

Circumstances determining the preparation of a will in the event of a plague in roman law¹

Abstract: The aim of the consideration in this article is to determine precisely the circumstances that authorized the use of a will, referred to by scholars as a will in case of plague: *testamentum pestis tempore conditum*). This mitigated form of will has its legal basis in the constitution of Emperors Diocletian and Maximian of 290. The content of the constitution of the emperors Diocletian and Maximian of 290 raises two basic questions. First, it is necessary to establish what kind of illness is entitled to use this form of will. Secondly, it has to be explained who was disease-stricken – the testator or witness? As a result of the consideration in the article, the commonly accepted name of this will will be criticized and a more appropriate one will be proposed: *testamentum oppressi morbo contagioso*.¹

Keywords: a will, special will, testator, witness, plague, contagious disease, Roman law, Diocletian, *testamentum pestis tempore conditum*

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1. Introduction

Ordinary forms of wills and a soldier's will, at the disposal of Roman citizens, were not able to meet all the real needs of the preparation of wills. The emperors tried to remedy them at first ad hoc. With time, they aimed at permanent regulations of special cases that did not fit into the concept of an ordinary testamentary form. As a consequence, a group of special wills was formed by wills which scope differed from the formal requirements of ordinary wills, drawn up on the basis of the provisions of civil law. The criteria for distinguishing them were specific circumstances concerning the subject (active or passive) of the will and formal requirements relating to the testator's submission of a declaration of last will, stricter or milder than those established by ordinary testamentary forms².

One of the special forms of will, the oldest at the same time, was a will, referred to by scholars as a will in case of plague: *testamentum pestis tempore (conditum)*³. This mitigated form of will has its legal basis in the constitution of Emperors Diocletian and Maximian of 290⁴.

² S.P. Kursa, *Testator i formy testamentu w rzymskim prawie justyniańskim*, Warszawa 2017, s. 219.

³ L. Palumbo, *Testamento romano e testamento longobardo*, Lanciano 1892, p. 130; B. Biondi, *Successione testamentaria. Donazioni*, Milano 1943, p. 69; A. Berger, *Encyclopedic dictionary of Roman law*, Philadelphia 1953, p. 734; P. Voci, *Diritto ereditario romano*, vol. 2, Parte speciale. Successione ab intestato. Successione testamentaria, Milano 1963, p. 101; A.D. Manfredini, *La volontà oltre la morte. Profili di diritto ereditario romano*, Torino 1991, p. 34.

⁴ M. Amelotti, *Per l'interpretazione della legislazione privatistica di Diocleziano*, Milano 1960, p. 90 n. 72.

C. 6,23,8 (*Diocletianus, Maximianus*): pr. *Casus maioris ac novi contingentis ratione adversus timorem contagionis, quae testes deterret, aliquid de iure laxatum est: non tamen prorsus reliqua etiam testamentorum sollemnitatis perempta est. 1. Testes enim huiusmodi morbo oppresso eo tempore iungi atque sociari remissum est, non etiam conveniendi numeri eorum observatio sublata.*

The immediate motive for its release was an inquiry addressed to the imperial chancellery by a certain Marcellinus about a will made in the circumstances of an infectious disease. The emperor, taking into account the risk of contamination⁵, specified in his rescript the requirements that were sufficient for the will to remain valid⁶. For unknown reasons, this constitution was not included in the Theodosian Codex. Its relevance, however, was noticed by Justinian's compilers, who included it in the Codex of 529.

The name *testamentum pestis tempore conditum* cannot, however, be inferred from the content of the cited constitution. Moreover, the name implies that it is only a will made during the plague (epidemic) and only because of its occurrence. There are no in-depth studies on this subject made by scholars. The aim of the consideration in this article is to determine precisely the circumstances that authorized the use of this form of will.

⁵ The content of this constitution could have been influenced by the awareness of frequent epidemics that decimated the empire's society. In the third century, the largest began in 251 and lasted until 266; see. M. Wójcik, *Plaga Justyniana. Cesarstwo wobec epidemii*. In: *Zeszyty Prawnicze* 11.1/2011, p. 379.

⁶ O.E. Tellegen-Couperus, *Testamentary succession in the constitutions of Diocletian*, Zutphen 1982, p. 29, notes that the privilege set out in C 6,23,8 allowed infected persons to draw up wills and encouraged others to participate as witnesses in their drawing up.

2. The circumstances of the making of the will

The content of the constitution of the emperors Diocletian and Maximian of 290 raises two basic questions. First, it is necessary to establish what kind of illness is entitled to use this form of will. Secondly, who was disease-stricken – the testator or witnesses?

2.1. Type of disease

The cited constitution never used the expression *pestis tempore*, which is commonly used to describe the will in question. Instead, it uses the expression *timorem contagionis, quae testes deterret*, which indicates that the preparation of this type of will justified the fear of the witnesses of contracting the disease (*morbus*).

Another reference in this constitution refers to the degree of this disease and its exceptional character. The expression *casus maioris ac novi contingentis ratione* used in the constitution indicates that the facilities therein concerned the situation of a disease independent of human will, included in the *casus maior*⁷. This kind of disease must have struck the testator unexpectedly – so that he was suddenly faced with the need to make a will. Undoubtedly, such a circumstance could be the incidence of cholera, plague, measles, smallpox or other epidemics occurring

⁷ More on this topic see D. 44,7,1,4 (*Gaius libro 2 aureorum*), where *casus maior* has been defined as a circumstance *cui humana infirmitas resistere non potest* (which human weakness cannot resist). M. Sobczyk, *Siła wyższa w rzymskim prawie prywatnym*, Toruń 2006, p. 109-111, referring to D. 13,6,5,4 (*Ulpianus libro 28 ad edictum*), showed that the disease was classified by the Romans as a *casus maior* case.

in the Roman Empire⁸. It seems that the appearance of leprosy also satisfied the features of the disease defined in the constitution. In his case, those affected were completely isolated and removed from the cities.

Therefore, a broader interpretation of the circumstances described in this constitution, which entitle to draw up the will in question, is permissible. In other words, it could not only be disease caused by the epidemic, but any other contagious disease, incurable or at risk of death. For the above reasons, the name *pestis tempore conditum* should be regarded as non-source and narrowing the scope of the circumstances which authorized the preparation of such a will.

2.2. Disease-stricken person

The question of who was disease-stricken appears in the context of various editions of the Justinian Code. For example, the French edition of *Corpus Iuris Civilis*⁹ contains this constitution with the sentence: *Testes enim huiusmodi morbo oppressos eo tempore iungi atque sociari remissum est*, which should be translated: „There is no need for [the requirement] that witnesses affected by this type of disease should be present together at the same time.“ In contrast, the Berlin edition of *Corpus Iuris*

⁸ J.F. Gilliam, The Plague under Marcus Aurelius. In: *American Journal of Philology* 82.3/1961, p. 225-251; R.J. Littman, M.L. Littman, Galen and the Antonine Plague. In: *American Journal of Philology* 94.3/1973, p. 243-255; R.P. Duncan-Jones, The impact of the Antonine plague. In: *Journal of Roman Archaeology* 9/1996, p. 108-136; W. Suder, 'Census populi'. *Demografia starożytnego Rzymu*, Wrocław 2003, p. 252-255; L.K. Little, Life and afterlife of the first plague pandemic. In: Little L.K. (ed.), *Plague and the end of the Antiquity. The pandemic of 541-750*, Cambridge 2007, p. 3-4; M. Wójcik, *Plaga Justyniana...*, p. 378-379.

⁹ *Codex Iustinianus*, Metz 1807 (translated by P.-A. Tissot).

Civilis¹⁰ gives this sentence as follows: *Testes enim huiusmodi morbo oppresso eo tempore iungi atque sociari remissum est*, which means „For [the requirement] is waived that the witnesses should be present at the same time [with the testator], [when the testator] [has been] afflicted with this kind of disease.“ The expression *morbo oppressos* used in the first version suggests the disease of the witnesses, whereas *morbo oppresso* used in the second version indicates the disease of the testator.

So we have two versions of the same constitution with different meanings. The question is which of them is true. Those in favor of the first of them explain that it concerns the release of witnesses from *unitas actus* due to their illness, due to which they are allowed to successively sign and seal a will¹¹. The fact that participation in drawing up a will as a witness was not obligatory, and the refusal was justified by disease, especially contagious disease, speaks against considering this version as true.¹² A healthy testator, knowing about the disease of one of the potential witnesses, could supplement them with the required number of other healthy people. Therefore, this version lacks logical justification.

However, it is easy to justify the second version. A testator affected by an infectious disease, who would be refused participation in the preparation of a will by potential witnesses, would not be able to validly draw up a will, if not for the facilities introduced in the said constitution. It should be added that this

¹⁰ *Corpus iuris civilis*, editio stereotypa; t. II, *Codex Iustinianus*, rec. P. Krüger, Berlin 1959.

¹¹ L. Palumbo, *Testamento romano...*, p. 130; B. Biondi, *Successione testamentaria...*, p. 69; A. Berger, *Encyclopedic dictionary...*, p. 734; A.D. Manfredini, *La volontà oltre la morte...*, p. 34; F. Longchamps de Bérier, *Law of succession. Roman legal framework and comparative law perspective*, Warszawa 2011, p. 168.

¹² Similarly see B. Biondi, *Successione testamentaria...*, p. 69 n. 2; O.E. Tellegen-Couperus, *Testamentary succession...*, p. 27.

version is supplemented later in Bas. 35,2,7, which indicates the minimization of the risk of contracting the testator's disease by witnesses, as the *ratio legis* of the privilege granted.

Bas. 35,2,7: *Testibus, qui metuunt propius ad testatorem accedere, ne morbi participes fiant, permittatur, ut separatim ab eo testamentum signent.*

Thanks to the solution adopted therein, the summoned witnesses who, for understandable reasons, were afraid to approach the contagiously ill testator¹³, could sign his will away from him.

3. Conclusion

To sum up, it should be stated that the will referred to by scholars as *pestis tempore conditum* was a will introduced in 290 by the emperors Diocletian and Maximian, drawn up by an incurably ill testator with a contagious disease who, due to the risk of infection, passed written document on to seven witnesses who were distant from him in order to perform the activities incumbent on them. In the light of the analysis carried out, it seems that a more appropriate name to describe this will would be the one with justification from the sources: *testamentum oppressi morbo contagioso*.

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¹³ M. Amelotti, Il testamento romano attraverso la prassi documentale. I. Le forme classiche di testamento, Firenze 1966, p. 243 n. 2, believes that the circumstance entitling to draw up a will in this relaxed form was the mere fact of an epidemic.

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