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## MISCELLANEA TESTAMENTARIA

## I. Pliny Epp. 7.6.8-10:

Mater amisso filio (quid enim prohibet, quamquam alia ratio scribendae epistulae fuerit, de studiis disputare?) libertos eius eosdemque coheredes suos falsi et ueneficii reos detulerat ad principem, iudicemque impetrauerat Iulium Seruianum. Defenderam reos ingenti quidem coetu; erat enim causa notissima, praeterea utrimque ingenia clarissima. Finem cognitioni quaestio imposuit, quae secundum reos dedit. Postea mater adiit principem, adfirmavit se novas probationes inuenisse. Praeceptum est Suburano, ut uacaret finitam causam retractanti, si quid noui adferret.

In one of his more endearingly self-laudatory passages, the younger Pliny celebrates an earlier courtroom witticism in a letter devoted to quite another topic. The matter of the case, inevitably subordinated to Pliny's role in it, is of some interest despite the lack of detail. A man died, leaving his mother and some freedmen as coheirs. The mother accused the freedmen of poisoning their master and forging his will. The emperor Trajan gave her Iulius Servianus as a judge and, since the case was notorious and counsel on both sides (including Pliny) were distinguished, it was heard before a large crowd. The mother lost. Later, claiming to have discovered fresh evidence, she went again to the emperor, who this time assigned the case to (Attius) Suburanus. All this leads up to Pliny's bon mot, and no more: no hint as to the outcome of the case, and all the names have been suppressed. Nevertheless, it fits well into what we know of forgery trials, and one aspect of the incident bears further investigation - why did the emperor choose Servianus and Suburanus, both men of tremendous eminence, as judges?

We are well informed about the trial of cases of testamentary falsum under the Principate. In the provinces, such cases were naturally the concern of the governor, as far as our evidence (all second and third century) goes.<sup>1)</sup> In Rome, however, they fell to the praefectus urbi himself. The instances are few but telling. Most celebrated is the forgery of the will of Domitius Balbus, an old, wealthy and childless ex-praetor, to which Tacitus assigns an astonishing amount of space under the year 61. Here the important point is that the original prosecutor was subsequently tried and condemned for indicting the accused before the praetor, to avoid having them charged - as was presumably normal - in the court of the city prefect.<sup>2)</sup> In the second

1) Dig. 48.2.18 (Modestinus) and 5.3.5.1 (Ulpian, referring to a case under Hadrian); CJ 1.40.1, 9.22.7 and 17, cf. 6.37.9 (all third century); SEG 29.127 (Marcus Aurelius).

My thanks to Géza Alföldy for his comments and to the Alexander von Humboldt-Stiftung for its support of a ten-month stay in Heidelberg.

2) Ann. 14.40-41.

century we find the wicked uncle in Apuleius' *Apologia*, Sicinius Aemilianus, continuing to impugn the will of his own uncle, even after it had been vindicated *amplissima causa* in the court of the urban prefect, Lollius Urbicus.<sup>3)</sup> Moreover, about the same time, the jurist Scaevola notes two scandalous cases, one tried *apud praefectum de falso testamento*, the other before the *praefectus urbi*.<sup>4)</sup> Among the cases of testamentary forgery where the court is known, only one was not tried before a governor or an urban prefect. This concerned charges made against some of the codicils to the will of the senator Iulius Tiro around the year 107, but here Pliny tells us explicitly that the aggrieved heirs and plaintiffs had written a communal letter to Trajan in *Dacia*, begging him to take up the case himself, which he did.<sup>5)</sup> Why he did so is quite clear: the defendants were Eurythmus, *Caesaris libertus et procurator*, and the knight Sempronius Senecio who was later, and may already then have been, in the emperor's service as well.<sup>6)</sup> According to Pliny, Trajan undertook the case to show that he was not a tyrant and his servants were not immune from the law ("I am under suspicion"), and indeed Tacitus remarks in another context that charges against imperial freedmen and procurators were commonly heard *apud principem*.<sup>7)</sup> Hence the case of Tiro's codicils is an easily explicable exception.

In the case of the angry mother, however, Trajan declined to judge, referring it successively to Servianus and Suburanus. The simple explanation for his choice of judges is not that these men were specially selected for what was an ordinary if sensational case; it is that they were in succession prefects of the city of Rome, and that such a case was within their normal jurisdiction. The urban prefecture was the very summit of a senatorial career, and while the office is not attested for either man, it certainly fits their careers. It has long been observed that the honour of the prefecture was commonly associated with that of a second consulship. L. Iulius Ursus Servianus (cos. 90) was consul II ordinarius in 102, while Sex. Attius Suburanus (cos. suff. 101) followed him as consul II ordinarius in 104.<sup>8)</sup> Pliny's letter, incidentally mentioning the *falsum* case, should fall around late 107, when the offices would have been so fresh in his correspondent's mind as to need

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3) *Apol.* 2-3.

4) *Dig.* 45.1.135.4 and 48.10.24.

5) *Epp.* 6.31.7ff.

6) *AE* 1975.849, with *CIL* II 3661 (Senecio). H.-G. Pflaum, in the *Suppl.* to his *Carrières* (1982) 103A, argued that Senecio was not yet in the imperial service in 107. However the affair might have led to a hiatus in his career, not visible in the new *cursus inscriptionis*.

7) *Dial.* 7.1.

8) See most recently L. Vidman in *Epigrafia e ordine senatorio*, Roma 1982, I 289-303. He notes that R. Syme had already suspected on the basis of this passage that Suburanus was prefect, at Tacitus, Oxford 1958, 645. This Vidman considers little likely for chronological reasons (296), though he elsewhere acknowledges (301) that there were no rules governing length of tenure.

no mention. If that is so, we have two new praefecti urbi, c.102 and c.104.

There is one rather startling item to add in support of the hypothesis. Although the fasti for the urban prefecture are far from complete, we happen to know that Q.Glitius Atilius Agricola, cos. suff. 97, cos.II suff. 103, was also at some point in his career, presumably c. 103, praefectus urbi; as was Ti.Iulius Candidus Marius Celsus, cos. suff. 86, cos. II 105, presumably c. 105.<sup>9)</sup> The truly extraordinary number of second consulships in Trajan's early years has always been striking.<sup>10)</sup> It looks as if he was also trying an annual turnover in the urban prefecture, if we do indeed have the remarkable series of prefects c. 102, c. 103, c. 104, and c. 105.

## II. Justinian, Inst. 2.25 pr.:

Ante Augusti tempora constat ius codicillorum non fuisse, sed primus Lucius Lentulus, ex cuius persona etiam fideicommissa coeperunt, codicillos introduxit. nam cum decederet in Africa, scripsit codicillos testamento confirmatos, quibus ab Augusto petiit per fideicommissum, ut faceret aliquid: et cum divus Augustus voluntatem eius implesset, deinceps reliqui auctoritatem eius secuti fideicommissa praestabant et filia Lentuli legata, quae iure non debebat, solvit. dicitur Augustus convocasse prudentes, inter quos Trebatium quoque, cuius tunc auctoritas maxima erat, et quaesisse, an possit hoc recipi nec absonans a iuris ratione codicillorum usus esset: et Trebatium suasisse Augusto, quod diceret utilissimum et necessarium hoc civibus esse propter magnas et longas peregrinationes, quae apud veteres fuissent, ubi, si quis testamentum facere non posset, tamen codicillos posset.

It is a curious article of faith that this Lentulus was proconsul of Africa when he died in that province, perhaps or probably in A.D. 4. That year has accordingly entered the legal literature universally as the precise date of the birth of the so-called ius codicillorum. B.E.Thomasson, compiler of the fasti for the North African provinces, is the only scholar who has rejected what by any standard is a highly dubious chain of inference.<sup>11)</sup>

It is first simply illicit to assume that a Roman senator who died in a province was necessarily governor there, and it is hard to think of another instance where chance attestation of mere presence in a province has led to a similar conviction. Nor is there any need to defend the contrary assertion - that he may not have been a governor - by offering a list of obvious alternative reasons for Lentulus' presence in Africa.<sup>12)</sup>

9) Respectively, CIL V 6980 and IK 13 (I Ephesos 3) 810.

10) See most recently R.Syme, ZPE 58,1985,235.

11) See most recently his Laterculi praesidium I, 1984,373, listing and in part replying to his critics.

12) U.Weidemann, Gnomon 37,1965,794 (in review of Thomasson) insisted that Lentulus must have been governor because Roman senators needed imperial per-

There is certainly no hint that the compiler of the Institutes thought him to be a governor: he is simply Lucius Lentulus, who died in Africa. If the jurist Trebatius is correctly reported, his opinion rested not on a specific and familiar appeal to the exigencies of state service, as one might expect, but on the broad consideration that codicilli were useful for citizens in general, those who make long journeys.

The Cornелии Lentuli proliferated notably in the late Republic and early Empire.<sup>13)</sup> If we assume that this L.Lentulus was proconsul of Africa under Augustus, he must indeed be L.Cornelius L.f. Lentulus, consul 3 B.C., the only consular Lucius available; hence, from the date of his consulship, prosopographers deduce the date of c. A.D. 4 for his death in office. But if we do not assume a proconsulship, he could be another L.Lentulus, this man's apparent father, for instance, praetor in 44 B.C.<sup>14)</sup> Or he could be one of the obscure Lentuli not yet attached to the pedigree (e.g. PIR<sup>2</sup> C1388). Or he could simply be an otherwise unknown member of the family: they do turn up.<sup>15)</sup>

The jurist C.Trebatius Testa, consulted on this significant occasion by Augustus, first appears in 54 B.C. in the letters of Cicero, already then an old friend of the orator and a jurist of eminence. On the standard calculation, that of P.Sonnet (as explained in the PW version, s.v. 'Trebatius 7'), he should have been at least thirty years old then, when he joined Caesar in Gaul. Thus, if born - as seems probable and as no one disputes - no later than 84 B.C., he would have been at the least 88 years old in A.D. 4. Trebatius was an avid swimmer (Cicero, Fam. 7.10.2, Horace, Sat. 2.1.7-9) and perhaps therefore healthier than average. He certainly lived to give an opinion on the divorce or non-divorce of Maecenas and Terentia (Dig. 24.64), in the 20's or slightly later, though dating the sequence of events in that marriage is difficult. He may indeed have lived to 88 and more, and he may even then have remained mentally alert, "cuius tunc auctoritas maxima erat" - anything is possible - but both propositions are unlikely in the extreme. The L.Lentulus on whose codicils he gave his opinion must have died 20 or 30 years before A.D. 4.

Finally, historians have assumed that the text of Justinian here, written over 500 years after the event and citing no authority, is accurate. It is mission to visit most provinces, including Africa. Either such permission was readily forthcoming - and there is no reason to think that Lentulus did not have it - or scores of senators attested as privati in the provinces were there illegally.

13) Stemma: G.V.Sumner, *Orators in Cicero's Brutus*, 1973, 142f., with adjustments by T.P.Wiseman, JRS 65, 1975, 198.

14) It can not be deduced from Justinian that Lentulus himself had no son - only that certain legacies were charged to a daughter in the codicils to his will.

15) ZPE 36, 1979, 110: the consul of A.D. 27 is now L.Lentulus Scipio. Cf. the otherwise unsuspected P.Scipio, quaestor in A.D. 1 (AE 1967.458), also a Lentulus.

not, and it has been roundly condemned by several Romanists as being completely devoid of credence as a source of legal history.<sup>16)</sup> Wherever the details may come from, the inferred office of proconsul and its date are unnecessary and unlikely, and the very existence of L.Lentulus must be open to doubt.

III. The most important of surviving Roman wills is the so-called testamentum Dasumii from the year A.D. 108 (CIL VI 10229 = FIRA<sup>2</sup> III 48). It is unique as the one Roman will known to have been inscribed in toto. All other testamentary inscriptions record or refer to particular capita and are in fact limited to those legacies or fideicommissa which arranged for funerals, tombs and foundations: that is to say, for all the richness of the information they contain, they are confined to one aspect of testation, the implicit or explicit need for assurance that the testator will be remembered.<sup>17)</sup> With the testamentum Dasumii we have a glimpse of the entire, if very fragmentary, will of a rich man who moved in the highest circles of Trajanic Rome, one who included not merely the emperor (mention could have been pro forma) but numerous senators and knights among his legatees, and considered L.Iulius Ursus Servianus (cos. II 102, III 134) a very close friend. The document is rich in personal detail, amounting to a nicely calibrated personal universe of kinship, friendship and patronage, expressed in the testator's detailed last wishes; his identity would be worth knowing, though at present it remains a mystery.

A testamentary adoption is recorded in the third line, and this together with some fragmentary names led long ago to the confident identification of the testator on prosopographical grounds with a shadowy Spanish consular named Dasumius. A decade ago a new fragment was discovered, a thin sliver which attached neatly to the first 19 lines, and Professor Eck's splendid analysis of the newly reconstituted document cast very serious doubt on this identification.<sup>18)</sup> That doubt and new information from the new text led naturally to renewed search for the testator's true identity. Several searchers (including myself) came independently to the conclusion that he was none other than the unhappy millionaire and ex-consul Domitius Tullus, whose fortune is the subject of one of the gems of the younger Pliny's correspondence (Epp. 8.18).<sup>19)</sup> Such an identification raises serious difficulties, chronological (can the date of Tullus' death, as deduced with difficulty from Pliny and, more importantly, from brickstamps, really be

16) A.Guarino, ZSS 62,1942,209-254, esp. 252ff., and SDHI 10,1944,317-332; E.Genzer, RHDfE<sup>4</sup> 40,1962,319-350; A.Metro, Studi sui codicilli I, 1979,9-60.

17) The one possible exception is the so-called testamentum Lingonis, CIL XIII 5708 = FIRA<sup>2</sup> III 49, but the long surviving fragment deals only with tomb arrangements.

18) W.Eck, ZPE 30,1978,277-295, with bibliography of the inscription.

19) A strong case will be made by R.Syme in Chiron 15,1985, adumbrated by him elsewhere. I presented another case in 1983 in Princeton, München and Köln.

squared with the year 108 on the inscription?) and legal (can the contents of Tullus' will, as obscurely described by Pliny, really be squared with the details to be derived from the inscription?). That the testator of the testamentum Dasumii was Domitius Tullus seems to me today to be unlikely. Of one thing I am now convinced: the amicus rarissimus of line 2 should for various reasons be identified with Ursus Servianus himself, who is mentioned four other times in the text.<sup>20)</sup> That raises several possibilities as to the identification of the testator.

Yet all of these prosopographical exercises are perhaps premature. Confident reconstructions of family relationships based on the text in CIL were shattered by the new fragment, first published in 1976: each of the first 19 lines was incorrectly restored by Mommsen and his predecessors, a sobering revelation. What we need now is not more prosopographical speculation but a close reconsideration of the text, out of which may yet come a new identity for the elusive testator. Professor Eck's complete recasting of the first 19 lines showed what can be done with a new fragment, but there is much to be done with the rest of the text as it stands, once fossilized restorations are cut away. New documents on stone and papyrus, renewed attention from social and legal historians, not to mention thorough examination of the surviving names, all should help. For instance, a Latin papyrus suggested to Arangio-Ruiz a new and more satisfactory restoration in line 120, formulaic but useful.<sup>21)</sup> A most unlikely legacy of (a pair of) mules with (carts) is much more likely in context to have been famulae with (children).<sup>22)</sup> What appears to be a massive legacy (lines 66-87) to an aunt, "matertera Septuma Secundini", is simply wrong: that person is introduced as such only in line 79, recalled in 85 as Septuma matertera; the mention of her husband should indicate that a new legatee comes into play at 79, leaving the anonymous female of 66-79, known to us perhaps only as [pienti]ssima, and thus recalling the first heir of testator (lines 1 and 7).<sup>23)</sup> Clearly much remains to be done with the text of the testamentum Dasumii.

The purpose of this note is not to identify the testator but to point out another, and important, passage in which the accepted restoration of CIL has gone badly, and in this case astonishingly, wrong. Lines 125-133 clearly held codicils to the original document. Lines 120-124 close the will proper, and incidentally give us the all-important consular date equivalent to May/August 108. The text in CIL reads as follows:

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20) The case will be presented elsewhere by Dr. A.M.Canto, to whom I am indebted for a preliminary version.

21) V.Arangio-Ruiz, Studi in onore di Ugo Enrico Paoli, 1956,5.

22) Suggested in conversation by Dr.Canto.

23) Suggested in conversation by Prof. Eck.

*Si quid codicillis alio[ve] quo ge[ner]e scriptum sig[natum]que reliquero, valere volo, quasi testamento scriptum signatu[m]que reli[quisse]m. Liturae [i]nductionesque quae in hoc testamento inventuntur, iam testam[en]ti faci[un]di [et signandi] tempore ibi fuerunt. — Testamentum scribendum curavi per . . . ]ntidiu[m] C]ampanum testa[mentarium]. . . . Ael[io] H[adria]no et Trebatio Pr[isco] eos.*

The restorations here are verbose and have little support in this or any other text. In one particular they are highly dubious, the testa[mentarium] of line 123. The ]ntidiu[m] C]ampanum named here is almost certainly Sex. Hermetidius Campanus, legatus pro praetore of the province of Judaea in A.D. 93, and he in turn is the most likely candidate for identity with a suffect consul of 97 whose name is preserved only as Se[ on the Fasti Ostienses. In short, consular or praetorian, a man of importance in the Roman world.<sup>24)</sup> That a senior Roman senator should be named a testamentarius is highly unlikely. A not very common term, it is used five times quite colourlessly in the Digest, but is applied in two inscriptions only to scribes of low birth who apparently specialized in drawing up wills.<sup>25)</sup> To summarize a longer discussion, there is no hint that testamentarii were anything more than scribes writing down what they were told and perhaps casting it in the proper form, and they certainly never appear (as purportedly here) in the document they prepare; and there is overwhelming evidence that the Roman testator of any rank in society composed the will himself or herself, and that it was written down privately by the testator, by a family member, by a servant or by a friend, without any professional consultation.<sup>26)</sup> In short, Campanus the testamentarius is a dubious construct at best.

The normal Roman will per aes et libram ended with a confirmation of future additions and then, invariably, a dolus malus clause, a standardized record of the mancipatio familiae, the place and the date of the signing. Thus the famed will of Antonius Silvanus (FIRA III<sup>2</sup> 47):

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24) W.Kunkel, *Herkunft und Sozialstellung der römischen Juristen*<sup>2</sup>, 1967, 147-150, with ILS 9059; R.Syme, *JRS* 44, 1954, 81-82, with FO 13a. Kunkel pointed to the brothers Sex. Hermentidius Zosimianus and Sex. Hermentidius Calpurnius of CIL VI 35449, in support of the identification. The idea of the testamentarius Hermentidius Campanus suggested to him identity with the jurist Campanus from this period, who is known, appropriately enough, by two fragments on fideicommissa (Dig. 38.1.47, 40.5.34.1).

25) Kunkel 148 n.214, and more fully M.Amelotti, *Il testamento romano*, 1966, 115 n.3. ILS 7750, 7749, cf. 7763 - and no others.

26) To be discussed in a forthcoming book on Roman wills. With regard to the jurist Campanus (n.24 above), it should be remembered that but for one passage in Suetonius, Nero 32, there is no hint in the ancient sources that jurisconsults advised on the making of wills, pace F.Schulz et al.



H(oc) t(estamento) d(olus) m(alus) <<h>><a>(besto).  
 Familiam pecu-  
 niamque t(estamenti) f(aciendi) c(ausa) e(mit)  
 Nemonius  
 dupl(icarius) tur(mae) Mari, libripende M. Iulio  
 Tiberino sesq(uiuplicario) tur(mae) Valeri, antes-  
 tatus est Turbinium sig(niferum) tur(mae)  
 Proculi. Testamentum factum  
 Alex(andrae) ad Aeg(yptum) in castris Aug(ustis?)  
 hibernis leg(ionis)  $\overline{\text{II}}$  Tr(aianae) For(tis)  
 et alae Mauretanae, VI kal.  
 Ap[ri]l[es] Rufino et Quadrato cos.

With very slight variations these formulae are absolutely standard in the surviving documents (all papyri). Their absence from the will of a Roman senator is not only astounding, it is legally indefensible.<sup>27)</sup> Since the testamentum Dasumii has both a confirmation clause and a date, surely its text should reasonably be expected to have had a dolus clause and a mancipatio between them. And in fact one fits in the surviving fragments, something along the following lines:

Si quid pugillaribus codicibus alio]ve quo ge[ner]e scriptum sig[natumque  
 reliquero, omnimodo valere volo quasi  
 testamento scriptum signatu]mque reli[quisse]m. Liturae [induc-  
 tionesque.....  
 .....h.t.d.m.a. Familiam pecuni]am testam[ent]i fac[i]undi [causa emit  
 Seius HS 1, libripende Titio.....  
 .....antestatus est Herme]ntidiu[m C]ampanum. Testa[mentum  
 factum.....(loco).....  
 .....(die, mense).....Ael]io H[adria]no et Trebatio Pr[isco] cos.

The exact restorations are perhaps not important, for as Eck demonstrated, each line of the document (in its earlier part at least) held a minimum of 90 letters.<sup>28)</sup> But that this was a proper version of the mancipatio familiae should be taken for certain. The new fragment of a decade ago clearly showed that, contrary to the old restoration, the will began with a standard formula, [Ille test]amentum fe[ci]t]; we can now see that it closed with standard

27) Amelotti 163ff. collects the documentary evidence. Texts published since 1966 only confirm his demonstration: POxy 2857, and CE 48,1973,318-320, improved at ChLA IX 399. The absence of the mancipatio and the dolus clause in the testamentum Dasumii Amelotti could attribute only to the "copia epigrafica" omitting more formal elements (163 n.7): hardly likely in so formal and elaborate a document.

28) Line 120 incorporates Arangio-Ruiz' restoration (n.21 above), based on the text of P.Mich. 439 = CPL 222. The formula h.t.d.m.a. might have been written out in full. In line 122, understand pecuniam(que) or read [familiam et] pecuniam? Faciundi is simply the older form of faciendi.

formulae as well, including the mancipatio clause without which it would have been invalid. Despite its size and importance, the testamentum Dasumii is to be treated not as a work of literature but as a document adhering to legal and social norms. From whom would one expect a will conforming to the best standards, if not from a Roman gentleman of the type of "Dasumius"?

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