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THE HERITAGE DOWRY IN GREEK-ROMAN PRACTICE

Alessia Spina
Università degli Studi di Milano-Bicocca

The dowry institution is certainly an interesting and fruitful testing ground to study the relationship between man and woman[1] and to observe, in particular, the evolution of women legal role within the family dynamics[2].

[1] In general about the family's structure in ancient Greek society and in particular about the figures of the women, we can remember: S.B. POMEROY, *Families in Classical and Hellenistic Greece. Representations and Realities*, Oxford 1997, p. 17; S.R. JOSHEL, A. MURNAGHAN (edited by), *Women and Slaves in Greco-Roman Culture. Differential Equations*, London-New York 1998; G. EISENRING, *Die römische Ehe als Rechtsverhältnis*, Wien-Köln-Weimar 2002; B. MACLACHLAN, *Women in Ancient Greece. A sourcebook*, London-New York 2012, p. 51 ss.; M.V. SANNA, *Matrimonio e altre situazioni matrimoniali nel diritto romano classico. Matrimonio 'iustum' - Matrimonium 'iniustum'*, Napoli 2012.

[2] About the Greek and Roman dowry, you can see: W. ERDMANN, *Die Ehe im alten Griechenland*, München 1934, p. 300 ff.; A. NICOLETTI, *Dote (Diritto romano)*, in *Novissimo Digesto Italiano*, VI, Torino, 1960, p. 257 ff.; C.A. CANNATA, *Dote*, in *Enciclopedia del diritto*, XIV, Milano, 1965, p. 1 ff.; R. MARTINI, *Diritti greci*, Siena 2001, p. 54 ff.; A. ARJAVA, *Women and Law in Late Antiquity*, Oxford 1996, p. 52 ff.; p. 112 ff.; U. YIFTACH-FIRANKO, *Marriage and Marital arragements. A history of the Greek marriage document in Egypt. 4th century BCE - 4th century CE*, München 2003, p. 105 ff.; J.F. STAGL, *'Favor dotis'. Die Privilegierung der Mitgift im System des römischen Rechts*, Weimar 2009, especially p. 1-22; G. RIZZELLI, *Una imagen del matrimonio en la cultura del principato*, in *Las mujeres en Roma antigua. Imágenes y derecho*, ed. E. Höbenreich, V. Kühne, Lecce 2009, p. 165 ff. About the dowry system in Attic law, you can see: A. BISCARDI, *Diritto greco antico*, Milano 1982, p. 101; U.E. PAOLI, *Famiglia (diritto attico)*, in

In particular, there are two meaningful moments, the dowry constitution and the dowry restitution. These moments can show clearly the development of a new role of women within the family and society.

Especially in the Greek-Roman context (this being understood as the age of the submission of the Greek provinces to the Roman empire), the original foundation of the dowry heritage, along with the practice of dowry restitution, and the succession *mortis causa* are very important[3]. In fact, these moments clearly show that women were less subordinated to the decisions of the family group and more active in the distribution of the goods they own, in comparison to the role Roman legal culture traditionally assigned to them[4].

Novissimo Digesto Italiano, VII, Torino 1961, p. 35; C.A. COX, *Household Interests, Property, Marriage Strategies, and Family Dinamics in Ancient Athens*, Princeton 1998, p. 38; C. PATTERSON, *The Family in Greek History*, London 1998, p. 14; p. 97; S. FERRUCCI, *L'oikos nelle leggi della polis. Il privato ateniese tra diritto e società*, in *Etica & Politica/Ethics and Politics*, IX, 2007, p. 135.

[3] About the succession *mortis causa* of women in Roman law, G. LA PIRA, *La successione ereditaria intestata e contro il testamento in diritto romano*, Firenze 1930, p. 172 ff.

[4] M. BRETONE, *La nozione romana di usufrutto*. I. *Dalle origini a Diocleziano*, Napoli, 1962, 218-220; in particular, Bretone writes that «… *un tale fedecommesso postula la concezione, peculiare al diritto greco e largamente applicata nelle province, secondo cui la moglie è proprietaria della dote; sicché sarebbe attraente studiare il testo di Modestino per l'appunto in rapporto a quella*

In this regard, I consider particularly interesting a passage by *Modestinus* (III cent. a.Ch.), D. 31.34.7.

A specific *Modestinus*'s legal doubt arises about the interpretation of a testamentary clause, even if – as we have already stressed – the passage is important because it overshadows a dowry system totally different to the Roman paradigm. This is the most important reason to suppose a provincial setting, specifically a Greek one:

D. 31.34.7 (Mod. 10 *resp.*): *Titia cum nuberet Gaio Seio, dedit in dotem praedia et quasdam alias res, postea decedens codicillis ita cavit:* Γάιον Σέιον τὸν ἄνδρα μου παρακατατίθεμαί σοι, ὦ θύγατερ. ᾧ βούλομαι δοθῆναι εἰς βίου χρῆσιν καὶ ἐπικαρπίαν μετοχὴν κώμης Νακλήνων, ἣν ἔφθασα δεδωκυῖα εἰς προῖκα, σὺν σώμασι τοῖς ἐμφερομένοις τῇ προικί, καὶ κατὰ μηδὲν ἐνοχληθῆναι αὐτὸν περὶ τῆς προικός· ἔσται γὰρ μετὰ τὴν τελευτὴν αὐτοῦ σὰ καὶ τῶν τέκνων σου'[5]: *praeterea alia multa huic eidem marito legavit, ut quamdiu viveret haberet. quaero, an propter haec, quae codicillis ei extra dotem relicta sunt, possit post mortem*

concezione, che sarà accolta, almeno per certi aspetti, da Giustiniano al termine di uno sviluppo storico molto travagliato».

[5] TH. MOMMSEN- P. KRUEGER's Latin translation of Greek words: *Gaium Seium virum meum commendo tibi, filia. cui volo dari in usum per vitam eius et fructum partem vici Nacolenorum, quam antea ei in dotem dedi, una cum hominibus in dotem illatis, neque ullo modo eum de dote inquietari: nam post eius obitum ea erunt tua liberorumque tuorum.*

Gaii Seii ex causa fideicommissi petitio filiae et heredi Titiae competere et earum rerum nomine, quas in dotem Gaius Seius accepit. Modestinus respondit: licet non ea verba proponuntur, ex quibus filia testatricis fideicommissum a Gaio Seio, postquam praestiterit quae testamento legata sunt, petere possit, tamen nihil prohibet propter voluntatem testatricis post mortem Gaii Seii fideicommissum peti[6].

The story is complicated. *Titia* married *Gaius Seius* and brought a dowry consisting of fields and some other goods; for the time after her death, she decided *in codicillis*: 'Oh my daughter, I entrust you my husband[7], I want him to be allowed

[6] D. SIMON, *Quasi-PARAKATAQHKE. Zugleich ein Beitrag zur Morphologie griechisch-hellenistischer Schuldrechtstatbestände*, in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, LXXXII, 1965, p. 44 f. and note 23; p. 65 and note 106. You can see also: H. KRELLER, *Erbrechtliche Untersuchungen auf Grund der gräko-ägyptischen Papyrusurkunden*, Leipzig-Berlin 1919 (Aalen 1970), p. 18 s.; A. TORRENT, *Fideicommissum familiae relictum*, Oviedo 1975, p. 39; A. MURILLO VILLAR, *El fideicomiso de residuo en derecho romano*, Valladolid 1989, p. 52; F. CUENA BOY, *Notas sobre el fideicomiso de residuo: clases y obligación de conserver del fiduciario*, in *Seminarios Complutenses de Derecho Romano*, VII, 1995, p. 44; L. DESANTI, *'Restitutionis post mortem onus'. I fedecommessi da restituirsi dopo la morte dell'onerato*, Milano 2003, p. 115 ff.

[7] The verb used is παρακατατίθημι: the meaning is similar to the sense of the word used in an other passage, D. 40.5.41.4 (Scaev. 4 *resp.*): *Sorore sua herede instituta de servis ita cavit:* 'βούλομαι καὶ παρακαλῶ, γλυκυτάτη μου ἀδελφή, ἐν παρακαταθήκη σε ἔχειν Στίχον καὶ Δάμαν τοὺς πραγματευτάς μου, οὓς ἐγὼ οὐκ ἠλευθέρωσα, ἄχρις ἂν τὰς ψήφους ἀποκαταστήσωσιν· ἐὰν

life estate of the part of the *vicus Nacolenorum*[8], which before I brought him as a dowry, together with the slaves I brought him too. I want him not to be disturbed in the enjoyment of the dowry goods: in fact, after his death, those goods will be owned by you and your sons'.

Then, to her husband again, she devised a lot of other goods to keep until he was alive. I'd like to arise the question about the treatment of assets after *Gaius Seius*'s death: is *Titia's* daughter and heiress entitled to a *petitio fideicommissi* for the

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δὲ καὶ σοὶ ἀρέσωσιν, ἐμήνυσα σοι τὴν γνώμην μου' [id est: *volo et rogo, soror dulcissima, ut commendatos haneas Stichum et Damam actores meos, quos equidem non manumisi, donec rationes reddidissent: quod si tu quoque eos probaveris, voluntatem meam tibi significavi*]. *Quaero, si paratis actoribus rationes reddere heres libertatem non praestet, dicendo eos non placere sibi, an audienda esset. Respondit non spectandum, quod heredibus displiceret, sed id quod viro bono posset placere, ut libertatem consequantur.* About this *Scaevola*'s passage, you can see these works: D. SIMON, *Quasi- ΠΑΡΑΚΑΤΑΘΗΚΗ cit.*, p. 65; H.J. WOLFF, *Neue juristische Urkunden. IV. Eigentumsbindung nach griechischem Recht*, in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, LXXXVIII, 1971, p. 332, nt. 8; G. GROSSO, *Obbligazioni. Contenuto e requisiti della prestazione. Obbligazioni alternative e generiche*, Torino 1966, p. 123, about the possibility, in Classic law, of refering to the discretion of the debtor *ex fideicommisso*.

[8] So we can read in Alciato's translation, *Disp.* 4.19: *cui volo dari in vitae usum et fructum participationem pagi Naccleni.* In *Vulgata*'s translation we can read: *cui volo dari ad vitae usum et fructum participationem Castelli Nacleorum.* Between the two translations there are not very important differences, because both the versions follow accurately the Greek text.

goods let *in codicillis* besides the dowry to her mother husband, also in the name of those things he received as a dowry?

Modestinus answers that there isn't any quotation of words which would legitimate the daughter's *testatrix* to petition *Gaius Seius* the trust, after he has obtained the goods devised and that nevertheless, nothing prevents the daughter and heiress from asking for a *fideicommissum* after *Gaius Seius*'s death, according to the *testatrix*'s will.

To better understand the described case, an author has suggested to compare the passage with other texts of the Digest.

The first passage is also *Modestinus*'s and it has a provincial setting, too; it is concerned with the interpretation of a legacy in a woman's testament. The case can be used *a contrario* to better light the content of D. 31.34.7 up:

D. 34.1.4 pr. (Mod. 10 *resp*.): 'Τοῖς τε ἀπελευθέροις ταῖς τε ἀπελευθέραις μου, οὕς ζῶσα ἔν τε τῇ διαθήκῃ ἔν τε τῷ κωδικίλλῳ ἠλευθέρωσα ἢ ἐλευθερώσω, δοθῆναι βούλομαι τὰ ἐν Χίοις μου χωρία, ἐπὶ τῷ καὶ ὅσα ζώσης μου ἐλάμβανον στοιχεῖσθαι αὐτοῖς κιβαρίος καὶ βεστιαρίου ὀνόματι'[9]. *quaero, quam habeant significationem, utrum ut ex praediis alimenta ipsi capiant an vero ut praeter praedia et cibaria et vestiaria ab herede percipiant? et utrum proprietas an usus fructus relictus est? Et si proprietas relicta sit,*

[9] The Latin translation is: *libertis libertabusque meis, quos viva vel in testamento inve codicillis manumisi manumiserove, dari volo praedia in Chio, ut quanta viva me accipiebant suppetant iis cibarii et vestiarii nomine.*

aliquid tamen superfluum inveniatur in reditibus, quam est in quantitate cibariorum et vestiariorum, an ad heredem patronae pertinet? et si mortui aliqui ex libertis sint, an pars eorum ad fideicommissarios superstites pertinet? et an die cedente fideicommissi morientium libertorum portiones ad heredes eorum an testatoris decurrant? Modestinus respondit: videntur mihi ipsa praedia esse libertis relicta, ut pleno dominio haec habeant et non per solum usum fructum et ideo et si quid superfluum in reditibus quam in cibariis erit, hoc ad libertos pertineat. sed et si decesserit fideicommissarius ante diem fideicommissi cedentem, pars eius ad ceteros fideicommissarios pertinet: post diem autem cedentem si qui mortui sint, ad suos heredes haec transmittent[10].

This is the content of the text: 'And to my freedmen and freedwomen, whom I have freed or I am about to free in my

[10] J.A. TAMAYO ERRAZQUIN, *'Libertis libertabusque'. El fideicomiso de alimentos en beneficio de libertos en Digesta y Responsa de Q. Cervidius Scaevola*, Vitoria-Gasteiz 2007, p. 287 ff. and note 1352: «*la determinación de la medida de los alimentos conlleva una sustancial polémica en el Digesto … De partida los fiduciarios ponen en duda el que con tal fideicomiso se les hubiera transmitido a los fideicomisarios la nuda propriedad. Lo cual podría ser indicativo de la fuerza que debería tener el uso extendido de constituir tales fideicomisos de alimentos a través de rentas periódicas, o constitución de usufructos sobre bienes, predios, o cantidades determinadas, con cuyon intereses atender al pago de los alimentos*». You can see also: M. BRETONE, *La nozione romana di usufrutto. I cit.*, p. 206, note 29, 220, note 61; M. BRETONE, *La nozione romana di usufrutto*. II. *Da Diocleziano a Giustiniano*, Napoli 1967, p. 5, note 11; 35, note 26; L. DESANTI, *'Restitutionis post mortem onus' cit.*, p. 171, note 193.

lifetime and by will and by codicil, I wish there to be given my lands in *Chios* for the provision of food and clothing for them to the extent that they received it in my lifetime'. I ask what these words mean, whether that they themselves are to take aliment from the estates or, in fact, that, apart from the estates, they are to receive both previsions and clothing from the heir. And has the property been left to them or the usufruct? And if the property has been left to them, but something is to be found in the returns over and above what is expended on the amount for provisions and clothing, does it belong to the patroness's heir? And if any of the freedmen have died, does their share belong to the surviving *fideicommissarii*? And are the shares of the freedmen who die before the day that the *fideicommissum* takes effect to devolve on their heirs or on those of the testator? *Modestinus* has given as his opinion: 'In my view, the estates themselves have been left to the freedmen, to hold with full *dominium* and not merely for usufruct, and, for that reason, even if there shall be anything in the returns over and above that reflected by the expenditure on provisions, this is to belong to the freedmen. But also where a *fideicommissarius* has died before the day when the *fideicommissum* takes effect, his share belongs to the other *fideicommissarii;* but if any have died after the period, they will hand these on to their heirs'[11].

[11] Translation edited by A. WATSON, *The Digest of Justinian*, III, Philadelphia 1985, p. 142 f.

The *familia libertorum* is addressee of a legacy of foods, on which a doubt originates. In fact, one asks if the *liberti* must obtain the *alimenta* from the *praedia* to the them intended, or if both *praedia*, food and clothing are entitled to them. In the first case, a kind of life estate can be amounted. And in fact, the text goes on with a series of other questions, exactly raised from the doubt about the nature of the real right: ownership or usufruct? If we accept the second alternative, in fact, at the beneficiaries' death, the *praedia* would have to return to the woman's heir. *Modestinus*'s solution goes in the opposite way. The jurist reads the object of the legacy as a real ownership, not as an usufruct ('*videntur mihi ipsa praedia esse libertis relicta, ut pleno dominio haec habeant et non per solum usum fructum*').

In this respect D. 34.1.4 pr. differs greatly from D. 31.34.7, in which the object of the legacy is without doubt an usufruct. Morover, in the reconstruction proposed by *Modestinus*, the most important moment is the *dies cedens* of the *fideicommissum* (the testatrix's clause is so classified). If the death of the freedman occurs before the *dies cedens*, then the portion of goods due to him will benefit the other freedmen (as they say, the *familia libertorum*). Differently, if the death occurs after the expiry of the deadline for acceptance, then the goods will be up to the heirs of the freedman.

The other one is a *Scaevola*'s passage (II cent. a.Ch.), from one of his case works, the *Digesta*[12]:

D. 34.2.15 (Scaev. 15 *dig.*): *Species auri et argenti Seiae legavit et ab ea petit in haec verba: 'a te, Seia, peto, ut quidquid tibi specialiter in auro argento legavi, id cum morieris reddas restituas illi et illi vernis meis: quarum rerum usus fructus dum vives tibi sufficiet': quaesitum est, an usus fructus auri et argenti solus legatariae debeatur. respondit verbis quae proponerentur proprietatem legatam addito onere fideicommissi.*

A testator left gold and silver of a certain type to *Seia* and has made the following request to her: 'I request you, *Seia*, that in respect of the gold and silver I have left specifically to you, you restore it on your death to such and such of the slaves born in my household; the usufruct of these articles will be adequate for your lifetime'. It has been asked whether only the usufruct of the gold and silver is due to the legatee. *Scaevola* has given it as his opinion that by the wording as set forth, the legacy is one of property in the gold and silver encumpered by a *fideicommissum*[13].

[12] About *Scaevola*'s life, origin and works, I may be allowed to mention A. SPINA, *Ricerche sulla successione testamentaria nei 'Responsa' di Cervidio Scevola*, Milano 2012, p. 13 ff.

[13] Translation edited by A. WATSON, *The Digest of Justinian cit*, III, 150.

The case is similar to D. 31.34.7 in several respects; first of all, in the testament a legacy is contained ('*Species auri et argenti Seiae legavit*'), together with a *fideicommissum* of restitution ('*a te, Seia, peto, ut quidquid tibi specialiter in auro argento legavi, id cum morieris reddas restituas illi et illi vernis meis*'). The testator (deliberately we choose the masculine form, since there are not any clues that make it possible to say that the *de cuius* is a woman) specifies that it is a life usufruct[14] in favor of *Seia* ('*quarum rerum usus fructus dum vives tibi sufficiet*'). The question is about the object of the usufruct, specifically if only the usufruct of gold and silver is due to the legatee. *Scaevola* answers that, according to the related words, the property has been given with the addition of an obligation *ex fideicommisso*. Therefore also the Antoninian jurist, as well as *Modestinus*, reconstructs the case in terms of ownership, rejecting the definition of usufruct.

We can notice that the term *usus fructus* appears in the original clause, reported almost literally by the jurist. This circumstance might suggest to use non-technical expression, which the lawyer corrects with a different qualification. It seems, rather, that the obligation *ex fideicommisso* is suitable to

[14] About the legacy of *usus fructus*, you can see F. MESSINA VITRANO, *Il legato d'usufrutto nel diritto romano*. Parte prima, Palermo 1912, especially p. 67 ff.

determine a temporary ownership, on which the doctrine has expressed different opinions[15].

However, the relevant fact is the choice of an extensive interpretation on a complicated and ambiguous clause. The legatee would have received the property and the words '*quarum rerum usus fructus dum vives tibi sufficiet*' could rather express the limited, concrete, remaining faculties, because of the further constraint *ex fideicommisso*. The bond provided for the possibility to use the goods and perceive the fruits, during life, to return to them at his death[16].

Now we can come back specifically on D. 31.34.7. Primarily, I would focus the attention on two expressions; first of all, we read: 'Γάιον Σέιον τὸν ἄνδρα μου παρακατατίθεμαί σοι, ὦ θύγατερ', that is: 'I entrust you my husband'. The testatrix address her daughter and proclaims the life tenant as her husband, not as her daughter's father. In my opinion, it is

[15] M. BRETONE, *La nozione romana di usufrutto, I. cit.*, 210; M. BRETONE, *La nozione romana di usufrutto*. II *cit*., p. 56, note 17.

[16] L. DESANTI, *Restitutionis post mortem onus cit.*, p. 114 f., where Desanti suggests (note 7) the comparision with D. 7.5.12 (Marc. 7 *inst*.): *Cum pecunia erat relicta titio ita, ut post mortem legatarii ad Maevium rediret, quamquam adscriptum sit, ut usum eius titius haberet, proprietatem tamen ei legatam et usus mentionem factam, quia erat restituenda ab eo pecunia post mortem eius, divi severus et antoninus rescripserunt.*

reasonable to think that there isn't any blood bond between *Titia*'s daughter and *Gaius Seius*[17].

Later, after *Gaius Seius*' death, the goods left to him in usufruct will pass to her daughter's ('ἔσται γὰρ μετὰ τὴν τελευτὴν αὐτοῦ σὰ καὶ τῶν τέκνων σου'): so, the daughter is the owner of mother's goods, and their enjoyment is only temporary suspended because of the usufruct.

We can think that the daughter acquires the ownership of the goods because of the same clause 'ἔσται γὰρ μετὰ τὴν τελευτὴν αὐτοῦ σὰ καὶ τῶν τέκνων σου'. This clause can also be interpreted as a *fideicommissum* in the daughter's benefit: the form of judicial protection mentioned in the *quaesitum* and in the real *responsum*, a *petitio fideicommissi*, is in support of this interpretation.

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[17] Cuiacius had already formulated the hyphotesis that the daughter *de qua* is not also the daughter of the *testatrix*'s husband (you can see J. CUIACIUS, *In librum decimum Responsorum Herennii Modestini recitationes solemnes*, in *Opera*, VI, Prati 1838, p. 140 f.). This idea was also accepted by the modern doctrine: you can see B. KÜBLER, *Griechische Tatbestände in den Werken der kasuistischen Literatur*, in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, 1907, p. 188. This reconstruction was considered a mere insinuation, for example, by H.E. TROJE, *'Graeca leguntur'. Die Aneignung des byzantinischen Rechts und die Entstehung eines humanistischen Corpus iuris civilis in der Jurisprudenz des 16. Jahrunderts*, Köln-Wien 1971, p. 227 f.: «*daß die Tochter, die in der Urkunde angesprochen wird, nicht aus der Ehe mit Gaius Seius (GS) stammte, ist eine einleuchtende Unterstellung… für die aber zwingende Gründe letztlich fehlen*».

As well, we can think that this clause is only a recognitive clause, because the daughter's ownership comes from the heiress's condition: since these are *codicilla*, possibly there is a real *institutio heredis* in the testament. The continuation of the will with the question: '*an propter haec … possit post mortem Gaii Seii ex causa fideicommissi petitio filiae et heredi Titiae competere*', admits this interpretation. It entails that the words '*filiae et heredi Titiae*' mean a coincidence of daughter condition and heiress one ('to the *Titia's* daughter and heiress'), not a reference to two different people ('to the *Titia's* daughter and to the to the *Titia's* heir').

But *tertium datur*; it is possible that the clause is, specifically, a codicillar clause which validates the will where it is written, in case the will is declared invalid. Such a circumstance could justify both the daughter's qualification as heiress and the information about the defense *ex fideicommisso*. A similar hypothesis could even be appropriate to the case of intestate succession, because of an invalid will: in fact, in *Modestinus* time, if there is a codicillar clause, the invalidity of a will, not due to the testator's *insania*, doesn't produce the fall of legacies and trusts.

After these essential considerations, let's now recall why the question the jurist is subject to arises. The text doesn't specify that the second group of goods left by the wife must be returned to her daughter when the husband dies. In Roman jurist's interpretation the *voluntas testantis*, even if not clearly

expressed in *verba fideicommissi*, could legitimate an extensive interpretation of the legacy.

Actually, here the case background is particularly relevant to the question the jurist is subject to. With reference to the dowry restitution, as remarked by Kübler the passage here considered is a unique example of opposition between the Roman family law and the Greek one. In fact, the content of the *mortis causa* clauses, stated by the woman, clashes with the system of the dowry restitution in classic Roman law, which now we briefly recall[18].

When the marriage is dissolved because of the woman's death, if the *dos* is *adventicia* it rests with the husband, whereas, if it is *profecticia*, an *actio rei uxoriae*[19] is up to the father or, in any case, to the ascendant that has founded it and the husband is

[18] B. KÜBLER, *Griechische Tatbestände cit.*, p. 190 and p. 219 ff. Kübler suggests a reasoning *per absurdum* and, at the end, he can decide only in these terms: «*Kaum eine andere Stelle zeigt so deutlich, wie die unsrige, die fundamentalen Unterschiede, die das griechische Familienrecht von römischen trennen", nonché con l'osservazione che "die milde, der grieschischen Denkart entgegenkommende Auffassung Modestins, der den Willen der Erblasserin aufrechterhalten wissen will*».

[19] See M. VARVARO, *Studi sulla restituzione della dote*. I. *La formula dell'actio rei uxoriae*, Palermo 2006 and the recension of A. BURDESE, *Recensioni e commenti. Sessant'anni di letture romanistiche*, II, Padova 2009, p. 717 ff.

entitled to keep a fifth of the heritage for every child born during the marriage[20].

Here, in the case under consideration, there are not evidences of *dos profecticia*: there are not mentions of paternal authority or ascendants nor of claims for restitution: the woman seems the only entitled to dispose.

Therefore, the residual hypothesis is a *dos adventicia* disposed by the woman or by a third. But the system of the *dos adventicia*, in event of the woman's death during the marriage, provides for its resting with the husband. So, *Titia*'s instructions are meaningless, because they set up *mortis causa* a life estate in benefit of whom – the husband – is already owner of the thing. The disposition would determine a *legatum inutile*. Even supposing that here the legal clause is due a lack of experience testators or compilers, we can't assume that the practical inutility of such a disposition escaped remark by *Modestinus*.

The Severian jurist doesn't allude to this contradiction, probably because he understands the non-involvement of the event into the Roman law. On the other hand, the doubt implicates another hyphothesis, in the text expressed in Latin

[20] C.A. CANNATA, *Dote cit.*, 4, basing on Ep. Ulp. 6, 4-5, writes that «in caso di morte della moglie, l'*actio rei uxoriae* non spettava che a chi avesse costituito la *dos profecticia*, se ancora vivo, e pertanto in ogni altro caso la dote restava al marito, a meno che non fosse *recepticia*. Nel caso di *actio rei uxoriae* del *paterfamilias* per la *dos profecticia*, al marito spettavano *retentiones propter liberos* di un quinto per ogni figlio, senza limiti».

and no longer as a direct clause. With this clause, the testatrix confered to the husband '*alia multa… ut quamdiu vivere, haberet*'.

Referring to this codicillar prevision, related to not-dowry heritage, the client asks if a *petitio fideicommissi* can be given to the *Titia*'s daughter and heiress, when *Gaius Seius* has dead, also[21] in the name of the goods he received as dowry.

Modestinus answers that in the testament there are not *verba* suitable and so the testatrix's daughter cannot demand the *fideicommissum* to *Gaius Seius*, not even if the testamentary obligations were fulfilled by the same daughter. Still, in front of testatrix's will expression, nothing prevents that, after *Gaius Seius*'s death, the *fideicommissum* can be demanded. In other words, the doubt arises because referring the second complex of goods bounded by the *de cuius* to the husband, it is not clear if this complex must be returned to the daughter at the man's death. In the Roman jurist's interpretation the *voluntas testantis*, even if not explained in the *verba fideicommissi*, is so much intense that an extensive interpretation of the legacy can be legitimated. Really, in this time, we are concentrated on the question that is the background and the requirement of the succession event: the dowry restitution system.

On the other hand, the events conform with the rules of Greek dowry, resulting from some Hellenic sources of different ages and origins.

[21] *Et*: but, for example, Alciato corrects the word and writes *ut*. The amendment determines very important interpretation consequences.

The Attic law ordered that, in the event of woman's death during the marriage, the husband returned the dowry observing different principles according as there were children or not. In particular, if there were children, they were considered heirs of dowry goods and they were devolved the dowry; if there weren't children, instead, the dowry was returned to whom founded it. So, in no case the husband could be entitled any *ius retentionis*.

In this case clearly the codicillary clause especially is formulated to warrant for the husband the enjoyment of the dowry goods: otherwise this enjoyment is not due to him. The burdened with this legacy is the testatrix's daughter and the mother addresses to her with the verb_παρακατατίθεμαι: we can rationally think that the daughter is the natural beneficiary of the dowry heritage, according to a regulation confirmed in the Gortyn code.

According to part of the doctrine, the Gorthyn law (VI-V cent. b.Ch.) was more considerate of the woman's property subjectivity; evidences for this are found in a series of dispositions, among which one – in my opinion – is worth to mention[22]. It is the one disposing that, in case of wife's death with children, the father has power over the motherly goods, but he can't alienate or offer them as a guarantee without the adult children's authorization:

[22] A. MAFFI, *Il diritto di famiglia nel Codice di Gortina*, Milano 1997, p. 61 ff.

col. VI, 31-36: αἰ δέ κ' ἀποθάνηι μάτηρ τέκνα καταλιπόνσα, τὸν πατέρα καρτερὸν ἦμεν τῶν ματρώιων, ἀποδόθαι δὲ μὴ μηδὲ καταθέμην, αἴ κα μὴ τὰ τέκνα ἐπαινήσει δρομέες ἰόντες.

Furthermore, as papyrological sources have proved, the provincial law, too, adopted in practice the principles of ancient Greek law[23].

In the passage by Modestino, the mother is dead leaving certainly at least one daughter and probably only her, because in the text there's not mention of other sons or daughters. The daughter and her children benefit from motherly goods. The dowry, that belongs to those goods, is naturally intended for the female descendant. In general, *Titia* arranged the dowry goods as her personal goods whose ownership she has not only *de facto*, but also *de iure*. This reconstruction shows that the conception of dowry foresees the one of inheritance.

From a certain point of view, into Digest, marks of this regulation are perceivable, for example in Paul's passage put in D. 36.1.83:

[23] R. TAUBENSCHLAG, *The law of Greco-Roman Egypt in the light of the papyri. 332 b.C.-640 a.D.*, New York 1944, p. 94 ff., but Taubenschlag highlights that «*in dealing with the question of matrimonial regime we have again to distinguish between national, Greek and Roman law*».

D. 36.1.83 (Paul. *imperial. sentent. in cognitionibus pralatarum ex liberis* VI libro primo seu decret. libro II): *Iulius foebus testamento facto, cum tres liberos heredes institueret, Foebum et Heracliam ex eadem matre, Polycraten ex alia aequis portionibus, petit a Polycrate minore fratre, ut accepto certo praedio hereditatem fratribus concederet: et invicem eos, qui ex eadem matre erant, si qui eorum heres non fuisset, substituerat. Polycrati, si intra pubertatem decessisset, secundas tabulas fecit, quas matri eius commendavit aperiendas, si impubes obisset. deinde petit a prioribus, ut, si quis eorum sine liberis decederet, portionem suam exceptis bonis maternis eorum et avitis ei vel eis qui superessent restitueret. Heraclia soror mortua sine liberis fratrem Foebum heredem instituit: Polycrates fideicommissum petierat et optinuerat apud Aurelium Proculum proconsulem Axaiae: appellatione facta, cum solus Foebus egisset μονομέρως [id est: agente uno tantum], victus est, quia 'ei vel eis' verba utrosque fratres complecterentur. adqui invicem duos illos tantum substituerat: sed et voluntas haec patris videbatur, qui exceperat eorum bona materna, quia Polycrates aliam matrem et quidem superstitem habebat, cuius etiam fidei commissum erat, ut legata, quae ei dederat in testamento, moriens Polycrati filio suo restitueret…*

Here's the translation: *Julius Foebus*, when he made his testament, had instituted as his heirs his three children: *Foebus* and *Heraclia*, who were born by the same mother, and *Polycrates*, who was born by a different mother. He gave them equal shares and requested of *Polycrates*, the younger brother

that he should take a certain estate for himself and grant the inheritance to his brother and sister, and he substituted the two born of the same mother to one another, should either of them not be heir. He made a second testament for *Polycrates*, should he die under the age of puberty, and entrusted it to his mother, to be opened should he die under that age. Finally, he requested of his elder children that should one of them die without children, he should restore his portion, except for those goods which had come to him from his mother and from his grandparents, to him or them who should survive. *Heraclia*, the sister, died without children and instituted her brother *Foebus*, her heir. *Polycrates* had claimed the *fideicommissum* and succeeded before *Aurelius Proculus*, proconsul of *Achaia*. There was an appeal, and though *Foebus* alone appeared to prosecute it, he failed; for the words 'to him or them' included both the brothers. Though it was true that he had substituted only the first two to one another; yet this also appeared to be the intention of the father; for he had excepted the gods which they had from their mother because *Polycrates* had a different mother, who was indeed still living, and on whom he had imposed a *fideicommissum* that on her death she should restore to her son *Polycrates* the legacies which he had given her in his testament[24].

[24] Translation edited by A. WATSON, *The Digest of Justinian*, III, Philadelphia 1985, p. 258.

It is a complex case (useful, though, to understand better the question Modestino is subject to, which here doesn't undergo further analysis), where we can notice some important elements. The setting is clearly a provincial one, resulting both from the name of the characters in the story – stated with history precision – and from the insertion of a Greek word μονομέρως[25].

Secondly, we can notice the distribution of the goods among three heirs, two of whom, *Foebus et Heraclia*, born of the first testator's first wife, the third, *Polycrates*, born of the second one.

The attribution of the goods to the third heir expressly excludes the motherly goods ('*exceptis bonis maternis eorum et avitis*'; '*qui exceperat eorum bona materna*'), that is the first wife's heritage, which represented a kind of "separated heritage".

On the other hand, for a long period, another part of the doctrine assumes that, maybe under the influence of Hellenistic principles, the Roman law began admitting the woman's ownership on dowry heritage in the classic or late classic age.

D. 23.3.75, a passage by Tryphonin (II-III cent. a.Ch.), could be the proof of this more modern idea.

[25] P. FREZZA, *PARAKATAQHKE*, in *Eos*, XLVIII, 1956, 173-206, now in *Symbolae Raphaeli Taubenschlag dedicatae*, 1, Vratislaviae-Varsaviae 1956, p. 139 ff.

D. 23.3.75 (Tryph. 6 *disputat*.): *Quamvis in bonis mariti dos sit, mulieris tamen est, et merito placuit, ut, si in dotem fundum inaestimatum dedit, cuius nomine duplae stipulatione cautum habuit, isque marito evictus sit, statim eam ex stipulatione agere posse. porro cuius interest non esse evictum quod in dote fuit quodque ipsa evictionem pati creditur ob id, quod eum in dotem habere desiit, huius etiam constante matrimonio, quamvis apud maritum dominium sit, emolumenti potestatem esse creditur, cuius etiam matrimonii onera maritus sustinet*.

The text can be translated so: Although a dowry becomes part of the husband's property, it still belongs to the wife. It has been correctly decided that if she gave land as a dowry which had not been valued and a stipulation for double damages was drawn up over it, where her husband was evicted from it, she can bring an action on the stipulation straight away. Again, as it is not in her interest for anymore to be evicted from the dotal property, and since she is held to be entitled to the profits from it during the marriage althought the husband owns it and bears the burdens of the marriage[26].

Some authors have thought that, specifically, the passage contains a decisive assertion about the wife'ownership of dowry goods; from this assertion arose many and conflicting

[26] Translation edited by A. WATSON, *The Digest of Justinian*, II, Philadelphia 1985, p. 684.

interpretations and opinions. I think it should be remembered, only in short, the question and the relative different solutions.

According to the dominant opinion, in classical time, the husband becomes dowry owner and dowry (specifically the goods given as dowry, to support the family) holder. Consequently, all these texts – D. 31.34.7 and D. 23.3.75 – could have a clear classical matrix: they can be considered proof of the wife's dowry ownership. These passages could express a new principle arisen from the influence of Hellenistic provinces. Depending on this principle, the wife kept the dowry ownership exclusively and the husband had the dowry in his own goods only to manage it and to collect the profits during the marriage. All these passages should be interpolated, because – this doctrine says – they mirror a typically postclassical or even Justinian concept[27].

[27] C. FAYER, *La 'familia' romana. Aspetti giuridici ed antiquari. 'Sponsalia' matrimonio dote*. Parte II, Roma 2005, p. 673 ff.; she writes that this principle '*si contrappose al principio classico, per cui la dote era proprietà del marito, scalzandolo e facendo acquistare alla dote il carattere di patrimonio riservato alla donna, perché questa potesse provvedere al suo mantenimento, una volta sciolto il matrimonio*'. This opinion is asserted by: E. ALBERTARIO, *La connessione della dote cogli oneri del matrimonio in diritto romano*, in *Rendiconti dell'Istituto Lombardo*, LVIII, 1925, now in *Studi di diritto romano*, 1, Milano 1933, p. 306 ff.; G. LONGO, *Diritto di famiglia*, Milano 1934, p. 230 f.; V. ARANGIO-RUIZ, *Istituzioni di diritto romano*, Napoli, 1978, p. 457; A. GUARINO, *Giusromanistica elementare*, Napoli 2002, p. 716.

The more recent literature inclines to save the authenticity of the texts, and so modern authors think that for the classical time we can talk about woman's dowry ownership.

In particular, the passages proper to prove that the ownership could express only a principle of social nature, that bears in mind the dowry heritage destination.

On the other hand, authors have recreated the circumstances in terms of expectation of the woman; this expectation could be changed into a real right in presence of specific events and conditions. An author has written that only in this sense (that during the marriage the woman has an expectation for the dowry restitution), we can read some assertions as classical, whereby the dowry is woman's turn[28].

In the text we read that, even if the dowry goods lie in the husband's heritage, however the woman keeps their ownership: '*Quamvis in bonis mariti dos sit, mulieris tamen est*'.

This reflection matches the contents implied in the passage by Modestino and the reference to life estate in husband's benefit explicitly contained. As during the marriage *Gaius Seius* managed the dowry – enjoying its profits – so his wife wants him to keep on managing after her death, entrusting her will execution to the daughter who is the new beneficiary of

[28] M. TALAMANCA, *Istituzioni di diritto romano*, Milano, 1990, p. 147. You can see C.A. MASCHI, *'Umanitas' come motivo giuridico. Con un esempio: nel diritto dotale romano*, in *Annali Triestini*, XVIII, 1948, p. 87 f.; P. BONFANTE, *Corso di diritto romano*. 1. *Diritto di famiglia*, Milano 1963, p. 447.

the goods. According to all above mentioned, in my opinion, the conception of dowry foresees not only the one of inheritance, but also the '*ad onera matrimonii substinenda*' function.

However, the system described in late classical age will become law in Justinian age, as we can read in C. 5.12.30 pr., where we can read the expression: '*cum eaedem res et ab initio uxoris fuerant et naturaliter in eius permanserunt dominio*'.

C. 5.12.30 pr. (IMPERATOR JUSTINIANUS A. DEMOSTHENI PP.: *In rebus dotalibus sive mobilibus sive immobilibus seu se moventibus, si tamen extant, sive aestimatae sive inaestimatae sint, mulierem in his vindicandis omnem habere post dissolutum matrimonium praerogativam et neminem creditorum mariti , qui anteriores sunt, sibi potiorem causam in his per hypothecam vindicare, cum eaedem res et ab initio uxoris fuerant et naturaliter in eius permanserunt dominio. Non enim quod legum subtilitate transitus earum in mariti patrimonium videtur fieri, ideo rei veritas deleta vel confusa est*. Iust. A. Demostheni PP. <a. 529 recitata Septimo in novo consistorio palatii Iustiniani. D. III K. Nov. Decio Vc. Cons.>.

The law can be translated in this way: a wife shall, after dissolution of her marriage, have the right to recover her dowry property, movable, immovable, or self-moving, provided it is still in existence, whether they were valued or not valued, and no prior creditor of her husband shall claim a better right in it

by reason of an hypothecation, since this property belonged to the wife in the first place, and naturally remains hers. Simply because it seems to become part of the property of her husband according to the subtlety of the law does not destroy the truth[29].

In conclusion, D. 31.34.7 is an exemplary passage to describe the dowry system in force in Greek provinces in III century confirming the validity of the most ancient Greek law rules.

About this question, Mitteis has completed an accurate and unsurpassed research, in a work that is still a classical work to describe and analyze the development of the Greek law influences on the Roman one. The main theory can be summarized as fellows: the ancient Greek law is penetrated through the Roman law and in Roman civil law structure it has preserved a long-lasting life force[30].

This reconstruction is supported by certain documental validation[31] and it was accepted by the following literature[32],

[29] Translated by F.H. BLUME, in http://www.uwyo.edu/lawlib/blume-justinian/ajc-edition-2/index.html.

[30] L. MITTEIS, *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs. Mit Beiträgen zur Kenntniss des griechischen Rechts und der spätrömischen Rechtsentwicklung*, Leipzig 1891, p. 238 ff.

[31] P. Oxy. 1208, 1268.

[32] G. CASTELLI, *I bona materna nei papiri greco-egizî*, in *Studî della scuola papirologica*, II, Milano 1917, p. 77 ff.

but in most recent works the complicate subject matter appears disregarded by the romanistic studies.

The text shows the women preeminence: the testatrix and her daughter, the heiress, are the two focus of the goods ownership; this pattern is not unknown in classical jurisprudence (as a matter of fact, a lot of Digest passages show women testatrices, heiresses, legataries, how we can read, for example, in D. 36.1.83), which mirrors a cultural as well as a legal renovation.

D. 31.34.7 seems to hint that the local law was essential to the renovation itself. Although it didn't determine the new culture, the local law supplied the new system with solid legal practice.

Finally, it is significant that such an official law-abiding jurist as Modestino, though understanding the new specificity of the case, accepted the principles of Greek law and conformed to them the typical classical Roman law proceedings.

Bibliography

E. ALBERTARIO, *La connessione della dote cogli oneri del matrimonio in diritto romano*, in *Rendiconti dell'Istituto Lombardo*, LVIII, 1925, now in *Studi di diritto romano*, 1, Milano 1933, p. 306-313.

V. ARANGIO-RUIZ, *Istituzioni di diritto romano*, Napoli 1978.

A. ARJAVA, *Women and Law in Late Antiquity*, Oxford 1996.

A. BISCARDI, *Diritto greco antico*, Milano 1982.

P. BONFANTE, *Corso di diritto romano*. 1. *Diritto di famiglia*, Milano 1963.

M. BRETONE, *La nozione romana di usufrutto*. II. *Da Diocleziano a Giustiniano*, Napoli 1967.

A. BURDESE, *Rec*. M. Varvaro, *Studi sulla restituzione della dote*. I. *La formula dell'actio rei uxoriae*, Palermo 2006, in *Recensioni e commenti. Sessant'anni di letture romanistiche*, II, Padova 2009, p. 717-726.

C.A. CANNATA, *Dote*, in *Enciclopedia del diritto*, XIV, Milano 1965, p. 1-8.

G. CASTELLI, *I 'bona materna' nei papiri greco-egizî*, in *Studî della scuola papirologica*, II, Milano 1917, p. 77-79.

C.A. COX, *Household Interests, Property, Marriage Strategies, and Family Dinamics in Ancient Athens*, Princeton 1998.

F. CUENA BOY, *Notas sobre el fideicomiso de residuo: clases y obligación de conserver del fiduciario*, in *Seminarios Complutenses de Derecho Romano*, VII, 1995.

J. CUIACIUS, *In librum decimum Responsorum Herennii Modestini recitationes solemnes*, in *Opera*, VI, Prati 1838.

L. DESANTI, *'Restitutionis post mortem onus'. I fedecommessi da restituirsi dopo la morte dell'onerato*, Milano 2003.

W. ERDMANN, *Die Ehe im alten Griechenland*, München 1934.

C. FAYER, *La 'familia' romana. Aspetti giuridici ed antiquari. 'Sponsalia' matrimonio dote*. Parte II, Roma 2005.

S. FERRUCCI, *L'oikos nelle leggi della polis. Il privato ateniese tra diritto e società*, in *Etica & Politica/Ethics and Politics*, IX, 2007, p. 135.

G. GROSSO, *Obbligazioni. Contenuto e requisiti della prestazione. Obbligazioni alternative e generiche*, Torino 1966.

A. GUARINO, *Giusromanistica elementare*, Napoli 2002.

S.R. JOSHEL, A. MURNAGHAN (edited by), *Women and Slaves in Greco-Roman Culture. Differential Equations*, London-New York, 1998.

H. KRELLER, *Erbrechtliche Untersuchungen auf Grund der gräko-ägyptischen Papyrusurkunden*, Leipzig-Berlin 1919 (Aalen 1970).

B. KÜBLER, *Griechische Tatbestände in den Werken der kasuistischen Literatur*, in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, 1907, 188.

L. MITTEIS, *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs. Mit Beiträgen zur Kenntniss des griechischen Rechts und der spätrömischen Rechtsentwicklung*, Leipzig 1891.

G. LA PIRA, *La successione ereditaria intestata e contro il testamento in diritto romano*, Firenze 1930.

G. LONGO, *Diritto di famiglia*, Milano 1934.

B. MACLACHLAN, *Women in Ancient Greece. A sourcebook*, London-New York 2012.

A. MAFFI, *Il diritto di famiglia nel Codice di Gortina*, Milano 1997.

R. MARTINI, *Diritti greci*, Siena 2001.

C.A. MASCHI, *'Umanitas' come motivo giuridico. Con un esempio: nel diritto dotale romano*, in *Annali Triestini*, XVIII, 1948, p. 87-88.

F. MESSINA VITRANO, *Il legato d'usufrutto nel diritto romano*. Parte prima, Palermo 1912.

A. MURILLO VILLAR, *El fideicomiso de residuo en derecho romano*, Valladolid 1989.

A. NICOLETTI, *Dote (Diritto romano)*, in *Novissimo Digesto Italiano*, VI, Torino 1960, pp. 257-259.

P. FREZZA, *PARAKATAQHKE*, in *Eos*, XLVIII, 1956, p. 173-206, now in *Symbolae Raphaeli Taubenschlag dedicatae*, 1, Vratislaviae-Varsaviae 1956, p. 139-172.

C. PATTERSON, *The Family in Greek History*, London 1998.

U.E. PAOLI, *Famiglia (diritto attico)*, in *Novissimo Digesto Italiano*, VII, Torino 1961, p. 35.

S.B. POMEROY, *Families in Classical and Hellenistic Greece. Representations and Realities*, Oxford 1997.

G. RIZZELLI, *Una imagen del matrimonio en la cultura del principato*, in *Las mujeres en Roma antigua. Imágenes y derecho*, Lecce 2009, p. 165-190.

M.V. SANNA, *Matrimonio e altre situazioni matrimoniali nel diritto romano classico. Matrimonio 'iustum' - Matrimonium 'iniustum'*, Napoli 2012.

D. SIMON, *Quasi-PARAKATAQHKE. Zugleich ein Beitrag zur Morphologie griechisch-hellenistischer Schuldrechtstatbestände*, in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, LXXXII, 1965.

A. SPINA, *Ricerche sulla successione testamentaria nei 'Responsa' di Cervidio Scevola*, Milano 2012.

J.F. STAGL, *'Favor dotis'. Die Privilegierung der Mitgift im System des römischen Rechts*, Weimar 2009.

M. TALAMANCA, *Istituzioni di diritto romano*, Milano 1990.

J.A. TAMAYO ERRAZQUIN, *'Libertis libertabusque'. El fideicomiso de alimentos en beneficio de libertos en Digesta y Responsa de Q. Cervidius Scaevola*, Vitoria-Gasteiz 2007.

R. TAUBENSCHLAG, *The law of Greco-Roman Egypt in the light of the papyri. 332 b.C.-640 a.D.*, New York 1944.

A. TORRENT, *Fideicommissum familiae relictum*, Oviedo 1975.

H.E. TROJE, *Graeca leguntur. Die Aneignung des byzantinischen Rechts und die Entstehung eines humanistischen Corpus iuris civilis in der Jurisprundenz des 16. Jahrunderts*, Köln-Wien 1971.

M. VARVARO, *Studi sulla restituzione della dote*. I. *La formula dell'actio rei uxoriae*, Palermo 2006.

A. WATSON, *The Digest of Justinian*, II and III, Philadelphia 1985.

H.J. WOLFF, *Neue juristische Urkunden. IV. Eigentumsbindung nach griechischem Recht*, in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, LXXXVIII, 1971.

U. YIFTACH-FIRANKO, *Marriage and Marital arragements. A history of the Greek marriage document in Egypt. 4th century BCE - 4th century CE*, München 2003.