The aim of this paper is to demonstrate a crucial point of change in the field of *mancipatio*, understood as the act consisting of solemn formulae and gestures and performed in front of witnesses and a scale-holder. The starting point for my research was the classical will, *testamentum per aes et libram*, and the exact moment when it stopped being an oral act requiring *mancipatio* and was converted into a simple document known from both post-classical and Byzantine sources of law (for instance C. Th. 4.4.1; 4.4.3; 4.4.7; Nov. Th. 16 = C. 6.23.21).

The form of will described in the Theodosian Code, Justinian’s Code and later sources required a properly protected and closed document written according to the testator’s wish. Such a document had to be offered to seven witnesses whose task was to seal and subscribe the will.\(^1\)

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1 In postclassical Roman law, two forms of wills were recognised by law, the oral and the written one, but as the papyrological evidence dealing with oral wills is drastically limited, the focus of this paper is to discuss solely the written wills. See M. Kaiser, *Das Römische Privatrecht*, II: *Die nachklassischen Entwicklungen*, Munich 1975 (2nd ed.), p. 481.

This had to be done in the presence of all witnesses at the same time. Witnesses had to know that they had witnessed to a will; however they did not have to know the content of the document. Also the testator had to subscribe his own testament. These rules are described by a constitution issued by the emperors Theodosius and Valentinianus in AD 439 and later incorporated to Justinian's Code.

Generally the way of making wills in Late-Roman times was quite comprehensible even for someone who was legally ignorant. However, we cannot forget that this idea evolved from Roman law, which offered much more formal rules for making wills, expressed in the second century Roman law manual, the *Institutiones* of Gaius.


The proceedings are as follows: the testator, as in other mancipations, takes five Roman citizens above puberty to witness and a scale-holder, and having previously written his will on tablets, formally mancipates his familia to someone (tr. F. de Zuletta).  

3 Yet, there were some exceptions to these rules, for instance in the case of the communicable disease of a testator (C. 6.23.8), his illiteracy (C. 6.23.21), the lack of persons being able to play the role of witness (C. 6.23.31), etc. See P. Voci, *Diritto ereditario romano*, II: *Parte speciale. Successione ab intestato. Successione testamentaria* (= Diritto ereditario romano 2), Milan 1963, pp. 62–64.


We do not know the exact moment when the will understood as the mortis causa act appeared, but there is no doubt that it was directly preceded by mancipatio familiaris. See S. Randazzo, *Leges mancipii. Contributo allo studio dei limiti di rilevanza dell’accordo negli atti formalì di alienazione* (= Pubblicazioni della Facoltà di giurisprudenza, Università di Catania, NS 160), Milan 1996, pp. 41–45; Stefania Pietrini, *Deducto usu fructu. Una nuova ipotesi sull’origine dell’usufrutto* (= Quaderni di ‘Studi senesi’ 113), Siena 2008.

5 *The Institutes of Gaius*, tr. F. de Zuletta, Oxford 1946.
The original act was oral, so the testator had to express his/her will aloud in the presence of required persons. However, if he/she wanted to keep the content of the dispositions secret, *nuncupatio* was reduced to the symbolic formula known thanks to Gaius, G. 2.104: HAEC ITA UT IN HIS TABULIS CERISQVE SCRIPTA SUNT, ITA DO ITA LEGO ITA TESTOR, ITA QVE VOS, QUIRITES, TESTIMONIUM MIHI PERHIBETOTE.\(^6\)

The difference between the rules concerning *testamentum per aes et libram* and the Late-Roman written will is significant. The interesting question is when exactly the formal act consisting of *mancipatio* and the solemn oral formulae became a simple document.

According to some romanists, Pasquale Voci,\(^7\) Mario Amelotti,\(^8\) Max Kaser,\(^9\) Bernardo Albanese,\(^10\) and Fritz Sturm,\(^11\) it was Constantine the

\(^6\) In the case of a secret will its content was preserved on tablets, but there is no doubt that even in the late classical period it could be expressed orally (D. 28.1.21.pr 1; D. 28.1.25; D. 28.5.1; D. 28.5.1.5; D. 28.5.59.pr; D. 29.7.20; D. 37.11.8.4), even if happened very rarely. Unfortunately, there is only one example of a will composed fully orally in the classical period (Suet., V. Hor. 75). See A. Guarino, ‘La forma orale e la forma scritta nel testamento Romano’, [in:] *Studi in onore di P. de Francisci* II, Milan 1956, pp. 51-77, at 58-64; G. G. Archi, ‘Oralità e scrittura nel *testamentum per aes et libram*,’[in:] *Studi in onore di Pietro de Francisci* IV, Milan 1956, pp. 287-318, at 293-294; Voci, *Diritto ereditario romano* (cit. n. 3), p. 53; Kaser, *Das Römische Privatrecht* (cit. n. 1), p. 679; Watson, *The Law of Succession* (cit. n. 4), p. 12. The above interpretation is proven also by the commentary to Justinian’s *Institutes*, Theophilus, *Paraphrasis* II 10.1.


\(^8\) M. Amelotti, *Il testamento romano attraverso la prassi documentale, I: Le forme classiche di testamento (= Studi e testi di papirologia 1)*, Florence 1966, p. 246.


Great who abolished the classical testamentary form, *testamentum per aes et libram*. This assumption is based on an interpretation of the constitution issued by the emperor in 326\(^2\) and preserved in Justinian’s Code (C. 6.23.15 pr-1 + C. 6.37.21 + C. 6.23.15.2).\(^3\) In the first part of the constitution we find the following phrase:

*C. 6.23.15.pr.: Quoniam indignum est ob inanem observationem irritas fieri tabulas et iudicia mortuorum, placuit ademptis his, quorum imaginarius usus est, institutioni heredis verborum non esse necessarium obser-vantiam, utrum imperativis et directis verbis fiat an inflexa.*

For it is unworthy that tablets and judgments of the dead should become void because of the failure to observe a vain pedantry, it has been decided that having taken away these formalities whose use is only imaginary, a particular form of words is not to be observed in the appointment of an heir, either this is done by imperative and direct expressions or by indefinite ones.

According to the above-mentioned scholars the words *placuit ademptis bis, quorum imaginarius usus est* are to be interpreted as the decision concerning *mancipatio nummo uno*.\(^4\) However, the context denies such interpretation, as we shall see later on.

As an argument for Voci’s and Amelotti’s statement it must be said that the adjective *imaginaria* present in the quoted phrase often appeared in connection with the noun *venditio* and together *imaginaria venditio* meant *mancipatio* (G. 1.113: *coëmptio*; G. 1.119: *est autem mancipatio, ut supra quoque diximus, imaginaria quaedam venditio*; *Tit. Ulp. 20.2: testamentum per aes et libram*). This is also how *mancipatio* is quoted twice in Justinian’s Institutes (I. 1.12.6: *emancipatio*; I. 2.10.1: *testamentum per aes et libram*). However, this is not the unique function of the adjective *imaginarius* in the legal sources. The examples are many. Even the conjunction *imaginaria venditio* has another meaning,

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\(^1\) For the date of the constitution, see C. Tate, ‘Codification of late Roman inheritance law, *Fideicommissa* and the *Theodosian Code*, *TR* 76 (2008), nos. 3–4, pp. 237–248.


\(^3\) Voci, ‘Il diritto ereditario romano’ (cit. n. 7), p. 32.
‘fictitious sale’ or Latin venditio simulata15 (PS. 2.23.4; C. Th. 16.5.58.4; Gai Fragments Augustodunensia 1.67; D. 18.1.55; D. 40.1.4.2; D. 44.7.54; D. 48.18.1.6; D. 50.11.16; C. 5.16.20; C. 8.27.10.2). The adverb imaginarius is an element of many other combinations in legal texts (G. 3.169; G. 3.171; G. 3.173; I. 3.29.1: imaginaria solutio; D. 4.5.3.1: imaginarium servilem causam; C. Th. 11.1.2: ex solis apochis falsis vel imaginariis; N. Val. 2: dignitatem imaginarii). A very important fact is that the adjective imaginarius never appeared to indicate mancipatio in the Theodosian and Justinianic Codes.

The next argument by which the aforementioned scholars supported their claim is this passage from the Vita Constantini:16

V. Cons. 4.26: Κύπετα τῶν τῶν βίων μεταλλαχτῶν ὁμοίως παλαιοὶ μὲν νόμοι ἐπὶ αὐτῆς ἐσχάτης ἀναποιήσεως ἀκριβολογεῖσθαι ῥήματων λέξει τάς συνταττόμενας διαθήκας πρόσωποι τε τίνας καὶ ποίας δεὶ φωνάς ἐπιλέγεσθαι ἅρις, καὶ πολλὰ ἐκ τοῖτων ἡκακοσφείται ἐπὶ περιγραφῇ τῆς τῶν κατοιχισμένων προαιρέσεως. Αἱ δὲ συνεδρίων βασιλείς καὶ τοῖτων μεταποιεῖτο τῶν νόμων, ψυλλός ῥηματίως καὶ ταῖς τυχούσαις φωναῖς τὸν τελευτῶν δεῖν τὰ κατὰ γνώμην διατάττεσθαι ψήφως κἂν τῷ τυχόντι γράμματι τῆς αὐτοῦ δόξαν ἐκτίθεσθαι, κἂν ἀγράφως ἑκάτη, καὶ μόνον ἐπὶ μαρτύρων τοῦτο πράττειν ἄξιοχρώμες, τὴν πίστιν δυνατῶν σὺν ἀληθείᾳ φυλάττειν.

In such regard to the wills of dying persons, the old laws had ordained that they should express the provisions of the will, even at the latest breath, in certain definite words, and had prescribed certain methods and language to be employed. This practice had occasioned many fraudulent attempts to hinder the intentions of the deceased from being carried into full effect. As soon as our emperor was aware of them, he changed this law likewise, declaring that a dying man ought to be permitted to indicate his wishes in simple words, and in whatever terms he pleased; and to set forth his will in any written form; or even by word of mouth, provided it were done in the presence of proper witnesses, who might be competent faithfully to discharge their trust (The Bagster translation revised by E. C. Richardson, with my modifications).17

15 Cf. TLL, s.v. ‘imaginarius’.
In the article ‘L’abolizione postclassica delle forme solenni’ Bernardo Albanese successfully proved that this passage of the *Life* paraphrases the above-quoted constitution. However, the quoted passage does not prove that Emperor Constantine abolished either the testamentary form, *testamentum per aes et libram*, or the *mancipatio* as such. Even the previously mentioned scholars never analysed the passage thoroughly, they just quoted it as an argument for their opinion that Constantine abolished *testamentum per aes et libram* without explaining why they thought so. We cannot disagree that the passage paraphrased the constitution issued by Constantine, but Eusebios never mentioned *mancipatio* in his text. It is true that he was not a lawyer, as Albanese argued, but he was still an educated person.

Thus, if wills performed in the form of *mancipatio* had existed right before he wrote the *Vita*, he would have mentioned either the term or the act, for it was not a technical detail but the entire ceremony.

The situation described by the bishop is as follows. Before the emperor issued his law, someone who wanted to make a will had to employ τρόπιον τε τίνας και σποίδεις φιλώναι, ‘certain methods and language’. Since there were many attempts at trickery towards testators, the emperor established a rule making valid any will composed in front of witnesses, no matter if it was composed ψιλόις ῥηματίσως και ταῖς τυχούσαις φιλώναι, ‘with simple words and common language’. Thus the aim of the said regulation was to make a testator able to control the content of his will. The passage discussed the same problem as the previously quoted constitution did. By abolishing solemn formulæ required by classical law, the emperor reformed the law of wills. However, in the first part of the quoted passage Eusebios mentioned some distant memory of formalism concerning the form of wills in order to contrast it with the general concept of Constantine’s reform which took place in the field of the Roman law of wills.

One reservation could still be made: the constitution was preserved in Justinian’s Code, so one could assume that the text originally spoke of

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mancipatio, but the codification committee purified it. However, the
already presented statement that the constitution never concerned either
testamentum per aes et libram or mancipatio is supported by the context of
the above-quoted laws. The passage from Justinian’s Code is a part of
a longer constitution. The other parts of the law concern the verbal
form of testamentary dispositions, heredis institutio, legata, and fideicom-
missa (C. 6.23.15. pr-1; C. 6.37.21), but they do not deal with formalities
accompanying the making of a will; it seems therefore that it could hardly
mention the rules concerning fictitious sale as well.

The beginning of the discussed constitution, namely the phrase,
indignum est ob inanem observationem irritas fieri tabulas, also supports this
statement, since by regulating the will the author clearly meant a written
deed. We can infer the same from the last part of the constitution, in
which a will is understood as a document.

C. 6.23.15.2: Et in postremis ergo iudiciis ordinandis amota erit sollemni-
um sermonum necessitas, ut, qui facultates proprias cupiunt ordinare, in
quacumque instrumenti materia conscribere et quibuscumque verbis uti
liberam habeant facultatem.

And the necessity of the solemn language shall be abolished in making
final judgments so that the ones who want to arrange their own matters
have a free possibility to write it on whatever writing material and in what-
ever words.

First, the passage clearly concerns the language, quibuscumque verbis.
Second, for the author of the text a will was a written deed, as he men-
tioned that it could be preserved on whatever writing material and in quacumque instrumenti materia conscribere. The most important argument
supporting the last sentence is the fact that the author, expressing the act
of making a will, applied the verb conscribere.

Careful examination of the quoted texts does not allow the conclusion
that mancipatio was abolished through Constantine’s constitution. More-
over, the constitution concerns the will as a document, not as a solemn

\(^{21}\) Tate, ‘Codification of Late Roman inheritance law’ (cit. n. 12), p. 241.
act. This was so, because *mancipatio* was no longer necessary to make a will and it had not been performed since before Constantine the Great issued the law. Thus the interesting question is when both *mancipatio* and *testamentum per aes et libram* disappeared from the sources and how this happened.

To answer this question we need to come back to the classical period of Roman law and look at testamentary deeds composed at that time. Most of testamentary tablets composed in the period before the *constitutio Antoninana* were based on a Roman model. A significant number of wills and their copies also contained the so-called mancipatory clause, which was supposed to prove that the proper act of *mancipatio nummo uno* took place when the will was composed. The clauses are of very repetitive character based on the following scheme: *Familiam pecuniamque testamenti faciendi causa emit quis, libripende quo, antetestatus est quem.*

The mancipatory clause is traceable in fourteen wills preserved on papyrus and wax tablets.22 The number is significant, since we have no more than thirty classical testaments in total. The clauses are virtually identical. The conclusion is that the mancipatory clause was an inseparable element of the Roman testamentary form; however it is not certain if it was still performed during the composing of a will. A few arguments justify such doubts.

First, we know well that wills were made on the basis of ready patterns.23 It can be supported, *inter alia*, by the fact that one such pattern has

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22 *Ch. L. A.* IX 399 (AD 91, provenance unknown), *Ch. L. A.* X 412 (AD 131, Ptolemais Euergetis), P. Oxy. xxxviii 2857 (AD 134, Oxyrhynchus), Tablette Keimer = FIRA 111 47 (AD 142, Alexandria), P. Select. 14 (AD 127–142, Arsinoites), SB 111 6273 (2nd cent. AD, Philadelphia), P. Hamb. 1 72 (2nd–3rd cent. AD, provenance unknown), BGU vii 1655 (AD 169, Philadelphia), SB v 7630 (AD 172–174, Alexandria), BGU i 326 = M. Chr. 316 = FIRA 111 50 (AD 194, Karanis), P. Digg. 9 (AD 186–224, Philadelphia), P. Oxy. xxii 2348 (AD 224, Oxyrhynchus), P. Laur. 1 4 (AD 246, Hermopolis Magna), P. NYU ii 39 (c. AD 345, Arsinoites).

been preserved (P. Hamb. 172 [2nd cent. AD, provenance unknown]). Moreover, this form contains a mancipatory clause identical to the clauses present in concrete wills and their copies: pecuniā[m]ue testam(enti) f(aciendi) clau(sa) semit quis (sestertio) 1, librerio endi) loco quis antetestatus est quem.

Also other clauses, like heredis institutio, c esto clause, etc., are similar to one another. The wills are parallel regardless of their provenance, be it Egypt, be it Wales (a second-century will on wax tablets published some ten years ago by Roger Tomlin), or be it Rome. Some of the clauses are even ill-composed and demonstrate that their authors did not have legal knowledge sufficient to understand the patterns they applied. The best illustration for this statement is the c esto clause, which in the majority of cases plays the role of una clausola di stile, as Mario Amelotti rightly observed. Mistakes are also traceable in mancipatory clauses (BGU vii 1655 [AD 169, Philadelphia], P. NTU II 39 [AD 335, Karanis]), as the symbolic price is one thousand coins, while it should be one coin. Nevertheless, the mistakes are much less frequent than in other clauses. However, this only proves that they were much simpler and better understood than any other testamentary clause, since they required only personal names to be added. For the above reasons it is hardly plausible that mancipatio was effectively performed during the composition of the wills; it can only be said that the mancipatory clauses were an element of the pattern.

Second, there is no evidence of the application of mancipatio in the papyri in the classical period of Roman law, but for the mancipatory clauses in wills. The only exception is a document of emancipation of a daughter composed at the beginning of the third century in Oxyrhynchos (FIRA 111 14 = CPL 206 = Jur. Pap. 9, after AD 212, Oxyrhynchos).


26 Amelotti, Il testamento romano (cit. n. 8), pp. 121 ff.
Outside of Egypt the practice of *mancipatio* is unsatisfactorily attested.\(^{27}\) It is worth underlining that all these sources mention *mancipatio* serving as a means of transferring ownership and none of them comes from the Roman East, except for the quoted Egyptian deed of *emancipatio*.

Moreover, some deeds of sale containing the mancipatory clause are not obviously a proof for the presence of *mancipatio* in Roman legal practice. For instance, a deed of sale from Roman Britain, so-called Fortunata, contains the following mancipatory clause:

*Tabula Fortunatae:*\(^{28}\) *Vegetus Montani Imperatoris Aug(usti) serv(i) Iu-
cund/iani vic/arius* emit mancipioque accepit puellam Fortunam sive quo alio nomine Diablintem de Albiciano ... (denariis) sescentis.

Vegetus, servus vicarius of the imperial slave Montanus Iucundus bought for six hundred denarii and acquired through mancipatio from Albinicus ... a girl Fortunata, or whatever her name is, of the tribe Diablintes.

The document states that Vegetus bought the slave-girl and acquired her through *mancipatio* (*mancipioque accepit*). This would not be exceptional, except for the fact that the acquirer and party to the *mancipatio*, the one *accipens*, was a slave, *servus vicarius*, of another slave Montanius Iucundianus. The problem is that a slave could take a part in *mancipatio* only if he acted on behalf of his master which is clearly not the case of the quoted tablet.\(^{29}\) The quoted tablet as well as the tablets from Dacia that list per-
grines as the parties of *mancipatio* demonstrate poor performance of *mancipatio* and the degeneration of the act itself, which would mean that the range of persons entitled to take part in the act was extended to non-citizens and slaves.\(^{30}\) On the other hand, a different statement is also justified. Another possible interpretation is that there was no *mancipatio* performed, but the mancipatory clause was written anyway. Thus the presence of the said clause would again be a proof for the presence of pre-made patterns in Roman legal practice, but not information for how the act was performed.\(^{31}\)

On the other hand, the preserved Roman documents of sale which do not contain the mancipatory clause are far more numerous. The deeds concern things such as slaves and oxen, the objects classified by Gaius as *res mancipi.* Despite the fact that the documents were written in the provinces, they are of Roman character because of features typical for Roman deeds of sale, such as the declarations concerning legal and physical defects, etc. There is also no doubt that the parties were Romans. Moreover, the majority of the documents state that a sold thing was transferred by *tradtio.* Furthermore, we cannot forget about the praetorian protection of bonitary owners that must have affected the need to perform *mancipatio* in order to transfer any of the *res mancipi,* as Fritz Sturm

\(^{30}\) Camodeca, ‘Cura secunda’ (cit. n. 27), p. 226.

\(^{31}\) Francesca Reduzzi Merola is of the same opinion. Reduzzi Merola, *Forme non convenzionali* (cit. n. 27), pp. 46–47: ‘Potremmo però anche ipotizzare che nella nostra tavole la *mancipatio* venisse menzionata solo come ripetizione di un formulario tralatizio, ed invece l’atto non venisse effettivamente compiuto; il trasferimento della schiavetta si sarebbe realizzato tramite traditio, che risulta nel documento, ma l’aquirente non ne avrebbe acquistato (e non avrebbe potuto acquistarne) la proprietà.’

\(^{32}\) For example FIRA iii 137 (AD 29/116, Frisia), P. Humb. 1 63 (AD 125/6, Upper Egypt), FIRA iii 111 133 = BGU iii 887 = M. Chr. 272 = C. Pap. Jud. iii 490 (AD 151, Pamphilia), P. Turner 22 (AD 142, Pamphilia), FIRA iii 111 134 = SB iii 6304 = CPL 193 (AD 151, Ravenna), P Lond. 11 229, p. xxi = Jur. Pap. 37 = FIRA iii 111 132 (AD 166, Seleucia Pieria), P. Oxy. XI. 2951 (AD 267, Oxyrhynchos), BGU 1 316 = M. Chr. 271 = FIRA iii 111 135 (AD 359, Arsinoites), P. Kellis 8 (AD 362, Oasis Magna).

observed.\(^{33}\) These documents may be also seen as an argument supporting the statement about the absence of \textit{mancipatio} in Roman legal practice.

The above arguments are not enough to state that the \textit{mancipatio} was absent from at least eastern legal practice in the classical period of Roman law. However, further issues support such a statement. The \textit{mancipatio} was not only a way of transferring ownership and making a will, but it also served other legal purposes. Among them were the emancipation of children and adoption. Except for the above-quoted \textit{emancipatio} deed we do not find any proofs of application of the \textit{mancipatio} in such acts. Moreover, \textit{emancipatio} based on the \textit{mancipatio} probably disappeared from legal teaching as well. Such an assumption is supported by the fifth-century text, \textit{Epitome Gai}. The author of the text described the act of emancipation through paraphrasing the parallel passage of \textit{Gai Institutiones}.\(^{34}\)


\(^{34}\) Cf. the paraphrased text, G. 1.132: ‘Praeterea emancipatione desinunt liberi in potestate parentum esse. Sed filius quidem tribus mancipationibus, ceteri vero liberi sive masculini sive feminini una mancipatione exequunt de parentium potestate: Lex enim XII tabularum tantum in persona filii de tribus mancipationibus loquitur his verbis: ‘Si pater filium venum duit a patre filius liber esto. Eaque res ita agitur: Mancipat pater filium alicui; is eum vindicta manumittit: Eo facto revertitur in potestatem patris; is eum iterum mancipat vel eidem vel alii (sed in usu est eidem mancipari) isque eum postea simuliter vindicta manumittit; eo facto rursus in potestatem patris revertitur; tertio pater eum mancipat vel eidem vel alii (sed hoc in usu est, ut eidem mancipetur) eaque mancipatione desinit in potestate patris esse, etiamsi nondum manumissus sit, sed adhuc in causa mancipii.’

Furthermore, children are released from the paternal power through emancipation. But a son leaves paternal power with three \textit{mancipationes}, other ascendants either men or women with one. The law of the Twelve Tables only mentions three \textit{mancipationes} in regard to the son, as follows: If a father sells his son three times, the son shall be free from his father. It happens as follows: a father delivers a son to someone by \textit{mancipatio}; the latter frees him by \textit{manumission vindicta}; and when this is done he is again under the power of his father, then he (the father) delivers him (the son) by \textit{mancipatio} either to the same person or to another one for the second time (but it is customary that he is delivered to the same person); and then he frees him again, and when this is done he is again under the power of his father; and then the father delivers him (the son) by \textit{mancipatio} either to the same person or to another one for the third time (but it is customary that he is delivered to the same person) and by the virtue of this \textit{mancipatio} he ceases to be under paternal power, even if he has not been manumitted yet, but he is still in \textit{mancipio}. 

Similarly children become *sui iuris* through emancipation, but a son leaves paternal power after three emancipations and he becomes *sui iuris*. Hence, *mancipatio*, that is delivery with a hand, is somewhat similar to a sale; since in emancipations a certain father summons another father who is called the fiduciary father. Then the same natural father delivers his son to the fiduciary father through *mancipatio*; that is, he delivers him with a hand. The natural father accepts a coin or two from the fiduciary father, as if in the likeness of a price, and again having accepted the coins he delivers him to the fiduciary father. This happens for the second and the third time; thus he leaves the parental power, when he (the natural father) delivers him to the fiduciary father through *mancipatio* for the third time. 4. It was customary to perform emancipation before a praeses; recently it is to be done at the *curia* in the presence of five witnesses, Roman citizens, before the one called the *libripens*, that is the one holding the scale, and another one called the *antetestatus*. These two are to fill the number of seven witnesses. But, when the natural father delivers his son to the fiduciary father through *mancipatio* for the third time, the natural father should do so that he (the son) is remancipated to him (the natural father) by the fiduciary father and is released by the natural father, not the fiduciary father, who shall inherit his property, if the son dies.

Even a very brief examination of the passage justifies the conclusion that the author had only a blurry idea of what *mancipatio* could have
looked like. First, the author of the text preserved in the *Epitome* mentions the *antetestatus*, who never appeared in the Gaian text, but we know that the *antetestatus* was one of five witnesses present during the *mancipatio*, whose name was listed as the first one in the mancipatory clause. In the discussed passage the *antetestatus* is described as an additional person taking part in the *mancipatio*, but not as a witness. Since the author did not know that the seventh person taking part in the *mancipatio* was a fictitious acquirer he replaced him by the *antetestatus* in order to complete the number known to him thanks to the Gaian text.

Second, the author explaining the emancipation of a son says *et tertio eum fiduciario patri mancipat et tradit*, which, in my opinion, may prove that the one who wrote the *Epitome Gai* did not see the difference between the *mancipatio* and *traditio*. He probably did not know what *mancipatio* was so he assimilated this act with the simple delivery. Third, the author of the *Epitome* says that the price that should be paid by a fiduciary father to a natural father is *unum aut duos nummos*, while the symbolic price was one coin.\textsuperscript{35} The most obvious explanation for this is that the author did not know much about the *mancipatio* and tried to explain the Gaian passage in the best way he could. There is no doubt that the discussed text is very late, but we still do not have any proof of the *mancipatio* performed as a part of the emancipation in the earlier period. Thus it could be considered as an argument for the much earlier disappearance of *mancipatio* from the legal practice. On the other hand, we cannot exclude that *mancipatio* survived until late period, but in a changed form, for instance as a solemn declaration.\textsuperscript{36}

There are not many examples of *mancipatio* in the imperial constitutions. In the Theodosian Code we find only three examples of laws mentioning it (C. Tb. 8.12.4–5; C. Tb. 8.12.7). All of them concern donations and were issued during the reign of Constantine the Great and his successors. Ernest Levy did not devote a lot of attention to them, but he


stated that they prove the absence of the mancipatio in the early fourth century.\textsuperscript{37} Wulf Eckart Voss was of a contrary opinion. He claimed not only that the mancipatio was well known, but also that it was performed during the reign of Constantine.\textsuperscript{38} The text of the first constitution runs as follows.

\begin{verbatim}
Iuxta Divi Pii consultissimi principis instituta valere donationes placet
inter liberos et parentes in quocumque solo et cuius libet rei liberalitas
probabitur extitisse, licet neque mancipatio dicatur neque traditio subse-
cuta, sed nuda tantum voluntas claruerit, quae non dubium consilium
tenat nec incertum, sed iudicium animi tale proferat, ut nulla quae-stio
voluntatis possit irreperere et collata inter ceteras exceptas Cinciae legi
personas obtinere propriae firmitatem, sive mancipationis decursa fuerit
solenmitas vel certe res tradita doceatur.
\end{verbatim}

The same Augustus to Bassus, Prefect of the City. In accordance with the statutes of the sainted Pius most learned in the law, it is Our pleasure that gifts shall be valid between children and parents on whatever soil and of whatever thing the gift is proved to have been made, even though the formal words of mancipation may not have been spoken and delivery may not have been followed, and only the bare intention was declared which contained a plan that was not doubtful and indefinite but expressed such a judgement of the mind that no question of intention could creep in. If any gift is bestowed between persons exempt from the requirements of the Cinician Law, it shall obtain its proper validity, whether the formality of mancipation has been executed or at any rate the property is proved to have been delivered (tr. C. Pharr).\textsuperscript{39}

\textsuperscript{38} W. E. Voss, \textit{Recht und Rhetorik in den Kaisergerichten der Spätantike. Eine Untersuchung zum nachklassischen Kauf- und Übereignungsrecht (= Forschungen zur byzantinischen Rechtsgeschichte 9)}, Frankfurt 1982, p. 175.
\textsuperscript{39} The \textit{Theodosian Code and Novels and the Sirmondian Constitutions}, tr. C. Pharr, Princeton 1952.
The text informs us that donations between parents and children were valid, even if either *traditio* or *mancipatio* were not performed, as long as the will of the donor was clear. Contrary to Levy, I am of the opinion that the author of the quoted text knew that *traditio* and *mancipatio* were two very different acts, *obtiner propriam firmitatem, sive mancipationis decursa fuerit sollemnitatis vel certe res tradita doceatur* – ‘it shall obtain its proper validity, whether the formality of mancipation has been executed or at any rate the property is proved to have been delivered’. We can infer that the author knew at least that the act of the *mancipatio* required some formalities and that *traditio* was the simple giving of something. There is also no doubt that the author of the passage was well educated in classical law.

The next text mentioning *mancipatio* was issued a few years later by the same emperor. It was probably issued together with the older, already quoted constitution, since the former law supplemented the latter one.

*C. Th. 8.12.5.1 (AD 333): Idem Augustus ad Severum com(item) Hispaniarum. Cum igitur ne liberos quidem ac parentes lex nostra ab actorum confecione secernat, id, quod necessario super donationibus apud acta conficiendis iam pridem statuimus, universos teneat, salvo tamen iuris privilegio, quod liberis et parentibus suffragatur, scilicet ne traditionis vel mancipationis sollemnitatis sit necessaria.*

The same Augustus to Severus, Count of Spain. Since, therefore, Our law does not exempt even children and parents from the execution of records, all persons shall be held by Our statutes formerly issued with reference to the necessity for registration of gifts in the public records. However, we preserve the priviledge of the law whereby children and parents are assisted, namely, that for them the formality of delivery and mancipation is unnecessary (tr. C. Pharr).

The third constitution was issued by the Emperors Constantius and Constans over twenty years later.

*C. Th. 8.12.7 (AD 355): Idem Augusti ad Orfitum praefectum urbi. Cum genitoris mei scitis evidenter expressum sit nullam donationem inter*
extraneos firmam esse, si ei traditionis videatur deesse sollemnitas et idem huiusmodi necessitatem liberis tantum ac parentibus relaxarit, in omnibus deinceps observari negotiis oportebit, ut donatio inter extraneos minus firma iudicetur, si iure mancipatio et traditio non fuerit impleta.

The same Augustuses (Constantius and Constans) to Orfitus, Prefect of the City. Since by the decrees of My father it has been clearly stated that no gift between extraneous persons shall be valid if it should appear that the formality of delivery is lacking, and since Our father also relieved only children and parents from the necessity of such formality, hereafter such rule must be observed in all such undertakings, so that a gift between extraneous persons shall be adjudged invalid if mancipation and delivery have not been legally executed (tr. C. Pharr).

Both above-quoted constitutions prove that neither mancipatio nor the difference between it and traditio were fully understood by the authors of these texts. We can infer this from the phrases traditionis vel mancipationis sollemnitas, ‘the formalities of the mancipatio and traditio’, and traditionis sollemnitas, ‘the formalities of the traditio’. Moreover, it is hardly plausible that they were aware of the fact that mancipatio and traditio were applied in order to transfer the ownership of two different types of things, res mancipi et nec mancipi, as Pasquale Voci rightly observed. Thus the laws cannot be considered proof of the presence of the mancipatio in the fourth century. In my opinion the quoted constitutions can be interpreted as follows. The text does not indicate that there was any difference between performing mancipatio and traditio. The only reasonable explanation is that the sollemnitas signifies the clarity of the transfer; thus mancipatio may mean a kind of solemn declaration. On the other hand, by inserting the term into a legal text its author could have wanted to increase its authority, as is the case of documents of sales and donations from Ravenna. Coming back to the first constitution (C. Th. 8.12.4) there is no doubt that it was composed by a person well-educated in law, but it cannot be proof of the existence of the act either in imperial legal practice or legal

41 Ibidem, pp. 98–99.
education, since two constitutions, one of which was issued during the reign of the same emperor, lead to the contrary opinion.

There are a few examples of deeds of sale and donation composed in Ravenna that mention *mancipatio* and *traditio* as ways of transferring ownership, for instance *P. Ital.* 1 20 (c. AD 600, Ravenna): *et in ius domini[umque sanctae ecclesiae] Ravennatis im perpetuo* transcribo, cedo, trado et *mancipo, id est ex fundum, cui vocabulum est Balonianus - ‘I transfer, concede, and deliver by both *traditio* and *mancipatio* what belongs to the soil named *Balonianus* to the holy Church in Ravenna in the right of ownership’. There is no doubt that the applied verbs do not express different methods of transferring the ownership, since they all regard one object, the land located close to Ravenna. Thus the phrase is of formulaic character and cannot be interpreted as proof of the application of *mancipatio* during the actual act of the donation of the land *Balonianus*.

The document of sale edited as *P. Ital.* 11 30 (AD 539, Ravenna) is extraordinary, for it mentions that the legal act was performed in the presence of *libripens, antetestatus*, and witnesses. However, there is *ius tradi* *tionisque causa* mentioned further, which is a clear proof that the document does not differ much from the other texts from sixth-century Ravenna, which list *mancipatio* as the way of transferring donated or sold property. Thus the discussed documents cannot be claimed as evidence of the existence of *mancipatio* in legal practice. According to Levy the presence of various already unused legal terms was the effect of the uncertainty of legal protection in general and the decreasing level of legal knowledge among the notaries in Ravenna. Two arguments supporting such explanation may be added. First, the lists naming the ways of transferring the ownership are of formulaic character. Second, the discussed Ravenna documents were composed after the issuing of Justinian’s compilation that replaced *mancipatio* by *traditio*. The discussed Ravenna documents

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are somewhat similar to at least two out of three above-discussed constitutions (C. Th. 8.12.5; 7), for they list ways of transferring ownership deprived of their original meaning.

The above arguments prove that *mancipatio* was absent from legal deeds long before the time of Constantine the Great. First, its application in acts other than the transferring of the ownership is unsatisfactorily attested (except for one emancipation of a daughter from Egypt and mancipatory clauses present in Egyptian wills), which is a strong argument supporting a statement that *mancipatio* as a part of acts such as adoption, emancipation, etc., disappeared very early. Second, in western documents *mancipatio* is attested only as a way of transferring the ownership, while in eastern evidence we do not find even one such attestation. Third, some mancipatory clauses in the western documents are very likely to be a proof of the formulary practice, but not the actual performance of the act of *mancipatio* itself. Summing up, all these observations can prove that *mancipatio* as such (no matter if used as a means of transferring ownership or as an element of acts such as emancipation, adoption, etc.) was abolished by *desuetudo* before the fourth century. Of course, we cannot forget that there are virtually no documents preserved from Italy itself; thus the conclusions regarding *mancipatio* can be representative mostly for the territories rich in the documentary evidence.

The above conclusions can strengthen the supposition expressed at the beginning of this article that the abolition of *testamentum per aes et libram* was much earlier than scholars argued. The arguments support the statement that the frequency of the mancipatory clauses in wills was the effect of formulary practice but not the real performance of the act. Moreover, after the *constitutio Antoniniana* and Alexander Severus' constitution on the language of the wills the testamentary and formulary practice underwent

44 Elisabeth Meyer claims that *mancipatio* continued to be performed in acts such as wills, adoptions, emancipations, *cöemptio*, *nexum* and noxal surrender of an erring child or slave until the time of Justinian or as long as these acts themselves continued to be used (Meyer, *Legitimacy and Law* [cit. n. 6], p. 114).


46 See Joëlle Beaucamp, *‘Tester en grec a Byzance’, [in:] eadem, *Femmes, patrimoines,*
significant changes. The unity of the Roman testamentary pattern disappeared. One of these changes was the disappearance of the mancipatory clauses. The fact that the clause disappeared so easily and right after the moment when the Roman testamentary pattern started collapsing can also indicate that its presence was a result of the formulary practice.

Discussing the moment of the disappearance of mancipatio from the testamentary form we cannot forget one more very important factor of this process, the praetorian protection imposed on correctly composed testamentary tablets. The praetorian edict granted bonorum sine re, and from the time of emperor Antoninus Pius cum re, to anyone instituted an heir on valid tablets, if the will was not effective for the lack of at least one of the formalities required to make a valid Roman will (G. 2.120). The significance of this law was huge, since it meant that the will composed according to civilian rules concerning testamentary form was equal to the will composed in writing. 47

To conclude, in my opinion the constitution of Constantine the Great quoted at the beginning of this article did not abolish mancipatio because it had already been abolished through desuetudo. However, the emperor abolished the solemnity of the internal form of the wills; he also unified the form, but he did not abolish mancipatio, which belonged to ius civile generally very rarely eliminated via imperial constitutions.

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