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TESTAMENTARY TROUBLE AND AN IMPERIAL RESCRIPT FROM BITHYNIA

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TESTAMENTARY TROUBLE AND AN IMPERIAL RESCRIPT FROM BITHYNIA[1]

In 1902 a Latin inscription from Prusias ad Hypium in Bithynia was published for the first time, and has appeared recently once again.[2] This text deserves close scrutiny, especially because it provides evidence about a significant development in Roman private law during the early empire. In particular, the inscription seems to preserve an imperial rescript concerning the obligations of a substitute heir to perform a trust, along with the implementation of that ruling by the provincial governor or a judge designated by him.

Unfortunately, the inscription was never photographed, and can no longer be located; hence, reconstruction of the fragmentary text must rely on the copy originally made by Mendel.[3] The stone was 0.45 m in height and 0.47 m wide, with letters of 2.5 cm. According to Mendel's description, it was broken at the top, on the right and left. He reports that the bottom was intact. It is worth remarking, however, that the right side, with the possible exceptions of lines 1 and 2, consistently ends in complete words, or in the case of line 4, abbreviations. Hederae, followed by large blank spaces in lines 6 and 10, add to the impression of completeness. One then wonders whether the inscribed text might not be intact both at the bottom and on the right.[4] Still, in the absence of a photo and given Mendel's description, we indicate lacunae at the right. On the left a significant portion of the text seems to have disappeared, and there may well have been a good deal more above what now remains. The presence of hederae also provides evidence for a very rough dating, i.e. from

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[1] We should like to thank E.J.Champlin, D.Hagedorn, B.Kramer, H.Schulze-Oben, and G.Wesch-Klein for discussing this text with us, and for their most helpful suggestions. G.Alföldy and A.Chaniotis have both commented as regards the proper reading of the stone. We should both also like to thank the Alexander von Humboldt-Stiftung for the opportunity to work in Heidelberg.

After we had sent the manuscript of this article to ZPE, we heard from Professor Dieter Nörr that Herr Wolfgang Kaiser was about to publish an article on the same inscription. An exchange of drafts ensued. Although we have learned a great deal from Herr Kaiser's arguments, indeed much that might have been incorporated in our own article, we have decided to let our original argument stand, so as better to demonstrate the possibilities of interpretation offered by such a stone. We are agreed with Herr Kaiser that the inscription contains a legal decision concerning the performance of a fideicommissum. We also agree that the likeliest candidate as the recipient of the trust is the city of Prusias or some corporate body. The obvious difference of interpretation concerns the upper part of the stone, where Herr Kaiser sees a text of the testament itself, or a codicile thereupon, and we an imperial rescript.

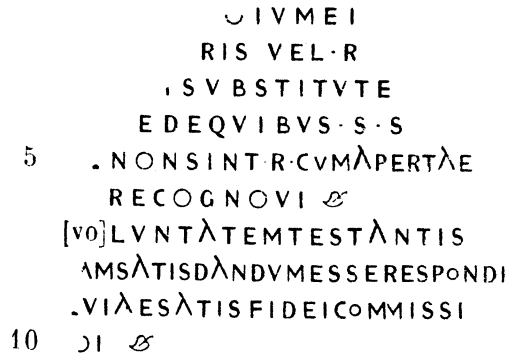
We should like to thank Professor Eck for agreeing to publish these two articles side by side, and we hope that the respective efforts do justice to this most perplexing text.

[2] G.Mendel, "Inscriptions de Bithynie," BCH 25,1901,89 no.225, and W.Ameling, Die Inschriften von Prusias ad Hypium. IK 27, Bonn 1985, no.139. Cf. also AE, 1902,159.

[3] Ameling, Inschriften vonPrusias vii n.4 remarks that all of the stones copied by Mendel in the garden of Sefer-effendi have since disappeared, and that the present residents have no memory of the man.

[4] Cf. M.Fränkel, Die Inschriften von Pergamon, 2. Römische Zeit, Berlin 1895, no.269, where several documents, including an imperial rescript of Trajan, are inscribed together in a very similar fashion. As is apparently the case with our inscription, on the intact right side hederae and blank spaces are used to indicate textual divisions. As a result, there is no consistency as to where the lines end on the right side.

the late first through the mid third centuries AD.[5] Otherwise, especially without a photo or squeeze, we hesitate to offer further suggestions regarding the date that would depend on palaeographic criteria.[6] First reproduced is Mendel's transcription of the stone, followed by our own restored version. In the main, matters concerning the text will be discussed in connection with our interpretation of the inscription rather than as comments to the individual lines.



vacat
[---]gium ei[---]
[---]ris vel R [---]
[--- hered]i substitut<a>e [---]
[---a]e, de quibus s(upra) s(criptum) [est ?]
[--- s]i non sint R cum apertae [---]
[fuerint tabulae --- Rescripsi.] Recognovi. (hedera) *vacat*
[--- secundum vo]luntatem testantis [---]
[--- i]am satis dandum esse respondi [---]
[---]. viae satis fideicommissi [---]
[--- respon]di. (hedera) *vacat*

Line 2: ---iu]ris vel R(omani) is tempting. However, we have not been able convincingly to fit this otherwise into our interpretation of the stone. See further below, especially n.19. Note also that the abbreviation appears again in line 5.

line 3: Restoration of hered]i is dictated by the subsequent word, substitut<a>e. The substitute heir, then, is a woman. Legalities involved with substitute heirs are discussed further below.

line 5: The abbreviation R should represent the same term [R(omani ?)] as in line 2.

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[5] There are a number of exactly dated (Greek) inscriptions from Lydia, all of which employ hederae: TAM V. 1 13 (94/5), 160 (108/9), 171 (128/9), 245 (145/6), 49 (149/50), 24 (191/2), 649 (225/6), 616 (277/8). See also: TAM V. 2 908 and 1308 (Hadrian), 913 (Caracalla), 915 (Alexander Severus).

[6] The A's, apparently inscribed without crossbars, might point to the late second or early third century.

line 6: Presence of apertae in the preceding line makes nearly certain that the opening of the will is referred to here, as was suggested to us by E.J.Champlin (letter 23.5.90). As to the restoration of rescripsi, see below.

line 8: i]am is suggested by Ameling.

line 10: We suggest here ---respon]di. The remains of the letter before the I can belong to either an O or a D. The former is impossible. Hence, a word ending in di is necessary. Since we know that we are here at the end of the document, and since respondi is a possible termination of the document as interpreted below, we suspect that it ought to be restored.

Let us first consider what bare facts can be got from the stone. It is clear, from the ensemble, that a testament is concerned; but also, a testament where substitutio played a role (line 3). We shall see that substitution of heirs nearly certainly was at issue. Further, the will involved a trust (fideicommissi, line 9), and one where interpreting the voluntas of the testator seems to have caused legal problems (line 7). This last is demonstrated further by the presence of a decision providing for a satisdatio (line 8), presumably in connection with performance of the fideicommissum. Finally, the presence of recognovi and respondi (this possibly twice) points to a legal dispute.

The inscription preserves this dispute in parts of (at least) two documents.[7] The first looks to terminate with the remark recognovi (line 6); a following hedera and substantial blank space bolster the suspicion that a text ends here.[8] Next, lines 7-10 include the remark respondi, once certainly (line 8), and possibly a second time (line 10). In line 10, as in line 6, the presence of a hedera followed by a blank space should indicate the end of a document. Lines 1-6 and 7-10, then, in all likelihood preserve separate but related documents concerning the case; and the first of these is arguably an imperial rescript. This suspicion is raised by recognovi, second half of the official closing formula in imperial rescripts -- Rescripsi. Recognovi.[9] Before proceeding, however, it is worth asking whether the remark recognovi might possibly be otherwise understood.

Although there has been much debate as to the implications of recognovi in imperial rescripts, it now seems generally accepted that it guaranteed the accuracy of these, and was applied to the documents by some official in the chancellery.[10] We know that provincial

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[7] The upper portion of the inscription, now lost, may have contained yet another document pertinent to the case. We suspect, for example, that the original petition to the emperor preceded the emperor's response (see below), as e.g. in the famous inscription from Scaptopara (IGBulg 2236).

[8] See above n.4 for a similarly inscribed stone.

[9] For this formula inscribed, see (e.g.), CIL III 411 = IK 24. 1, 597 (Smyrna, Antoninus Pius), IGBulg 2236 (Scaptopara, Gordian III). The rescript of Commodus from Souk-el-Khmis has: Et alia manu. Scripsi. Recognovi. (CIL VII 10570 + 14464, col. iv, 9). On the formula and its use in rescripts, D.Nörr, "Zur Reskriptenpraxis in der hohen Prinzipatszeit," ZRG 98,1981,12 and 32-3 especially. G.Mihailov, IGBulg ad num. 2236 provides convenient and comprehensive bibliography on the topic.

[10] The most complete discussion of the topic is, F.Preisigke, Die Inschrift von Skaptoparene in ihrer Beziehung zur kaiserlichen Kanzlei in Rom, Strassburg 1917, esp. 1-29. See also, A.Berger, Encyclopedic Dictionary of Roman Law, Philadelphia 1953, s.v. "recognoscere," and Nörr, ZRG 98,1981,32.

governors also answered petitions by means of subscriptiones, and we might therefore expect to find the word used in these documents as well.[11] The remark recognovi as such, however, is employed, so far as we can determine, only once in such a context, viz. in connection with a petition to the prefect of Egypt.[12] When the verb recognoscere appears on inscriptions that preserve responses of provincial governors, the phrase descriptum et recognitum stands as the measure of official accuracy.[13] Indeed, it is this expression that seems more generally to have been the official seal of accuracy in Roman governmental (or legal) documents.[14] In sum then, the first person singular in the perfect tense of recognoscere is most common at the end of imperial rescripts. And thus, although the mere appearance of recognovi cannot by itself absolutely prove the presence of an emperor's response, the expression certainly points in that direction. Examination of the legal issues involved lends persuasive support to this supposition.

The case from Prusias appears to have involved a dispute frequently encountered in the Roman law of trusts, namely one concerning substitution of heirs. This type of substitutio was a legal means by which testators sought to avoid the embarrassment of intestacy. There were two forms. In substitutio vulgaris, the testator named an alternate heir, or heirs, against the eventuality that the first named heir should be unable or unwilling to take up the inheritance. By means of substitutio pupillaris, the testator provided against the possibility that an impubes named as heir should die before reaching the age of fourteen, when he could legally make a will. Were such an heir to die before reaching majority, the estate would lapse into intestacy without a substitute heir stipulated by the original testator.[15]

It is not absolutely certain which form of substitution is involved in the present case, though the former is more likely. Problems with substitution could arise, however, if a testator had imposed a fideicommissum on the instituted heir. Was, then, the substitute equally bound by the testator's desires? This issue prompted imperial rescripts, as well as comment from Ulpian.

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[11] Cf. Nörr, ZRG 98,1981,31-2 (esp. n.93) on the waning, in the third century, of the term subscriptio to describe an imperial rescript, and use of this expression in reference to praesidial responses.

[12] SB I 1010 (Oxyrhynchus, AD 249), with the comment of A.S.Hunt, P.Oxy. IX 1201 ad 1.11. Common in the papyri, and in this context, however, is the Greek, ἀνέγνων, which is equivalent to recognovi. On this, see Preisigke, Inschrift von Skaptoparene 18-29. Cf. also SB VI 9200 (AD 242), registration with the prefect of a birth in Oxyrhynchus, where recognovi is the official acknowledgement by the prefect's office of the document's accuracy.

[13] Cf. (e.g.), CIL X 7852 (L.Helvius Agrippa, procos. Sardiniae), and SEG I, 1923,329 with D.M.Pippidi, Epigraphische Beiträge zur Geschichte Histrias in hellenistischer und römischer Zeit, Berlin 1962,133-53 (M.' Laberius Maximus, leg. Aug. pr. pr. Moesiae inferioris).

[14] Note its consistent use in military diplomas, CIL XVI, or M.M.Roxan, Roman Military Diplomas, London 1978-1985, passim. For descriptum et recognitum as a soft of general notarial formula, cf. Gaius Dig. 10.2.5, lib. 7 ad ed. prov., Dig. 29.3.7, lib. 7 (17) ad ed. prov. Further, FIRA^2 III nos. 2, 3, 47.

[15] On substitutio in wills, see M.Kaser, Das römische Privatrecht^2, Munich 1971, I 688-90, as well as O.E.Tellegen-Couperus, Testamentary Succession in the Constitutions of Diocletian, Zutphen 1982,78-79. The heir substituted for a pupillus was regarded by some authorities as, strictly speaking, the heir of the original testator.

Traditional rule held that if a testator wanted his substitute heirs to perform the same legacies and trusts as the instituted heirs, he was required to repeat the dispositions specifically for each substitute.[16] This situation changed with Septimius Severus, who, in a rescript cited by Ulpian, ruled that any trusts imposed on instituted heirs had likewise to be performed by any substitute heirs: sed post rescriptum Severi, quo fideicommissa ab instituto relicta a substitutis debentur ... (Ulp. Dig. 31.61.1, 18 ad leg. Iul. et Pap.). Ulpian discusses another rescript on this issue, this one attributed to Severus and Caracalla: licet imperator noster cum patre rescripserit videri voluntate testatoris repetita a substituto, quae ab instituto fuerant relicta ... (Dig. 30.74, 4 disp.). In conjunction with this constitution, Ulpian considers gray areas as to the interpretation of the testator's intentions. He remarks that the issue of interpreting the testator's voluntas was not at all clear if, for example, the testator had a specific reason for imposing a specific trust on the instituted heir which could not apply in the case of the substituted heir. In the eventuality that the testator's intention should not be clear, according to Ulpian's interpretation of the law, the voluntas of a testator would be understood as requiring the substitute to perform the same obligations as were imposed on the original heir. There may have been yet another rescript on this issue, of Caracalla alone. Diocletian, in connection with a ruling on the obligation of an heir B to perform a trust imposed on heir A when A refuses the inheritance, cites an earlier rescript of "the divine Antoninus." The quoted rescript required substitute heirs to perform such trusts: cum divo Antonino parenti nostro deberi etiam a substitutis fideicommissum contemplatione iudicii testatoris quasi tacite ab his repetitum iam dudum placuerit (CJ 6.49.4).[17] Several considerations point to Caracalla rather than to Antoninus Pius as the author of this rescript: a) there are two other references to Severan constitutions treating precisely this issue; b) the Severans seem to have attempted to alter a juristic situation bequeated them by the second century emperors; c) this constitution is clearly in sympathy with the Severan attitude.[18]

We have seen that recognovi points to an imperial rescript, and now we have several Severan rescripts concerned with precisely the subject matter represented by our stone. Preserved by the first seven lines of our inscription from Prusias, then, is almost certainly an imperial rescript dealing with the legal issue of the responsibility of substitute heirs in Roman law to perform fideicommissa. Given that, we might offer the following hypothetical reconstruction of the situation in Prusias.

Someone had died, leaving a will drawn up in accordance with Roman law. This person instituted an heir, or heirs, and charged them to perform a trust in the interest of a third party.

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16 For the legal problems involved with trusts on intestacy, see D.Johnston, The Roman Law of Trusts, Oxford 1988,117-54; for the traditional rules with trusts involving substitution of heirs and the changes introduced by Septimius Severus, see id. 123-25.

17 The rescript of Diocletian is analyzed by Tellegen-Couperus, Testamentary Succession 81-83.

18 On the confusion caused by imperial constitutions attributed to an Antoninus, cf. Nörr, ZRG 98,1981,7.

The testator also provided for a substitute heir, or heirs, in the event that those instituted did not take up the inheritance.[19] At least one of the initial heirs did not take up the inheritance, thus leaving a substitute as heir. For some reason, this substitute heir balked at the prospect of performing the trust, and the beneficiary sued. Then, at some point in the proceedings, one of the parties involved, more likely the plaintiff, petitioned the emperor regarding the case. Given the nature of the other rescripts concerned with substitution of heirs, it seems highly likely that the reason for our substitute heir's insistence in refusing to perform the trust stemmed from an ambiguity concerning the testator's intentions. The imperial response, preserved in the fragmentary lines 1-6, then, seems to reflect the Severan concern with interpreting the voluntas of the testator; the rescript on our stone must have been in favor of the beneficiary/plaintiff.

This now allows us to explain the relationship of the two documents preserved on the stone to one another. The rescript must have set out general legal principles concerning the responsibility of the substitute heir to perform the trusts and legacies imposed on the instituted heir. The second document on the stone, however, was quite different in nature, as is demonstrated especially by the presence of respondi. If the imperial rescript addressed the general legal principle, the decision following should then have been concerned with the implementation of this principle in the specific case at hand. This hypothesis is supported by the contents of the second document.

In a fideicommissum, the heir (or other trustee) might be required to provide for his performance of the trust through a cautio.[20] A cautio was a legally binding promise setting the trustee or heir in a contractual relationship with the beneficiary of the trust. In turn, a satisdatio was a special form of cautio that involved supplying one or more guarantors (sponsores) who personally were responsible financially for the trustee's performance of his legal obligations.[21] In the present text, we must have a decision, by some authority,

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[19] The abbreviation R just may provide a clue as to why the controversy arose in the first place. If indeed R represents some form of Romanus, and refers to Roman citizenship, we might imagine that the ability of some party to receive a benefit was predicated upon having Roman citizenship at the time of the opening of the will. If this concerned the heir or heirs, then without Roman citizenship, that person (or persons) would be ineligible as heir, so that the inheritance would devolve to the substitute. This presupposes, of course, that the will was opened before 212.

[20] This interpretation is derived from an analogy with the Roman law of legacies. To ensure performance of a legatum sub modo, the praetor or provincial governor would often exact a cautio from the heir charged with the legacy. For the use of this method, see Johnston, Trusts 239-40, and Kaser, RPR^2 I 743-44. For the exacting of cautiones to enforce a legacy to a town, see D.Johnston, "Munificence and Municipia: Bequests to Towns in Classical Antiquity," JRS 75,1985,105-25 at 118. As Johnston, Trusts 222-55, argues, the beneficiary of a fideicommissum was better protected than a beneficiary of a legatum sub modo, in that he could sue the trustee directly for performance of the trust through a cognitio extraordinaria in the city of Rome or through the provincial governor, a remedy not available to a beneficiary of a legacy. But cautiones and other legal institutions developed for the law of legacy mighv nevertheless be used to enforce trusts; see Kaser, RPR^2 I 760, based on Ulp. Dig. 36.3.14 pr., 79 ad ed.

[21] On satisdationes, see. Kaser, RPR^2 I 539, as well as id., Das römische Zivilprozessrecht, Munich 1960,336 and n.26.

requiring the new heir to guarantee performance of the terms of the trust, in accordance with what was interpreted as the testator's will (secundum vo]luntatem testantis, line 7), by providing such a surety. The official in a provincial setting who would be responsible for this would be the governor or his deputy; and therefore, the second document represents the provincial official's final dispensation in the case, terminating with the comment [respon]ḍi (line 10).[22]

A difficulty with our interpretation of lines 7-10, as indeed the verbatim response of the judge presiding in this case, is that we have been unable to locate an exact parallel, either in the inscriptions or in the papyri, of a judge announcing his decision with the word respondi, or in Greek, ἀπεκρινάμην. On the other hand, there will have existed an official protocol of the trial before the provincial magistrate, and the successful litigant will have been able to quote this document in the same way that he quoted the imperial rescript.[23]

But why was all of this inscribed? Clearly, the beneficiary of the will had a special interest in publicly advertising the case. It is certainly possible that the beneficiary was a private individual, that this was a purely private case and that he was simply proud to have triumphed at law. He might have been particularly pleased to be the recipient of an imperial response. However, this would make a context for the inscription rather difficult to imagine. On the other hand, if the beneficiary was some public group, for example the city itself, a collegium or a cultic association, then the existence of such an inscription is easier to understand. Although we are able to locate no exact parallel for this text, that is, an inscription commemorating the adjudication of a case involving a trust, there are other examples of inscribed testaments set up in public contexts. These most usually involve benefactions to public organizations, so that the inscription commemorates either the generosity of the benefactor or the organization's claim to what was left it.[24] In the present

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22 On provincial governors, or their delegates, deciding cases involving fideicommissa, see Johnston, Trusts 223-4. Note as well, J.Keil and A. von Premerstein, Bericht über eine zweite Reise in Lydien, Vienna 1911,13 no.18, who discuss a stone preserving litigation between Thyateira and Hierocaesarea. Because the decision recorded on the stone (from a Greek-speaking area) is in Latin, they presume a Roman judge in the case. The inscription from Prusias ad Hypium might be similarly interpreted.

23 Modestinus tells us explicitly that the acta of provincial governors were recorded (Dig. 4.6.33.1, lib. sing. de enucleatis casibus). For public access to protocols of trials, cf. P.Parsons, ad P.Oxy. XLII 3015. Generally on the use of oratio recta in the records of trials, see R.A.Coles, Reports of Proceedings in Papyri, Brussels 1966,9-27. Note as well the famous case involving the farmers from Goharia, tried by Caracalla and now preserved on stone, AE 1947,182 = SEG 17,1960,759.

24 See L.Robert, Le sanctuaire de Sinuri près de Mylasa, Paris 1945,45, discussing the testament of a certain Melas. The man had apparently left a legacy to the god and his sanctuary, which was the cause for inscribing his will there. Robert cites other such cases from Asia Minor. See also P.Herrmann und K.Ziya Polatkan, Das Testament des Epikrates und andere neue Inschriften aus dem Museum von Manisa, Vienna 1969,7ff., esp.18-9 on "Stiftungen." For the legal problems arising from bequests to towns, see Johnston, JRS 75,1985,105-25, and G.Wesch-Klein, "Rechtliche Aspekte privater Stiftungen während der römischen Kaiserzeit," Historia 38,1989,177-97. Note also CIL II 1359, where the decurions of Arunda in Baetica force a recalcitrant heir to carry out the wishes of a testator. On this case, see H.Schulze-Oben, Freigelassene in den Städten des römischen Hispanien. Juristische, wirtschaftliche und soziale Stellung nach dem Zeugnis der Inschriften, Bonn 1989,66-67.

case, not the will itself, but a legal dispute and the ensuing decision regarding the will have given rise to an inscription. Although it is impossible to divine the exact context of this inscription, we suspect that it was set up in some public place in order to commemorate some public group's ultimate success at law, and its receipt of the trust.

This inscription from Prusias ad Hypium, then, provides another elusive glimpse at the imperial legislation concerning trusts. It is certainly not possible conclusively to identify the rescript whose existence we have suggested on this stone, with an otherwise preserved Severan rescript concerning substitute heirs and their responsibilities. However, the matters that resulted in the dispute here resolved fit perfectly with those described by Ulpian and in the rescript of Diocletian. And in particular, the apparent insistence of the ultimate decision on the wishes of the testator echoes suggestively the Severan principle. Might we therefore have here a trial from the Severan period, indeed a rescript from Septimius Severus or Caracalla?[25]

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[25] It might just be conceivable that Caracalla delivered this opinion when he visited Prusias in the spring of 215. For the emperor's presence there at this time, see H.Halfmann, Itinera principum. Geschichte und Typologie der Kaiserreisen im Römischen Reich, Stuttgart 1986,224 and 227-8.