary: C.6.36.8.3 [424] (five subscribing witnesses, *subnotationem*) and C.6.23.28.6 [530] (if the testator writes with his own hand he does not need witnesses).

[15] D.48.10.1.8 (Marcian); the edict, D.48.10.15 pr. (Callistratus); also when manumitting the slave who wrote the wills or codicils, the testator must subscribe, D.48.10.15.2 (Callistratus), D.48.10.22.9 (Paul). See J. M. Fröschl, "*Imperitia Litterarum*," *ZSS* (RA), 104 (1987), 120–22 and O. F. Robinson, "An Aspect of *Falsum*," *TRG*, 60 (1992), 29–38.

wills (C.6.23.15 [320/326?]).[16] By the fifth century, the statement of the testator that the written document is *his* will is part of his own written subscription of his will, and required in the so-called "tripartite will" of Theodosius II (C.6.23.21 pr. + C.7.2.14 + C.5.28.8; N.Th. 16.1.2 [439/446]).[17] Testators had subscribed Roman law wills long before this, however, the subscription appearing in Greek as well as in Latin, one as early as 91.[18] Thus we see, in the will of Antonius Silvanus (*FIRA*, 3, 47 = *CPL* 221 [142]), the following: in a different hand from the body of the will, the subscription reads (in Greek), "I, Antonius Silvanus . . . have considered my will as it has just been set out, and have read it, and found it satisfactory just as it was set out." Gregory Nazianzus provides a similar example in 381: "I, Gregory, bishop . . . having reread the will, and being satisfied with all that has been written, have subscribed with my own hand, and I order and wish this will to be valid."[19] Other late-antique examples are similar.[20] Although such subscriptions also appeared in wills of the Roman period from Egypt written according to Greek rather than Roman law,[21] their addition to the Roman will was a conceptually easy one, since subscriptions such as these were very much like Gaius' spoken nuncupation, confirm-

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[16] C.6.23.15 combines also with 6.37.21 and 6.9.9 (for date, see J. C. Tate, "Codification of Late Roman Inheritance Law: *fideicommissa* and the Theodosian Code," *TRG*, 76 (2008), 241–42 and nn.21–23), with B. Albanese, "L'abolizione postclassica delle forme solenni nei negozi testamentari," in *Sodalitas. Scritti in onore di Antonio Guarino* (Naples 1984), 777–92 and Meyer (note 11), 271–73. If apparent defects in wording persist through the fault of a notary, they will be overlooked, C.6.23.24 and 25 [528].

[17] Also C.Th. 4.4.7.5 [424]; J.2.10.3.

[18] *ChLA* IX 399 [91]; other wills before the fourth century: *ChLA* X 412 [130]; *P.Oxy.* XXXVIII 2857 [134]; *FIRA*, 3, 47 = *CPL* 221 [142]; *BGU* XIII 2244 [186]; *P.Diog.* 10 [211]; *P.Oxy.* XXII 2348 [224]; and *SB* I 5294 [235]. Other types of specific or occasional subscriptions ("I made these erasures") noted by C. G. Bruns, "Die Unterschriften in den römischen Rechtsurkunden," *Kleine Schriften*, 2 (Weimar 1882), 83–85.

[19] Gregory, Beaucamp (note 3).

[20] *AE* 2016.2032 [332], 2033 [340], and 2036 [371]; *P.Ital.* I 4–5 BII 1–7 [fifth century], *P.Ital.* I 4–5 BIII 4–8 [470], *P.Cairo Masp.* III 67324 [525–6], will of Remigius of Rheims (*MGH SRM* III, 250-341 [533]), will of Aredius and Pelagia (J. M. Pardessus, et al., *Testamentum Aridii et Pelagiae matris eius: Diplomata, chartae, epistolae, leges aliaque instrumenta ad res gallo-francicas spectantia*, 1 (Paris 1843), 136–41 [573]).

[21] M. Kaser, *Das römische Privatrecht* [2. *Die nachklassischen Entwicklungen*] (Munich 1975), 481 & n.27 (adopted from Greek practice); for an overview, Nowak (note 4), 64 and 65 n.159.

ing and activating the words of the will.[22] Writing, and especially the testator's own hand, thus came over time to authenticate the will itself.

Writing affected the contribution of witnesses as well. How witnesses were to "bear witness" to a testator's *testimonium* Gaius had not elucidated. Evidence from what is known of will-writing and will-opening in the first and second centuries makes clear, however, that witnesses were expected to attach their seals to the outside of the closed tablets, and then acknowledge their seals at the will-opening.[23] Although Justinian's *Institutes*, four centuries later, claimed that witnesses' seals were not necessary for the validity of a will "under the old *ius civile*" (2.10.2),[24] this must be wrong, or at least a *very* old *ius civile*, before the first century BC, by which time the sealing of wills by seven witnesses was assumed and, indeed, was required if the praetor were to uphold a will's terms and grant *bonorum possessio* to the heirs named in the will if the will were for some reason invalid according to the *ius civile*.[25]

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[22] B. Strobel, *Römische Testamentsurkunden aus Ägypten* (Munich 2014), 28–29 suggests that the subscription was added because a Greek-speaking Roman citizen, unfamiliar with Latin, was approving the Latin version presented to him.

[23] An official will-opening (thus necessitating the will's prior sealing) was required by the *lex Julia vicesimaria* of AD 6, which imposed an inheritance tax, see Strobel (note 22) 55 nn.165, 167. For confirming seals at the will-opening, D.29.3.4 (Ulpian); Paul. *Sent.* 4.6; C.6.32; R. Martini, "Sulla presenza dei *signatores* all'apertura del testamento," in *Studi in onore di Giuseppe Grosso*, 1 (Turin 1968), 484–95; M. Kaser, *Das römische Privatrecht* [1. *Das altrömische, das vorklassische und klassische Recht*], 2nd ed. (Munich 1971), 692–93; Nowak (note 4), 76–94. The standard language in accounts of will-openings is *adgnovi*, "I recognize (my seal)," Nowak (note 4), 88 n.61.

[24] The requirement for the seals of seven witnesses continued through the Late Empire: C.6.23.12 pr. [293]; N.Th. 16.2 [439] (eastern part of Empire); J.2.10.3. For wills with seven sealers, see Nowak (note 4), 51–52 n.104 (adding *P.Köln* X 421 [525–45] and *P.Lond.* III 1308 = Nowak (note 4), 408–409 [521–2]).

[25] First century BC: unsealing or falsifying a seal on a will is one of the crimes targeted by the late-Republican *lex Cornelia de falsis*, Paul. *Sent.* 5.25.1, and Cicero quotes the praetor's edict, which states that the appropriate number of seals for a will was established by (an unknown to us) law (2 *Verr.* 1.117, with A. Watson, *The Law of Succession in the Later Roman Republic* (Oxford 1971), 13–15 and Nowak (note 4), 35–36). The praetor could not grant a *hereditas* (*Tit. ex corp. Ulp.* 23.6, 28.6), that is, could not declare the document a civil-law will that instituted an heir and granted *dominium* over property (G.3.32); he could only grant *possessio bonorum*, and this "possession of goods" he granted was *sine re*, which meant an heir instituted in a defective will could own the inheritance only after a year and

This permissible default from civil-law to praetorian succession all but guaranteed that *ius civile* mancipatory wills of nervous testators would be sealed by seven witnesses.[26] The various penalties of the *senatusconsultum Libonianum* of 16 also applied only if a will were sealed (D.48.10.6 pr. (Africanus)), and the requirement for sealing was reiterated by the *senatusconsultum Neronianum* of the year 61, which also imposed rules for closing and binding the *tabulae* (Suet. *Ner.* 17).[27] This attestation through sealing was the witnesses' confirmation that the words in the *tabulae* were those of the testator, not that they knew what the words were. This practice preserved the secrecy of the dispositions until the moment of the will-opening, and witnesses (according to Marcus Aurelius) did not even have to know Latin, only that they were sealing a will.[28] Sealing witnesses were thus (also) guarantors of the authenticity of the document.[29] Initially, at least, they *themselves* did not have to write their names next to their seals. Such writing nonetheless starts to appear in the second century, and Ulpian later identifies it as a requirement: "If any of the witnesses did not write his name on the will, but did seal it, it is as if he had not been called as a

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only if no intestate heirs existed and petitioned for it; see Buckland (note 4), 285–86; O. Tellegen-Couperus, *Testamentary Succession in the Constitutions of Diocletian* (Zutphen 1982), 20–21 n.7; T. Rüfner, "Testamentary Formalities in Roman Law," in K. G. C. Reid, M. J. de Waal, and R. Zimmermann, eds., *Comparative Succession Law* [1. *Testamentary Formalities*] (Oxford 2011), 6–7. The sources gathered by F. Terranova, *Ricerche sul* testamentum per aes et libram. [1. *Il ruolo del* familiae emptor *con particolare riguardo al formulario del testamento librale*] (Turin 2011), 424–25 make clear that the praetorian solution applied to wills in which there is some unintentional defect by civil law, in other words a mancipatory will was attempted but something in its execution was defective; see also Nowak (note 4), 34–35, 38, 40.

[26] The *libripens* (above note 6) and *emptor* served as witnesses in addition to playing their mancipatory roles: in the will of Antonius Silvanus, the two are in the "mancipation clause" but also seal and sign the will (*FIRA*, 3, 47 = *CPL* 221 [142]). In neither case are they "only" witnesses (Rüfner (note 25), 5): they played an active (if symbolic) role in the act of will-making, and by witnessing as well as performing made the will acceptable to the praetor. So *emptor* and *libripens* were necessarily present; if they also sealed, then the praetor would accept the will.

[27] G. Camodeca, "Nuovi dati dagli archivi campani sulla datazione e applicazione del 'S.C. Neronianum'," *Index*, 21 (1993), 359; discussion, Meyer (note 11), 165–66 (dating to 61) and Strobel (note 22), 23–24 (dating to 60).

[28] D.28.1.20.9 (Ulpian); also Paul. *Sent.* 3.4a.13.

[29] M. Nowak, "The Function of Witnesses in the Wills from Late Antique Egypt," in P. Schubert, ed., *Actes du 26e Congrès international de papyrologie, Genève, 16–21 août 2010* (Geneva 2012), 575; I have also argued that they initially served as judges of correct performance in formal acts, Meyer (note 11), 159–60.

witness; and if, as many do, he wrote his name on (*adscripserat*) but did not seal, we will still say the same."[30] (They could write in Latin or Greek.[31]) His close contemporary Paul went further. "It has been agreed," he wrote, that each of the individual witnesses who is summoned for a will must note in his own handwriting who has sealed" – so far, as Ulpian said – "and whose will" it was (D.28.1.30). This last comment is an addition, although (since it does not appear in actual wills)[32] it may have been a juristic suggestion rather than a requirement. So here too a performed action, witnessing, became an act that involved tablets and writing, and the names were then written by the participants themselves.[33] In the Late Empire this writing becomes more extensive, was called the *subscriptio*, and may have been required by Constantine for both wills and codicils: a law of Arcadius and Honorius (C.Th. 4.4.3.1-2 [396/403]) did require it, but claimed a *sanctio* of Constantine as precedent, although no such law survives, and the closest Constantinian law (C.Th. 4.4.1 [326?]) does not mention subscription.[34] Seven witnesses were also to seal and subscribe a

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[30] D.28.1.22.4 (Ulpian). In second-century practice, Nowak (note 4), 58–61. Attribution to Ulpian: P. Voci, "Testamento pretorio," *Labeo*, 13 (1967), 320 & n.8 argued that this excerpt was a later addition manipulated by Justinian's compilers, but Amelotti (note 11), 199 n.2 finds it acceptable.

[31] See *ChLA* IX 399 [91], a copy faithfully producing both languages, *FIRA*, 3, 47 = *CPL* 221 [142], *BGU* VII 1695 = *CPL* 223 [157].

[32] Whose will it is does not appear in the witness-attestations of the 33 Roman wills (many admittedly incomplete) translated by Nowak (note 4), 342–88; including this identification was an element of the Greek-will tradition, e.g., the wills published by T. Derda and M. Nowak, "Two Wills from Oxyrhynchos," *The Journal of Juristic Papyrology*, 42 (2012), 106–15 and T. Derda and M. Nowak, "Will of Ploution, Son of Ischyrion, from Oxyrhynchos, a Weaver (?)," *ZPE*, 207 (2018), 145–54.

[33] The only complete Roman will preserved, that of Antonius Silvanus (*FIRA*, 3, 47 = *CPL* 221 [142]), has a proper slot for seals on the outside (external face of *tab.* V), with *adnotationes* ("I sealed"); this face was then protected by a cover, but not sealed shut (O. Guéraud and P. Jouguet, "Un testament latin *per aes et libram* de 142 après J.-C.," *Études de Papyrologie*, 6 (1940), 2 and pl. 6). *BGU* VII 1695 = *CPL* 223 [157] is also original but fragmentary, and has at least one man noting *signavi.*

[34] Nowak (note 4), 61–62 suggested that C.Th. 4.4.1 [326?], which required five or seven witnesses for codicils and wills, might have been such a law, since its later interpretation (C.Th. 4.4.1 int.) referred to these witnesses as subscribing. Witness-subscribing is found in the third century (*SB* I 5294 [235]) and was endorsed in the fifth century; see also C.6.36.8.3 [424], N.Th. 16.2 = C.6.23.21 [439] and N.Val. 21.1 [446], and J.2.10.3, in which the witnesses had to subscribe "knowingly" (*non ignari*) to a will offered to them by the testator, and note that they were present for the composition

blind man's will dictated to a *tabularius*, or previously dictated to another party and read out by the *tabularius* in the presence of these witnesses, according to Justin (C.6.22.8 [521]). In the Late Empire, too, at the will-opening the witnesses were not only required to recognize their seals, but to write that they did so.[35] And Theodosius II's "tripartite will" reiterated the requirement of the subscription and sealing of seven witnesses, as did many of Justinian's enactments.[36]

II. Practice, and imperial enactments

Over almost a thousand years, then, the Roman will had moved from a simply oral statement to a document that had gradually incorporated into itself, and into writing, all of the performed oral elements that had once been characteristic of – required in – the process. The end-point was a document[37] whose validity was esta-

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of the will or that they had been offered the will. Such subscriptions are found in late-antique wills: Gregory of Nazianzus [381], Beaucamp (note 3); *FIRA*, 3, 52 [end fifth century]; *P.Lond.* III 1308 = Nowak (note 4), 408–409 [521-2]; *P.Lond.* V 1894 = Nowak (note 4), 409 [524–45]; *P.Köln* X 421 [524–45]; *P.Oxy.* XVI 1901 [sixth century]; *P.Cairo Masp.* III 67324 [525–6]; *P.Vat.Aphrod.* 7 [before 546–7]; *P.Ital.* I 6 [575]; *M.Chr.* 319 [seventh century]. The language of "being present, I subscribed with my own hand" is also found in Gregory's will, *P.Oxy.* XVI 1901, *P.Cairo Masp.* III 67324, and the will of Aredius and Pelagia, Pardessus, et al. (note 20), 137 [573].

[35] *P.Oxy.* LIV 3758 [after 325], the *logistes* requires this of witnesses; also at Ravenna, *P.Ital.* I 6 [575]; see Nowak (note 4), 88–90, 101. This too was seen in local Greek-law will-openings before the Late Empire, Nowak (note 4), 88: *P.Köln* II 100 = *SB* 10500 [133], *P.Strasb.* VI 546 [155], and *P.Oxy.* III 494 [165].

[36] C.6.23.28.6 [530], 6.23.29.6 [531], 6.23.30 [531], 6.23.31 [534], J.2.10.3.

[37] This describes the "tripartite will," and simplifies the situation, since in the Late Empire jurists refracted the combinational elements of the mancipatory will into separate types of will, (1) the purely 'nuncupatory' (C.6.11.2.1 [242] and C.6.23.21.4 [439], with seven witnesses; this had been accepted in classical law as well: D.28.1.21 pr., 28.5.1.1–3, 28.6.20.1 (all Ulpian), 28.1.25 (Javolenus), 29.7.20 (Paulus)). E. Garel and M. Nowak, "Monastic Wills: The Continuation of Late Roman Legal Tradition?," in M. Choat and M. C. Giorda, eds., *Writing and Communication in Early Egyptian Monasticism* (Leiden 2017), 110 n.22 identify *P.Lond.* V 1709 [566–8] as one; see also Nowak (note 4), 67–68); (2) the holograph (which deaf-mutes are now allowed to write in their own hand if their condition was not congenital, C.6.22.10.1 [531]; or the testator had to write, but not subscribe, in his own hand, with no witnesses, N.Val. 21.2 [446] with M. Beutgen, *Die Geschichte der Form des eigenhändigen Testaments* (Berlin 1992), 11–16, only valid in the western half of the Empire, Nowak (note 4), 69–70; or the testator wrote in his own hand and wrote that he had done so, but did not

blished only through writing, witnesses, and subscribing by the various parties.[38] Some of this change, especially the last phases of requiring the subscription of testator and witnesses, has been linked to Constantine's relaxation of the requirements for the mancipatory will. It is (it is argued) *because* requirements internal to the will (specific formal language) and to the process (wooden tablets, and possibly the mancipation itself)[39] were removed that external controls on the document are emphasized.[40] This is a logical argument, and works at a general level, but the timing does not correlate particularly well. On the one hand, some verbal formality may have already been vanishing in the third century, thanks to permission, probably granted by Alexander Severus, for Roman citizens to write wills in Greek (although this was perhaps possible only in Egypt).[41] Ulpian had also already claimed in the earlier third century that wills could be written on papyrus and

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need to subscribe, but must then have witnesses who seal and subscribe, C.6.23.28.6 [530]); (3) the will entered into the public *acta* (C.6.23.19.1 [413]). Nowak (note 4), 51–54 notes that the written will with five witnesses and the written will with seven witnesses (C.Th. 4.4.1 [326] (7 or 5), 4.4.3.1 [396/402] (5), 4.4.7.5 [424] (7 or 5); N.Th. 16.2 [439] (7), N.Val. 21.1 [446] (7 or 5) existed in practice, but C. Sánchez-Moreno Ellart, "The Late Roman Law of Inheritance. The Testament of Five or Seven Witnesses," in B. Caseau and S. R. Huebner, eds., *Inheritance, Law and Religions in the Ancient and Medieval Worlds* (Paris 2014), 229–57 argues that they were never juridically acknowledged as independent types of will in Late Antiquity.

[38] Nowak (note 29), 577 argues that, in the Late Empire, witnesses were the "sole element required for the validity of wills," but this overlooks the role of the testator's subscription (in the "tripartite will") and of the testator's handwriting (in the holograph will).

[39] Argued as implied in C.6.23.15 [320/326?] by, e.g., Albanese (note 16), 650–51 and many others, summarized Amelotti (note 11), 217–33, Sánchez-Moreno Ellart (note 37), 234–36, and Nowak (note 4), 19–46, 110–13.

[40] D. Johnston, *The Roman Law of Trusts* (Oxford 1988), 147; Nowak (note 29), 577; Nowak (note 4), 67.

[41] This edict or rescript does not survive, but is referred to five times (first in *SB* I 5294), see B. Rochette, "La langue des testaments dans l'Égypte du III[e] s. ap. J.-C.," *RIDA* (3rd), 47 (2000), 449–61 with M. Nowak, "*Titius Heres Esto.* The Role of the [*sic*] Legal Practice in the [*sic*] Law-Creation in Late Antiquity," *The Journal of Juristic Papyrology*, 40 (2010), 164–67 and Nowak (note 4), 110–13. It is also confirmed in C.6.23.21.6 + 7.2.14 + 5.28.8 [439]. Changes in third-century language (emphasizing mistakes, inaccuracies, and deviations) are studied by Nowak (note 4), 114–17; Strobel (note 22), 289–96 (analysing six wills that straddle the year 212) instead concludes that serious attempts were made to conform to traditional Roman requirements. He also argues (233) that Alexander Severus' constitution applied only to Egypt, and (236) that he allowed the Greek language but not changes in the formality that language should use.

parchment as well as wooden tablets, and this seems to have been the case in fact, and may have been permitted by Alexander Severus as well.[42] On the other hand, the new wills from North Africa (four dating from Constantine's reign) are written on wood and show a devoted fidelity to the traditional formal language: all have the ancient phrases *ex asse mihi heres esto* and *do lego*, and all but one *ceteri alii omnes exheredes sunto*; one has the formula for a legacy *per damnationem*.[43]

In addition to employing these formalities of language, three of these North African tablets were not only on wood but make specific reference to their physical form or *materia*. One calls itself a *codex testamenti*; one notes that the will is written in black ink on "smoothed triple tablets because I do not have a *codex testamenti* to hand"; and a third uses virtually the same formula, the testator also lacking a "prepared codex."[44] These three wills thus reflect a different context for understanding Constantine's relaxation of the rules about language and *materia*. His constitution permitted people to use other languages and other physical forms, but not all of his subjects wanted to, even fifty years later.[45] It is notable that prefabricated *codices testamenti* still existed, even if two of the three testators did not have time to find one, and that people felt that not using one required some explanation.[46] Devotion to

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[42] D.37.11.1 pr., where "we should accept" *tabulae* written in all types of *materia*, including papyrus and parchment, and again in Paul. *Sent.* 4.7.6; in N.Th. 16.2 [439] wills must still be sealed and tied; and in J.2.10.12. Third-century wills on papyrus: *PSI* VI 696 [third century]; *PSI* IX 1040 [third century]; *SB* I 5294 [235]; *P.Princ.* II 38 [264]; *P.Oxy.* VI 990 [331]; *P.NYU* II 39 [335–45], with Nowak (note 4), 112–13. Alexander Severus: L. Migliardi Zingale, "Dal testamento ellenistico al testamento romano nella prassi documentale egiziana: cesura e continuità?," in G. Thür and J. Vélissaropoulos-Karakostas, eds., *Symposion 1995. Vorträge zur griechischen und hellenistischen Rechtsgeschichte (Korfu, 1.–5. September 1995)* (Cologne 1997), 311–12.

[43] *Ex asse . . . , do lego*: *AE* 2016.2031 [294], 2033 [340], 2035 [330-50], and 2036 [371] (this one does not have the disinheritance clause), as well as 2032 [331], which also has *damnas sunto* (for this type of legacy, see G.2.201–208).

[44] *Codex*: *AE* 2016.2032 [332], with traces of a whitened background still visible, although only one hole in the frame; *in tabulis triplicibus rasici(bus) atramento scriptis . . . quod codicem testamenti pr(a)e manu non haberem*, *AE* 2016.2033 [340], with two holes in the frame; virtually same (*quod codicem paratum ad praesens minus invenire potui*), *AE* 2016.2036 [371].

[45] It is also possible that Constantine's constitution, promulgated at Serdica, only pertained to the eastern Empire, becoming universal only with its republication in the Code.

[46] Rothenhöfer and Blänsdorf (note 1), 156–57.

tradition goes even further, however. For one tablet ends with "Julius Julianus bought the *familia* for the purpose of making a testament; Julius Romantius was *antestatus*; Julius Siddin was *libripens*."[47] These men are playing their traditional mancipatory roles: Julius Julianus bought the *familia*, just as Gaius described it and Nemonius had done for Antonius Silvanus 200 years before. Whether the performance of the mancipation itself had decayed (at least in the East) even before Constantine's time, along with the other formal requirements of language and *materia*, has been a controversy among scholars for a long time, but this document gives new life to the possibility that, indeed, mancipation as a symbolic ritual, described by Gaius, was still performed.[48] The emperors may be giving permission for a relaxation of various requirements, but what they are allowing was already happening in the East, and not happening at all in the West. The transformation of the mancipatory Roman will into a free-form written document, secured only by witnesses, writing, and subscriptions, was less significant than it seemed before the 2016 finds: not as welcome, rapid, comprehensive or Empire-wide.

The timing of the legal requirement of testator- and witness-subscriptions, which supposedly served as replacements for lost formalities, was also chronologically incongruent with practice, and the application of this requirement was geographically uneven. For the requirement for these subscriptions (at their earliest, Constantinian) were preceded, at least in Egypt, by several centuries of the employment and acceptance of these in wills and in other documents of Roman law,[49] while the North African wills hardly use them at all. Only two of these wills, from 332 and 371, include a promise of a testator-subscription by their use of the phrase

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[47] *AE* 2016.2035 [330–50]. In the other wills the endings are not preserved.

[48] *Mancipatio*: not performed even in Gaius' time (Rüfner (note 25), 5)? M. Nowak, "*Mancipatio* and its Life in Late-Roman Law," *The Journal of Juristic Papyrology*, 41 (2011), 103–22 argued for its disappearance "much earlier" than the time of Constantine (a standard opinion, see above note 39). She also suggested ("The Function of Witnesses" (note 29), 576–77) that the need for the act disappeared with a rescript of Antoninus Pius (G.2.120), which strengthened the position of the *bonorum possessor* by allowing him to resist claims of those who would have been heirs had the testator died intestate. By contrast, *AE* 2016.2035 comments (p. 920) that this document shows that this type of will was *encore en vigeur à cette époque*.

[49] See above notes 18 (testator-subscriptions), 34–35 (witness-subscription and writing recognition of seals at will-opening); Nowak (note 4), 60 n.140 notes how common witness-subscriptions were in Greek testaments of the Roman period. See also, in general, Fröschl (note 15), 155.

subscribens et signaturus . . . subscripsi, signavi; the others make no mention of subscribing.[50] There is no reference to witness-subscriptions at all: three note specifically only that the testator has ordered or asked the will to be sealed, not that it be subscribed.[51] This lack of subscription would seem to endorse a strict reading of the words of C.Th. 4.4.1 [326?], which did not specifically say that witnesses were to subscribe although the constitution was interpreted even in antiquity as such, and casts some doubt on the claim of Constantinian precedent made by C.Th. 4.4.3.1–2 [396/403] as well.[52] In other words, in the East some legal change derived from imperial permission (the use of Greek) and some originated from the ways people had already expanded the role of writing in authenticating the mancipatory will, while in North Africa the pull of tradition appears to have been stronger and the late date of legal requirements for both forms of written authentication together (verifiably the case only under Theodosius II [439/446]) seems to be confirmed. In either part of the Empire it would have been dangerous to depart intentionally, without imperial permission,[53] from the standard language, standard performance, or standard materials Roman authority required. In the East, however, practice made clear that no harm was done by indicating the name of a sealer with an actual subscription, or by adding the testator's affirmation of the will's terms in writing. For it was also a precept of Roman law long established that additional or excessive material did not harm a legal document, just as trivial mistakes did not vitiate it, and it was these additions that eventually made their way into the law.[54]

So *usus* is much in evidence, even more so than *constitutiones*,

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[50] *AE* 2016.2032 [332] and 2036 [371]; 2033 [340] has *signavi et signari iussi* only, no subscribing. *AE* 2016.2035 [330–50] is the only tablet to preserve the end rather than the beginning of a will, and has no testator-subscription. Is it a coincidence that this will has mancipatory language but no subscribing, implying that performative formality obviated any need for external authentication?

[51] *AE* 2016.2032 [332], 2033 [340], and 2036 [371], *signandum optuli*. *AE* 2035 [330-50], the end of a will, omits any mention of witnesses entirely.

[52] For discussion of both, above note 34.

[53] Hence I find unlikely the argument that mancipation faded away out of difficulty or lack of understanding, Nowak (note 15), 21; note also that Roman wills of the Justinianic period show a healthy respect for Justinian's technical requirements, J. Beaucamp, "La transmission du patrimoine: législation de Justinien et pratiques observables dans les papyrus," *Subseciva Groningana. Studies in Roman and Byzantine Law*, 7 (2001), 2–5, 7–8, 12, as did those before 212 (below note 64).

[54] Paul. *Sent.* 3.4a.10; C.Th. 4.4.3 pr. = C.6.23.17 [396/402]; C.6.23.28 pr. [530].

and with a striking range of differences between East and West in the late-antique period. The requirement for testator- and witness-subscriptions was clearly rooted in the "*usus* of men," although the *Institutes* declares (2.10.3) that these elements of the tripartite will were "discovered" in imperial enactments and derived from "the scrupulousness of sacred *constitutiones*," when such laws in fact merely accepted usage that had long existed. In other words, the *Institutes*' history, with which we began, is a distortion, a claiming of credit made possible by not looking at anything outside the world of the law despite the token reference to *usus*. Indeed, the *Institutes* never attributes any specific requirement to testamentary *usus*, although clearly it contributed a great deal.

III. Blind spots: illiteracy and work-arounds

It is only by looking at change in the law and in actual practice over time that the over-simplifying view of the author(s) of the *Institutes* can be appreciated and adjusted. A look at another kind of related testamentary usage reveals not the history the *Institutes* preferred to see, but the world its authors and their predecessors did not see. For even with the heightened emphasis on writing that witness- and testator-subscribing would demand, there was for a long time no recognition in the law that there could be a problem here for those who could not write. This indifference had a long history in the Roman law. For one thing, classical jurists in general did not concern themselves with illiteracy.[55] Moreover, in (surviving) practice no known testator with a subscription in a Roman will before the year 295 *was* illiterate, nor any witness to a will before the year 320.[56] Illiterates in Egypt were more likely to be the poor,[57] and poor people were in turn less likely to write wills. And when illiteracy did appear in 295, the testator was a woman, Aurelia Eustorgis, and women were more likely to be illiterate and less likely to write wills, and their illiteracy therefore was more likely

[55] Fröschl (note 15), 94–109 (only directly mentioned in D.27.1.6.19 (Modestinus), related inexactly to *Frag. Vat.* 244, on possible excuses for refusing a tutorship; D.14.3.11.3 (Ulpian), on not reading public notices; D.48.2.3.2 (Paul), subscription in criminal prosecution, with Bruns (note 18), 49–54).

[56] Illiterate testatrix: *M.Chr.* 318 [295]; three illiterate centurion-witnesses, *P.Köln* VII 188 = *SB* XII 11042 [320], "once . . . a rare condition at this rank," W. V. Harris, *Ancient Literacy* (Cambridge, MA 1989), 316.

[57] R. Calderini, "Gli ἀγράμματοι nell'Egitto greco-romano," *Aegyptus*, 30 (1950), 25 (and also more likely to be workers, 25–26).

to be an almost invisible problem.[58] Finally, the illiteracy of testators could be compensated for by someone else writing for them, and saying they had done so. This "because s/he does not know letters" clause was older than the Romans in Egypt,[59] was used also on the few occasions that will-witnesses too were illiterate, and was clearly accepted locally as valid. If the habit of testator- and witness-subscribing was taken over from local usage in the East, as the gaps between their appearance in practice and the legal requirement for them strongly suggest, then it is not surprising that an accepted work-around for the illiterate came along as well, and also not surprising that Roman legal authors assumed, and silently and unproblematically accepted, its existence.

Such acceptance of others writing for you was also deeply rooted, even if this fact, too, was often invisible. Roman legal authorities had long assumed that the writing of a will was not done by the testator himself. The testator's child or the slave of another could take wills by dictation, as could *testamentarii* (testamentary scribes), *librarii* (scribes), and *magistri* (teachers).[60]

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[58] Women in Egypt more likely illiterate, H. C. Youtie, "ΑΓΡΑΜΜΑΤΟΣ: An Aspect of Greek Society in Egypt," *Harvard Studies in Classical Philology*, 75 (1971), 170; Harris (note 56), 279–80. Roman women were less likely than men to write wills, for they faced some legal restrictions: they had to be of age (12), had to have undergone *coemptio* (which freed them from *potestas* or *manus*) – a restriction lifted only by Hadrian – and had to receive the permission of their tutor (if they had one), G.2.112–113, 118. E. Champlin, *Final Judgments. Duty and Emotion in Roman Wills 200 B.C. – A.D. 250* (Berkeley 1991), 46–49 estimates that only one in five testators was female, and notes that juristic discussion of wills took no notice of sex (47). No Roman will of a Roman woman before 212 survives from Egypt; of all the wills of the illiterate in both the Greek and Roman tradition, seven of thirteen were of women. Wills of illiterate Greek women written in the Greek-law tradition before 212: *P.Wisc.* I 13 [early second century], *P.Oxy.* III 490 [124], *P.Oxy.* III 492 [130], *P.Köln* II 100 = *SB* 10500 [133], *PSI* XII 1263 = *SB* V 7816 [166-7]; after 212, *P.Lond.* III 1308 = Nowak (note 4), 408–409 [521–2], *P.Vat.Aphrod.* 7 [before 546–7]. Wills of illiterate men, Derda and Nowak (note 32), 106–15 [first-second century], *P.Oxy.* LXVI 4533 [first-second century], *P.Oxy.* III 489 [117], *P.Ital.* I 4-5 BIV 3-6 [474], *SB* XVIII 13740 [sixth-seventh century], *M.Chr.* 319 [seventh century].

[59] Calderini (note 57), 15–16; L. C. Youtie, "Notes on Subscriptions," *ZPE*, 18 (1975), 215 n.5 (nn. 3–4 give examples, starting in the first century AD).

[60] Dictating, D.29.1.40 pr. (Paul); slave, 28.1.28 (Modestinus); *testamentarii*, 28.5.9.3, 28.5.9.6, 29.6.1 pr., 36.1.3.5 (all Ulpian), 48.10.15.6 (Callistratus), 48.10.22.10 (Paul); *ILS* 7749 (Gades); *CIL* XII 3538 (Nîmes), with Amelotti (note 11), 115 n.3; *librarius*, *ILS* 7750 (Venafrum); *magister*, *ILS* 7763 (Naples). See also Champlin (note 58), 70–75; Robinson (note 15);

Friends were called on to write four of the five late-antique North African wills.[61] Indeed, it was an acknowledgement that others would be writing, and thus in a position to write favorable terms for themselves into a will, that animated the *senatusconsultum Libonianum*, which penalized such activities and introduced the requirement that the testator write codicils in his own hand. Here too the interest was not in illiteracy, but in fraud. Attention elsewhere, in practice but mostly among jurists, similarly focused on a higher-level problem, that of defects of formal language, rather than on the lower-level problem of illiteracy. Thus in order to avoid an unintentional mistake in the required language, formularies were created and followed, such as *P.Hamb.* I 72 = *ChLA* XI 496 [second-third century],[62] and much legal chatter was generated by jurists discussing proper language and ways of compensating for that language's absence.[63] As a consequence, the surviving Roman wills before 212 follow the established civil-law formulae with

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and M. Avenarius, "Formularpraxis römischer Urkundenschreiber und *ordo scripturae* im Spiegel testamentrechtlicher Dogmatik," in M. Avenarius, R. Meyer-Pritzl, and C. Möller, eds., Ars Iuris. *Festschrift für Okko Behrends zum 70. Geburtstag* (Göttingen 2009), 18–19.

[61] *AE* 2016.2031 [294], 2032 [332], 2033 [340], and 2036 [371]; the last three specifically say that the testator has read over the will before subscribing and/or sealing it. These testators were not illiterate, but ill.

[62] See also Nowak (note 4), 105–106, 109–10; the best-preserved will, *FIRA*, 3, 47 = *CPL* 221 [142] follows it but adds some incorrect details, D. Liebs, "Das Testament des Antonius Silvanus, römischer Kavallerist in Alexandria bei Ägypten, aus dem Jahr 142 n. Chr.," (2008), available digitally at Universitätsbibliothek Freiburg: FreiDok plus (an improved version of an essay published in 2000).

[63] A selection: order of topics in a will, Avenarius (note 60), 22–40. Qualities of testators: deaf-and-dumb a disqualification, D.28.1.6.1 (Gaius), 28.1.25 (Javolenus); Tit. ex corp. Ulp. 20.7, 20.13 (because the purchase of the family must be heard and the nuncupation must be spoken); of age and *sui iuris*, D.28.1.6 pr. (Gaius). Defects in formal wording: in, e.g., the institution of the heir, D.28.5.1.5 (Ulpian), 28.5.9.2, 28.5.9.5, 28.5.9.6 (all Ulpian), and C.6.23.7 [290], all discussed in O. Tellegen-Couperus, "The Origin of 'quando minus scriptum, plus nuncupatum videtur' used by Diocletian in C. 6.23.7," *RIDA* (3rd), 27 (1980), 313–31 and O. Tellegen-Couperus (note 25), 23–26, although she assumes that the entire contents of the written will were nuncupated; in legacies, G.2.218; see also Avenarius (note 60), 21–22. Compensatory arguments: see examples cited in Meyer (note 11), 267–70, 273–74; for further literature see Sánchez-Moreno Ellart (note 37), 233–34 n.16. The multimedia quality of the mancipatory will, which was one basis for this type of argumentation, provided the "theoretical framework" for interpretation well into the Late Empire, Sánchez-Moreno Ellart (note 37), 233 & n.16, and note that the restrictions on some of the deaf and dumb, which assumed hearing and speaking mancipation and nuncupation, were not lifted until 531 (C.6.22.10).

admirable closeness,[64] and much juristic genius was showcased in enjoyable argument about written formality. Before the late-antique period there were, therefore, attempts to address the challenge of drafting a formally correct written will from the side of practice (experienced writers, or scribes using formularies) and from the lofty perch of legal opinion (proposing arguments of compensation), but the question of illiteracy was not addressed.

The possibility that a testator might be illiterate and unable to subscribe his (or her) own will is not acknowledged, nor offered a remedy in law, until late. The *Novella* of Theodosius II that created the "tripartite will" (requiring a testator-subscription in the presence of seven witnesses) also included, for the first time,[65] the following: "if the testator should be ignorant of letters or should not be able to subscribe, We decree that the aforesaid regulations shall be observed and that an eighth subscriber shall be employed in his stead" (C.6.23.21.1 = N.Th. 16.3 [439]). Although this precept was followed in practice, if one counts the man writing for the testator a subscriber of the will,[66] there was also recourse to already existing ways of doing things. These included having another man write for the illiterate, sometimes with a smaller number of witnesses,[67] as well as the testator merely making a cross rather than having someone write for him.[68] Justinian subsequently required a testator to write in the name of the heir(s) either in his *subscriptio* or in another part of the will (C.6.23.29 pr. [531]), but this too was

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[64] Nowak (note 4), 22 and 130, 131–32, 153–54.

[65] Fröschl (note 15), 118, 124; the only earlier accommodation was the possibility of someone writing for an illiterate in a criminal accusation, D.48.2.3.2 (Paul).

[66] *P.Lond.* III 1308 = Nowak (note 4), 408–409 [521–2] and *P.Vat.Aphrod.* 7 [before 546–7], both with a writer for the testator and seven, not eight, witnesses. In two cases from Ravenna, it is unclear how many witnesses there were: in *P.Ital.* I 4–5 BIV 3–6 [474] an illiterate testator "made the *signum* below with (my) own hand" (*subter* [*sic*] *manu propria signum feci*) in the presence of the "proper number of witnesses" (*praesentibus testibus numero competenti*), as did another who, when ill, "made the sign of the blessed cross as best I could in the presence of witnesses" (*signum tamen be<at>ae crucis, ut potui, coram testibus impressi*), who were again of the "proper number" (*P.Ital.* I 5, BVI 12–VII 11 [before 552]).

[67] *SB* XVIII 13740 [sixth-seventh century], four witnesses (and a fifth writes for those of them who were illiterate); *M.Chr.* 319 [seventh century], five witnesses.

[68] In *P.Ital.* I 4–5 BIV 3–6 [474] and I 5 BVI 12–VII 11 [before 552], recognized only later by Justinian (C.6.30.22.2b [531]), in the context of an heir signing an inventory with a cross, with a notary subscribing for him and witnesses.

followed immediately by a work-around. If he is unable to subscribe because of illness or illiteracy, "the name or names of the heir or heirs is to be nuncupated to the present witnesses" and, indeed, the witnesses are then to write this or these down (C.6.23.29 pr.–1, 4; J.2.10.4). In 544, however, Justinian reversed himself (Nov. 119.9), and there is no clear sign that these precepts, only briefly in existence, were followed. In general, then, only passing thought is given, quite late, to the possibility of an illiterate testator, and does not reveal much that is creative: add another subscriber instead.[69]

Witnesses lived in the same law-givers' blind spot that testators did, for legal authorities also made assumptions about witnesses that made the idea of their illiteracy only a distant possibility. Witnesses were to be Roman citizen males above puberty, and men of the highest status available.[70] Juristic and imperial opinion in general reinforced this last characteristic, for they said that the qualities valued in witnesses by a court were those of *dignitas*, *fides*, *mores* (virtuous practice), and *gravitas* (D.22.5.2 (Modestinus)); Hadrian explicitly endorsed *dignitas*, *existimatio*, and *auctoritas* in a witness (D.22.5.3.1–2).[71] These were men unlikely to be illiterate; rather, they were likely to be well-known, city-dwellers, and much in demand.[72] The habit of listing witnesses in descending order of status is well-attested in the early Empire, and can still be seen in the *Tablettes Albertini* in late-fifth century Vandal North Africa.[73] So powerful was the force of status that even the witnesses' acknowledgment of their seals at a Roman will-opening could be bypassed by an appeal to it. As Gaius explained (D.29.3.7), when all the witnesses were not available, the tablets could be opened with the cooperation of men "of the best repute" (*optimae opinionis viris*), copied and acknowledged (*descriptum et recognitum*), resealed (by them), and sent to the witnesses so they could inspect their (that is, the original) seals, while the business of executing the will could continue. This was allowed because it was unthinkable that a man (an important man, obviously) who had acted as a witness would be called back from

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[69] Which had already been proposed in C.6.22.8.2 [521], to take the place of a *tabularius* in the will of a blind man; cf. J.2.12.4.

[70] See, for several types of document, Meyer (note 11), 156, 158–68.

[71] See also E. A. Meyer, "Evidence and Argument. The Truth of Prestige and its Performance," in P. J. du Plessis, C. Ando, and K. Tuori, eds., *The Oxford Handbook of Roman Law and Society* (Oxford 2016), 275–77.

[72] Such as Pliny the Younger, *Ep.* 1.9.2–3; and see other examples cited at Meyer (note 11), 162 n.119.

[73] H. Weßel, *Das Recht der Tablettes Albertini* (Berlin 2003), 235, with further references in n.104.

performing his *officium*, his duty.[74] When the idea of witness-illiteracy is seemingly grasped, at last, by Justinian, he ordained (in 534, one hundred and forty years after Arcadius and Honorius had first required the subscription of witnesses) that

> in those places where literate men are rarely found, through the present law We allow country folk (*rusticani*) to observe their ancient custom in the place of law, as long as, however, that where those knowing letters are to be found, the seven witnesses who are necessarily summoned to (making) a will be gathered and each subscribe for himself. Where, however, literate men are not found, seven witnesses offering testimony even without writing are allowed. But if in that place not even seven are found, We order that as few as five witnesses be employed by any means; but in no way do We allow fewer. But if one or two or more of them know letters, they shall be permitted to write their signature for the illiterate who nonetheless are present, provided that these witnesses know the testator's wish and especially whom he wants to leave as heir or heirs to himself; and after the testator's death they attest this under oath (C.6.23.31.2–4).

So it is finally accepted in law that a literate witness may write for an illiterate witness, as long as the latter is present as a witness, knows the testator's intentions, and is willing to take an oath to that effect. As far as Justinian is concerned, this is a situation that could only arise in the countryside, not in "all cities and (army) camps of the Roman world" (C.6.23.31.1), to which this relaxation of legal rules is emphatically not extended; but it had been a practice accepted for centuries in Egypt. So this is another example of *usus* that makes its way into legal practice, indeed had made its way long before the law even noticed. The practice of men precedes the "emendations of enactments" claimed in the *Institutes*, in this case revealing how indifferent Roman legal authority had been, for how long, to a problem that could have been predicted and must have arisen. The Roman response also reveals, in passing, a simplifying view of a world consisting of cities and army camps, where people could read and write, and the land of *rusticitas*, where they could not.[75]

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[74] Also Paul. *Sent.* 4.6.2; this is the procedure followed in C.6.32.2 [256].

[75] T. Mayer-Maly, "*Rusticitas*," in *Studi in onore di Cesare Sanfilippo*, 1 (Milan 1982), 309–47 (tracing the concept of *rusticitas* in Roman law). The practice of will-writing in Roman Egypt does not, however, show a strong

Emperors and imperial jurists gave themselves more credit than they deserved, and by their omissions revealed what they overlooked. The new fragments of wills from North Africa in their turn show that usage itself did not change in a uniform fashion, and suggest that there were substantial differences between a more conservative Roman West and a Greek East more open to incorporating local practices. *Usus* varied across the Empire, but especially in the East contributed its own way of authenticating documents, sufficiently sturdy and trusted that it, and its workarounds for the illiterate, were incorporated into the law itself, centuries after their appearance in practice and, for testators and witnesses, centuries before the law required them. In the end, it was the "practice of men" that became the "emendations of enactments."

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dichotomy between villages and *metropoleis*, M. Nowak, "Village or Town? Did it Matter for Making Wills in Roman Egypt?," in M. Langellotti and D. Rathbone, eds., *Village Institutions in Egypt in the Roman to Early Arab Periods* (Oxford 2020), 109–21. The very late fifth-century *Tablettes Albertini* (mostly sale documents from North Africa) show a small number of protagonists (16%) subscribing documents in their own hand (9/14 female vendors specifically "did not know letters," and 17/25 men the same), but a much larger number of witnesses (67%) able to subscribe, and often called upon to subscribe more than one document, J. P. Conant, "Literacy and Private Documentation in Vandal North Africa: The Case of the Albertini Tablets," in A. H. Merrills, ed., *Vandals, Romans and Berbers. New Perspectives on Late Antique North Africa* (Padstow 2004), 204–209. He also points out that all 69 witnesses in the Ravenna papyri subscribed in their own hands, suggesting that "securing ... literate witnesses was standard practice," and that there was a difference here between city and countryside (209).