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BETWEEN HEAVEN AND EARTH: FAMILY OWNERSHIP VERSUS RIGHTS
OF MONASTIC COMMUNITIES. THE THEODOSIAN CODE AND LATE
ANTIQUÉ LEGAL PRACTICE*

1. INTRODUCTION

THE RELIGIOUSLY INSPIRED and pro-Christian legislation included in the Theodosian Code has been studied on numerous occasions. Several laws introduced between the years 370 and 434 demonstrate a visible trend of recognising ecclesiastical proprietary rights. By way of contrast, the possibility of receiving pious donations by Church entities is hardly discussed by the Theodosian compilation – and even if so, it is in a rather restrictive manner.¹ It is only with the reign of Justinian that the legal regime concerning donations for *piae causae* and *venerabiles domus* finally took significant

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¹ With an exception of the law issued by Constantine in 321 (*CTh* 16.2.4) as discussed below.

shape.² This is surprising because the sources of legal practice show the rapid spreading of the abandonment of wealth and the transfer of property to the Church and the poor, apparently in line with New Testament texts that urge such conduct.³ Peter Brown calls this period ‘The Age of a Camel’, and sketches the dilemma faced by Christian communities of the later empire, revolving around the problem of the possession of worldly goods and the risk of failing the test of ‘passing through the eye of a needle’.⁴ Brown persuasively argues for a more balanced position, showing that the renunciation of wealth was not the only option for those seeking personal salvation. The true renunciation of property and poverty was at the far edge of the Christian spectrum rather than in its centre.⁵ Gifts to the poor as well as donations and offerings for pious reasons – made both by the faithful and by Church entities – could equally well draw a link between heaven and earth. Hence, it may raise an eyebrow that laws in favour of religious gifts are hardly represented in the *Codex*, and, moreover, that restrictions on alienation of property to the benefit of the Church were introduced during reign of Theodosius the Great, who – needless to say – made religion one of the main subjects of imperial propaganda.

The idea behind this article is to investigate the relationship between the legislation introduced in the field of proprietary rights assigned to various Church entities and the practice of accumulation of wealth by the monastic

² On the property rights of the monasteries and monks in the light of Justinian’s legislation, see R. ORESTANO, ‘Beni dei monaci e monasteri nella legislazione Giustiniana’, [in:] *Studi in Onore di Pietro Francisci*, vol. 3, Milan 1956, pp. 563–593.

³ However, both of these actions seem to be located at the opposing edges of the spectrum. For relevant fragments in New Testament, see most of all Matthew 19:21; cf. Mark 10:21; Luke 18:22; see also Luke 12:33. For literature (with further references), see e.g. L.W. COUNTRYMAN, *The Rich Christian in the Church of Early Empire: Contradictions and Accommodations*, New York – Toronto 1980, esp. pp. 78–80. Cf. also Acts 4:32–37; 2:43–45; D. J. KYRTATAS, *The Social Structure of the Early Christian Communities*, London – New York 1987, pp. 38–41. For mitigation of the idea of voluntary poverty in early Christianity, see P. BROWN, *Poverty and Leadership in the Roman Empire*, Hanover – London 2002, esp. pp. 17–18.

⁴ See P. BROWN, *Through the Eye of a Needle: Wealth, the Fall of Rome, and the Making of Christianity in the West, 350–550 AD*, Princeton 2012, *passim*.

⁵ See R. S. BAGNALL, ‘Monks and property: Rhetoric, law, and patronage in the *Apophthegmata Patrum* and the papyri’, *GRBS* 42 (2001), pp. 7–24, at p. 21.

communities in late antique Egypt. On the one hand, among the literary sources the predominant theme concerning Egyptian monasticism is the idea of voluntary poverty and renunciation of worldly affairs aimed at the pursuance of a contemplative life. On the other hand, the papyri offer insight into monastic life that does not seem to have been entirely detached from the outside world, but also led to the accumulation of capital and acquisition of land estates, and sometimes quite large ones.⁶ In this vein, the laws of Valentinian I and Theodosius II clearly indicate that monks and nuns continued to own property without disturbance after undertaking religious life.⁷ In addition, Theodosius the Great and later emperors restricted the freedom of certain groups of citizens to disown their property, rendering the Christian ideal of voluntary poverty not always feasible.⁸ It is only with Justinian that certain rules regarding monastic poverty are shaped and set by the secular power.⁹ Earlier imperial legislation is not so much indifferent

⁶ According to the literary sources the rules on the property acquisition and its management differed for anchoritic lauras and cenobitic monasteries. A typical representative of the early monastic milieu was expected to abandon his entire property and embrace the life in voluntary poverty. Admittedly, we also find texts that mention monks selling the effects of their work – performed while contemplating God and praying – in order to earn a living. It is, however, only with the papyrological evidence that our perception of everyday existence of Egyptian monks changes significantly. The papyri prove that owning property was common in the monastic movement (regardless of the form of organisation of monastic community as well as for individual monks). For more, see e.g. E. WIPSYCKA, ‘Resources and economic activities of the Egyptian monastic communities (4th–8th century)’, *JJurP* 41 (2011), pp. 159–263; *eadem*, *Moines et communautés monastiques en Égypte (IV^e–VIII^e siècles)* [= *JJurP Sup* 11], Warsaw 2009, pp. 471–565; BAGNALL, ‘Monks and property’ (cit. n. 5), pp. 7–24; J. E. GOEHRING, *Ascetics, Society and the Desert: Studies in Early Egyptian Monasticism*, Harrisburg 1999, pp. 39–52. On the practical dimension of this division in the papyrological evidence, see also further in n. 90.

⁷ See most of all the provisions of *CTh* 5.3.1, also discussed below. As also noted by Bagnall, the fact that the attestations for monks’ property and financial transactions are so extensive suggest that we cannot be dealing with an entirely illegal situation, see R. S. BAGNALL, *Egypt in Late Antiquity*, Princeton 1993, pp. 293–303, esp. p. 298.

⁸ Extensively on that A. LANIADO, ‘The early Byzantine state and the Christian ideal of voluntary poverty’, [in:] M. FRENKEL & Y. LEV (eds.), *Charity and Giving in Monotheistic Religions*, Berlin 2009, pp. 15–43.

⁹ In the wake of introduced laws monastic poverty was shaped for the first time by the secular powers. These rules interfere with and limit the property rights belonging to Roman citizens. In the light of these provisions – with certain exceptions – a prospective monk dis-

to the issue as it seems to reject (or at least ignore) the fundamental tenet of poverty in the rising monastic movement.¹⁰

I would like to verify how the constitutions devoted to these issues fit into the broader legislative context of the Theodosian Code. Here, both the political dimension of this compilation as well as the plausible influence of the imperial laws on the legal practice will be taken into consideration. The incentive for this study is to check for any conflict between the principles of classical Roman law in the field of private ownership and imperial legislation included in the *Codex Theodosianus*. Giorgio Barone-Adesi observed the tension that took place between the Christian communities and their corporations that were allotted ever broader privileges and the Roman principle of preservation of the property within the family unit.¹¹ There is, however, still some room left for discussion since not all the data easily adds up to an unequivocal conclusion. In this analysis, the Code is treated as a measure for taking a stand by the legislator in the dispute between the will of the owner, recognition of the rights of the heirs and family members, and finally the privileges granted to the religious *consortia*.

posed of his property only until the moment of entering the monastery. The aim was to assure that the property not alienated by the monks before joining the monastery would belong to the latter. Cf. most of all: *Nov.* 5.5; 22.5; 76; 123.38; 133.1. Still, it seems that the introduced set of rules did not refer to anchorites. For more on the Byzantine legislation on monastic poverty, see e.g. A. STEINWENTER, 'Byzantinische Mönchstestamente', *Aegyptus* 12 (1932), pp. 55–64; ORESTANO, 'Beni dei monaci' (cit. n. 2), pp. 563–593; see also G. BARONE-ADESI, 'Il sistema giustiniano delle proprietà ecclesiastiche', [in:] E. CORTESE (ed.), *La proprietà e le proprietà*, Milan 1988, pp. 75–120. Earlier literature on the subject in LANIADO, 'Early Byzantine state' (cit. n. 8), p. 15 n. 2. For an outline of legislation concerning monks in the reign of Justinian, see A. HASSE-UNGEHEUER, *Das Mönchtum in der Religionspolitik Kaiser Justinians I*, Berlin – Boston 2016.

¹⁰ We may observe in this case a rather slow endorsement of the general idea of monastic poverty into imperial legislation. The property rights of individual monks appear to remain intact in the *Codex Theodosianus*. Indeed, even Justinian's legislation regarded only a fraction of the existing monastic milieu, namely the cenobitic movements. On that also LANIADO, 'Early Byzantine state' (cit. n. 8), pp. 15–17.

¹¹ See G. BARONE-ADESI, 'Dal dibattito cristiano sulla destinazione dei beni economici alla configurazione in termini di persona delle venerabili domus destinate piis causis', *Atti dell'Accademia Romanistica Costantiniana* 9 (1993), pp. 230–265.

2. ECCLESIASTICAL PROPRIETARY RIGHTS:
THE ISSUE OF PIOUS DONATIONS IN CODEX THEODOSIANUS

The first law included in the Theodosian Code that granted the general possibility to designate the Church as the beneficiary of a legacy or *fideicommissum* was introduced by Constantine in 321. *CTh* 16.2.4 states clearly that a dying person may leave whatever he or she wishes to ‘the most holy and venerable Catholic council’.¹² The formulation of the constitution calls for attention since it refers to an organisational body of the Church that is vested with capacity to acquire property rights.¹³ Caroline Humfress recently hinted at the possible origin of the issuance of *CTh* 16.2.4. What may lie behind the constitution are the inheritance strategies and disputes resulting from the formulation of the testator’s intent. If one assumes that the Constantine’s incentive for introducing the constitution originated in the doubts or opposition of the statutory heirs with regard to the effectiveness of the bequests made to the *sanctissimo catholicae venerabilique concilio*, then the reason for these doubts could not only be the matter of the Church’s testa-

¹² *CTh* 16.2.4 (*Imp. Constantinus a. ad populum*): *Habeat unusquisque licentiam sanctissimo catholicae uenerabilique concilio decedens bonorum quod optauit relinquere. Non sint cassa iudicia. Nihil est, quod magis hominibus debetur, quam ut supremae uoluntatis, post quam aliud iam uelle non possunt, liber sit stilus et licens, quod iterum non redit, arbitrium*. Later included in *CJ* 1.2.1.

¹³ This could contribute to a long-lasting discussion concerning the existence of legal persons in case of Church institutions, see e.g. R. ORESTANO, *Il ‘problema delle persone giuridiche’ in diritto romano*, Turin 1968, esp. pp. 77–90; more recently on that matter (with further references), see J. M. BLANCH NOUGÉS, ‘Sobre la personalidad jurídica de las “fundaciones” en derecho romano’, *Revista jurídica Universidad Autónoma de Madrid* 16 (2007), pp. 9–28; *idem*, ‘La responsabilidad de los administradores de las piae causae en el derecho romano justiniano’, *RIDA* 49 (2002), pp. 129–146. It seems that if we were to identify any legal concept that could be approaching our modern notion of legal personality in late antiquity, we would probably point at the Church entities such as bishoprics, monasteries, orphanages, infirmaries, hospices, and houses for old and poor. See in similar manner J. URBANIK, ‘*P. Oxy.* LXIII 4397: The monastery comes first or pious reasons before earthly securities’, [in:] A. BOUD’HORS *et al.* (eds.), *Monastic Estates in Late Antique and Early Islamic Egypt: Ostraca, Papyri and Essays in Memory of S. Clackson* [= *American Studies in Papyrology* 46], Cincinnati 2009, pp. 225–235, at p. 227 (with reference to further literature). On the controversies concerning the verbal formulation ‘the most holy and venerable Catholic council’ in *CTh* 16.2.4, see C. HUMFRESS, ‘Gift-giving and inheritance strategies in late Roman law and legal practice (fourth to sixth centuries CE)’, [in:] O.-A. RØNNING, H.M. SIGH & H. VOGT (eds.), *Donations, Strategies and*

mentary capacity, but also the possibility of challenging the testamentary dispositions. The legislator's concern that is clearly outlined in the constitution is that the testator's 'judgement' should not be ineffectual. Already in Valerius Maximus' *restitution edict* from 312 and Constantine's Edict of Milan from 313, the Christian 'bodies' (*corpora*), are encumbered with proprietary rights.¹⁴ Humfress posed a question whether, in line with these provisions, 'the most holy and venerable Catholic council' had testamentary capacity, and whether relatives of the deceased person could in fact challenge the will on the grounds of the wording used. To be more specific, since there is no

Relations in the Latin West and Nordic Countries, London – New York 2017, pp. 9–27, at pp. 15–16. Cf. also T. BARNES, *Constantine: Dynasty, Religion and Power in the Later Roman Empire*, Chichester 2011, pp. 139–140.

¹⁴ The Greek translation of *restitution edict* is provided by Eusebius, *Eccl. hist.* 9.10.11: ἵνα εἴ τινες οἰκίαι καὶ χωρία ἃ τοῦ δικαίου τοῦ τῶν Χριστιανῶν πρὸς τούτου ἐτύγχανον ὄντα, ἐκ τῆς κελεύσεως τῶν γονέων τῶν ἡμετέρων εἰς τὸ δίκαιον μετέπεσεν τοῦ φύσκου ἢ ὑπὸ τινος κατελήφθη πόλεως, εἴτε διάπρασις τούτων γεγένηται εἴτε εἰς χάρισμα δέδοται τι, ταῦτα πάντα εἰς τὸ ἀρχαῖον δίκαιον τῶν Χριστιανῶν ἀνακληθῆναι ἐκελεύσαμεν ἵνα καὶ ἐν τούτῳ τῆς ἡμετέρας εὐσεβείας καὶ τῆς προνοίας αἴσθησιν πάντες λάβωσιν. Accordingly, the passus of the Edict of Milan found in Lactantius (*De mort. pers.* 48.9) is also provided in Greek translation by Eusebius. See Lact., *De mort. pers.* 48.9: *Et quoniam idem Christiani non [in] ea loca tantum ad quae conuenire consuerunt, sed alia etiam habuisse noscuntur ad ius corporis eorum id est ecclesiarum, non hominum singulorum, pertinentia, ea omnia lege quam superius comprehendimus, citra ullam prorsus ambiguitatem uel controuersiam isdem Christianis id est corpori et conuentibus eorum reddi iubebis, supra dicta scilicet ratione seruata, ut ii qui eadem sine pretio sicut diximus restituant, indemnitate de nostra beniuolentia sperent*; as well as: Eusebius, *Eccl. hist.* 10.5.11: ἐπειδὴ οἱ αὐτοὶ Χριστιανοὶ οὐ μόνον ἐκείνους εἰς οὗς συνέρχεσθαι ἔθος εἶχον, ἀλλὰ καὶ ἑτέρους τόπους ἐσχηκέναι γινώσκονται διαφέροντας οὐ πρὸς ἕκαστον αὐτῶν, ἀλλὰ πρὸς τὸ δίκαιον τοῦ αὐτῶν σώματος, τοῦτ' ἔστιν τῶν Χριστιανῶν, ταῦτα πάντα ἐπὶ τῷ νόμῳ ὃν προειρήκαμεν, δίχα παντελῶς τινος ἀμφισβητήσεως τοῖς αὐτοῖς Χριστιανοῖς, τοῦτ' ἔστιν τῷ σώματι αὐτῶν καὶ τῇ συνόδῳ ἐκάστῳ αὐτῶν ἀποκαταστήναι κελεύσεις, τοῦ προειρημένου λογισμοῦ δηλαδὴ φυλαχθέντος, ὅπως αὐτοὶ οἵτινες τοὺς αὐτοὺς ἄνευ τιμῆς, καθὼς προειρήκαμεν, ἀποκαθιστῶσι, τὸ ἀζήμιον τὸ ἑαυτῶν παρὰ τῆς ἡμετέρας καλοκάγαθίας ἐλπίζοιεν. Artur Steinwenter argued that the term *dikaion* (as cited in the sources above and appearing in the Coptic and Greek documents from late antiquity) corresponds to *ius corporis* and should be interpreted as denoting a 'legal person', see A. STEINWENTER, 'Die Rechtsstellung der Kirchen und Klöster nach den Papyri', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Kanonistische Abteilung* 50 (1930), pp. 1–50, at pp. 31–34. In similar vein on the rights assigned to Church and the meaning of *dikaion*, see E. WIPSYCZKA, *CE*, vol. 3, s.v. 'Dikaion' (with references to further literature). For the discussion with hypothesis proposed by Steinwenter,

mention of *concilium* in the Edict of Milan as a generic term referring to the Christian community, Humfress wondered if the Constantine's enactment of 321 could have been prompted by a specific case or concrete legal problem, and suggests that its purpose was to eliminate the controversies found in practice. To my mind, it remains beyond doubt that in the eyes of the law, the capacity of Christians and all their 'bodies' (*id est corpori et conventiculis eorum*)¹⁵ was recognised allowing them to possess and acquire – also through inheritance – property. Thus, in *CTh* 16.2.4 Constantine reaffirms the freedom to establish the Church as the beneficiary of testamentary dispositions. It is stated in the constitution that *non sint cassa iudicia*. This wording does not seem to fit the declaration of nullity *ipso iure* (as for instance in the case of establishing a *persona incerta* as an heir), and thus opens the debate whether we could be dealing with a reference to cases where wills could be subject to *querela inofficiosi testamenti* (a remedy with which close relatives of the deceased could complain against 'undutiful' will).¹⁶ Particularly in the light of the arguments invoked in the second part of the constitution (*nihil est, quod magis hominibus debetur, quam ut supremae voluntatis, post quam aliud iam velle non possunt, liber sit stilus et licens, quod iterum non redit, arbitrium*) such interpretation may appear tempting, yet not certain, due to the very general nature of the provisions.¹⁷ In my opinion, however, we should

as well as on the legal capacity and patterns of legal representation of monastic communities, see M. WOJTCZAK, "Legal representation" of monastic communities in late antique papyri', *JJurP*, forthcoming.

¹⁵ Lact., *De mort. pers.* 48.9 (cited above).

¹⁶ Closest relatives who had not been disinherited with good reason were entitled to pursue with a claim (against persons established as heirs in the testament) aiming at bringing down the testament as *inofficiosum*. In order to avoid such situation, the testator could leave no less than a quarter of the share that the claimant would have received if the testator had died intestate (*portio debita/legitima*). See e.g. R. ZIMMERMANN, 'Compulsory heirship in Roman law', [in:] K. G. C. REID, M. J. DE WAAL & R. ZIMMERMANN (eds.), *Exploring the Law of Succession. Studies National, Historical and Comparative*, Edinburgh 2007, pp. 27–48.

¹⁷ It seems that close relatives should be deprived of the possibility to pursue with *querela inofficiosi testamenti* by a verbatim statement in the constitution, since such provision would be of high significance. This is more likely than to assume that one should infer it from a rather general statement *non sint cassa iudicia*. A similar solution would be expected if the limitation regarded the possibility to complain in case of transgressing the provisions of the *lex Falcidia*. This law protected an heir if the testamentary bequests made to other entities

interpret the cited passage within the broader context of the Constantine's laws regarding wills. In that sense the *stilus* mentioned in *CTh* 16.2.4 would rather refer to the abolition of the formal requirements concerning the language of testamentary dispositions (including *heredis institutio*), so that the verbal formulation could not be used against the intent of a testator.¹⁸ With

(including the Church) exceeded three quarters of net estate and hence infringed the guaranteed 'Falcidian share'. Such situation would lead in consequence to a proportional diminution of the bequests so the *heres institutus* would always get his or her fourth. Cf. later exclusion of interference on the basis of the *lex Falcidia* against inheritance or legacy (*hereditatem vel legatum*) assigned to the captives, the poor or religious houses (only under given conditions): *CJ* 1.3.48 (531) as well as *Nov.* 131.12 (545). For Justinian's exclusion of bringing *querela inofficiosi testamenti* against testaments of bishops, presbyters and deacons (however, again in very specific circumstances), see *CJ* 1.3.49 (531). On the contradictions between the pure imperial law, the legal practice of late antiquity in regard to differentiation between *quarta Falcidia* and the *portio debita/legitima*, see: J. URBANIK, 'Dioskoros and the law (on succession): Lex Falcidia revisited', [in:] J.-L. FOURNET & C. MADGELEINE (eds.), *Les archives de Dioscore d'Aphrodité cent ans après leur découverte. Histoire et culture dans l'Égypte byzantine, Études d'archéologie et d'histoire ancienne*, Paris 2008, pp. 117–142.

¹⁸ Cf. *Life of Constantine* (Euseb. *V.Const.* 4.26): Κάπειτα τῶν τὸν βίον μεταλλατόντων ὁμοίος παλαιοὶ μὲν νόμοι ἐπ'αὐτῆς ἐσχάτης ἀναπνοῆς ἀκριβολογεῖσθαι ῥημάτων λέξεσι τὰς συνταττόμενας διαθήκας τρόπους τε τίνας καὶ ποίας δεῖ φωνὰς ἐπιλέγεσθαι ὄριζον, καὶ πολλὰ ἐκ τούτων ἐκακουργεῖτο ἐπὶ περιγραφῇ τῆς τῶν κατοικομένων προαιρέσεως. Ἄ δὴ συνιδὸν βασιλεὺς καὶ τούτων μετεποιεῖτο τὸν νόμον, φιλοῖς ῥηματίοις καὶ ταῖς τυχεύσαις φωναῖς τὸν τελευτῶντα δεῖν τὰ κατὰ γνώμην διατάττεσθαι φήσας κὰν τῷ τυχόντι γράμματι τὴν αὐτοῦ δόξαν ἐκτίτεσθαι, κὰν ἀγράφως ἐθέλη, μόνον ἐπὶ μαρτύρων τοῦτο πράττειν ἀξιοχρέων, τὴν πίστιν δυνατῶν σὺν ἀληθείᾳ φυλάττειν. Eusebius stresses the fact that the strict compliance with verbal formalism led in the past to many attempts to breach the testators' wills. In contrast to earlier legislative framework, Constantine's reforms are aimed at placing the primary importance on the wishes of the testator. In relation to the above fragment of *Vita Constantini*, see esp. the provisions of *CJ* 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 necessariam observantiam, utrum imperativis et directis verbis fiat an inflexa*. See further the passage of *CJ* 6.23.15.2: *Et in postremis ergo iudiciis ordinandis amota erit sollemnium sermonum necessitas, ut, qui facultates proprias cupiunt ordinare, in quacumque instrumenti materia conscribere et quibuscumque verbis uti liberam habeant facultatem*. Bernardo Albanese has persuasively demonstrated that the contents of the cited passage of *Vita Constantini* are indeed a commentary to the provisions of *CJ* 6.23.15, see: B. ALBANESE, 'L'abolizione postclassica delle forme solenni nei negozi testamentari', [in:] *Scritti giuridici* II, Palermo 1991, pp. 1637–1654. On the reforms of Constantine introduced in regard to testaments, see M. NOWAK, *Wills in the Roman Empire: A Documentary Approach* [= *JJurP Sup* 23], Warsaw 2015, pp. 42–46 (with abundant references to earlier literature).

this the emperor could aim at dispersing doubts that likely existed in the legal practice regarding vast array of issues, such as the recognition of testamentary capacity of the Church, the possibility of challenging the testamentary bequests by relatives, as well as – perhaps above all – the form of specific dispositions in the will. It is in this context that Constantine’s legislation – as Humfress put it – ‘does not simply confirm the validity of inheritances and deathbed gifts left to the Catholic Church, it is also evidence for the legal complexities and potential challenges that such bequests could entail’.¹⁹

The next legislative step made in the field of bequeathing property to the ecclesiastics is *CTh* 16.2.20. This law, issued in the year 370 by Valentinian to Damasus, the bishop of the City of Rome, seems to point to a direction entirely different than the one indicated by the favourable legislation of Constantine.²⁰ According to this constitution, the clerics and monks (*ecclesiastici aut ex ecclesiasticis vel qui continentium se volunt nomine nuncupari*) should not visit the houses of widows and female wards (*pupillae*). They should not obtain anything from the aforementioned women, ‘to whom they have attached themselves privately under the pretext of religion’ (*privatim sub praetextu religionis adiunxerint*). Everything that may have been left to the ecclesiastic through a testament of these women shall be considered ineffective and such property shall be appropriated by the fisc. Not only ecclesiastics are exempt from such enrichment, but also those who have renounced their religious status for whatever reason.

The wording of the constitution is highly restrictive as it states that anything that was given to the ecclesiastics either through the act of generosity

¹⁹ Cf. HUMFRESS, ‘Gift-giving’ (cit. n. 13), p. 16.

²⁰ *CTh* 16.2.20 (*Imppp. Valentinianus, Valens et Gratianus aaa. ad Damasum episcopum urbis Romae*): *Ecclesiastici aut ex ecclesiasticis vel qui continentium se volunt nomine nuncupari, viduarum ac pupillarum domos non adeant, sed publicis exterminentur iudiciis, si posthac eos ad fines earum vel propinqui putaverint deferendos. Censemus etiam, ut memorati nihil de eius mulieris, cui se privatim sub praetextu religionis adiunxerint, liberalitate quacumque vel extremo iudicio possint adipisci et omne in tantum inefficax sit, quod alicui horum ab his fuerit derelictum, ut nec per subiectam personam valeant aliquid vel donatione vel testamento percipere. Quin etiam, si forte post admonitionem legis nostrae aliquid isdem eae feminae vel donatione vel extremo iudicio putaverint relinquendum, id fiscus usurpet. Ceterum si earum quid voluntate percipiunt, ad quarum successionem vel bona iure civili vel edicti beneficiis adiuvantur, capiant ut propinqui.*

or by the will of such women should be ineffective and confiscated. An analogous solution is foreseen in case of the donation or testamentary bequest made through an interposed person. Such provision brings to mind the legal regime of *fideicommissum tacitum* that was forfeited to the *fiscus* if a *legatarius* or *heres* engaged themselves to give the *fideicommissum* to a person legally incapable of taking it.²¹ It seems that the constitution assumes a scenario according to which the goods left to an ecclesiastic or a former ecclesiastic did not become a *caducum* (and hence could not have been claimed by the heirs or legatees), but could be directly seized by the *fisc*.²²

It is thus disputable whether we may consider the latter constitution as designed to protect the interest of the family above all. Of course, the risk of the forfeiture of part of the property in favour of the *fiscus* might have been a deterrence for possible donors *inter vivos* or *mortis causa*. One should note, however, that from the perspective of a person who decides to make a donation for pious reasons, in the event that the bequest has no legal effect the exclusion of the family from receiving part of the property should not have a 'blocking' effect, because in a reverse situation (i.e. when the bequest is effective) their position would be equally infringed. Admittedly, those who preferred to make testamentary bequests to the benefit of the clerics, rather than to their relatives would not always treat as irrelevant the fact that their property could be transferred to the treasury instead of the family. Still, to my mind, it seems unlikely that the risk of forfeiture could effectively discourage the donor or testator, causing him or her to leave the property in the hands of his or her relatives. The constitution's aim as well could have been to discourage a cleric to take any action leading to acquiring a donation or a testamentary bequest, since such a bequest would be subject to forfeiture regardless. The constitution also states that the provisions in favour of the ecclesiastics would be deemed effective on the condition these per-

²¹ Certainly, such *fideicommissum* must have been established in a manner that was evading the law (*in fraudem legis*). Otherwise, the *fideicommissum* that was openly given in the testament to a person incapable of its appropriation would be considered null and void.

²² Cf. *CTh* 16.2.27 (also discussed below), that provides a solution indeed protecting the family. Barone-Adesi in his argumentation in favour of the imperial policy protecting the family rights omits the controversy regarding the appropriation of property assigned in *fideicommissum* by the *fisc*. See BARONE-ADESI, 'Dal dibattito cristiano' (cit. n. 11), pp. 243–244, 251.

sons are included in the catalogue of heirs *ab intestato*, be it on the basis of civil law or praetorial edict. It remains, however, an open question whether these provisions were at all targeted at the bequests made to the Church itself, at least at this stage.

In a somewhat similar vein, *CTh* 16.2.27 (390) – issued while Theodosius I was at Milan but addressed to the eastern praetorian prefect Tatianus²³ – limits the rights of women attempting to be accepted into *diaconissarum consortium*, as well as their capacity to leave their possessions after death to the benefit of the Church.²⁴ In regard to women, and especially those coming from noble families, the law states that they should not dispose of their jewels, plate or furniture (or anything else for that matter) under the presence of religion (*sub religionis defensione*). Moreover, when a woman dies,

²³ On Tatianus, see J. MATTHEWS, *Western Aristocracies and Imperial Court*, Oxford 1975, pp. 114, 224. The law limiting the capacity of clerics to inherit after women from the year 390 was most probably directed at the Eastern Church, in contrast to the twenty years earlier Valentinian's law that had been addressed to Damasus, the bishop of Rome. On that also, see J. EVANS-GRUBBS, 'Virgins and widows, show-girls and whores: Late Roman legislation on women and Christianity', [in:] R. W. MATHISEN (ed.), *Law, Society and Authority in Late Antiquity*, Oxford 2001, pp. 220–241, at p. 227.

²⁴ *CTh* 16.2.27 (*Imppp. Valentinianus, Theodosius et Arcadius aaa. Tatiano praefecto praetorio*): pr. *Nulla nisi emensis sexaginta annis, cui votiva domi proles sit, secundum praeceptum apostoli ad diaconissarum consortium transferatur. Tum filiis suis, curatore, si id aetas poscit, petito, bona sua idoneis sedula religione gerenda committat, ipsa tantum praediorum suorum reditus consequatur, de quibus servandi abalienandi donandi distrahendi relinquendi vel quoad superest vel cum in fata concedit et libera ei voluntas est, integra sit potestas. Nihil de monilibus et superlectili, nihil de auro argento ceterisque clarae domus insignibus sub religionis defensione consumat, sed universa integra in liberos proximosve vel in quoscumque alios arbitrii sui existimatione transcribat ac si quando diem obierit, nullam ecclesiam, nullum clericum, nullum pauperem scribat heredes. Careat namque necesse est viribus, si quid contra vetitum circa personas specialiter comprehensas fuerit a moriente confectum. Immo si quid ab his morienti fuerit extortum, nec tacito fideicommisso aliquid clericis in fraudem venerabilis sanctionis callida arte aut probrosa cuiuspiam coniventia deferatur; extorres sint ab omnibus quibus inhiaverant bonis. Et si quid forte per epistulam codicillum donationem testamentum, quolibet denique detegitur genere conscriptum erga eos, quos hac sanctione submovimus, id nec in iudicium devocetur, sed vel ex intestato is, qui sibi competere intellegit, statuti huius definitione succedat, si quis se agnoscit filium, si quis probat propinquum, si quis denique vel casu vel iudicio, pro solido pro portione, heres legatarius fideicommissarius apertis deprehenditur codicillis, fruatur fortunae munere, conscientiae suae fructu et submotis his adque deiectis in hereditariis corporibus potestate utatur heredis.*

she must designate as her heirs neither church (*nullam ecclesiam*), nor cleric (*nullam clericum*), nor pauper (*nullam pauperem*).²⁵ Her property should be – as indicated in the constitution – rather assigned to her children, next of kin or to any other person according to her free will. If these provisions are broken and something is bestowed on clerics by *tacitum fideicommissum* (cunning artifice or disgraceful connivance of anyone) then the clerics should be deprived of everything that has been given to them. If anything was transferred through a letter, codicil, donation or testament to the above-mentioned persons, the deed of transfer should have no legal effect. This time, it is the family members that are entitled to the property and shall succeed as heirs *ab intestato* or on the basis of the testament to all or to the portion of the goods as heirs, legatees, beneficiaries of a trust or through a codicil.

This law, however, was revoked only two months later by the subsequent constitution listed in *Codex Theodosianus*, i.e. 16.2.28, which makes it hardly suitable to serve as a basis of any conclusions on a coherent legislative policy of Theodosius I.²⁶ In secondary literature, one often finds references to the abrogation of these provisions, yet the discussion on the origins of this action is rare.²⁷ The conspicuous discrepancies between the ecclesiastical commandments and the imperial legislation have served as the main explanation for the rapid change of law. This supposedly led to a subsequent change of a legislator's mind on the limitations the freedom of disposition of the Church and clerics.²⁸ Recent scholarship appended the latter interpretation by a suggestion that the law relating to the deaconesses and widows could have been introduced due to some particular matters of state.

²⁵ Her property should be – as indicated in the constitution – rather assigned to her children.

²⁶ Or it even suggests that there was no such coherent legislative policy.

²⁷ *CTh* 16.2.28 (*Imppp. Valentinianus, Theodosius et Arcadius aaa. Tatiano praefecto praetorio*): *Legem, quae de diaconissis vel viduis nuper est promulgata, ne quis videlicet clericus neve sub ecclesiae nomine mancipia superlectilem praedam velut infirmi sexus dispoliator invaderet et remotis adfinibus ac propinquis ipse sub praetextu catholicae disciplinae se ageret viventis heredem, eatenus animadvertat esse revocatam, ut de omnium chartis, si iam nota est, auferatur neque quisquam aut litigator ea sibi utendum aut iudex noverit exequendum.*

²⁸ See BARONE-ADESI, 'Dal dibattito cristiano' (cit. n. 11), pp. 252–254 (with references to further literature).

In that context scholars pointed at two alternative hypotheses. First of all, according to Sozomen the unfavourable legislation could be related to a scandalous event: the rape of a Christian woman by a deacon while she was doing penance in church.²⁹ Secondly, the case of Olympias is often offered as a probable impetus for the sanctions enacted against clerics.³⁰ Theodosius, who was related to Olympias, attempted to pressure her into concluding a second marriage, although the widowed woman wished to devote herself to celibacy and pass her wealth to the Church. The aim of the law would then be to deter Olympias from giving generous donations for pious reasons.³¹ The story ends with Olympias' ordination as a deaconess by Nectarius, bishop of Constantinople. As the emperor's primary tactic failed, there was no point in keeping the law, which additionally had provoked objections on the part of the Church.³² As tempting as the proposed hypothesis may seem, it does not work chronologically. The provisions regarding deaconesses were revoked already in 390, whereas Olympias regained control over her property and became deaconess only in 391. The story could

²⁹ Cf. Sozomen, *HE* 7.16.

³⁰ See EVANS-GRUBBS, 'Virgins and widows' (cit. n. 23), pp. 229–230. Also on that earlier J. H. W. LIEBESCHUETZ, *Barbarians and Bishops. Army, Church and State in the Age of Arcadius and Chrysostom*, Oxford 1990, pp. 143–144; R. P. COLEMAN-NORTON, *Roman State and Christian Church. A Collection of Legal Documents to AD 535*, vol. 2, London 1966, no. 225, pp. 429–434; no. 227, pp. 433–434; G. DAGRON, *Naissance d'une capitale: Constantinople et ses institutions de 330 à 451*, Paris 1974, p. 502 n. 7; R. BRUNO-SIOLA, 'Viduae e coetus viduarum nella chiesa primitiva e nella normazione dei primi imperatori cristiani', *Atti dell'Accademia Romanistica Costantiniana* 8 (1990), pp. 367–426, at pp. 415–418; J. R. CURRAN, *Pagan City and Christian Capital. Rome in the Fourth Century*, Oxford 2000, pp. 286–287.

³¹ See *Vita Olympiae* 3–6, [in:] Jean Chrysostome, *Lettres à Olympias. Seconde édition augmentée de la Vie anonyme d'Olympias*, A.-M. MALINGREY (ed. & tr.) [= *SCh* 13bis], Paris 1968, pp. 410–420; cf. Sozomen, *HE* 8.9.

³² The story of Olympias seems to have common points with an account on the introduction of Theodosius' law in *Miracles of St Thekla*, cf. *Miracle* 9, [in:] G. DAGRON (ed.), *Vie et miracles de Ste Thecle*, Brussels 1978, pp. 304–309. The story concerns one Menodorus, a former priest of the church of Saint Thekla who had become bishop of Aigeai, who has been made an heir to wealthy and pious woman. However, eunuch Eutropius (who was an official at the imperial court in Constantinople) in the view of personal gain persuaded the emperor to pass a law that forbade clerics to become woman's heir unless they are of her kin. This story is recalled and analysed in detail by EVANS-GRUBBS, 'Virgins and widows' (cit. n. 23), pp. 230–232.

thus form a background in the changes made in legislation, but it does not seem to be their direct cause.

There is another vital factor that should be taken into consideration when discussing the reasoning behind *CTh* 16.2.27 and 16.2.28. It seems hardly a coincidence that the conflict between Theodosius and Ambrose took place in the background of the introduced provisions. The discord resulted in the excommunication of the ruler by the bishop after the pacification of a mob in Thessaloniki ordered by the emperor in spring 390, and in the wake of the murder of the Roman commander Butheric. Ambrose refused to celebrate a mass in the emperor's presence until Theodosius repented.³³ The introduction of *CTh* 16.2.27 could well be a result of the emperor's emotional reaction to such an insult.³⁴ This would also explain the quick revocation of the limitations, when both sides decided to act towards the end of the dispute.³⁵

The correspondence of Jerome and Ambrose confirms that the restrictions were indeed felt by the clergy. Each refers directly to the imperial legislation. In 384, the Bishop of Milan objected against the provisions of (most probably) *CTh* 16.2.20 in his letter to the Emperor Valentinian II.³⁶ In 394, Jerome wrote a telling letter to a monk-cleric named Nepotian, in which he stressed that while pagan priests, mime artists, charioteers, and prostitutes could all inherit property, nevertheless clerics and monks were prohibited

³³ On that, see, e.g. F. KOLB, 'Der Bußakt von Mailand: zum Verhältnis von Staat und Kirche in der Spätantike', [in:] H. BOOCKMANN, K. JÜRGENSEN & G. STOLTENBERG (eds.), *Geschichte und Gegenwart – Festschrift für K. D. Erdmann*, Neumünster 1980, pp. 41–74, at pp. 48–55; H. LEPPIN, *Theodosius der Große*, Darmstadt 2003, pp. 153–161.

³⁴ This proposition is not decisive, but offers a hypothesis on the possible reasons underlying *CTh* 16.2.27 and 16.2.28. It points to the wide spectrum of tensions along the axes: the emperor – the bishop, ideology – practice, and private ownership – ecclesiastical privileges.

³⁵ To my mind, this interpretation was proposed by Ewa Wipszycka during one of her seminars in Warsaw. The abrogation of previous legislation regarding deaconesses and widows goes also in line with Theodosius' alleged promise, made after the conflict with Ambrose, to promulgate a law which in cases of death sentences would introduce a thirty-day lag before the execution. The latter law is extant and was most probably issued in August of 390 (cf. *CTh* 9.40.13; during the consulship of Antonius and Syagrius) by Theodosius, Valentinian II and Gratian (only formally acting jointly).

³⁶ See Ambrose, *Ep.* 18.14–16.

to obtain anything in that manner.³⁷ Jerome suggested that clerics were henceforth forced to circumvent the law through *fideicommissa*. However, already the law from 370 excluded the possibility of clerics acquiring anything through an interposed person who was expected later to pass the property onto the beneficiary originally intended. The same provisions, this time explicitly referring to *fideicommissum tacitum*, were repeated in the constitution from the year 390.³⁸ Apparently notwithstanding the aforementioned legislation, certain individuals were still attempting to evade the law by using the same strategic and fraudulent schemes. As Jerome stated: *per fidei commissa legibus inludimus* and as an explanation for such practices he offered the need of the Church to provide for the poor. Admittedly, if the *fideicommissa* were used to the benefit of particular ecclesiastics due to their avarice, such actions should be considered shameful and condemned.³⁹ All

³⁷ Jerome, *Ep. 52.6: Pudet dicere: sacerdotes idolorum, mimi et aurigae et scorta hereditates capiunt; solis clericis et monachis hoc lege prohibetur et prohibetur non a persecutoribus, sed a principibus Christianis.*

³⁸ These laws are only tip of an iceberg when it comes to the prohibition of ‘secret trusts’ under Roman law. It seems that already the *lex Iulia et Pappia Poppea* gave provisions according to which such *fideicommissum* should be appropriated by the fisc. In 317, Constantine also attempted, yet without much success, to limit the practice of *hereditas commissa tacitae fidei*, cf. *CTh 10.11.1 (Imp. Constantinus a. rationalibus Hispaniarum): Is, cuius tacitae fidei commissa fuerit hereditas, statim officio gravitatis tuae nuntiet et gesta prodat et continuo quod actum fuerit renuntiet, et post hanc fidem tertiam ab omnibus defuncti bonis percipiat portionem*; (later repeated in *CJ 10.13.1*). According to the latter law, anyone who had been charged with *fideicommissum tacitum* should denounce it to the imperial officials, produce the records and repudiate what has been done. As a consequence, those who informed against themselves would receive a third of the deceased’s entire estate. See: HUMFRESS, ‘Gift-giving’ (cit. n. 13), pp. 14, 20–21. As observed by Humfress, legislation against ‘secret trust’ should be also treated as ‘an important reminder of how legislative enactments can, in some cases, relate directly to social practice’. One should note that in case of *CTh 10.11.1* – as already stated – the property is appropriated by the fisc without giving any priority to the family of the deceased. It needs to be noted that the ‘secret trusts’ are being also outlawed in cases where heretics and adherents of other proscribed sects were the intended beneficiaries. These regulations – needless to say – were not designed to protect the inheritance rights of the family, but rather go in line with numerous late imperial constitutions restricting the legal capacities of apostates and heretics to bequeath and receive inheritances and donations (including their descendants if they were counted among these groups).

³⁹ Jerome, *Ep. 52.6: Per fidei commissa legibus inludimus, et quasi maiora sint imperatorum*

in all, Jerome's mention of the law in his letter to Nepotian seems perplexing, since unfavourable legislation regarding widows and deaconesses was abrogated already in 390.⁴⁰

At the same time, we observe a recurring *topos* in fifth- and sixth-century biographies, where wealthy Christian women renounce their secular life and donate their fortunes to found monasteries, endow churches and provide for the poor.⁴¹ Reading between the lines of the legislation, it seems clear that

scita quam Christi, leges timemus, evangelia contemnimus. Sit heres, sed mater filiorum, id est gregis sui, ecclesia, quae illos genuit, nutrit et pavit. Quid nos inserimus inter matrem et liberos? Gloria episcopi est pauperum opibus providere, ignominia omnium sacerdotum est propriis studere divitiis.

⁴⁰ See the already mentioned *CTh* 16.2.28. Jerome in his letter indicates that some of these provisions have in fact remained active or at least certain obstacles or uncertainties were still encountered in practice. The presence of doubts concerning the binding law seems to be confirmed also in later legislation, cf. *Nov. Marc.* 5. Jerome could be referring in his letter to the law of Valentinian from 370, since he was the secretary of Damasus to whom the constitution was addressed. Cf. on that matter EVANS-GRUBBS, 'Virgins and widows' (cit. n. 23), pp. 225–227. In that context it is worth reminding that Jerome himself had some legal proceedings brought against him in regard to his relations with the high-born widow Paula and other aristocratic women (possibly for the violation of *CTh* 16.2.20; cf. Jerome, *Ep.* 45). The legitimacy of claims raised against Jerome has been recently discussed by Chrysanthi Demetriou in her paper 'Controversies in Jerome' given during the 4. Internationaler Workshop: Trial Procedure in the Acts of the Ecumenical Councils and Other Late Antique Documentary Sources (4–6 July 2018) at Otto-Friedrich-Universität Bamberg. It also appears that Jerome's case was solved through *audientia episcopalis* rather than the secular judge. See also on that J. N. D. KELLY, *Jerome: His Life, Writings, and Controversies*, New York 1975, pp. 11–114; as well as J. C. LAMOREAUX, 'Episcopal courts in late antiquity', *J ECS* 3 (1995), pp. 143–167; On Paula, see L. L. COON, *Sacred Fictions: Holy Women and Hagiography in Late Antiquity*, Philadelphia 2010, pp. 103–109.

⁴¹ See the examples of Olympias, Melania the Younger, or Demetrias. Further on the Christian women and gift-giving (with literature): DAGRON, *Naissance d'une capitale* (cit. n. 30), p. 33; J. HARRIES, "'Treasure in heaven': property and influence among senators of late Rome", [in:] E. M. CRAIK (ed.), *Marriage and Property*, Aberdeen 1991, pp. 54–70; E. A. CLARK, 'Antifamilial tendencies in ancient Christianity', *Journal of the History of Sexuality* 5.3 (1995), pp. 356–380; A. ARJAVA, *Women and Law in Late Antiquity*, Oxford 1996, pp. 157–177; K. COOPER, 'Poverty, obligation, and inheritance: Roman heiresses and the varieties of senatorial Christianity in fifth-century Rome', [in:] K. COOPER & J. HILLNER (eds.), *Religion, Dynasty and Patronage in Early Christian Rome 300–900*, Cambridge 2007), pp. 165–189; G. D. DUNN, 'The Poverty of Melania the Younger and Pinianus', *Augustinianum* 54.1 (2014), pp. 93–115; HUMFRESS, 'Gift-giving' (cit. n. 13), pp. 16–17.

women who adopted asceticism could (and often did) face family opposition. It is probable that this legislative input was inspired by the complaints of the senatorial class about the instances of ‘inheritance hunting’ from greedy clerics, who sought for an easy opportunity to improve their economic situation under the ‘false pretence of religion’. It seems therefore that practice provided impetus for the laws against the clerics who preyed on wealthy widowed or young women.⁴² Such provisions could be also considered as an economic facet of the wide protection offered to holy women against violence.⁴³

A papyrus codex recording a (fictional) conversation between Cyril of Alexandria and two deacons corresponds perfectly with this context.⁴⁴ In it, the bishop is asked what should be done when relatives protest against the donations made for pious reasons. The answer goes against the Church’s obvious interest since Cyril states that the charity of the Church does not seek what does not belong to it. In the same spirit as the bishop’s recommendation we find the letter of Jerome, where clerics who devoted their time to ‘learning the names, homes, and habits of matrons’ are condemned.⁴⁵

In this light it appears that the legislation should be seen as targeting certain unwanted behaviours rather than suggesting the bestowing of privileges on, or defending the interests of, one specific group. It should be mentioned

⁴² Interestingly enough, the addressee of the imperial constitution, Damasus, was a rather controversial figure when it comes to his relations with matrons, see on that KELLY, *Jerome* (cit. n. 40), pp. 80–90; EVANS-GRUBBS, ‘Virgins and widows’ (cit. n. 23), p. 227.

⁴³ A large group of laws was devoted to the protection of women undertaking a celibate life, cf. e.g. *CTh* 9.24.1 (326); *CTh* 9.25.1 (354); *CTh* 9.25.2 (364). These laws point to the fact that single status of these women as well as their wealth made them tempting targets. Later emperors continued to condemn the abduction of pious virgins and widows. Particularly interesting example is provided by the law of Honorius (concerning the prohibition for clerics to have women living with them who were not closely related to them) that we find in *CTh* 9.25.3 (420) and in more extensive version in tenth Sirmondian Constitution. It is stated that the emperor undertakes action due to a recommendation made by priest who was concerned with the disrepute and scandal the clergy was bringing upon itself. On that more extensively with reference to literature, EVANS-GRUBBS, ‘Virgins and widows’ (cit. n. 23), pp. 223–226.

⁴⁴ Coptic text with German translation: W. E. CRUM (ed. & tr.), *Der Papyruscodex saec. VI–VII der Phillipsbibliothek in Cheltenham*, Strasbourg 1915; see also WIPSYCKA, ‘Resources and economic’ (cit. n. 6), pp. 167–168 (with further references).

⁴⁵ See Jerome, *Ep.* 22.28.

that the Roman inheritance law offered a number of possibilities to move the property away from the family. As argued by Humfress, the Church tends to use existing methods rather than disrupt traditional Roman inheritance strategies, when possible.⁴⁶ One should also pay attention to the catalogue of people whose *testamenti facti passiva* and freedom to give away their property as donations are limited due to these constitutions. Valentinian's law was specifically targeted at protecting widows and young women under guardianship (*pupillae*). The short-lived constitution by Theodosius I, in turn, included a prohibition on women becoming a 'deaconess' before reaching a certain age, and was designed to limit the practice of drafting secret *fideicommissa* with clerics as beneficiaries, or establishing Church entities as heirs of such women. These constitutions not only exclude men from their scope, but are also selective in their choice of categories of women. Thus, the freedom of dispositions made to the benefit of the Church is rather upheld, although subject to certain reservations.⁴⁷ It seems that the nature of the constitutions discussed is more 'against' than 'in favour of'. We are not dealing with any carefully tailored legislative policy, but rather a response to various groups trying to protect their own interests. One should also note here that the solutions adopted are not unequivocally favourable to the family. Admittedly, the closest relatives are indicated as the will's neutral beneficiaries, but apart from excluding the possibility of charitable gifts to the clerics, monks, and the Church, widows and young women were free to make donations to any other individual or institution.

It is a common conviction that it is only with *CTh* 5.3.1 (434) that we may observe a vital change in the policy of the Roman legislator towards the inheritance capacity of the Church. The constitution states that if any bishop, priest, deacon, or cleric of any other rank, or a monk/nun should die without having made a testament, and if there are no relatives (through agnation or cognation) entitled to the inheritance, then the property shall be incorporated entirely into that of the church or the monastery.⁴⁸ Judith Evans-Grubbs

⁴⁶ HUMFRESS, 'Gift-giving' (cit. n. 13), p. 9.

⁴⁷ In agreement with the earlier provisions from the reign of Constantine (*CTh* 16.2.4).

⁴⁸ This constitution has been claimed by many scholars as a breakthrough delimiting moment in which the ecclesiastical institutions gained the recognition of a corporation under

argues that with this constitution we may observe ‘a progressive softening of official resistance to the Church and its clerics as beneficiaries’.⁴⁹ In my opinion, however, no radical alteration can be observed regarding the path taken by earlier laws included in Theodosian Code. In fact, the earlier provisions concerning testamentary bequests remain in force, whereas Church rights are recognized only in cases of intestate succession to a cleric or a monk, and in the absence of any other potential heirs. In this context the law pertains to an entirely different matter than has been previously discussed. *CTh* 5.3.1 is the next step towards bestowing rights on the Church that were assigned to other corporate bodies and assemblies already known in Roman law.⁵⁰ Admittedly, the Church benefits from such a solution, but this does not indicate any radical turn in imperial policy. The earlier sanctions ordered in case of specific practices – undertaken *sub praetextu religionis* – can hardly mean any general resistance to the Church. Further, this provision has neither positive nor negative influence on the position of the family in the traditional succession.⁵¹ Rather, as has been signalled at the beginning of this

Roman law, since they could inherit after its members. It requires noting, however, that in the aspect of the general inheritance capacity the Church already in earlier constitutions appeared as a ‘body’, or ‘entity’.

⁴⁹ See EVANS-GRUBBS, ‘Virgins and widows’ (cit. n. 23), p. 232.

⁵⁰ Theodosius II followed here the solutions already applied to, e.g. municipal councils and military units to inherit from intestate members. Cf. E. HERMAN, ‘Die Regelung der Armut in den byzantinischen Klöstern’, *Orientalia Christiana Periodica* 7 (1941), pp. 406–460, at p. 409; R. DELMAIRE, *Largesses sacrées et Res privata. L’aerarium impérial et son administration du IV^e au VI^e siècle*, Paris 1989, pp. 615–616. It is also mentioned by LANIADO, ‘Early Byzantine state’ (cit. n. 8), pp. 27–28; and BARONE-ADESI, ‘Dal dibattito cristiano’ (cit. n. 11), pp. 254–257.

⁵¹ The family is given the regular priority in case of an intestate succession. Moreover, the constitution ends by stating that any lawsuits arising from petitions for the property of intestate ecclesiastic shall be stopped and that no (extraneous) claimant is allowed to enter court and annoy the church stewards, the monks or the procurators. Cf. *CTh* 5.3.1 (*Impp. Theodosius et Valentinianus aa. ad Taurum pf. p. et patricium*): (...) *ita ut, si qua litigia ex huiusmodi competitionibus in iudiciis pendent, penitus sopiantur, nec liceat petitori post huius legis publicationem iudicium ingredi vel oeconomis aut monachis aut procuratoribus inferre molestiam, ipsa petitione antiquata, et bonis, quae relicta sunt, religiosissimis ecclesiis vel monasteriis, quibus dedicati fuerant, consecratis*. Thus, this constitution should not be seen as particularly ‘safeguarding’ the family’s interest. Cf. BARONE-ADESI, ‘Dal dibattito cristiano’ (cit. n. 11), p. 254; See also on the meaning of *CTh* 5.3.1: ORESTANO, ‘Beni dei monaci’ (cit. n. 2), pp. 589–590.

article, the constitution in question shows that the pattern of voluntary poverty had yet to make its way into the secular legislation and, as a consequence, the clergy and monks retained their property rights.⁵²

It is only with the *Novellae* to the Theodosian Code that we start to see a changing picture. In 455, Marcianus introduced a law by which holy women, widows, deaconesses, and all religious matrons were given the power, either through a testament or by any other written documents, to leave their property to churches, monasteries, and all clerics.⁵³ The reasoning behind this law was a case of certain Hypatia and her testamentary dispositions, by which she conferred a large amount of property upon churches, monasteries, and the poor. The validity of the testament must have been questioned, because the case reached the imperial court. The emperor examined the text of Hypatia's will and stated that she was of sound mind and that the testament was justly and prudently established, and that testator neglected no person. Hypatia prepared her testament in accordance with the law, properly establishing an heir, the priest Anatolius, so that her testamentary dispositions could be then fulfilled through him.⁵⁴ Thus the claim raised against

⁵² Cf. LANIADO, 'Early Byzantine state' (cit. n. 8), pp. 26–30. On the endorsement of the idea of voluntary poverty by the Byzantine Church, see especially p. 27.

⁵³ *Nov. Marc. 5 (Imp. Marcianus a. Palladio Praefecto praetorio): Saepe materiam scribendis ferendisque legibus negotia inopinato exorta suppeditant et aut novas constitui sanctiones aut durius et asperius latas faciunt abrogari. Aequalis enim in utroque aequitas est vel promulgare, quae iusta sunt, vel antiquare, quae gravia sunt. Nuper cum de testamento clarissimae memoriae feminae Hypatiae, quae inter alios virum religiosum Anatolium presbyterum in portione manifesta bonorum suorum scripsit heredem, amplissimo senatu praesente tractaret pietas mea et dubium videretur, an valere deberent eae voluntates viduarum, quae testamento suo aliquid his clericis relinquunt, qui sub praetextu religionis huius modi feminarum domus adeunt, cum lex divinae memoriae Valentiniani et Valentis et Gratiani ecclesiasticos, vel eos, qui continentium se volunt nomine nuncupari, nihil quacumque liberalitate viduarum extremo iudicio permittat adipisci, contra haec autem divinae memoriae Valentiniani, Theodosii et Arcadii constitutio legeretur: ... inspicientibus et aestimantibus nobis latoris animum visum est iusta ac rationabili poenitentia priorum constitutionum vigorem antiquare voluisse. Nam cum in prima lege viduarum tantummodo mentio facta sit, in secunda autem tantummodo diaconissarum, intelligitur eam constitutionem, quae viduarum et diaconissarum meminit, de lege utraque dixisse. (...).*

⁵⁴ *Nov. Marc. 5 (Imp. Marcianus a. Palladio Praefecto praetorio): (...)* 1. *Quod cum de voluntate latoris et de sanctione legis nobis videretur, universum testamentum iussimus relegi atque replicari; et cum repertum fuisset alias quoque partes eiusdem voluntatis ita iuste ac prudenter insti-*

the validity of the testament was most probably based on the laws issued by Valentinian I and Theodosius.⁵⁵ Marcian's law clearly stated that the previous legislation had been already repealed by *CTh* 16.2.28. This justification clearly indicates that controversies regarding the law in force were still existing, that is why the emperor's constitution was meant to cast away all doubts.⁵⁶ Indirectly, it also suggests that earlier acts were somewhat out of the ordinary, as their revocation did not worsen significantly the position of the family, due to the existence of the defence mechanisms resulting from the inheritance law and also – as it seems – *querela inofficiosi testamenti*.⁵⁷ In case of widows, deaconesses, and young women, we are dealing with

*tutas, ut nullum de se meritum neglexerit, multa sacrosanctis ecclesiis, multa pauperibus, multa monachis religionis intuitu, multa captivorum redemptioni commota miserabili eorum sorte contulerit, multa libertis suis delatorum sibi obsequiorum contemplatione praestiterit, alteram quoque partem institutionis, in qua Anatolium presbyterum reliquit heredem, advertimus ordine fuisse dispositam. Ea enim mobilia, quae plurimus iuste ac pie reliquit, per hunc voluit universa conpleri, ut non solum heredis, sed paene etiam dispensatoris fungatur officio. Ideoque huiusmodi praedictae clarissimae memoriae Hypatiae voluntatem etiam in ea parte, qua Anatolium presbyterum instituit heredem, ea auctoritate firmavi (...). In order to avoid any ambiguity in the future, the emperor decides to abrogate earlier legislation entirely and states that in case of instituting as an heir or making a testamentary bequest to a church, a martyr, a cleric, a monk, or the poor such gifts will be considered valid and effective, cf. *Nov. Marc.* 5. See also: *CJ* 1.2.13.*

⁵⁵ Marcian's law has a lacuna just after the mention of Valentinian's law (*CTh* 16.2.20) and some legislation of Theodosius. It appears that the lacuna contained references to *CTh* 16.2.27–8. On that, see EVANS-GRUBBS, 'Virgins and widows' (cit. n. 23), p. 232.

⁵⁶ The explanation given by Marcian for the abrogation of earlier legislation shows that there could have been some doubts as to the scope of the earlier *CTh* 16.2.28. Cf. *Nov. Marc.* 5: (...) *...inspicientibus et aestimantibus nobis latoris animum visum est iusta ac rationabili poenitentia priorum constitutionum vigorem antiquare voluisse. Nam cum in prima lege viduarum tantummodo mentio facta sit, in secunda autem tantummodo diaconissarum, intelligitur eam constitutionem, quae viduarum et diaconissarum meminit, de lege utraque dixisse (...).* Thus, all previous limitations were meant to be abolished.

⁵⁷ In case of making a donation, testamentary bequest, or determining as an heir the Church or an ecclesiastic, the legal measures available to the family resulted from the Roman inheritance law and *querela inofficiosi testamenti*. Roman law thus protected close relatives who had been 'undutifully' overlooked by granting them a procedural remedy in order to contest the testator's will. On the legal instruments and rules concerning traditional Roman inheritance strategies in the context of pious donations see HUMFRESS, 'Gift-giving' (cit. n. 13), pp. 11–14 (with further literature). However, cf. Justinian's laws in that field: *CJ* 1.3.48–49.

a risk group that tends to be treated separately in the imperial legislation. Religious motivation plays hardly a substantial part in the restrictions. What is important from the point of view of the legislator is the property, which – even if would not eventually land in the hands of the family (as long as the testament was not *contra officium pietatis*) – should not be wasted or end in the hands of those that do not deserve it.⁵⁸

3. ECCLESIASTICAL PROPERTY RIGHTS:
THE RESTRICTIONS OF FREEDOM TO RENOUNCE THE WORLD
IN THE CODEX THEODOSIANUS

The *Codex Theodosianus* contains imperial constitutions aimed at limiting the cases where churches or monasteries are endowed with land belonging to *curiales*. Similarly, restrictions were introduced in regard to alienation of curial property in order to benefit the poor. The reasoning behind these regulations is clear and has been already discussed on numerous occasions.⁵⁹ It is not the hostility or ideological opposition of the secular power towards the voluntary poverty or the monastic movement, or the will to safeguard the family rights in the perspective of future inheritance. These laws were connected to the key role the landed property played in the administrative system where tax revenues and other duties stemming from the land burdened with *munera* were one of the obligations towards the state. Alienation of

⁵⁸ It seems that widows continued to trouble the emperors. In later legislation we find provisions ordering the childless widows to remarry within the five years; in case of infringement of this rule they should transfer their entire property to their relatives or, in case of their absence, to imperial fisc, cf. *Nov. Maj.* 6.5. The plausible reasons behind this law have been discussed by EVANS-GRUBBS, ‘Virgins and widows’ (cit. n. 23), pp. 232–234. For our considerations it is important to note that the situation under regulation concerns yet again a special case of widows who ‘do not choose a solitary life in order that they may cherish their chastity out of love of religion, but [...] they choose a lascivious freedom of living’ (tr. after Pharr). Moreover, *Nov. Maj.* 6.11 gave provisions suppressing the avarice of the inheritance hunters. This implies that we are dealing with a more general trend in imperial legislation aimed at limiting of certain unwanted actions taking place in the legal practice, rather than provisions that target the Church.

⁵⁹ Cf. e.g. LANIADO, ‘Early Byzantine state’ (cit. n. 8), pp. 21–30 (with references to literature); WIPSYCKA, ‘Resources’ (cit. n. 6), pp. 163–165.

landed estates was thus limited in order to exclude or at least diminish the attempts at evading public obligations. Also, leaving the curial class could pose a threat to the interests of the state and hence was prevented through imperial legislation. The emperors had nothing against their subjects undertaking religious life, as long as the interest of the state was not put at risk.

The constitution of Valens from 370 or 373 (*CTh* 12.1.63) gives a clear sign of the imperial policy toward the renunciation of the world by municipal councillors.⁶⁰ The law states that those who desert the compulsory services of municipalities and, under the pretext of religion, join the hermit monks should be recalled to perform their duties or deprived of their property. The law seems to be targeted at instances in which people could avoid their secular obligations by becoming monks or devoting themselves to Christian service. It is aimed predominantly at discouraging or deterring people from leaving the curial class. As the provisions of the constitution also threaten decurions with the confiscation of their property, it is clear that they had not alienated it or transferred their duties to another person. This constitution is also in line with other laws that demonstrably favour the interest of the state and forbid, or at least try to limit exemption from, compulsory public services, and evading the duties that devolve upon the birth status.⁶¹ In this context, however, one should also consult the content of *CTh* 16.2.19 (370), where it says that after the lapse of ten years of undisturbed association in the clergy a decurion shall be considered exempt forever from the public duties together with his patrimony.⁶² It is notable that the laws become increasingly restrictive over time.

⁶⁰ *CTh* 12.1.63 (*Idem aa. ad Modestum praefectum praetorio*): *Quidam ignaviae sectatores desertis civitatum muneribus captant solitudines ac secreta et specie religionis cum coetibus monazonton congregantur. Hos igitur atque huiusmodi intra Aegyptum deprehensos per comitem Orientis erui e latebris consulta praeceptione mandavimus atque ad munia patriarum subeunda revocari aut pro tenore nostrae sanctionis familiarium rerum carere illecebris, quas per eos censuimus vindicandas, qui publicarum essent subituri munera functionum.* Frazee connects the introduction of *CTh* 12.1.63 with the fact that Valens was a strong proponent of Arianism, whose opponents often drew the Egyptian monks to their side in the doctrinal struggle. See Ch. A. FRAZEE, 'Late Roman and Byzantine legislation on the monastic life from the fourth to the eight centuries', *ChHist* 51 (1982), pp. 263–279, at pp. 264–265.

⁶¹ See also in regard to clergy, e.g. *CTh* 16.2.2 (313/319?); 16.2.3 (320/329?); 16.2.6 (326/329?); 16.2.21 (371); 16.2.39 (408).

⁶² *CTh* 16.2.19 (*Imp. Valentinianus et Valens aa. Modesto praefecto praetorio*): *Quicumque ex*

In 386, Theodosius the Great set further rules limiting the freedom of *curiales* to dispose of their property that – compared to earlier legislation – must have seriously hindered the possibility of leaving curial class.⁶³ In the light of *CTh* 12.3.1, if a municipal councillor was willing to alienate his slaves or landed property, whether rural or urban, he was required to file a petition to a ‘competent judge’ in order to prove that his actions were necessary. In such cases a purchase would require a special decree. However, if anyone – contrary to the provisions of law – would secretly, or by an imposed person become a purchaser of a decurion’s property, he would be deprived of the object of sale as well as the paid price.⁶⁴ The function of the solution adopted is to deter a potential contractor from attempting to enter a suspicious agreement. As pointed out by Avshalom Laniado, although the wording of the constitution does not refer directly to the prospective monks or the idea of voluntary poverty, it should nevertheless be viewed as limiting the possibility of making donations *piae causae* or renouncing worldly possessions, as it is hardly possible that such actions could be considered as

curialium natus genere ad clericatum venerit et praeiudicio sanguinis coeperit postulari, certi temporis definitione defendatur, ut, si in consortio clericatus decennium quietis impleverit, cum patrimonio suo in perpetuum habeatur immunis, si vero intra finitos annos fuerit a curia revocatus, cum substantia sua functionibus subiaceat civitatis: observando hoc, ut hi, quos decennium vindicat, petitione superflua minime fatigentur.

⁶³ Various (and usually earlier) limitations concerning decurions are also listed in *CTh* 12.1 *passim* (regarding land dispositions cf. esp. *CTh* 12.1.33 (342) and 12.1.49 (361)); See also laws regarding prohibition of evading the compulsory public duties on the ground of religion or the possibility of transferring the duties/property onto another person/municipal council, e.g. *CTh* 12.1.50 (362); 12.1.59 (364); 12.1.63 (370/373?); 12.1.99 (383); 12.1.104 (383); 12.1.115 (386); 12.1.121 (390); 12.1.123 (391); 12.1.163 (399); 12.1.172 (410).

⁶⁴ *CTh* 12.3.1 (*Imppp. Valentinianus, Theodosius et Arcadius aaa. Cynegio praefecto praetorio*): *Si quis decurionum vel rustica praedia vel urbana vel quaelibet mancipia venditor necessitate coactus addicit, interpellet iudicem competentem omnesque causas singillatim quibus stranguilatur exponat, ut mereatur valituram in perpetuum comparatori probata adsertione sententiam. Ita enim fiet, ut nec inmoderatus venditor nec emptor inveniatur iniustus. Denique nihil erit postmodum, quo venditor vel circumventum se insidiis vel obpressum potentia comparatoris queri debeat, quandoquidem sub fide actorum et de necessitate distrahentis et de voluntate patuerit comparantis. Quod si quis contra vetitum occultis molitionibus per subpositas fraude personas cuiuslibet loci, quem tamen decurio distrahat, comparator exstiterit, sciat se pretio quod dederit et loco, quem comparaverit, esse privandum.* Later repeated in *CJ* 10.32.26. See also *CTh* 12.3.2 (423).

a ‘necessity’ by secular authorities.⁶⁵ In the same vein, Honorius declared that if one should try to escape the compulsory public services that one is due to perform and secretly sell one’s property, such attempts will be void and one will be recalled to the services. It is also confirmed that the purchaser will be deprived of the price.⁶⁶ Legislation against ‘flight of the councillors’ by no means ends with the Theodosian Code. We find further restrictions in the *Novellae* introduced already during the reign of Theodosius II,⁶⁷ as well as in the laws given by Valentinian III,⁶⁸ Majorian,⁶⁹ and Zeno.⁷⁰ The trend finally peaked under Justinian.⁷¹

Certain later limitations also concerned slaves, who were either forbidden to join monasteries, or allowed to do so only with the consent of their masters.⁷² The latter provisions were likely connected – at least in most of

⁶⁵ See LANIADO, ‘Early Byzantine state’ (cit. n. 8), pp. 24–25, esp. n. 38 (showing an example of necessity for the sale of curial land). Also on that (following Laniado): WIPSYCKA, ‘Resources’ (cit. n. 6), p. 165.

⁶⁶ Cf. *CTh* 3.1.8 (399).

⁶⁷ Cf. *CJ* 10.35.1 (428); *Nov. Th.* 22.2 (443); see also *CJ* 10.34.2 (428).

⁶⁸ Cf. *Nov. Val.* 32.5 (451).

⁶⁹ Cf. *Nov. Maj.* 7.9 (458).

⁷⁰ Cf. *CJ* 10.34.3 (476–480 or 484?).

⁷¹ Justinian maintained the laws of his predecessors, see *CJ* 10.32; 10.34; *CJ* 10.35 (*passim*). For Justinian’s legislation regarding the possibility of leaving curial class, see esp. *CJ* 10.32.67 (529); cf., however, an exception outlined in *CJ* 1.3.52.1 (531); See further: *Nov.* 6.1.1 (535); *Nov.* 123.1 (546); cf. *Nov.* 137.2 (565). For more on Justinian’s laws regarding decurions, see: A. LANIADO, *Recherches sur les notables municipaux dans l’empire protobyzantin*, Paris 2002, pp. 47–49 and 52–54.

⁷² With regard to the admittance of slaves to monasteries, the imperial legislation underwent certain changes. In the Zenon’s law, the slaves are strictly forbidden to enter monasteries (*CJ* 1.3.36; even if their owners willingly consent), to be admitted later (*CJ* 1.3.37) only on the condition of their masters’ wish and awareness that if they grant their slaves the freedom to pursue the monastic worship, they shall be stripped of ownership of these slaves while they remain in a monk’s habit (cf. *Chalc. Can.* 4). Justinian (*Nov.* 5.2.1), in turn, decides further that slaves are allowed to remain in the monastery without the knowledge of their masters or even against their will, although only after a probation. All this is provided that it will not be demonstrated that the slaves were hiding in the monastery in consequence of some misdeed. See also H. BELLEN, *Studien zur Sklavenflucht im römischen Kaiserreich*, Wiesbaden 1971, pp. 86–91.

the cases – to the arguments concerning the diminishing of private property, which resulted from accepting such a person to a monastic community. Similar restrictions, again being linked to protecting the interest of the state, affected various civil officials and servants.⁷³

The concerns exhibited in the above legislation by the emperors were principally fiscal or administrative in character. One also notes that in certain cases there is a tendency to safeguard private property, so that the owner does not suffer a loss unwillingly. These provisions, as already mentioned, were not directly targeted in their formulation at ecclesiastical proprietary rights. For instance in case of *CTh* 12.1.63 – which concerned the change of status rather than dispositions of curial propriety – it is above all the abandonment of compulsory, public duties (admittedly, made for the reasons of religion)⁷⁴ that is being subject to sanctions. Undeniably, we may indeed observe certain correlations between the growing monastic movement and the accumulation and harshness of provisions introduced.⁷⁵ This seems to be, however, rather an answer to the current state of affairs, according to which *ratio legis* of the introduced solutions remains unchanged, namely guarding the interest of the state, not limiting the rights of the Church and other ecclesiastical ‘bodies’.

In contrast to the bulk of legislation concerning pious donations made by women, the literary sources (as investigated by Laniado) have little to offer regarding the transfer of curial property to churches and monasteries after the introduction of restrictions in 386.⁷⁶ Even though explicit evidence

⁷³ Cf. e.g. *Nov. Val.* 35.1.3 (452). On that legislation, see e.g. A. H. M. JONES, *The Later Roman Empire. A Social, Economical and Administrative Survey*, Oxford 1964 [reprint: Baltimore 1986], vol. 2, p. 931; FRAZEE, ‘Late Roman and Byzantine legislation’ (cit. n. 60), pp. 268–269.

⁷⁴ It requires noting, however, that *CTh* 12.1 *passim* contains various laws dealing with instances of evading public duties by the decurions where the religion is not always given as the reason.

⁷⁵ See JONES, *The Later Roman Empire* (cit. n. 73), p. 1064; W. SPEYER, ‘Das christliche Ideal der Geschlechtlichen Askese in seinen negativen Folgen für den Bestand des Imperium Romanum’, [in:] M. WACHT (ed.), *Panchaia. Festschrift für Klaus Thraede*, Münster 1995, pp. 208–227, at pp. 224–225.

⁷⁶ See LANIADO, ‘Early Byzantine state’ (cit. n. 8), pp. 32–37 (with presentation of cases known from the literary sources).

is lacking, we may observe that instances of joining the clergy or entering monasteries by representatives of curial class indeed took place.⁷⁷ In most of the situations, however, we are left without the data necessary to ascertain what happened to curial property. In face of the ambiguity of literary sources, it is impossible to state with certainty whether the legislation was observed.⁷⁸ The literary sources also indicate that, among the monastic circles, the contents of the legislation had to be known.⁷⁹ The provisions had to – even if only potentially – make it difficult for the Church to acquire new assets from landowners belonging to the curial class. In this case, however, the Church needs to be seen as one of the indirect addressees of these laws, right next to other potential parties of all the legal actions aimed at any alienation of curial property that was deemed unnecessary by the state.

4. ACQUISITION OF PROPERTY BY MONASTIC COMMUNITIES IN THE LIGHT OF THE POPYRI

The normative texts discussed above concerned most of all Church property. Yet – needless to say – as far as our subject of interest goes, from the legal perspective, donations made to the churches do not differ from those made to the monasteries. I would like now to move forward to the analysis of

⁷⁷ However, it seems that the renunciation of the world did not appear to be in fact widespread within this specific social strata, see e.g. K. HEUSSI, *Der Ursprung des Mönchtums*, Tübingen 1936, p. 303. We have much more evidence for the municipal councillors becoming clerics and bishops, as noted by C. RAPP, *Holy Bishops in Late Antiquity. The Nature of Christian Leadership in an Age of Transition*, Berkeley 2005, pp. 183–188, at pp. 203–207.

⁷⁸ However, it cannot be assumed that the imperial legislation was not observed based only on the silence of sources. In this way also LANIADO, ‘Early Byzantine state’ (cit. n. 8), p. 35. Contrary to R. MACMULLEN, ‘Social mobility and the Theodosian Code’, *JRS* 54 (1964), p. 50.

⁷⁹ Cf. e.g. E. DE STOOP (ed. & tr.), *Vie d’Alexandre l’Acémète* [= *PO* 6.5], Paris 1911, pp. 645–705, p. 673; D. CANER, ‘Life of Alexander Akoimētēs’, [in:] *idem*, *Wandering, Begging Monks: Spiritual Authority and the Promotion of Monasticism in Late Antiquity* [= *The Transformation of the Classical Heritage* 33], Berkeley 2002, pp. 249–280. For the critique of the text regarding information on the imperial legislation, see LANIADO, ‘Early Byzantine state’ (cit. n. 8), pp. 35–36.

papyrological attestations dealing with offerings of diverse character received by monastic communities. This will place the earlier considerations in a wider context of legal practice. The documentary sources – probably due to their opacity and uneven distribution – have been largely neglected in the legal discourse regarding pious gifts.⁸⁰

The greatest difficulty with the analysis of donations made to the monastic communities is that the majority of our sources stem from the sixth–eighth centuries.⁸¹ Earlier material, dating back as far as the fourth century, often depicts only the property owned by individual monks, and has very little to offer on the beginnings of the process of acquisition of landed property by monasteries (let alone the legal form of the performed acts).⁸² How-

⁸⁰ In 1972, Ewa Wipszycka analysed the available source material from the perspective of Church's income and expenses, but did not consider the legal aspects of pious donations. In her later works, Wipszycka focused on the economic context in which the monastic communities functioned in late antiquity. Her works exhaustively discuss the problems connected with monks' daily life, acquired income, organisation structures of monastic communities as well as types of monastic dwellings. The legal matters, however, are treated only occasionally. Cf. E. WIPSYZKA, *Les ressources et les activités économiques des églises en Égypte du IV^e au VIII^e siècle*, Brussels 1972; WIPSYZKA, 'Resources' (cit. n. 6), pp. 159–263; Arietta Papaconstantinou, in turn, concentrates on the hagiographic aspects of pious donations and their image in the papyrological evidence. Cf. A. PAPAConstantinou, 'Donation and negotiation: Formal gifts to religious institutions in late antiquity', [in:] J.-M. SPIESER & É. YOTA (eds.), *Donations et donateurs dans la société et l'art byzantins*, Paris 2012, pp. 75–95, at p. 76.

⁸¹ See e.g. CPR X 122 (after 545); *P. Cair. Masp.* II 67151 (545/6); *P. Cair. Masp.* I 67003 (567); *P. Cair. Masp.* III 67312 (567); *P. Cair. Masp.* I 67096 (573); PSI VII 786 (581); *P. Cair. Masp.* III 67324 (6th cent.); *P. Oxy.* XVI 1901 (6th cent.); *P. KRU* 105 (2nd half of the 6th cent.); SB I 5114 (before 630–640); *P. CLT* 1 (698); CPR IV 177 (7th cent.); CPR IV 32 (7th–8th cent.); *P. KRU* 69 (729 or 744); *P. KRU* 13 (733); *P. KRU* 106 (735); *P. KRU* 111 (770); *P. KRU* 109 (771); *P. KRU* 108 (8th cent.). On the ecclesiastical and monastic property, see most of all STEINWENTER, 'Die Rechtsstellung' (cit. n. 14). For the analysis of later source material, cf. WIPSYZKA, *Les ressources* (cit. n. 80), *passim*; G. SCHMELZ, *Kirchliche Amtsträger im spätantiken Ägypten: nach den Aussagen der griechischen und koptischen Papyri und Ostraka*, Munich – Leipzig 2002, pp. 162–254.

⁸² We have only one clear attestation of a donation dating back to fourth century that was made to the benefit of 'the holy church' by Flavius Abraham, *ex-praepositus*, i.e. *P. Gron.* 10. For the plausible reasons behind this situation and the character of the papyrological findings, see e.g. M. CHOAT, 'Property ownership and tax payment in fourth-century monasticism', [in:] BOUD'HORS *et al.*, *Monastic Estates* (cit. n. 13), pp. 129–140, at pp. 135–137. However, we come across indirect attestations of donations *inter vivos* and/or *mortis causa* made to individual monks, see e.g. *P. Oxy.* XLVI 3311 (373–374), which is a petition to the *curator*

ever, as random as the papyrological documentation is, one may still feel tempted – not at all unreasonably – to link this phenomenon to the intensive spread of churches' and monasteries' foundations from the end of the fifth throughout the sixth century.⁸³ Thus the increasing number of donations in our documentation could be a by-product of the proliferation of these institutions in the Egyptian landscape. It is obvious that the imperial constitutions did not function in a vacuum. The introduction of laws found in the Theodosian Code that limit certain kinds of donations to ecclesiastical institutions should be perceived as an attempt to meet the demand of legal practice or imperial legislative policy. Admittedly, the papyri contain no traces that indicate the enforcement of the laws outlined above. In this case, however, this silence could be deceptive. The difficulty of evaluating the constitutions discussed above results from the selectiveness of the written evidence, differences in the documentation practice, and the gradual progress of the monastic movement in Egypt. This situation is hardly improved in the later period. Although for this time sources of legal practice are extant, they still fail to inform us how effective the imperial legislation was at targeting the alienation of land encumbered with *munera*.⁸⁴ What we

civitatis or *logistes* concerning an inheritance. The document mentions a transfer of property belonging to a certain Gemellos to his relative Ammonios, a monk. The legal form of the act (i.e. whether we are dealing with a donation *mortis causa*, a legate or *heredis institutio*) is not certain. However, there appears to be no controversy as to the validity of Ammonios's legal title, since the authors of the petition – Cyrilla and Martha – do not raise any claims against the monk (their doubts concern succession after Ammonios). For attestations of monks' individual property, see *P. Herm. Landl.* G505/F722 (350) that shows an *apotaktikos* Makarios owning sixteen arouras of land located in Hermopolite; as well as: *P. Neph.* 48 (323?); *P. Lips.* 28 (381); *PSI* VI 698 (392); *P. Oxy.* XLIV 3203 (400); *PSI* XII 1239 (430); *SB* XIV 12021 (after 377). More on these documents: BAGNALL, 'Monks and property' (cit. n. 5), pp. 12–14; *idem*, *Egypt* (cit. n. 7), p. 298; CHOAT, 'Property ownership' (cit. n. 82), pp. 129–130. For fourth-century attestations of the property of monastic communities, see e.g. *SB* XXII 15311 (367/368?); *P. Gen.* II 69 (4th cent.). It is also through hagiographical sources that we may observe the accumulation of wealth for the early monasticism in Egypt, e.g. we find information on the donations made by Petronios upon entering the Pachomian congregation; see *Vita Pachomii Graecae* 1, F. HALKIN (ed.) [= *Subsidia Hagiographica* 19], Brussels 1932, §80 and *Vita Pachomii Bohairice scripta*, L.-T. LEFORT (ed.) [= *CSCO* 89, 107], Louvain 1953, §56.

⁸³ See PAPAConstantinou, 'Donation and negotiation' (cit. n. 80), pp. 81–82.

⁸⁴ This is particularly symptomatic for the reign of Justinian, who, while promulgating a con-

can recover from the papyri is a picture from the reign of Justinian, not the time period represented in the Theodosian Code. Nevertheless, later material allows us to distinguish certain regularities which might hold also for the preceding period. Both the patterns of acquisition of landed estates by monks and monasteries, as well as the frequency of disputes linked to such donations, demonstrate the existence of a certain tension in the legal practice and provide insight into the broader context within which these constitutions were introduced. Our task is then to try to grasp the practices present in our documentation, and to answer the question: ‘How did the legislative activity of the capital functioned within this framework?’

The available documentation is insufficient to assess precisely the property belonging to the monasteries or their monks in late antiquity.⁸⁵ Still, thanks to the papyri we can observe the scale and importance of the engagement of various monastic communities and their members in the process of acquisition and use of worldly possessions. In the light of tax registers from Egypt, it is highly likely that individual monks and monasteries paid taxes for the land that they owned.⁸⁶ What remains less clear, however, is the per-

siderable number of constitutions in regard to receiving donations *inter vivos* and *mortis causa* by Church and monasteries, as well as inheriting after monks belonging to the community, simultaneously clearly aggravates the laws against the alienation of curial land and leaving the curial class. Justinian’s legislation coincides with the growing number of churches and monasteries (that is visible in our sources from the end of the fifth century and in the early sixth century). Some of the issued laws appear to answer controversies appearing in the legal practice, cf. e.g. *CJ* 1.2.19; 1.2.25. For Justinian’s laws and further conceding approach towards the pious donations, see e.g. *CJ* 1.2.19; 1.2.22–23, 25; 1.3.45; 1.3.48. Book 1.2 contains also earlier legislation on Church proprietary rights and donations made to religious institutions (see esp. *CJ* 1.2.1; 1.2.13; 1.2.15). Naturally, not all of them are favourable to the Church, cf. e.g. *CJ* 1.2.20. Also in regard to pious donations, see *CJ* 1.3.24; *CJ* 1.3.28. For monastery’s rights on inheriting after monks belonging to the community and on transfer of property of prospective monk on entering the monastery, see *CTh* 5.3.1=*CJ* 1.3.20; *CJ* 1.3.38. For Justinian’s laws against ‘the flight of the councillors’, see n. 71.

⁸⁵ On that WIPSZYCKA, ‘Resources’ (cit. n. 6), pp. 170–171.

⁸⁶ See e.g. CHOAT, ‘Property ownership’ (cit. n. 82), pp. 130–131, 135. Naturally, the documentation at hand provokes questions such as whether the property owned by monks could be administered by the monasteries and whether the monasteries took collective responsibility for the tax duties. Cf. BAGNALL, *Egypt* (cit. n. 7), p. 290; GOEHRING, *Ascetics, Society and the Desert* (cit. n. 6), pp. 49–50.

formance of *munera*, with which the landed property could be burdened.⁸⁷ A particular example of sources attesting to tax duties of monastic communities is offered by two large documents from Aphrodito: (i) a fiscal register of money taxed on land dating to 525/526 (*P. Aphrod. Reg.*), and (ii) a cadastre drafted c.523 (*SB XX 14669*).⁸⁸ The famous (and intensively studied) cadastre outlines the dominance of religious institutional landholding in Aphrodito.⁸⁹ Monastic communities appear in the entries of the tax register and the cadastre as owners or co-owners of land, tenants, and fiscal intermediaries. These sources point at the role played by landed property in the monas-

⁸⁷ See WIPSYCKA, *Moines et communautés* (cit. n. 6), p. 524; *eadem*, 'Resources' (cit. n. 6), p. 166, with reference to the curious case of boats belonging to the monastery that transported grain to Alexandria.

⁸⁸ The cadastre contains a list of landholdings located in Aphrodito and registered in the *astika*-category that were burdened with fiscal liabilities. The information we draw from the cadastre enables us to see the scale of monastic holdings and trace the possible methods of land acquisition. This information can be further supplemented by data from the Aphrodito fiscal register (*P. Aphrod. Reg.*) which records different tax payments made by both individuals and institutions for parcels in the *kometika*-category.

⁸⁹ We need to remember, however, that the situation depicted in the cadastre was a result of a long process of accumulation of landed property by monastic communities that started most probably already in the fifth century. Such practice has been shown for the monastery of Abba Sourous (the largest landholder of *astika* in the Aphrodito cadastre) by Giovanni Ruffini, cf. G. RUFFINI, 'Aphrodito before Dioskoros', *BASP* 45 (2008), pp. 225–239, at pp. 228–230. Ruffini also persuasively argued for the network-driven nature of land acquisition in Aphrodito, that as a broader pattern can also be applicable for the monastic milieu of the region. Cf. G. RUFFINI, *Social Networks in Byzantine Egypt*, Cambridge 2008, pp. 147–197. Another – however later – fiscal register containing data on the monastic landed property has been published by Jean Gascoü and pertains to the Hermopolite nome, see J. GASCOU, *Un codex fiscal hermopolite (P. Sorb. II 69)*, Atlanta 1994. Cf. on the ecclesiastical endowments in the West and the transfer of land becoming much more significant in the course of the fifth century and thereafter: I. WOOD, *The Transformation of the Roman West*, Kalamazoo – Bradford 2017, pp. 91–108. However, the majority of information for the acquisition of estates by the monastic communities in the West belongs to the late seventh century and beyond ('The major transfer of property to monasteries obviously went hand in hand with the increasing number of monastic foundations that are a mark of the seventh century'; at p. 100). Wood marks also as striking the relatively little influx of legislation on the ecclesiastical acquisition of land in the fourth and fifth century (especially when compared to the sixth and seventh century).

tic communities, and offer a convenient starting point for the discussion on the practical dimensions of pious donations, offerings, and testamentary bequests made to the monasteries, as well as their social setting. Undoubtedly, landholding served as a backbone, securing the position of a monastery in the surrounding area and assuring the influx of means necessary in order to secure the community's sustenance.

Strategies for accumulation and use of land varied depending on the type of the community, the particular needs of monks, and/or the decisions of their administrators.⁹⁰ On the one hand, we have property-owning monasteries; on the other, we have property-owning monks. Both categories could be driven in their decision-making process by their interest and specific circumstances. In more general terms, among the main forms of property acquisition (especially land) that had substantial influence on the material growth of the monastic community, we can list various donations (both *inter vivos* and *mortis causa*).⁹¹ Monks as well as monastic communities could also acquire land and other belongings by means of other legal acts such as purchase or exchange. It should be also kept in mind that monks, while entering the monasteries, could contribute to the community with their 'worldly possessions'. The fate of such property, however, depended on the will of the

⁹⁰ A variety of solutions existed between the two main literary models, i.e. (i) the anchorite monks, who were allowed to retain their property on condition of not getting attached to it, and (ii) the cenobitic monks affiliated to Pachomian or Shenoutean congregations, who were expected to renounce all private possessions and thus depended entirely on their community. The papyri offer ample proof of property-owning monks who lived in communities which had certain communal assets at their disposal. Property acquisition for holy purposes apparently did not constitute a breach of the rule of the Christian poverty; see e.g. D. CANER, 'Wealth, stewardship, and charitable "blessings" in early Byzantine monasticism', [in:] S. R. HOLMAN (ed.), *Wealth and Poverty in Early Church and Society*, Grand Rapids 2008, p. 224; *idem*, 'Towards a miraculous economy: Christian gifts and material "blessings" in late antiquity', *J ECS* 14 (2006), pp. 329–377; A. LÓPEZ, *Shenoute of Atripe and the Uses of Poverty: Rural Patronage, Religious Conflict and Monasticism in Late Antique Egypt*, Berkeley 2013, *passim*.

⁹¹ For donations as one of the sources of ecclesiastic and monastic landholdings, see e.g. R. RÉMONDON, 'L'Église dans la société égyptienne à l'époque byzantine', *CdE* 47 (1972), pp. 254–277, esp. pp. 272–273; WIPSYCZKA, *Les ressources* (cit. n. 80), pp. 36–37; *eadem*, 'Resources' (cit. n. 6), pp. 159–263. In comparison, on a Christian 'spiritual economy' and ecclesiastical endowment in the West, see most recently WOOD, *Transformation* (cit. n. 89), pp. 91–108.

prospective monk.⁹² He could also leave it at his disposal and retain complete freedom of alienation. In the latter case, the monk could later pass his assets through a testament to an heir of his choice and make testamentary dispositions to the benefit of other entities.⁹³ This diversity of available scenarios translates well into difficulties with assessing the size of the community's initial holdings, as well as with distinguishing which parcels were acquired by the community, and how. It is thus impossible to go directly from the list of patterns for property acquisition visible in papyri to any rigid estimation as to which of these strategies proved more effective or at least was more often encountered in practice. Papyri provide us with only random information about the transfer of particular parcel or specific house and thus rarely allow us to calculate – even roughly – the assets belonging to the monasteries in total.⁹⁴ Nevertheless, even based on such selective data it is possible to state that the monastic estates must have at times been of considerable size,

⁹² See e.g. *P. Cair. Masp.* I 67096 (573), in which we find information on a donation made by a monk and priest named Psa/Psates to the monastery of Apa Apollos. For more on this document and the story behind donation, see G. RUFFINI, *Life in an Egyptian Village in Late Antiquity*, Cambridge 2018, pp. 117–118.

⁹³ On the economic aspects of various monastic communities, see most of all WIPSYCKA, *Moines et communautés* (cit. n. 6), pp. 471–565 (with references to sources and further literature). The fact that monasteries could inherit property after the members of their community allowed to amass a considerable wealth that in large part consisted of real estates. Our sources also show that monasteries took interest in the possessions of their members. Cf. e.g. *P. Cair. Masp.* I 67069; *P. Alex. inv.* 689 recto + *P. Cair. Masp.* II 67176 recto with additional unpublished fragments = *P. Cair. Masp.* III 67353 recto (forthcoming edition by Anne Boud'hors). The latter papyrus outlines a controversy over a cell – earlier belonging to a former monk, who died – between monk's children and the heirs of Apa Papnoute, probably administrator or head of the monastery. The cell was apparently ceded to Apa Papnoute by the plaintiffs' mother, who in response to this act had brought a counterclaim in regard to the ownership of the cell. More on the background of the dispute, see RUFFINI, *Life in an Egyptian Village* (cit. n. 92), p. 116–117. For other examples of women administering or alienating the property in current or former possession of monasteries and monks, see e.g. *P. Duk. inv.* 728 (see J. R. COMBS & J. G. MILLER, 'A marriage-gift of part of a monastery from Byzantine Egypt', *BASP* 48 [2011], pp. 79–88); *P. Oxy.* XVI 1890.

⁹⁴ With the exception of the data concerning Aphrodito obtained on the basis of cadastre and fiscal register, cf. C. ZUCKERMAN, *Du village à l'Empire: autour du registre fiscal d'Aphrodito*, Paris 2004; J. GASCOU, 'Le cadastre d'Aphrodito (SB XX 14669)', [in:] *idem*, *Fiscalité et société en Égypte byzantine*, Paris 2008, pp. 247–305; L. S. B. MACCOULL, 'Monastic and church landholding in the Aphrodito cadaster', *ZPE* 178 (2011), pp. 243–246.

extending beyond the local landscape. Such estates were not created overnight, but were the effect of a long-term accretion.

Pious gifts in the papyri were narrowed down by Arietta Papaconstantinou to two basic categories, i.e. offerings (*προσφοραί*) and donations (*δωρεαί*).⁹⁵ The former were claimed to usually consist of goods intended for consumption, liturgical purposes, or redistribution during charitable activity, whereas the latter were described as aimed at increasing the economic assets of the given institution and comprised fixed assets, such as real estate or movable property. To my mind, however, this distinction not always stands a trial when confronted with documents belonging to the monastic milieu. At times, what seems to emerge from the sources is a rather blurred and intertwined application of both terms, quite irrespectively of the content of the given offerings/donations.⁹⁶ The attestations for these acts comprise mostly account books, various receipts, as well as separate deeds of donation and testamentary bequests. It has been observed that the donations and bequests are much less numerous in our documentation than offerings.⁹⁷ This is caused by the influx of documents coming from the Apion archive which concern mostly the estate accounts of the family of great senatorial landowners in middle Egypt. The Apionic texts mention several monasteries, to which offerings

⁹⁵ See PAPAConstantinou, 'Donation and negotiation' (cit. n. 80), p. 76.

⁹⁶ See e.g. *P. Cair. Masp.* III 67312, in which Flavius Theodore, a childless member of the staff of the provincial governor of the Thebaid, leaves all of his land (except for a farm for his grandmother) in the Hermopolite, Antinoopolite, and Panopolite nomes to the monasteries of Apa Shenoute and Apa Moses. The share in the inheritance (in this case the income from the land) is to be used on ransoming captives and other pious distributions. Flavius Theodore also orders to sell everything that he earlier obtained from his wife (the objects are not defined precisely) and to use the price of sale as *prophora*, in order to finance a commemorative mass for his deceased wife; *P. Cair. Masp.* I 67003, in which the parcels of land are given for *prophora* and *agape*; *P. Cair. Masp.* II 67151 that is the testament of Flavius Phoibammon, in which a bequest of one aroura of vineyard is made to the Antaiopolite monastery of Apa Jeremias; the income from the land was supposed to secure the *prophora* for the testator.

⁹⁷ For literature and sources on offerings, see e.g. E. R. HARDY, *The Large Estates of Byzantine Egypt*, New York 1931, pp. 140–145; WIPSYCKA, *Les ressources* (cit. n. 80), pp. 64–92; see also PAPAConstantinou, 'Donation and negotiation' (cit. n. 80), pp. 76–77. As observed by Papaconstantinou, to date the archive of the monastery of St Phoibammon in Western Thebes is the most abundant in evidence of pious donations. This is mostly so not because the monastery was particularly wealthy, but probably due to the erratic distribution of the papyrological evidence.

were made in the form of regular subventions.⁹⁸ Yet, the papyri provide us also with sufficient proof that lay people transferred or ordered their heirs to transfer land, buildings or parts of them, movables, livestock, labour (in case of donation of individuals)⁹⁹ as well as money to monks and monasteries as pious gifts.¹⁰⁰ There is no space (or need) here to present all the pertinent source material. The list of papyri dealing with donations given to Church institutions, known either through the separate deeds or testaments, has already been made available and commented on by Papaconstantinou.¹⁰¹ I will bring up and discuss here only few documentary examples as a case study.

⁹⁸ See WIPSZYCKA, 'Resources' (cit. n. 6), p. 168. There have been controversies regarding the scale of Apionic involvement in the functioning of the monasteries as well as the dependence of the monasteries on the offerings coming from the great landowners. Recently, Joanna Wegner in her doctoral dissertation (*Monastic Communities in Context: Social and Economic Interrelations of Monastic Institutions and Laymen in Middle Egypt, 6th-8th century*, University of Warsaw, 2017) proposed that 'instead of counting the donations into "the package of aids", we should perhaps view them as offerings intended for charitable redistribution, and focus on their symbolic meaning rather than build hypotheses on the degree of dependence of monasteries on estates'. See also cases of private foundations of monasteries as for instance of the monastery of Apa Apollo, founded by Apollos, father of Dioskoros of Aphrodito (see e.g. *P. Cair. Masp.* I 67096 [573/4]). John Philip Thomas interpreted also the monastery of Apa Agennios, administered by *comes* Ammonios and Apollos, as a private establishment of the former (J. Ph. THOMAS, *Private Religious Foundations in the Byzantine Empire*, Washington 1987, p. 89).

⁹⁹ For the donations of children, see A. PAPACONSTANTINO, 'Notes sur les actes de donation d'enfants au monastère thébain de Saint-Phoibammon', *JJurP* 32 (2002), pp. 83–105; *eadem*, 'Θεία οἰκονομία: Les actes thébains de donation d'enfants ou la gestion monastique de la pénurie', *Mélanges Gilbert Dagron* [= *TravMem* 14], Paris 2002, pp. 511–526; T. S. RICHTER, 'What's in a story? Cultural narratology and Coptic child donation documents', *JJurP* 35 (2005), pp. 237–264. Cf. also *P. KRU* 96; *P. KRU* 78; *P. KRU* 79. It should be, however, stressed that such practice can only be observed for the monastery of St Phoibammon. This fact excludes the possibility of drawing any general conclusions based on the available material.

¹⁰⁰ Cf. WIPSZYCKA, 'Resources' (cit. n. 6), p. 167 (with further references to literature).

¹⁰¹ PAPACONSTANTINO, 'Donation and negotiation' (cit. n. 80), pp. 78–80, gathers thirty-five papyri concerning donations made to religious institutions (coming mostly from the sixth–eighth century; only one example dates from the fourth century). The attestations pertain to different ecclesiastical institutions among which monasteries are best represented (located particularly in the Theban region, but we also have examples from Memphis, Aphrodito, Antinoopolis, Hermopolis, Apollonopolis Magna and Oxyrhynchos). This list can be supplemented by, e.g., *P. Cair. Masp.* I 67096 (Aphrodito, 573); *PSI* VII 786 (Hermopolite nome, 581); *P. Köln* X 421 (Aphrodites Kome, 6th cent.); *P. CLT* 1 (Thebes, 698); *P. Ryl. Copt.* 294 (Wadi Sarga, 7th–8th cent.).

By far, the biggest group of attestations mention that charitable donations were made in order to guarantee salvation of the soul, remittance of the sins, or mercy at God's tribunal. The practice of appointing religious institutions as heirs or legatees was undoubtedly linked to the desire to ensure the prayers and ceremonies for salvation and peace of testator's soul. Two documents belonging to the famous Aphrodito dossier can serve as examples of testamentary bequests made to the monastic communities. These were prepared by Dioskoros for two representatives of the Antinoopolite elite, namely Flavius Theodoros (*P. Cair. Masp.* III 67312; 567) and Flavius Phoibammon (*P. Cair. Masp.* II 67151 and 67152; 570).¹⁰²

In the testament of Flavius Theodoros, the entire property belonging to him is distributed among the monasteries of Apa Shenoute in the Panopolite nome and of Apa Mousaios in the Hermopolite nome, as well as testator's maternal grandmother Herais.

P. Cair. Masp. III 67312, ll. 52–61: βούλο[μαι δ]ὲ τοίνυν καὶ κελεύω Πέτρον τὸν εὐλαβέστατον ἀρχιμανδρίτη[ν], ἥτοι τὸ δίκαιον το(ῦ) αὐτο(ῦ) εὐαγούς μοναστηρίο(υ) ἅπα Σενούθου, ἔχειν εἰς τὴν ἰδίαν ἔνστασιν πάντα τὰ παρ' ἐμο(ῦ) ἐν καιρῷ τελευτῆς καταλειφθησόμενα ἀκίνητα πράγματα κατὰ τε τὸν Ἑρμουπολίτην καὶ Ἀντινοίτην καὶ Πανοπολίτην τοὺς νομούς, ἢ καὶ κατ' ἑτέ- ρους ὡς εἰκὸς διαγείται τόπους ἔχειν δὲ οὐδὲν ἦττον εἰς τὴν ἰδίαν ἔνστασι[ν κ]αὶ πάντα τὰ κατὰ τὴν Ἀντι(νοέων) ἢ κατὰ τὴν Ἑρμουπολιτῶν διακειμένα παντοῖά μο(υ) πράγματα ἀκίνητα.

I want and order that Petros, the most pious archimandrite, and the *dikaion* of the same holy monastery of Apa Shenoute, have as their inheritance all immovable goods left by me at the moment of my death in the Hermopolite, and Antinoite, and Panopolite nomes, and in other likely places, and to have not less as their inheritance, and all my immovable goods situated in Antinoopolis and in Hermopolis.¹⁰³

¹⁰² For more information concerning the life and career of Dioskoros, see L. S. B. MACCOULL, *Dioscorus of Aphrodito: His Work and His World*, Berkeley – Los Angeles – London 1988, especially pp. 9–15. For more information on the archive and Dioskoros' family, see J.-L. FOURNET & C. MAGDELEINE (eds.), *Les archives de Dioscore d'Aphrodité cent ans après leur découverte: histoire et culture dans l'Égypte byzantine: Actes du Colloque de Strasbourg, 8–10 décembre 2005*, Paris 2008; most of all J.-L. FOURNET, 'Archive ou archives de Dioscore? Les dernières années des 'archives de Dioscore'', *ibidem*, pp. 17–30.

¹⁰³ Tr. after NOWAK, *Wills* (cit. n. 18), p. 419.

As is clear, a significant part of testator's property went to the Panopolite monastic community.¹⁰⁴ Moreover, the archimandrite Petros was also supposed to sell the family house in Antinopolis that Theodoros inherited from his father as well as everything that was left to Theodoros by his wife. The testament specifies that revenue obtained from the transaction should be spent on ransoming captives, the wife's *prosphora*, and other pious distributions. The testator also decided that the income from the immovable property assigned to Apa Shenoute should be used for pious purposes, whereas the movable property left to the monastery of Apa Mousaios was to be spent on distributions that would please God. Theodoros's aim was to safeguard the salvation of his soul.

In turn, in the testament of Flavius Phoibammon (*P. Cair. Masp.* II 67151) we find a bequest of one aroura of vineyard made to the Antaiopolite monastery of Apa Jeremias (with reservation that the fiscal liabilities are to be discharged by the testator's family).¹⁰⁵ The income from the land was supposed to secure the *prosphora* of the testator. Interestingly enough, it was the monastery that was given the right of choice of the aroura from the larger tract of land that had been left to Phoibammon by his father. Moreover, the monastery is given one of two boats that Phoibammon had in his possession at the moment of death. It is said that the boat had been purchased by Phoibammon from the people of Antaiopolis, and the testator emphasizes his intention to surrender the document of sale together with the boat and its equipment.¹⁰⁶ Perhaps such a disposition could be explained by the testator's wish to secure the monastery against any future attempts to undermine the bequest should there be any doubts as to Phoibammon's title of ownership in regard to the boat.¹⁰⁷

¹⁰⁴ The generosity of the faithful in case of the estates left to the religious institutions could exceed the value of property left to the testator's family; for further examples, see e.g. *P. Oxy.* XVI 1901; *P. Bodl.* I 47.

¹⁰⁵ See: *P. Cair. Masp.* II 67151, ll. 101–160. On the arrangements concerning fiscal liabilities burdening property bequeathed to monasteries, see THOMAS, *Private Religious Foundations* (cit. n. 98), p. 82 (with references to further sources and literature).

¹⁰⁶ See *P. Cair. Masp.* II 67151, ll. 278–279.

¹⁰⁷ See *P. Cair. Masp.* II 67151, ll. 275–285. Probability of such solution has been also suggested by Wegner in her dissertation *Monastic Communities* (cit. n. 98). On boats owned by monas-

It is worth stressing that both texts have been suspected to be only drafts of testaments rather than the definitive documents.¹⁰⁸ For our purposes, however, this fact is irrelevant as even as drafts these texts would still provide proof of the existence of specific practices. The documents must have been composed in accordance with the legal, social, and religious standards. The property is bequeathed to monasteries, and the revenue from the testator's property were to serve pious purposes and thus help the testator's soul attain salvation. Moreover, in both documents we find information on the testators' expectations towards monastery representatives. In *P. Cair. Masp.* II 67151, one request of Flavius Phoibammon concerns the possibility of burial of the testator in the monastery, and another concerns adding his name to the list of people commemorated during the services in the monastic church.¹⁰⁹ Further, the prior of the monastery is appointed to deal with certain 'worldly affairs' of the deceased donor. Phoibammon chooses Apa Besas as a curator of his minor sons and overseer of their property until their coming of age.¹¹⁰ The prior is also asked to deal with the testator's

teries in Egypt, attested in literary sources and papyrological documentation, see WIPSZYCKA, 'Resources' (cit. n. 6), pp. 216–219. See also N. GONIS, 'Ship-owners and skippers in fourth-century Oxyrhynchus', *ZPE* 143 (2003), pp. 163–165.

¹⁰⁸ Especially in case of *P. Cair. Masp.* II 67151, which has been analysed by Maria Nowak. The very rich language and prolixity of the document (even for Dioskoros' standards) calls for cautiousness. Further, as pointed out by Nowak, the document fails to provide key information such as the names of the heirs or the dates, which makes one wonder whether this is the final version of the document. See NOWAK, *Wills* (cit. n. 18), pp. 101, 156, 170.

¹⁰⁹ *P. Cair. Masp.* II 67151, ll. 160–168. The practice of prestigious burials of laymen near monasteries is known to us also from the archeological findings dated to the Byzantine period; see e.g. I. ZYCH, 'Cemetery C in Naqlun: preliminary report on the excavation in 2006', *PAM* 18 (2008), pp. 230–246; W. GODLEWSKI & B. CZAJA-SZEWCZAK, 'Cemetery C.1 in Naqlun. Tomb C.T.5 and its cartonnages', *PAM* 18 (2008), pp. 247–260; D. DZIERZBICKA, 'Footwear from Cemetery C at Naqlun. Preliminary report', *PAM* 18 (2008), pp. 261–267.

¹¹⁰ In this context, we can also conjecture that the generous bequest in favour of the monastery could have an additional aim. The motivation could in fact be slightly more 'earthly', namely to secure that Apa Besas would take good care of Phoibammon's children and their property after his death. See on that MACCOULL, *Dioscorus of Aphrodito* (cit. n. 102), p. 51. On guardianship, see e.g. T. S. MILLER, *The Orphans of Byzantium: Child Welfare in the Christian Empire*, Washington 2003, pp. 78–107. Cf., however, Justinian's constitution stating that monks shall not only be exempt from guardianship, but also from the curatorship: *CJ* 1.3.51 (531).

financial obligations. Similar requests addressed to the representatives of the monasteries are included in *P. Cair. Masp.* III 67312. This time, Flavius Theodoros orders the priors of the monasteries of Shenoute and Apa Mousaios – Petros and Phoibammon respectively – to provide twelve solidi a year to a woman, Tadelphe, and her daughter Leontia.¹¹¹

Cases where testators bind monks to take specific action are found in our corpus more frequently than one might suspect. These cases testify to the high esteem enjoyed by the monasteries in local communities. The above-mentioned solutions are also proof of the involvement of monks and monasteries in earthly matters and make it likely that the beneficiaries of the bequests deserved both the donated property as well as the fulfilment of the testator's last will. Similar patterns could have served as inspiration for the earlier imperial legislation, namely *Nov. Marc.* 5, that recalls the case of Hypatia, who with full awareness chose the priest Anatolius to be the executor of her testament.¹¹²

Of particular interest are the rather numerous papyri that attest donations made by women to monastic communities. A text – this time from Apollonopolis Magna – *SB I* 5114 (before 630–640) mentions a donation made by Tachymia, daughter of Sansnotus, to the monastery of Abba Cyrus.¹¹³ It is a sale agreement of one third of a house formerly belonging to the late woman that was concluded by the monastery some time after the death of the donor. The donation could have been made in the form of a bequest; it is more likely, however, that the share of a house was transferred still during the life of Tachymia, since the document mentions a donation deed (δωρεαστική).¹¹⁴

An interesting example of a donation can be also seen in a late Coptic papyrus from the Theban region: *P. KRU* 106 (735). According to the document, a woman called Anna, daughter of the blessed Iohannes and the blessed Taham, being aware of approaching death caused by sickness, decided to donate a substantial part of her property (the house that she inherited

¹¹¹ *P. Cair. Masp.* III 67312, ll. 104–108. See also ll. 52–84, which concern other dispositions left to Petros and Phoibammon, as outlined above.

¹¹² See *Nov. Marc.* 5, cited above.

¹¹³ *SB I* 5114, ll. 13–15.

¹¹⁴ *SB I* 5114, l. 13.

from her father, half-share of her mother's house, her share in the land co-owned with certain Abraham, son of Athanasios and the share of one fourth of a bakery) to the monastery of Apa Paulos in exchange for prayers for the preservation of her soul.¹¹⁵ *P. KRU* 106 is especially worth attention since it includes a number of biblical quotations that go in line with the prevailing hagiographical discourse on the donations *piae causae* and the importance of alms. The document was drafted by Hementsneu, son of Shenoute, the priest of the church of Jeme.¹¹⁶

The available documents attest to numerous pious gifts made by both men and women of various social and economic backgrounds.¹¹⁷ The social origin of donors varied considerably. Yet it is likely they still needed to be

¹¹⁵ *P. KRU* 106, ll. 57–77. Cf. also T. G. WILFONG, *Women of Jeme. Lives in a Coptic Town in Late Antique Egypt*, Ann Arbor 2002, pp. 85–86.

¹¹⁶ Although the fact that the document was drafted by the priest of the church of Jeme brings to mind controversies around the involvement of clergy in the process of property acquisition from widowed women (as outlined in the earlier imperial legislation), drawing any conclusions from this would be far-fetched. Admittedly, it is not the only case when such a document is drafted by a member of clergy or a monk. However, even for the period in which the monastic communities were already firmly established in Egypt, such practice is not particularly well attested. One should not, therefore, place too much value on this phenomenon (cf. e.g. PAPAConstantinou, 'Donation and negotiation' [cit. n. 80], p. 88). We cannot exclude the possibility that our sources paint a picture of local particularities and a specific community. The existence of such a practice – even on a lesser scale than advocated by Papaconstantinou – could be explained by how strongly the monastic communities were embedded in the Egyptian landscape as well as the role they played together with churches in the local communities of late antiquity. It seems that the clergy of various ranks and sometimes even monks tended to be a frequent choice when one was in need of resolution of a conflict (through private means of dispute resolution); see M. WOJTCZAK, *Arbitration and Settlement of Claims in Late Antiquity*, forthcoming. Similar tendency could occur when parties found themselves in need of drafting a document or of esteemed witnesses for the concluded deeds. In this light the monastic interactions with the outside world were hardly marginal, contrary to what the literary sources would have us believe. Moreover, the papyri indicate that some communities were indeed active economic and religious centres. Within the context of drafting legal documents by ecclesiastics, cf. the limitations imposed by *Cj* 6.23.23 on the *defensor ecclesiae* in regard to their assistance in drawing up and opening of the testaments. On that most recently Norman Underwood in a paper 'Ordained lawyers or inquisitors? *Defensores ecclesiae* and deviance in late antiquity' given during the conference *Clerics in Church and Society up to 700*, University of Warsaw, 26–27 April 2019.

¹¹⁷ Cf. e.g. *CPR* IV 32; *P. KRU* 69; *P. KRU* 54; *CPR* IV 33.

affluent.¹¹⁸ Papyrological evidence allow us to classify them as members of local elites, representatives of lower aristocracy, as well as landowning villagers.¹¹⁹ Our source corpus not only constitutes a proof for the accumulation of landed property by monks and monasteries and allows to list donations among the most frequent manners of acquisition, but it also offers us an insight into the expectations lay donors had when bequeathing their property to monastic communities.

Just attestations of donations made to the monastic communities are insufficient, however, to establish anything beyond the fact that such practice took place.¹²⁰ We would prefer to have more data than is extant. The distribution of the land belonging to individual monasteries often simply suggests that a popular method of acquiring them was through donations. We are then dealing with bequests comprising land to the monasteries, which in effect led to the existence of a patchwork of holdings (at times even scattered around various locations).¹²¹

¹¹⁸ Naturally, except for when the donations included children (or rather their work to the monastery's benefit). This was one of the forms of pious donations also (but not exclusively) available to the lower strata of local communities, who had no land or movables to give away. Numerous documents from the eighth century – yet all coming from the monastery of Saint Phoibammon – can serve as an example of using labour of an individual as an item of exchange in transactions. On that, see PAPAConstantinou, 'Notes sur les actes de donation' (cit. n. 99), pp. 83–105; Richter, 'What's in a story?' (cit. n. 99), pp. 237–264. As already noted, due to the nature of the evidence which in principle is limited to only one monastic community, one should avoid drawing any general conclusions.

¹¹⁹ On that, see e.g. WIPSYCKA, 'Resources' (cit. n. 6), pp. 163–172; PAPAConstantinou, 'Donation and negotiation' (cit. n. 80), p. 81; WEGNER, *Monastic Communities* (cit. n. 98). What is striking is the lack in our papyrological corpus of attestations of private endowments and equipping of the monastery by representatives of the highest, senatorial classes, such as e.g. the Apions. In the case of the latter, however, we come across texts connected to the numerous and regular subventions to individual monastic communities that consisted most frequently of wheat, barley, wine and vinegar, money, oil, and wood.

¹²⁰ Cf. e.g. STEINWENTER, 'Byzantinische Mönchstestamente' (cit. n. 9), pp. 55–64; E. WIPSYCKA, 'Les aspects économiques de la vie de la communauté de Kellia', [in:] P. BRIDEL (ed.), *La site monastique copte des Kellia. Sources historiques et explorations archéologiques*, Geneva 1986, pp. 117–144; J. E. GOEHRING, 'Monasticism in Byzantine Egypt: Continuity and memory', [in:] R. S. BAGNALL (ed.), *Egypt in Byzantine World, 300–700*, Cambridge 2007, pp. 390–407; BAGNALL, 'Monks and property' (cit. n. 5), pp. 7–24; Choat, 'Property ownership' (cit. n. 82), pp. 129–140.

¹²¹ See WIPSYCKA, *Les ressources* (cit. n. 80), pp. 36–38; WIPSYCKA, 'Resources' (cit. n. 6), pp.

We should thus turn our attention to papyri that show the atmosphere accompanying the pious donations. In most cases, all we learn is that donations to religious institutions took place, and there is hardly any hint with regard to the context of such gifts. Some instances, however, indicate that this practice could spark disputes and lead to lawsuits. Scenarios of this kind were particularly plausible in case of the closest relatives of the deceased when the testator had reduced the family property beyond the common practice or managed it in such a way that the heirs were left mainly, or even only, with debts to pay.

Already in the case of Flavius Phoibammon discussed above, we find standard provisions that were given in the testament in order to avoid the risk of future disputes.¹²² We can also see a clear indication of these concerns in the testament of Aurelius Panchab (*P. Cair. Masp.* III 67324) drawn up before 525–526. The testator encourages the representatives of monastic community to proceed with a claim against his heirs:

P. Cair. Masp. III 67324, ll. 2–8: βούλομαι δὲ καὶ το(ῦ)το, ὡς εἰ συμβαίῃ τῇ ῥαθυμ[ί]α τὰς κληρο(νόμους) μου] θυγατέρας οὐσας μὴ καταβα[λ]εῖ[ν] ἐν[γ]ν[ω]μόνως, ἢ τοὺς κληρονόμο(υ)ς αὐτῶν, τὴν προορισθεῖσαν παρ' ἐμο(ῦ) προσφ[ο]ρὰν τῷ ἁγίῳ μοναστηρίῳ σίτου τε καὶ οἴν[ο]υ] τ[.] .]χ[.] .]τ[ο]υ) τρυγηθέντος, κελεύω τὸν εὐλαβέστατον πρεσβύτερον το(ῦ) αὐτο(ῦ) μοναστηρίου(υ) καὶ τοὺς ἐν αὐτῷ εὐλαβ(εστάτους) μονάζοντας ἀπαιτῆσαι τατας (l. τα(ῦ)τα) ἐκόντας καὶ ἄκοντας διὰ παντός, πρὸς τῷ ἀκαταγνώστως προβῆναι τὰ τῆς ἁγίας προσφορᾶς εἰς ἀε[ί] τοὺς ἀποθανόντας προσδοκεῖν.

I also want the following: if it happens that by negligence my heirs, that is my daughters, or their heirs, will not pay gratefully to the holy monastery the *prosphora* of wheat and wine determined by me, gathered ... I order that the most pious presbyter of this monastery and the most pious monks belonging to this monastery demand them by all means – no matter whether willingly or not – in order to prepare the things pertaining to the holy *prosphora*, unexceptionably for ever, for the commemoration of the deceased.¹²³

163–172, 199–212. However, instances of acquiring land through purchase or in execution of debt were not seldom; cf. *P. Oxy.* LXIII 4397 (545); *P. Lond.* V 1686 (565); *P. Mon. Apollo* 24 (8th cent.).

¹²² See *P. Cair. Masp.* II 67151, ll. 57–62; 74–101. These passages belong to the standard testamentary clauses regarding the institution of an heir and disinheritance, see NOWAK, *Wills* (cit. n. 18), pp. 129–146; 153–159.

¹²³ Tr. after NOWAK, *Wills* (cit. n. 18), p. 410.

Also in documentary practice there are traces of the parties trying to protect themselves from a possible conflict that had not yet come to pass. Security clauses in many of the surviving documents are not only rhetorical; they constitute a response to the real contestations encountered in practice. It seems, moreover, that these clauses developed gradually and in parallel to the tendency to keep such documents safe in the archives in case of a dispute.¹²⁴ Some of the late donation documents coming from Jeme contain a clause stating that whoever takes action to have the deed annulled will be subject to a pre-established penalty.¹²⁵ One should note, however, that some papyri also demonstrate that monks tried to avoid conflict with donor's family, and acknowledged the return of the *prosphora*.¹²⁶

A direct attestation of a dispute is recorded in *P. Cair. Masp.* I 67003 (567) – a petition of the monks of the monastery of Pharaous to Flavius Theodoros, *dux et Augustalis* of the Thebaid. The text concerns a dispute that arose in response to the pious donation of land by an anonymous widow after the death of her children. The validity of this deed was questioned by a certain Iezekiel.

P. Cair. Masp. I 67003, ll. 15–17: διδάσκωμεν οὖν τὸ φιλόπρωπον ὕψος ὑμῶν ὡς ὀλίγας ἀρούρας, ἕως ἑξ καὶ μόνων, σπορίμης γῆς, συννημμένας τοῖς ἡμετέροις γηδίσις ἦτοι το(ῦ) ἀγίο(υ) τόπο(υ) τῆς διακονίας, ἐδωρήσατο ἡμῶν κατ' ἔγγραφον δωρεὰν μία τις γυνὴ χήρα.

For we inform your benevolent highness that a small number of arourae, no more than six and only, adjacent to our parcels, that is (those of) the holy *topos* of the *diakonia*, were donated to us through a written deed of donation by a widowed woman.¹²⁷

¹²⁴ For the explicit passages, see e.g. *P. KRU* 96, ll. 64–70; *P. KRU* 100, ll. 50–53. More on that, PAPAConstantinou, 'Donation and negotiation' (cit. n. 80), p. 81.

¹²⁵ Cf. PAPAConstantinou, 'Donation and negotiation' (cit. n. 80), p. 92. The relevant question would be whether these penalties were effective and could be executed. An attempt to enforce them in practice likely carried with it problems both concerning the solvency, as well as those connected to the effectiveness of the state administration of justice and the eventual difficulties with the law enforcement. On challenges of the administration of justice in late antiquity, see B. PALME, 'Law and courts in late antique Egypt' [in:] B. SIRKS (ed.) *Aspects of Law in Late Antiquity. Dedicated to A. M. Honoré on the Occasion of the Sixtieth Year of His Teaching in Oxford*, Oxford 2008, pp. 55–76, at pp. 71–72.

¹²⁶ Cf. e.g. *P. CLT* 1 and *P. CLT* 2.

¹²⁷ Tr. WEGNER, *Monastic Communities* (cit. n. 98).

As discussed above, restrictions on donations and testamentary bequests made by widowed women were revoked much earlier. However, the background of this conflict appears to be entirely different. The monks claim that Iezekiel was unrelated to the donor and her family.¹²⁸ The grounds for proceeding with a claim seem to result from Iezekiel's prior arrangements with previous owners of the land which granted him the title to the land (perhaps in connection to a loan secured with a mortgage). Naturally, our document shows the perspective of only one party, rendering a reconstruction of the entire case impossible.¹²⁹

Families were not the only entities who could oppose the transfer of property to monastic communities. Traces of a controversy concerning a donation to the monastery can be found in a late *P. Ryl. Copt.* 294 from Wadi Sarga. It is a fragmentary Coptic letter written probably to the head of the monastery of Apa Thomas, i.e. 'the pious and esteemed Apa Amoun', by an unknown individual that concerns a donation of a garden (ⲁⲛⲏⲏ) to the monastery.¹³⁰ Apparently the people of the village of Tjaser questioned the gift; the writer intervened on behalf of the monastery by sending a letter and officially announcing the *dorea*.¹³¹ Details of the controversy are

¹²⁸ *P. Cair. Masp.* I 67003, l. 24.

¹²⁹ Ewa Wipszycka suggests, however, that the decision to approach a high-ranking official in order to get the problem solved may indicate that Iezekiel's claims were not as groundless as the text would make us believe. See E. WIPSZYCKA, 'Le monastère d'Apa Apollôs: un cas typique ou un cas exceptionnel?', [in:] FOURNET & MADGELEINE, *Les archives de Dioscore* (cit. n. 102), pp. 261–273, at p. 267.

¹³⁰ *P. Ryl. Copt.* 294, ll. 2–3. Cf. J. CROMWELL, 'The Rylands contribution to the history of the monastery of Apa Thomas', *Bulletin of the John Rylands Library*, forthcoming.

¹³¹ 'ⲡ I have received the letter from your piety and, look, I have written to Tjaser as I had ordered them [...] so that they will not come because of this matter. I have announced the gift of the garden [...] give it to you, into the Rock. And believe me, that everything which I will be able to do for you, I will not conceal from you. Farewell in the Lord. ⲡ [ⲡ Give] it to the pious and esteemed Apa Amoun, Father of the Rock of Apa Thoma[s ⲡ]'. Tr. after CROMWELL, 'The Rylands contribution' (cit. n. 130). The sender of the letter does not include his name in the address on the verso. Jennifer Cromwell is, however, doubtful whether the author of the letter could be identified as a monk. As she duly points out, the writer appears to be a senior figure. This could be further supported by the fact that he is in a position of power enabling him to impose a decision concerning the property rights of the garden onto the village community. This could perhaps point to some sort of administrative functions.

unfortunately too obscure to allow any authoritative statements as to the nature of the donation (i.e. whether it was *inter vivos* or a testamentary bequest).

It seems that the disputes over landed property could also be reflected in some of the entries of the Aphrodito cadastre. *SB XX 14669* lists a number of individuals and entities (including monasteries) whose land was assigned to somebody else after a revision of the ownership titles carried out during a land survey.¹³² More specifically, in the majority of cases where we observe expropriation of the monastery of Apa Sourous, the land parcel was co-owned by the monastery along with other individuals. Such situations of co-ownership could be a result of testamentary dispositions through which the testator divided his or her property between the family members and the monastery.¹³³ It is reasonable to assume that in those cases when the expropriation was carried out against the individuals referred to as 'heirs', the cadastral adjustment was probably a consequence of a revision of earlier donations and testamentary bequests. In this light it is clear that the landowning patterns in which monastic communities were engaged were complex and dynamic. Monasteries were not given any immunity against property claims, and such disputes occurred both between monasteries and

WEGNER, *Monastic Communities* (cit. n. 98), suggests that it is also possible that the author was the donor himself, or (at least) a person connected to the donor (e.g. his descendant). Although this is possible, it is far from certain. The document seems to indicate that the rural community was in charge of some part of the land. A legal perspective makes this observation all the more interesting (meaning the recurring problem of the existence of the legal persons as such in late antiquity). This also begs the question whether this document is a product of a region-specific or period-specific phenomenon, or a situation more common and perhaps earlier than the Arab conquest (this would be missing in the earlier papyrological evidence). What also requires noting is the engagement of other entities in the dispute on the side of the monasteries. This may prove the position of the monastery in the local community and show how the monastery was embedded in the local landscape.

¹³² See GASCOU, 'Le cadastre' (cit. n. 94), pp. 247–305. Observations on that matter also made by WEGNER, *Monastic Communities* (cit. n. 98).

¹³³ This, however, can serve only as one of the plausible reasons behind the patterns of co-ownership as observed in the entries. See GASCOU, 'Le cadastre' (cit. n. 94), p. 255. In the papyri we come across the examples of co-ownership regarding movables as well as workshops, which also could be an effect of earlier testamentary dispositions, cf. e.g. *P. Cair. Masp.* I 67110; *P. KRU 13* and *P. KRU 12*.

individuals as well as between monasteries and other religious institutions.¹³⁴

If the interpretation that I have presented is correct, then we may also see the frequent practice – discussed on several occasions by Ewa Wipszycka – of giving land belonging to religious institutions in *emphyteusis* as a strategy for avoiding, or a least limiting, conflict.¹³⁵ Such a guarantee would certainly

¹³⁴ Cf. e.g. SB XX 14669 col. v, ll. 144–145 (where the monastery of Shenoute is said to register four arourae of arable land acquired through expropriation of the *xenon* of Apa Dios). When conflicts occurred, it was sometimes inevitable for the monasteries to admit their defeat and withdraw from disputed land. We come across attestations showing that religious institutions of recognisable social position turned to high-ranking officials or esteemed individuals that could settle their case. Naturally, monks and monasteries did their best to assure a positive outcome of the confrontation. Still, the negative outcome was sometimes unavoidable. The cases of expropriation may indicate that the position of a religious institution was not enough to guarantee immunity. In the same vein, see WEGNER, *Monastic Communities* (cit. n. 98). However, a nice example for the efficient use of the social capital by the monasteries is a case outlined in *P. Oxy.* LXIII 4397. The text tells us of the monastery of Apa Hierax engaged in a financial business. The story ends with a settlement of claims, with the monastery gaining the upper hand. What makes this case particularly interesting is the fact that monastery manages to press their case against all legal odds, relying in the final phase mostly on its social influence. See URBANIK, ‘*P. Oxy.* LXIII 4397’ (cit. n. 13).

¹³⁵ Ewa Wipszycka gives two possible explanations for the recurrence of *emphyteusis* in case of the land belonging to religious institutions: either (i) the testaments with the land bequests must have included provisions enabling the family in some way to remain on the land, or (ii) the emphyteutic lease was the only way to attract tenants to the land given to Church entities. See WIPSZYCKA, *Les ressources* (cit. n. 80), pp. 35–37. Papaconstantinou opposes the first hypothesis stating that: ‘If the second of these hypotheses is indeed plausible, there is nothing in surviving documents, admittedly few in number, to substantiate the first one’; see PAPACONSTANTINOU, ‘Donation and negotiation’ (cit. n. 80), p. 77. However, Jakub Urbanik has persuasively shown that *emphyteusis* was used by the ecclesiastical institutions as a convenient mechanism of land management and a way of by-passing the prohibitions on alienation of ecclesiastical property (approximately eighty per cent of documentary attestations dealing with *emphyteusis* regard the ecclesiastical persons; J. URBANIK, ‘It is easier for a camel...’ *Emphyteusis and the economy of Heaven and Earth*, a paper given during the 27th International Congress of Papyrology, Warsaw 2013). Moreover, Wegner suggests in her doctoral dissertation that monasteries tended to maintain contacts with local residents of the donated land (tenants of the previous owners, or donors’ descendants), both through lease agreements and *emphyteusis* (even despite the lack of direct provisions in the testaments); see *Monastic Communities* (cit. n. 98). In regard to that – *contra* Papaconstantinou – I think we should look for direct attestation of such practice not so much in the testaments but rather in the provisions of emphyteutic leases and the wider context of their conclusion (both

make it easier for family members to give up the land in question. The management of land parcels, in particular the ones scattered between various locations, would require from the monastic communities significant input of labour and other measures.¹³⁶ Therefore, the most efficient and easiest solution could be relying by the monasteries on the pre-existent relations and renewing lease contracts with tenants of the previous owners, or leasing the land to the donors' descendants. In addition, with regard to the numerous emphyteutic lease agreements drawn by the monasteries as land owners, one could argue for the simultaneous use of such solution as a strategy in favour of monastic communities acting as tenants (when, e.g., the land could not be transferred to their benefit due to the introduced legal limitations).¹³⁷ Considering the effectiveness of imperial legislation, it is also important to note that in the entries of the cadastre *SB XX 14669*, we often find the representatives of Aphrodito's elite as the lay co-owners of the monastic land. This may not seem surprising at first, since people acting as donors in the papyri cover a broad social scope, as discussed above. In the cadastre, however, we find direct confirmation that some of these people were members of the curial class, as for instance Panolbios *curialis*, a prominent Antaiopolite figure known from other papyri.¹³⁸ We cannot be sure whether the land referred to in the document was subject to the statutory exclusion of alienation, how the process of its acquisition looked, or what the reason for the co-ownership

social and economic). See also: T. S. RICHTER, 'The cultivation of monastic estates in late antique and early Islamic Egypt: Some evidence from Coptic land leases and related documents', [in:] BOUD'HORS *et al.*, *Monastic Estates* (cit. n. 13), pp. 205–215; MACCOULL, 'Monastic and church landholding' (cit. n. 94).

¹³⁶ For the examples of emphyteutic leases, see e.g. *P. Lond.* II 483; *P. Dub.* 33; *P. Cair. Masp.* III 67299. It is worth of note that monastic communities had also control over holdings that were not so much dispersed between various locations, but rather formed a busy patchwork of arable land, which the monks could not or would not work on their own for different reasons (also religious, depending on given community). However, in our corpus we also come across papyri attesting the practice of leasing land by monasteries to their monks, as well as examples of monks and clergymen privately involved in leases, cf. RICHTER, 'The cultivation' (cit. n. 135).

¹³⁷ Most of all, cf. limitations regarding the alienation of curial land burdened with *munera* (discussed above).

¹³⁸ See e.g. *P. Flor.* III 281; *P. Cair. Masp.* I 67113; *P. Lond.* V 1689. Cf. R. P. SALOMONS, 'Testamentaria', *ZPE* 156 (2006), pp. 217–241.

was. Papyri fail to offer any direct proof that the limitations imposed on the dispositions of curial land were in fact enforced. It is, however, also impossible to conclude that these laws were never put into practice.¹³⁹ Wipszycka considers the possibility of a certain *modus vivendi*: it might have been possible for the representatives of the curial class to make pious donations or to enter a monastery as long as the greater part of their property was left to the family members who could assume the responsibility for *munera*.¹⁴⁰ It is true that imperial laws indirectly equipped the municipal *curiae* with instruments of pressure against decurions that attempted to avoid public duties and undertake monastic life.¹⁴¹ Whether *curiae* used those tools remain an open question. When verifying Wipszycka's hypothesis one also has to keep in mind the laws – and their potential (non-)effectiveness – which limited the possibility to leave the curial class through alienation of land or transfer of the duties onto other people.¹⁴²

5. TENSIONS BETWEEN FAMILY OWNERSHIP
AND RIGHTS OF MONASTIC COMMUNITIES IN THE CODEX THEODOSIANUS?
TOWARD A CONCLUSION

It may appear a paradox that the legal restrictions with regard to the alienation of property for pious reasons and the possibility of 'renouncing the

¹³⁹ See LANIADO, 'Early Byzantine state' (cit. n. 8), pp. 31–35.

¹⁴⁰ See WIPSZYCKA, 'Resources' (cit. n. 6), p. 165.

¹⁴¹ See e.g. *CTh* 12.1.49; 12.1.59; 12.1.63; 12.1.104; 12.1.115; 12.1.121; 12.1.123; 12.1.163; 12.1.172. In similar vein: *CTh* 8.4.7 and *CJ* 1.3.4.

¹⁴² See e.g. *CTh* 12.3.1 (= *CJ* 10.34.1); *CJ* 10.34.2; *Nov. Val.* 32.5; *Nov. Maj.* 7.9; *CJ* 10.34.3; for the decurions entering the ranks of the clergy, see e.g. *CJ* 1.3.12 in relation to *CTh* 12.1.121; *CJ* 1.3.52. During Justinian's reign leaving the curial class became a personal privilege granted by the emperor, see *CJ* 10.32.67. We do not know how the execution of these laws was carried out, but the rising number of constitutions and their restrictiveness could suggest that the problem was (still) existing, and that the earlier provisions were infringed. For more on these laws, see e.g. W. SCHUBERT, 'Die rechtliche Sonderstellung der Dekurionen (Kurialen) in der Kaisergesetzgebung des 4.–6. Jahrhunderts', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 86 (1969), pp. 287–333.

world' were introduced during the reign of 'Christian emperors'. However, in the light of the analysis above it seems that provisions of the Theodosian Code concerning the economic rights of Church institutions tended in a direction that is not as surprising as one could expect. In numerous matters the imperial legislation is favourable to Christianity even when the fundamental tenets of this religion were not always followed by the secular authorities. In certain situations the emperors aimed at finding *ad hoc* remedies and solutions for crises, conflicts, and particular problems of legal practice. In the case of provisions concerning widows, female wards, and deaconesses, constitutions could be a reaction to clearly deviant cases of the extortion of testamentary bequests by ecclesiastics. Moreover, limitations introduced during the reign of Theodosius I seem to fit with the general political context that included his conflict with Ambrose. As concerns the restrictions regarding the alienation of curial land, here of importance is guaranteeing the administrative and financial interest of the state, which not only does not deteriorate with the rising power of the Church, but becomes even stronger in times of Justinian.¹⁴³

Such controversial dispositions must have been sufficiently common in order to justify the new laws. Unfortunately, the character of the available documentation of legal practice – its frequent scarcity and opacity – makes it difficult to assess the precise impact of the imperial restrictions concerning the transfer of curial property to monasteries.¹⁴⁴ A similar situation is particularly visible in case of the papyri that post-date the abrogation of part of the restrictions on donations made by widows or young women.¹⁴⁵

¹⁴³ See n. 71.

¹⁴⁴ The papyri which refer to material assistance provided by aristocratic landowners to monasteries record most of all gifts of commodities. We do not come across any records of landed endowments to the benefit of monastic communities in the Apion archive or the dossier of Ammonios. As noted by Joanna Wegner, this phenomenon could be an Egyptian particularity, since on other territories the landowners presented monasteries with land, and the great monastic properties derived mostly from this type of donations. See WEGNER, *Monastic Communities* (cit. n. 98).

¹⁴⁵ See *CTh* 16.2.20; 16.2.27–28 and *Nov. Marc.* 5. We cannot exactly tell how the said legislation was effective in practice, yet as later laws indicate (at times *explicite*), the controversies regarding the validity of such bequests (cf. *Nov. Marc.* 5; *CJ* 1.2.13) existed for a long time. This, of course, begs the question whether the claims raised in legal practice should be linked

These sources clearly show that donations of both immovable and movable property were one of the principal means through which monasteries accumulated land and acquired revenue sources. Acquisition of land by the monastic communities was likely a long-term process, and what we know from the sixth-century sources must have had its origins years before the above outlined documents were drafted.

Individuals must have felt the actual pressure to make donations to monasteries and churches. Hagiographical and biblical accounts of ‘rich sinners’ and ‘pious donors’ formed a very persuasive and easily internalized discourse, which was probably known among even average Christians.¹⁴⁶ It is not hard to imagine that imperial legislation could partially be the answer to the most radical pressure exerted on widows and young women.

In this light, the alleged paradoxical nature of the solutions adopted by the Christian emperors and found in the Theodosian Code appears to be false. The ascetic discourse could indeed display ‘antifamilial tendencies’, but it must be remembered that in many cases the activities it entailed could well have been in accordance with the structures and principles of Roman law.¹⁴⁷ The limitations concerning the donations made to the monasteries and Church institutions are in fact quite meagre. Hence the priority given

to the knowledge of the former restrictive laws, or are they rather an example of a typical family reaction to being omitted in the testamentary dispositions (or both).

¹⁴⁶ See PAPAConstantinou, ‘Donation and negotiation’ (cit. n. 80), p. 89. It was even suggested that the Church should be considered by the faithful in a similar manner as their children when it comes to the testamentary dispositions; see E. A. MEYER, *Literacy, Literate Practice, and the Law in the Roman Empire, AD 100–600*, PhD dissertation, Yale University 1988, p. 193.

¹⁴⁷ It does not come as a surprise that Roman law allowed inheritances to pass outside the family and designed an array of instruments that enabled testators to pursue a variety of goals through their last-will dispositions. The late antique practice of pious donations functioned in a pre-existing and well embedded legal framework, which was used effectively both by donors as well as beneficiaries. The reign of Justinian brings – as already noted – further concession with regard to acquiring pious gifts by the ecclesiastical institutions. Also then, however, the adopted policy is hardly one-dimensional (see n. 84). For examples of late antique testaments and their relation to the Roman provisions, see e.g. M. NOWAK & E. GAREL, ‘Monastic wills: The continuation of late Roman legal tradition?’, [in:] M. CHOAT & M. GIORDA (eds.), *Writing and Communication in Early Egyptian Monasticism* [= TSEC 9], Leiden – Boston 2017, pp. 108–128. Cf. CLARK, ‘Antifamilial tendencies’ (cit. n. 41) and HARRIES, “Treasure in Heaven” (cit. n. 41)

to the claims of the family in general seems to reach only slightly beyond the protection already guaranteed by the Roman inheritance law. Thus, the tension between the family's ownership and rights of the monastic communities and Church institutions – as argued by Barone-Adesi – appears to be similar to those between the family's ownership and the rights of any extraneous heir or beneficiary of a donation made contrary to the interests of the family. In this aspect, imperial constitutions demonstrate a careful and far from trivial weighing of interests: the family's on the one hand, and that of the extraneous heirs, including monasteries and other Church institutions, on the other.¹⁴⁸ The classical Roman law created enough possibilities to transfer large parts of the property to subjects from outside of the family. We can, admittedly, observe – especially for the reign of Justinian – a growing conceding approach towards the pious donations (e.g. by easing the formal requirements of such deeds, as well as exempting them from certain legal charges).¹⁴⁹ One should keep in mind, however, that already the classical guarantees for the closest relatives in terms of inheritance law concerned only the possibility to recognize the will as *inofficiosum* if it unjustly deprived *sui heredes* of the minimal compulsory portion of their inheritance (i.e. *pars legitima*). This tendency appears to intensify in the post-classical period, when the protection of the family rights becomes stronger through careful and detailed regulation of cases in which the disinheritance (that is the deprivation of *pars legitima*) could take place.¹⁵⁰ The testator could, however, dispose of the remaining part of the property at his or her discretion. Also, the abrogation of part of the imperial restrictions concerning the pious gifts – as outlined in *Nov. Marc.* 5 and later partially repeated in *CJ* 1.2.13 – does not seem to change the atmosphere accompanying the legal practice of such donations present among the closest relatives. As demon-

¹⁴⁸ See HUMFRESS, 'Gift-giving' (cit. n. 13), p. 17.

¹⁴⁹ For the laws easing the formal requirements of such deeds, see e.g. *CJ* 1.2.19 and 25; for the laws exempting them from certain legal charges, see e.g. *CJ* 1.2.22–23; *CJ* 1.3.24; 28; 48. It does not appear plausible to me that *querela inofficiosi testamenti* was ever denied to the 'undutifully' overlooked relatives in cases where significant part of testator's estate was assigned to ecclesiastical institutions for pious reasons. In such cases I would except a verbatim statement as e.g. in *CJ* 1.3.49. Cf. also *Nov.* 1 and 131, esp. chapter 12.

¹⁵⁰ See e.g. *Nov.* 115.3–4.

strated by later papyrological sources, opposition on the side of the family is not infrequent and concerns the property dispositions by both men and women. Naturally, the claiming parties were not necessarily in their right according to the law and could not always enjoy the perspectives to win the trial. Thus, it seems that in case of pious donations we could be rather dealing with the tension between the hagiographical discourse and mundane reality.

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BETWEEN HEAVEN AND EARTH: FAMILY OWNERSHIP VERSUS RIGHTS OF MONASTIC COMMUNITIES. THE THEodosIAN CODE AND LATE ANTIQUE LEGAL PRACTICE

Abstract

This article investigates the relationship between the legislation introduced in the field of proprietary rights assigned to various Church entities and the practice of accumulation of wealth by the monastic communities in late antique Egypt. On the one hand, among the literary sources the predominant theme concerning Egyptian monasticism is the idea of voluntary poverty and renunciation of worldly possessions aimed at the pursuance of a contemplative life. On the other hand, the papyri offer insight into monastic life that does not seem to have been entirely detached from the outside world. In this vein, the laws of Valentinian I and Theodosius II clearly indicate that monks and nuns continued to own property without disturbance after undertaking religious life. In addition, Theodosius the Great and later emperors restricted the freedom of certain groups of citizens to disown their property, rendering the Christian ideal of voluntary poverty not always feasible. It is only with Justinian that the rules regarding monastic poverty are shaped and set by the secular power. The incentive for this study is to check for any conflict between the principles of classical Roman law in the field of private ownership and imperial legislation included in the *Codex Theodosianus*. Giorgio Barone-Adesi observed the tension that took place between the Christian communities and their corporations that were allotted ever broader privileges and the Roman principle of preservation of the property within the family unit. There is, however, still some room left for discussion since not all the data easily adds up to an unequivocal conclusion. In this analysis, the Code is treated as a measure for taking a stand by the legislator in the dispute between the will of the owner, recognition of the rights of the heirs and family members, and finally the privileges granted to the religious *consortia*.

Keywords: monks, monasticism, Late Antiquity, Roman law, legal practice, Theodosian Code, legal capacity, Church, family, proprietary rights, donations, *piae causae*, voluntary poverty

MIĘDZY NIEBEM A ZIEMIĄ: MAJĄTEK RODZINNY A PRAWA WSPÓLNOT MONASTYCZNYCH.
KODEKS TEODOZJUSZA I PRAKTYKA PRAWNA PÓŹNEGO ANTYKU

Abstrakt

Artykuł przedstawia analizę relacji zachodzących między ustawodawstwem przyznającym prawa majątkowe różnym podmiotom kościelnym, a praktyką gromadzenia majątków przez wspólnoty monastyczne w późnoantycznym Egipcie. Tematem przewodnim źródeł literackich dotyczących egipskiego monastycyzmu jest idea dobrowolnego ubóstwa oraz rezygnacja ze wszelkich dóbr doczesnych w imię poświęcenia się religijnej kontemplacji. Jednak papiirusy ukazują życie monastyczne, w którym nie brakuje kontaktów ze światem zewnętrznym. W tym kontekście konstytucje wprowadzone przez Walentyniana I i Teodozjusza II jasno wskazują na fakt, że mnisi dysponowali własnością prywatną nawet po podjęciu życia religijnego. Teodozjusz Wielki i późniejsi cesarze sukcesywnie ograniczali możliwość wyzbycia się przez określone grupy poddanych należącego do nich majątku, czyniąc w ten sposób chrześcijański ideał dobrowolnego ubóstwa nie zawsze osiągalnym. Dopiero panowanie Justyniana przynosi świeckie regulacje dotyczące mniszego ubóstwa. Artykuł stawia sobie za cel weryfikację tezy o potencjalnym konflikcie zachodzącym między postanowieniami klasycznego prawa rzymskiego w zakresie dysponowania własnością prywatną oraz ustawodawstwem cesarskim zawartym w Kodeksie Teodozjusza. Giorgio Barone-Adesi zaobserwował napięcie występujące między rzymską zasadą zachowania majątku wewnątrz rodziny, a wspólnotą chrześcijan i ich korporacjami, którym to przyznawane są coraz szersze uprawnienia majątkowe. Wydaje się jednak, że posiadane dane nie zezwalają na jednoznaczną konkluzję. W niniejszej analizie Kodeks traktowany jest jako manifestacja stanowiska zajętego przez prawodawcę w kwestii granic woli właściciela, praw przysługujących spadkobiercom i członkom rodziny, a także przywilejów przyznanym religijnym *consortia*.

Słowa kluczowe: mnisi, monastycyzm, późny antyk, prawo rzymskie, praktyka prawna, Kodeks Teodozjusza, zdolność prawna, Kościół, rodzina, prawo własności, darowizny, *piae causae*, dobrowolne ubóstwo