Application, adaptation and rejection: the strategies of Roman jurists in responsa concerning Greek documents

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I The Law of Obligations: Consensual Contracts

I Introduction

The Roman development of the legal doctrine of *consensual contracts* has been considered a groundbreaking event in the Mediterranean legal world. According to Zimmermann it was 'one of the most remarkable achievements of Roman jurisprudence'[1]. This type of contract, which existed by virtue of the mere consensus of contracting parties, had no formal requirements. That is to say that no additional prerequisites to form the contract are necessary such as the presence of witnesses or specific acts or formulaic wordage.

Four contracts are grouped under the consensual contract[2]: *emptio venditio* (contract of sale), *locatio conductio* (letting and hiring), *mandatum* (mandate) and *societas* (partnership). Gaius added a fifth contract, namely *hypotheca*. The contract of *hypotheca* could be validly entered by consensus alone, without formal requirements or mandatory wording[3]. Because of their consensual nature the contracts mentioned could be validly entered via letters (*epistulae*) and messengers, as Gaius wrote in his *Institutiones*: '*Unde inter absentes quoque talia negotia contrahuntur, ueluti per epistulam aut per internuntium...*'.[4] This Roman invention of entering contracts by mere consensus was not part of the Attic law of obligations (if such a thing existed) or of Hellenistic legal cultures in general, as shown by Wolff.[5]

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1 Zimmermann 1992, 230. See also Watson, who called it "one of the greatest (purely) Roman inventions" (Watson 1984, 8) and Seidl, who said it to be "*die Krönung einer internationalen antiken Entwicklung*" (Seidl 1952, 56). Although concurring with Seidl that it was a Roman invention, Wolff did not agree that it was the culmination of an international development in the ancient world (Wolff, *SZ* 74 (1957), 71).

2 This can be concluded from Gaius, *Inst*. III 135 (cf. Just. *Inst.* III 22.1).

3 See Dig. 20.1.4 (Gaius, 1 *ad Form. Hyp*).

4 Gaius, *Inst*. III 136: *Therefore, such contracts can also be entered between absentees, via a letter or via a messenger* (cf. Just. *Inst.* III 22.2). This is also explicitly mentioned for the contract of *mandatum* in Dig. 17.1.1.1 (Paul. 32 *ad Ed.*).

5 Wolff 1957, 28. Wolff confirmed the view of Partsch and Pringsheim that for example the contract of sale is not a purely consensual contract in Attic Law. The existence of a general law of consensual contracts is furthermore denied by Wolff, stating that it is not the *consensus*, but *Zweckverfügung* that constituted a contract in both Attic law and Hellenistic legal cultures (Wolff 1957, 67-68 and Wolff 1978, 143). Contracts based on *Zweckverfügung* originated from a disposition to a particular purpose' (Thür, G. '*Zweckverfügung*' in: *Der Neue Pauly*) and not by means of *consensus* between the contracting parties. See also Biscardi 1982, 145-146. Lastly, in a response to Gagliardi, stating *il consenso sarebbe stato fonte di obbligazioni* (Gagliardi in: Gagarin 2014, 180), Wallace denied that the consensual contract was a source of obligations in 'Attic law', (Wallace in: Gagarin 2014, 221).

There are four cases of bilingual replies concerning consensual contracts in the Digest. In two cases in the Digest consensual contracts were entered via *epistulae* from the Roman East and two cases are known via codicils in Greek. In one of these Greek documents the name of the province of origin (Roman Syria) is mentioned. These documents are all *responsa* by Cervidius Scaevola. Two of these *responsa* concern contracts of *mandatum* in Dig. 17.1.60.4 (Scaev. 1 *Resp*.) and Dig. 44.7.61*pr* (Scaev. 28 *Dig*.), while the other two *responsa* are contracts of *hypotheca*: Dig. 20.1.34.1 (Scaev. 27 *Dig.*) and Dig. 32.101*pr* (Scaev. 16 *Dig.*). Dig. 20.1.34.1 (Scaev. 27 *Dig.*) appears to involve a non-possessory pledge. The two bilingual *responsa* concerning *mandatum* can be categorised under *procuratio* (Dig. 44.7.61*pr*) and *mandatum generale* (Dig. 17.1.60.4).

These four *responsa* will be addressed in this chapter. First each text is contextualised after which both the text and the legal questions are analysed to establish to what extent a Roman jurist, in this case Scaevola, took the Hellenistic context of these texts into account and to discover whether comparable Hellenistic legal concepts caused a (partially) non-Roman interpretation of the case by the jurist on which he could have based his strategy. Because of the lack of bilingual Greek documents on *emptio venditio, locatio conductio* and *societas* in the *Corpus Iuris Civilis*, these contracts fall outside the scope of this chapter. In the following, two cases of *mandatum* and two cases on *hypotheca* will be examined followed by a conclusion.

II *Mandatum*

After an introduction on the contract of *mandatum* in both the Roman legal system and in Hellenistic legal cultures alongside the relevant papyri on the topic, two cases on *mandatum* are examined in this section, namely Dig. 17.1.60.4 (Scaev. 1 *Resp.*) and Dig. 44.7.61*pr* (Scaev. 28 *Dig.*). These cases are from the second century AD. Dig. 17.1.60.4 (Scaev. 1 *Resp.*) contains a contract of *mandatum* in Greek. In Dig. 44.7.61 there is no contract in Greek. The Greek text in this reply is a written declaration by one of the contracting parties, which could or could not constitute an obligation. Dig. 26.7.47*pr* contains a *mandatum*. It, however, contains elements of other areas of law too, as it also deals with aspects of the law of inheritance (*fideicommissa*) and family law (guardianship). Dig. 26.7.47*pr* is examined in chapter III on the law of inheritance.

II.1 *Mandatum* in Roman law

In this paragraph an introduction to the Roman contract of mandate will be given using classical Roman law paralleled by papyri from Roman Egypt from the second century AD, in which Roman citizens were involved. The different forms of *mandatum* which occur in both legal and papyrological sources will be discussed.

In giving a *mandatum* the mandator asked the mandatary to perform a task (in principle) gratuitously[6]. The performance of this task could be in the interest of the mandator, of both the mandator and the mandatary, of a third party or in the interest of the mandator and a third party, as Justinian stated in Just. *Inst.* III 26[7]. When a person mandates a task solely in the interest of the mandatary however, both contracting parties do not enter a valid contract. Roman jurists considered a mandate which is exclusively beneficial to the mandatary to be nothing more than 'good advice'[8].

II.1.1 The development and use of mandatum in Roman law

The earliest datable testimony in which the Roman contract of *mandatum* is mentioned can be found in the first century BC treatise *Rhetorica ad Herennium* (II. 19). In this passage the unknown author[9] summed up the sources of Law. The *actio mandati* is mentioned in the context of 'passed judgments': '*et fit ut de eadem re saepe alius aliud decreverit aut iudicarit, quod genus: M. Drusus, praetor urbanus, quod cum herede mandati ageretur iudicium reddidit, Sex. Iulius non reddidit*'.[10] Both judgments are from the second half of the second century BC, as the years in which both Roman magistrates held office were respectively 115 BC and 123 BC.[11]

The Roman contract of *mandatum* is not only known from the writings of the jurists. The contract is also attested in papyrological sources from Roman Egypt with a distinct Roman context. Examples of these are P. Phil. 16 (Philadelphia, 161 AD), in which a Roman cavalryman named Bucolus mandated his farmer Casius to pay the cavalryman's debt to the veteran Aphrodisius, and P. Hamb. I 102 (Arsinoite nome, 138-161 AD). The latter is a mandate for debt collection (*Inkassovollmacht*) in which Lucius Anthestius is mandated to collect a debt from Flavius Anta on behalf of a creditor, whose name is not preserved on the papyrus due to damage to the top side of the document. According to classical Roman legal doctrine assignment of a debt was not possible[12]. In a construction such as in P. Hamb. I 102, the mandatary is ordered to collect the debt, while the mandator remained the creditor.

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6 See Dig. 17.1.1.4 (Paul. 32 *ad Ed.*) and Just. *Inst.* III 26.13.

7 Cf. Dig. 17.1.2*pr* (Gaius, 2 *Res Cott.*).

8 See Dig. 17.1.2.6 (Gaius, 2 *Res Cott.*) and Just. *Inst*. III 26.

9 This work was attributed to Cicero, although his authorship of the treatise was questioned as early as the 15th century by Lorenzo Valla (Caplan 1954, ix).

10 'And often it happens that concerning the same case one decided or judged this, while the other decided or judged something different, of which an example is the following: M. Drusus, the urban *praetor* granted an *actio mandati* against an heir, whilst Sex. Iulius refused such an *actio*. '

11 Watson 1961, 22.

12 This can be seen in Kaser 1975, 451: '*die Unübertragbarkeit des Forderungsrechts, die einen Wechsel in der Person des Gläubigers oder des Schuldners bei fortbestehender Identität des Schuldverhältnisses ausschließt*'.

From the reconstructed *σε ἀντ' ἐμοῦ* ('you instead of me') in line three of the contract, it is suggested that the mandator granted the right to collect the debt, while refraining from doing so himself. If the reconstruction is correct, the document can be viewed as a contract of *mandatum in rem suam* which is a mandate to collect a debt and keep the payment, which served the same economic purposes as assignment of the debt.

In the previous paragraph, the *mandatum* to perform a specific task is mentioned. When this specific task in the mandate entails agency to act as attorney at law, the mandatary is called a *procurator,* as is mentioned by Gaius (Gaius, *Inst.* IV 84)[13]. In P. Mert. I 18 (Oxyrhynchus, 161 AD) power of attorney is mandated to a freedman and the power to offer a petition to the prefect of Egypt (*praefectus Alexandreae et Aegypti*). In this document the prefect was Volusius Maecianus, whose legal writings are known from the Digest[14]. The mandate in question concerned three ex-gymnasiarchs of the city of Oxyrhynchus and their freedman Sarapion, a priest of the imperial cult. Because the ex-magistrates were not able to attend the legal proceedings in Alexandria[15], Sarapion was to travel there to offer a petition and represent them by functioning as their *procurator*.

This is not the only form of *procuratio*. Another form of (indirect) agency is called *procuratio omnium bonorum*. This special form of *mandatum* put the mandatary in charge of all the assets of the mandator. This form of *mandatum* is known from both Roman legal writings[16] and papyrological sources. It is also employed in the Greek contract cited by Scaevola in Dig. 17.1.60.4 (*administratio rerum suarum*)[17] which will be discussed below.

Regarding the internal relationship between mandator and mandatary, a mandator was not liable towards the mandatary for all acts done by the mandatary. For example, if the mandator appointed the mandatary to sell a thing, the mandatary was not allowed to buy a thing, because those are two completely different mandates. In order for the mandatary to use the *actio mandati contraria* to recover expenses incurred by the execution of the mandate, he had to operate within the scope of the task(s) mandated. Regarding third parties, the mandator was also not always liable for acts done

13 Cf. Just. *Inst.* IV 10*pr.*

14 Among his legal writings is also a treatise on the *Lex Rhodia de Iactu* (Rhodian sea law on jettison).

15 It is not clear from the papyrus what the grounds were for the petition or for the legal proceedings.

16 See for example: Dig. 3.3.1.1 (Ulpian. 9 *ad Ed.*), Dig. 3.6.7*pr* (Paul. 10 *ad Ed.*) and Dig. 3.3.47 (Iul. 4 *ad Urs. Fer.*).

17 For other second century AD legal sources cf. Gaius, *Inst.* III 155 and Dig. 17.1.1.1 (Gaius, 2 *Res Cott.*). For Severan and post-Severan examples, e.g. Dig. 17.1.6.6 (Ulpian. 21 *ad Ed.*), see Angelini 1971, 107. In Cicero's *pro Caecina,* he gives a definition of this *procuratio* (*Pro Caec.* XX 57).

by the mandatary. For example, in the special case of an *institor*[18] (a form of mandate, allowing a mandatary to sell things belonging to a mandator), the mandator was only bound to the acts of the mandatary if they were done within the scope of the mandate, as can be seen in Dig. 14.3.5.11 (Ulpian. 28 *ad Ed.*):

> Non tamen omne, quod cum institore geritur, obligat eum qui praeposuit, sed ita, si eius rei gratia, cui praepositus fuerit, contractum est, id est dumtaxat ad id[19] quod eum praeposuit.
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> Not everything, though, which is done through a manager, binds him who has appointed him, but only in the following manner, if a contract is entered concerning the task for which he has been appointed; this is only to the extent to which he has appointed him.

Lastly, a special form of *mandatum* is touched upon, namely the contract of *mandatum pecuniae credendae* or *mandatum qualificatum*[20]. In this contract of *mandatum*, which was used as a form of suretyship, the mandator ordered the mandatary to lend money (*mutuum*: loan for consumption) to a third party. The mandatary/creditor could claim the money from the third party/debtor. If this proved to be impossible the mandator was liable for the costs incurred by the mandatary/creditor, i.e. the sum of money lent minus possible payments of the debt by the third party/debtor, by means of the *actio mandati contraria*. This contract is attested in Roman legal writings[21] and in a few papyri from Roman Egypt in Late Antiquity, e.g. P. Flor. III 384 (Hermopolis Magna, 489? AD)[22]. It is the most common form of *mandatum* according to Watson[23]. In the analyses of the legal questions concerning Scaevola's *responsum* in Dig. 17.1.60.4 discussed below, this *mandatum pecuniae credendae* is addressed in more detail.

II.2 *Mandatum* in Hellenistic legal culture

The contract of mandate is not specific to Roman law alone. Contracts of mandate have been found in Egypt that can be dated to Ptolemaic times, well before the Roman rule of the territory[24]. An example is SB XVI 12810

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18 The powers granted to a *procurator* often encompassed those of an *institor*. A *procurator*, however, is not always an *institor.*

19 In the *apparatus criticus* of his *Editio Maior,* Mommsen questions whether it should be *id ad* instead of *ad id*.

20 Zimmermann 1992, 139.

21 See Dig. 17.1.2.5 (Gaius, 2 *Res Cott.*), title Dig. 46.1 *de fideiussoribus et mandatoribus* in general and in particular in Dig. 46.1.13 (Iul. 14 *Dig.*).

22 See also P. Hamb. I 23 (Antinoopolis, 569 AD).

23 Watson 1961, 84. He comes to this conclusion because of the large amount of Roman legal writings on this subject.

24 Taubenschlag 1955, 297.

(Philadelphia, III BC)[25]. In this document in epistolary form a Greek named Thrasymedes ordered (l. 8 *ἐντολή*) Apollonius to collect a debt of three hundred *drachmae*[26]. The document shows that two centuries before the Roman conquest of Egypt, Greeks present in Ptolemaic Egypt ordered others to collect debts on their behalf via documents. Not only debt collection on someone else's behalf, but also the mandate to enter or dissolve a contract and to register contracts can be found[27]. Procuration (the grant of powers of attorney), as shown above in P. Mert. I 18, is also found in papyrological sources without a directly Roman context. Examples are P. Fouad 35, 11-14 (Oxyrhynchus, 48 AD) and P. Fouad 36 (Oxyrhynchus, 167 AD). In the former, Thaesis, daughter of Heraclius gave power of attorney to her husband Ptollion in a lawsuit against Thoonis and others. In the latter Sarapias gave power of attorney to her freedman Eutyches to open her will. That a similar concept of *mandatum* can be found in both papyri from Ptolemaic Egypt and in legal writings from Rome does not need to indicate an exchange of legal concepts between the two legal cultures, as it is far from unlikely that a contract so basic as a mandate was not developed separately in both legal cultures.

A *mandatum generale* with distinctively Greek or Hellenistic contracting parties cannot be found in the papyri. According to Solazzi, mandates in the Hellenistic East had to contain clearly defined powers granted to the mandatary, which is not the case in a *mandatum generale*[28]. Presumably, this idea comes from the analysis of Hellenistic contracts, which all have distinct formulae of granting powers to third parties. Even though the *mandatum generale* is not attested in papyrological sources, Hellenistic legal cultures may still have had a type of *mandatum generale*, as the *mandatum generale* is an attested type of contract in Attic law. This is known from Demosthenes[29].

Demosthenes, Speeches 53. 5 *Against Nicostratus*

'ἐπιστέλλω δὴ αὐτῷ ὅτι αὐτὸς μὲν ἀνῆγμαι καὶ οὐχ οἷός τε ἦν οἴκαδε ἀφικέσθαι, ἵνα μὴ κατακωλύοιμι τοὺς πρέσβεις: τούτῳ δὲ προσέταξα ἐπιμελεῖσθαί τε τῶν οἴκοι καὶ διοικεῖν, ὥσπερ καὶ ἐν τῷ ἔμπροσθεν χρόνῳ'.

'I wrote him that I myself had set sail [to Sicily] and was not able to return home, so as not to delay the ambassadors: I appointed him to take care of my belongings at home and the administration thereof, as he had done earlier.'

25 This papyrus is from the so-called 'Zenon archive'. This 'archive' contains papyri spanning some four decades, which were all connected to the person of Zenon, the private secretary of the *diocetes* Apollonius.

26 See Aly 1984, 799. For a photo of the two fragments of this papyrus combined see Aly 1984, 805 (BL X, 215).

27 See for example SB V 7573 (Elephantine?, 116 AD) on a mandate to enter a contract of sale and P. Grenf. II 71 (Oasis Maior, 244-248) on a mandate to register a deed.

28 Solazzi 1924, 11.

29 See further Wenger 1906, 172.

From this text it becomes evident that in Attic law a legal concept had to exist to ensure that someone, other than yourself, took care of your property and the administration as the I-figure in the text appointed Nicostratus to do so.

II.3 Dig. 17.1.60.4 (Scaev. 1 *Resp.*): A *procuratio omnium bonorum*

The first example examined of a bilingual text on a *mandatum* can be found in the *Responsa* by Scaevola. Scaevola's *responsum* of Dig. 17.1.60.4 from the first book of his *Responsa* is included by the compilers in the first section of book 17 of the Digest (*mandati vel contra*). In this section contracts of *mandatum*, the action originating from *mandatum* and the counteraction from *mandatum* (*actio mandati contraria*) are addressed[30]. In Lenel's *Palingenesia* his reply (fr. 234) is incorporated in the title *Mandati* alongside Dig. 22.1.13.1 (fr. 235). The Hellenistic context of fr. 234 is primarily deduced from the use of Greek.

Dig. 17.1.60.4[31] (Scaev. 1 *Resp.*)

Lucius Titius fratris filio commisit rerum suarum administrationem ita: Σεῖῳ τέκνῳ χαίρειν. ἐγὼ μὲν κατὰ φύσιν εἶναι νομίζω τὸ ὑπὲρ πατρὸς καὶ τῶν τοῦ πατρὸς ὑιῶν πραγματεύεσθαι δίχα τοῦ τινὰ ἐπιτροπικὸν αἰτεῖν. εἰ δὲ δεῖ καὶ τοιούτου τινός, ἐπιτρέπω σοι περὶ πάντων τῶν ἐμῶν ὡς θελεις πραγματεύεσθαι, εἴτε πωλεῖν θελεις εἴτε ὑποτίθεσθαι εἴτε ἀγοράζειν[32] εἴτε ὁτιοῦν πράττειν, ὡς κυρίῳ ὄντι τῶν ἐμῶν· ἐμοῦ πάντα κύρια τὰ ὑπὸ σοῦ γινόμενα ἡγουμένου καὶ μηδὲν ἀντιλέγοντός σοι πρὸς μηδεμίαν πρᾶξιν. Quaesitum est, si quid non administrandi animo, sed fraudulenter alienasset vel mandasset[33], an valeret. Respondi eum, de quo quaereretur, plene quidem, sed quatenus res ex fide agenda esset, mandasse. Item quaero, an, cum Seius magistratu functus debitor exstitisset, Lucius Titius eo nomine conveniri possit vel res eius obligatae essent propter verba epistulae supra scripta. Respondi neque conveniri posse neque res obligatas esse.

30 Cf. Gaius *Inst.* III 155-162 and Just. *Inst.* III 26*pr*.

31 Cf. De Jong 2013, 297-298; Talamanca 2009, 547.

32 This formula is already attested in a legal document written in Greek from the third century BC, viz. SB V 8008, 53-54 (provenance unknown): '*μηδενὶ ἐξέστω ἀγοράζε*[*ιν*] *μη* // *δὲ* [*ύ*]*ποτί*[*θε*]*σθαι*'.

33 According to Solazzi *mandasset* can be seen as a possible reference to a *mandatum credendae pecuniae*: Solazzi 1924, 11. Angelini, however, states, that the meaning of *mandasset* is obscure and that it might be the case that a Latin *terminus technicus* is used for a Greek / Hellenistic legal concept, such as *παρακαταθήκη* (*depositum/ depositum irregulare*); see Angelini 1971, 144. This seems implausible because *παρακαταθήκη* in the *responsa* by Scaevola is mentioned using other *formulae* than in Dig. 17.1.60.4.

> Lucius Titius commanded the administration of his affairs to the son of his brother as follows: "Greetings to Seius, the child. I consider it to be according to nature that a son[34] takes care of his father's property on his and his family's behalf without a person requesting some sort of authorization. If such authorization is needed, I entrust you to take care of everything which belongs to me as you see fit, whether you want to sell or place under hypothec or buy or to do whatsoever, as if you were master of my belongings. All acts done by you are considered valid by me and I shall therefore not make claims against you in any case". The following question has been raised: if something has been alienated or mandated fraudulently without the intent of proper administration, would that be valid. I have responded that he, about whom this was asked, indeed has given the mandate broadly, but only as long as the matter is handled in good faith. I also ask, whether, when Seius has become a debtor because he accepted a position as a magistrate, Lucius Titius could be sued on that account and whether his property was pledged due to the wording of the letter mentioned above. I replied that neither could he be sued, nor was his property pledged.

This fragment from Scaevola's *Replies* can be divided in three distinct parts: a Greek epistolary contract on *mandatum*[35], the first legal question and corresponding reply by Scaevola and lastly a second legal question followed by Scaevola's reply. The Greek contract is preceded by a brief introduction. The introduction touches upon the general theme of the Greek contract labelling it as a type of mandate called *administratio rerum suarum*. This is a special type of mandate, namely the *procuratio omnium bonorum* / *mandatum generale*[36]. Via this mandate Lucius Titius granted the administration of all his belongings to his nephew.

II.3.1 Contextualising the Greek epistolary contract from Dig. 17.1.60.4

In this section the Hellenistic origin of the contract from Dig. 17.1.60.4 is addressed as well as the form of the document and the nationality of the contracting parties. The contract in epistolary form from the second century AD probably originated from a 'Hellenised' Roman province, based on its use of the Greek language and typical epistolary form, as known from papyro-

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34 Mommsen has emended the word *ὑιῶν* into *υἱόν*. I have translated it accordingly. Kübler suggests the following translation leaving *ὑιῶν* as it is (Kübler 1908, 217): „*Die Verwaltung für den Vater und die Söhne des Vaters ohne besondere Vollmacht halte ich für natürlich*". In my view the emendation by Mommsen is justified, because the Greek text does not address multiple '*Söhne des Vaters*', it addresses the son of his brother (*filio fratris*). Furthermore, the Greek text does not mention a contract of agency between father and son. The reasoning seems to have been that it is natural for paternal uncles to mandate their nephews, analogous to the reasoning that it is natural for fathers to mandate their sons.

35 For other written contracts on mandate: Dig. 17.1.12.12 (Ulp. 31 *ad Ed.*), Dig. 17.1.59.5 (Paul. 4 *Resp.*), Dig. 17.1.60.1 (Scaev. 1 *Resp.*) and Dig. 17.1.62.1 (Scaev. 6 *Dig.*) (*manu mea scripta*). Cf. Watson 1961,62.

36 This is apparent from the phrase: '*ἐπιτρέπω σοι περὶ πάντων τῶν ἐμῶν*'. Cf. Kübler 1908, 219; Solazzi 1924, 11; Angelini 1971, 137, Hamza 1980, 210 & Briguglio 2007, 33.

logical sources from Roman Egypt. In this case the document can be classified as a *cheirographon* which is an unregistered document written by one of the contracting parties[37]. According to Solazzi, the contract probably does not originate from Roman Egypt. It can however, be attributed to a 'Hellenised Roman province' by its style and the clauses used[38].

The contract begins with an opening characteristic of letters. The author Lucius Titius greets the other contracting party (*χαίρειν*) Seius 'the child'. 'Child' could be interpreted as 'the younger' or 'junior'. Papyrological sources, however, do not warrant such an interpretation. Lucius Titius then gives a rationale for this mandate. He believes that it is according to nature (*κατὰ φύσιν*) that a son acts on behalf of his father regarding his property and on behalf of his fathers' cognates (*τῶν τοῦ πατρὸς*). The latter group would then include the mandatory Lucius Titius, who is the paternal uncle of Seius the child, the mandatary in this contract. However gratuitous it may seem; the addition of *κατὰ φύσιν* touches a vital point. Seius' paternal uncle (*patruus*) declared that according to him this mandate is *κατὰ φύσιν,* i.e. that a *mandatum generale* to a nephew is a recurring phenomenon amongst civilised people and therefore belongs to the *ius gentium* or *ius naturale*[39], meaning that this legal concept is valid and known among all people (Roman, Greek and Egyptian alike). Another potential explanation, however, is that the paternal uncle wanted to stress that this mandate is legally binding precisely because the arrangement mentioned is far from *κατὰ φύσιν*. Indeed, it may not have been common for nephews to manage the estates of their uncles. Regardless, the mention of *κατὰ φύσιν* is meant to validate the contract by presenting it as normal.

Regarding the nationality of the contracting parties, even though the Greek language is used, it appears to be that the contracting parties were Roman citizens on the whole of it. Three arguments for a Roman nationality can be given. Firstly, the aliases of the contracting parties – the text has been anonymised[40] – in this fragment are Roman. This is not always the case. In the

37 Cf. *τὸ χειρόγραφο*(*ν*) in the contract of BGU I 300, 3 (Arsinoite nome, 148 AD) with Dig. 17.1.62.1 (Scaev. 6 *Dig.*): '*Manu mea scripta*' ('written with my own hands'). A *cheirographon* could be registered by sending it to the *archidicastes*. This had legal consequences. By doing so the legal effect of a *δημόσιος χρηματισμός*, which is a document issued by a competent government official, could be achieved. The office of the *archidicastes*, the *katalogeion*, located in Alexandria was able to make official notarial deeds from *cheirographa*. See Wolff 1978, 129 and 139. Later is could also be done at the Bibliotheke Enkteseon. See Jördens, A. (2010), *Nochmals zur Bibliotheke Enkteseon,* in: Thür, G. (ed.), *Symposion 2009: Vorträge zur griechischen und hellenistischen Rechtsgeschichte (Seggau, 25-30 August 2009)*, Vienna, 277-290.

38 Cf. Solazzi 1924, 12.

39 Cf. Cortese 1978, 241; For *ius gentium* and *naturalis ratio* see Gaius, *Inst.* I 1.

40 The 'Greek' name, i.e. a Roman name transcribed into Greek letters, and Lucius Titius are *Decknamen* (Talamanca 2009, 498), which indicate that the reply has been anonymized. Cf. Dig. 17.1.60.1: '*Titius Seio salutem*'.

fragment Dig. 45.1.122 (Scaev. 28 *Dig.*) on *foenus nauticum* (maritime loan), for example, the contracting parties have Greek aliases: Eros and Callimachus[41]. Furthermore, the content matter of the contract, sent to a Roman jurist, seems typically Roman as this type of *mandatum* (*procuratio omnium bonorum*) is not attested between evidently non-Roman contracting parties in papyrological sources. Lastly, Seius took office as a public municipal magistrate. He and his family can therefore be linked to the Romanized Greek governmental elite, which contributes to the argument that both Seius and his paternal uncle may have been Roman citizens. If the three arguments are taken separately, they appear circumstantial, but taken together they provide a strong indication that the contracting parties were Roman citizens.

II.3.2 The contract from Dig. 17.1.60.4 in the light of three papyri

In papyrological sources the type of *procuratio omnium bonorum* instanced in Dig. 17.1.60.4 cannot be found. The Greek contract in the Digest is broad and has almost no limitation in the type of actions permitted to the mandatary. The papyri do contain instances, however, that appear similar on points to contracts of *procuratio omnium bonorum* though less comprehensive in scale. In these sources, representatives are appointed to take care of estates because the owners are not present. Three contracts, concerning Roman citizens, all containing broad mandates in the form of a *procuratio,* can be mentioned. These are BGU I 300 (Arsinoite nome, 148 AD), P. Oxy. IV 727 (Oxyrhynchus, 154 AD) and P. Freib. II 9 (Soknopaiou Nesos, 138-61 AD). In the following the Greek contract of Dig. 17.1.60.4 will be compared to the above-mentioned papyri, starting with BGU I 300.

BGU I 300, 1-8 (Arsinoite nome, 148 AD)

Γάιος Οὐαλέριος Χαιρημονιανὸς οὐετρανὸς Ἀντινοεὺς
Νερ[ο]υϊάνιος ὁ καὶ Ἑστι[α]ῖος Μάρκῳ Σεμπρωνίῳ Κλήμηστ(ι)
οὐε[τρ]ανῷ χαίρειν. Συνέστησά σοι κατὰ τοῦτο τὸ χειρόγραφο(ν)
φροντιοῦντά μου τῶν ἐν Ἀρσινοείτῃ ὑπαρχόντων καὶ
5 ἀπαιτήσαντα τοὺς μισθωτάς, κἂν δέον ἦν, μισθώσαντα
ἢ αὐτουργήσαντα καὶ ἀποχὰς προησόμενον αὐτοῖς ἐκ το[ῦ]
ἐμοῦ ὀνόματος καὶ πάντα τῇ ἐπι[τρο]πῇ ἀνήκοντα ἐπι-
τελέσαντα, καθὰ κἀμοὶ παρόντ[ι ἔ]ξεστιν

l.2: Κλήμεντι, l.3: σε, l.5: ἀπαιτήσοντα, καὶ ἐὰν, ᾖ, μισθώσοντα, l.6: αὐτουργήσοντα, l. 7-8: ἐπι- // τελέσοντα. The text has been adjusted using the corrections from BL I 37, II.2 15, and VIII 22

41 In the latter fragment a voyage is mentioned from Berytus, modern day Beirut, to Brentesium, which is Latinized Greek for Brundisium, modern day Brindisi.

> Gaius Valerius Chaeremonianus, a veteran, Antinoopolite from the phyle Nervianeius, from the deme Hestiaeus to Marcus Sempronius Clemens, a veteran, greetings. According to this handwritten document I have appointed you to be the agent of my belongings in the Arsinoite nome and to collect the rent, and, if necessary, to lease the land out or farm it yourself, and to write out receipts for them in my name and to fulfill everything relating to the mandate, as would be possible to me when present.

The 2nd century AD contract of BGU I 300 is a *cheirographon* similar to Dig. 17.1.60.4. In the contract two Roman citizens are mentioned as contracting parties which is apparent from their *tria nomina,* who were both Roman veterans. A certain Gaius Valerius Chaeremonianus[42] gave a mandate to Marcus Sempronius Clemens to act as procurator of his belongings (*ὑπαρχόντων*) in the Arsinoite nome. The contract is mostly written by a third Roman veteran, named Gaius Iulius Saturnilus (l.13-14: *Γάιος Ἰούλ[ι]ος Σατορνῖλος οὐετρανὸς ἔγραψα τὰ πλ[εῖσ]τα*'), presumably because the contracting parties could not write. The mandate is narrowly defined, meaning that all the acts covered by the mandate are carefully summed up in the document. A concluding remark rounds off the mandate in line 7-8 (*πάντα – ἔξεστιν*). This reflects the closing formula from the contract in Dig. 17.1.60.4 (*πράττειν, ὡς κυρίῳ ὄντι τῶν ἐμῶν*). When comparing these two closing formulae, it is apparent that BGU I 300,7-8 only refers to the acts summed up in the mandate. The mandatary could act as if the mandator was present, but only to the extent of the acts mentioned in the document. In Dig. 17.1.60.4, the mandator wrote that all acts could be done by the mandatary regarding his property as if he were the owner of the mandator's property '*πράττειν, ὡς κυρίῳ ὄντι τῶν ἐμῶν*'.

The second papyrus containing a type of *procuratio* is P. Oxy. IV 727. In this contract two Roman brothers, presumably of Greek descent[43], mandate a certain Ophelas, who has already acted as procurator for their Egyptian affairs in the village of Oxyrhynchus, to take care of the belongings of their niece and nephew, who are still minors (l. 16: *ἀφηλίκων*). The two Roman brothers were the guardians (*tutela impuberum*) of Apollonarion also known as Nicarete and of Valerius Theodotus also known as Polion. The mandate by the guardians is necessary because they are unable to travel back to Egypt (l. 11: *Αἴγυπτον πλοῦν*).

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42 The name Chaeremonianus from the Greek name *Χαιρήμων* implies that the soldier had a Greek ethnicity. Presumably, he had been granted Roman citizenship after retirement from the army. The city of Antinoopolis, from which Chaeremonianus originated was granted the status of 'Greek *polis*' by the Romans. See Scheuble-Reiter and Bussi 2019, 290.

43 This is implied by their 'aliases' (e.g. Gaius Marcius Apion also known as Diogenes). Cf. Marotta 2017, 187.

P. Oxy. IV 727, 1-29 (Oxyrhynchus, 154 AD)[44]

Ι̣[ ]ρ[ ]μ[.]ει᾽Ιᾳσι[δ]ώρου γενομένου ἐξηγητοῦ υἱῷ
γενομένῳ στρατηγῷ τῆς πόλεως ἱερεῖ ἀρχιδικαστῇ
καὶ πρὸς τῇ ἐπιμ[ε]λίᾳ τῶν χρηματιστῶν καὶ τῶν ἄλλων
κριτηρ[ί]ων διὰ [Δ]ημητρίου Ἡρακλείδου γενομένου
ἐξηγη[τ]οῦ υἱῶ διέπ[οντ]ι τὰ κατὰ τὴν ἀρχιδικαστείαν
παρὰ Γαίων Μαρκίων Ἀπίωνος τοῦ καὶ Διο-
γέν[ο]υς καὶ Ἀπολιναρίου τοῦ καὶ᾽Ιουλιανοῦ καὶ ὡς
χρηματίζομεν καὶ παρὰ Ὤφελα τοῦ Ὠφελᾶτος τῶν
ἀπ᾽ [Ὀ]ξ[υ]ρύνχων πόλεως. Συνχωροῦσι οἱ Γάιοι Μάρκι-
οι Ἀπίων ὁ καὶ Διογένης καὶ Ἀπολινάριος ὁ καὶ Ἰουλιανὸς
οὐ δυν[ά]μενοι κατὰ τὸ παρὸν τὸν ἰς Αἴγυπτον πλοῦν ποι-
ήσασθ[α]ι συνεστακέναι τὸν προγεγραμμένον Ὠφελᾶν
ὄντα καὶ τῶν ὑπαρχόντων αὐτοῖς ἐν τῷ Ὀξυρυνχεί-
τῃ νομῷ φροντιστὴν καὶ κατὰ τήνδε τὴν συνχώρησιν
φροντιοῦντα καὶ ἐπιμελησόμενον ὧν καὶ αὐτοὶ ἐπι-
τροπεύουσιν ἀφηλίκων ἑαυτῶν ἀδελφιδῶν Οὐαλερί-
ων Θεοδότου τοῦ καὶ Πωλίωνος καὶ Ἀπολλωναρίου
τῆς καὶ Νεικαρέτης ἔτι δὲ καὶ ἀπαιτήσοντα φόρους
καὶ ἐγμ[ι]σθώσοντα ἃ ἐὰν [δ]έον ἦν καὶ καταστησόμενον
πρὸς οὓς ἐὰν δέῃ καὶ γένη διαπωλήσοντα ἃ ἐὰν δέον
ᾖ τῇ αὐτοῦ πίστει, διὸ τοὺς πρὸς τούτοις ὄντας συνχρημα-
τίζειν τῷ Ὠφελᾷ ἕκαστα [τ]ῶν προκειμένων ἐπιτελοῦν-
τι, καὶ λ[όγο]υς ὧν ἐὰν ἐπιτελέσῃ κατὰ μῆνα ἕκαστον
διαπε[μ]ψομενον [αὐτοῖ]ς πάντα δὲ ἐπιτελεσοντα κα-
θὰ καὶ αὐτοῖς παροῦσι ἐξῆν, ἐπεὶ καὶ ὁ συνιστανόμενος
Ὠφελᾶς εὐδοκεῖ[45] τῇδε τῇ συνχωρήσει, κυρίων ὄντων
ὧν ἔχουσι ὅ τε Ἀπίων ὁ καὶ Διογένης καὶ Ἀπολινάριος
ὁ καὶ Ἰουλιανὸς ἀλλήλων γραμμάτων παντοίων πάν-
των.

l.3: ἐπιμελείᾳ, l. 5: υἱοῦ, διέποντος l. 6-7: corr. ex διαγεν[ο]υς, l.8: Ὠφελᾶτος, l. 11: εἰς, l. 24: διαπεμψομένῳ, ἐπιτελέσοντι. The text has been adjusted using the corrections from BL II.2, 96-97

To… son of Isidorus the former exegetes, former strategus of the city, priest and supreme judge and superintendent of the circuit judges and all the other courts through Demetrius, son of Heraclides the former exegetes, substitute to the supreme judge, from Gaius Marcus Apion alias Diogenes and Gaius Marcus Apolinarius alias Julianus and whatever function or magistracy we fulfill and from Ophelas son of Ophelas from the city of Oxyrhynchus. Gaius Marcus Apion, also Diogenes, and Gaius Marcus Apolinarius also Iulianus, who are at the time not able to set sail to Egypt, agree to have appointed the aforementioned

44 For another English translation of the papyrus see the edition of P. Oxy. IV 727 on page 211.

45 For the technical term '*εὐδοκεῖ*' (l. 26) used in a *Generalvollmacht*: Gradenwitz 1900, 91-92.

> Ophelas, who is also the agent of their belongings in the nome of Oxyrhynchus, in conformity with the conditions of the present agreement, to also manage the affairs of those, who they themselves have under guardianship, being minor and being our brother's children, Valerius Theodotus alias Polion and Valeria Apollonarion alias Nicarete, and that he is guardian to them and also to collect rent and lease out, whatever would be necessary, and to commence legal procedures against whomever it is and to sell whatever produce is necessary, in his own authority. In accordance with this let them, whom it may concern, do business with Ophelas in fulfilment of the tasks previously mentioned. And each month accounts of his transactions will be sent to them and he shall do everything, which it would have been possible for them to do, if they were present. And Ophelas, appointed agent, consented to this mandate. All written contracts remain valid which Apion also known as Diogenes and Apolinarius also known as Iulianus have entered together.

In P. Oxy. IV 727 an extensive, but narrowly defined mandate is given. The mandate which is similar to BGU I 300, does not grant as much power to the mandatary as the mandate in Dig. 17.1.60.4. The mandators mention the tasks which were to be fulfilled by Ophelas who earlier also entered a contract with both brothers to be the agent of their belongings in Oxyrhynchus (see ll. 12-14), namely to fulfill the tasks of a guardian of two minors.

Similar to the Greek fragment in Scaevola's reply and BGU I 300, the contracting parties in P. Oxy. IV 727 added a closing formula in ll. 24-25. Unlike BGU I 300 and Dig. 17.1.60.4, this document is not a letter from one contracting party to the other, but from one contracting party (the two brothers) to a high government official called the *ἀρχιδικαστής*, a supreme judge, whose name is not preserved on the papyrus. As a consensual contract, *mandatum* in Roman law does not have requirements as to its form[46]. Therefore, sending this letter to a supreme judge would not have been necessary. That the document has been sent to the office of the *archidicastes*, can be explained by the fact that it is a *synchoresis*. Such a document is drafted before a judicial authority. The *archidicastes* was in charge of the *katalogeion*. In this *katalogeion, synchoreseis* were kept. The notarial document of *synchoresis* originated from dispute resolution at the court of the *chrematistae*[47]. A *synchoresis* document is therefore also called a *gerichtsnotarielle Urkunde*. This form of document became standard in Alexandria in the beginning of the Augustean period[48]. By the fourth century AD this type of contract was not used any more[49].

46 See Dig. 3.3.1.1 (Ulp. 9 *ad Ed.*). See also Dig. 15.4.1.1 (Ulp. 29 *ad Ed.*) & Dig. 29.2.25.4 (Ulp. 8 *ad Sab.*) cited by Bisazza 2007, 508.

47 Wolff 1978, 94

48 Wolff 1978, 92-93.

49 Allam *SAK* 11 (1984), 177.

The third and last papyrus in this part of the analysis is P. Freib. II 9 (Soknopaiou Nesos, 138-61 AD)[50]. This papyrus is a contract of *procuratio omnium bonorum* between Roman contracting parties:

P. Freib. II 9, 9-14 (Soknopaiou Nesos, 138-61 AD)

ὄντα ἐπ]ετροπον ὑπαρχόντων <τῶν> ἐν γε-
[-ca.?-] ἄλλων π̣[ά]ντων ᾧ καὶ ἐπει-
[-ca.?- Καπί]τωνι πωλεῖν ἀγοράζειν ὑ-
[-ca.?-, ἐφ᾽ ᾧ αὐτὸν τοὺς λόγους διαπέμψαι πίστιν] ἐπιθοῦντα πρὸς τὴν ἀποδω-
[σομένην (?)]- ca.12 -[, αὐτὸν δὲ Τίτον Φλαούιον Καπ]ίτωνα ἐκ τοῦ αὐτῆς ἀπόντος
[ἀργυρίου - ca.32 - ἐπί]τροπον ἐτεθήκει.

l.9: [ἐπ]ίτροπον. See BL II.2 122-123

(Text is too fragmentary to be translated) Being the procurator of belongings in… of all other (property) to him and... to Capito to sell, alienate, (place under hypothec?) … that he will send the accounts …
[-ca. ?] … him Titus Flavius Capito with regards to the money of her in absentia …. She instituted him as procurator.

That this contract concerns a *procuratio omnium bonorum* can be seen in line 9 in which one of the contracting parties is called *ἐπίτροπος ὑπαρχόντων* (procurator of belongings). The omission of a definite article before *ὑπαρχόντων* indicates that the belongings are not more precisely defined. The contract mentions three distinctively Roman citizens. The two parties are a woman named Iulia Aphrodous, who can operate 'without a guardian, according to Roman legal customs[51], with the right of three children' (l.4: *χωρὶς κυρίου κατὰ τὰ Ῥωμαίων] ἔθη δικαίῳ τέκνων τριῶν*) and Titus Flavius Capito[52]. The latter has been named *procurator* of the property of the deceased by Iulia Aphrodous. The third Roman is a deceased veteran, Marcus Iulius Gemellus, whose testament is dealt with (l. 8 according to the Roman testament: *κα]τὰ διαθήκην Ῥωμαεικήν*). From the *nomen gentis* Iulius a degree of kinship can be expected with one of the contracting parties, Iulia Aphrodous. Marcus Iulius Gemellus probably was the father of Iulia Aphrodous.

In P. Freib. II 9, probably, a typical formula is used in which three verbs indicate the powers of the mandatary. The formula is mirrored in Dig. 17.1.60.4 in which the verbs *πωλεῖν*, *ὑποτίθεσθαι* and *ἀγοράζειν* were used.

50 Angelini (1971, 137) and Briguglio (2007, 6) both mention this papyrus. For one more contract of mandate (*procuratio*) in an epistolary form in a similar fashion to Dig. 17.1.60.4 see P. Bodl. I 31 (Soknopaiou Nesos, 167-177 AD, ll. 3-4): [*Ἀποσυ*]*νέστησά σ*[*ε*] *φρ*[*ον*] *τ*̣[*ιοῦν*]*τ*̣*α* // [. . . *μ*]*ου τῶν ὑπαρχόντων* (I have appointed you to be the procurator of my belongings). The top of this papyrus is badly damaged, therefore the names (and any clues as to the nationality of the contractual parties) are lost. See also the Roman will of Gaius Longinus Castor translated into Greek in BGU I 326, Col. II 16-1 (Karanis, 189 AD).

51 This custom (*ἔθη*) is the Roman *ius trium liberorum*.

52 This Titus Flavius Capito is also known from P. Hamb. I 70 (Arsinoite?, 144-145 AD).

In line 11 of the document [-ca.?- *Καπί]τωνι πωλεῖν ἀγοράζειν*[53] *ὑ-* is to be supplemented with *-ποτίθεσθαι*. This formulation is known from documents from Roman Egypt, where it is used to grant or retract the *potestas alienandi/ pignori dandi*, but only in a Roman context[54]. Further it is mostly attested in non-Roman contracts of sale. In fact, this formula is often employed not to grant a *potestas alienandi* and *pignori dandi*, but to limit this power contractually through a non-alienation clause, as is the case in contracts concerning secured credit, such as P. Lond. III 1168 (Hermopolis Magna, 44 AD), P. Mich. IX 566 (Karanis, 86 AD) and P. Flor. I 81 (Hermopolis Magna, 103 AD)[55]. Both in P. Freib. II 9 and Dig. 17.1.60.4 these powers to sell or hypothecate are added explicitly, which is unnecessary from a Roman legal point of view in case of a *libera administratio* (a mandate in which the mandatary can freely dispose of the property of the mandator). In Dig. 41.1.9.4 (Gaius, 2 *Res Cott.*) Gaius, living in the century in which P. Freiburg II 9 was drafted, stated that no special authorization was needed for procurators who manage estates, in order for them to have the power to alienate goods belonging to the mandator[56]. According to Solazzi, the explicit mention of the power to

53 Another contract of mandate with both *πωλεῖν* and *ἀγοράζειν* is P. Oxy XXXVI 2271, 6-7 from fourth century AD Oxyrhynchus.

54 The formula is common in Greco-Roman legal papyri from Roman Egypt (1st-2nd cent. AD). The following papyri all grant the power to sell goods and to place goods under hypothec to a representative, as is done in BGU I 300: BGU I 183 (1st century AD, Arsinoite, l. 26): *πολεῖν, ὑποτίθεσθαι, διαθέσθαι* (to sell, to place under hypothec or to devise it by will), BGU IV 1013, 17 (1st century AD, Arsinoite, l.17): *πολεῖν ὑ[πο]τίθεσθαι* (to sell, to place under hypothec), P. Lond. II 288, 34-36 = SB XXII 15705, 34-36 (1st century AD, Soknopaiou Nesos, ll.): *πωλεῖν μετατίθεσθαι ὑπο<τί>θεσθαι, οἷς ἐὰν β[ο]ύληται ἀμέμπτως* (to sell, alter, place under hypothec, in whatsoever way he wishes without reproach), P. Mich. V 322A, 31 (1st century AD, Tebtynis, BL IX, 160): *τούτους κυρίους εἶνε καθ' ὧν καὶ ἔχιν αὐτοὺς τὴν ἐξουσίαν πωλεῖν καὶ ὑποτίθεσθαι καὶ ἐξαλλοτριοῖν καὶ μισθοῖν τρώπῳ ᾧ ἐὰν ἐρῶνται* (that they have proprietary rights over them and that they have the power to sell, place under hypothec, alienate and lease in whatever way they desire), BGU I 86, 24-25 (2nd century AD, Soknopaiou Nesos): *ἔχειν αὐτὸν τὴν κατὰ] τῶν ἰδίων πάν[των] ὁλοσχερῆ ἐξουσίαν πωλεῖν, ὑποτίθεσθαι, ἑτέροις παρασ[υ]νχωρεῖν* (that he has complete authority over all his own property to sell, place under hypothec, and sublet to others), BGU III 859, 14 (2nd century AD, Arsinoite, BL I, 74; VIII 35-36): *ἐξουσίαν ἔχειν πωλεῖν, ὑποτίθεσθαι, οἰκονομεῖν κατ' αὐτοῦ* (that they have the power to sell, place under hypothec and to manage him), P. Münch. III 80 (2nd century AD, Soknopaiou Nesos, ll. 27-28, BL XII, 130): *καὶ ἕκαστος αὐτῶν ὁροσχελῆ [ἐξουσίαν] [π]ωλεῖν ὑποτίθεσθαι χρᾶσθαι τρόπῳ [ᾧ] ἐὰν προαιρῆται* (and each of them has the complete authority to sell, place under hypothec, use in whatever way he chooses), P. Oxy. III 494 (2nd century AD, Oxyrhynchus, ll.19-20, BL I, 323): *καὶ Ἀπολλωναρίῳ ἐξέστω δι' αὐτῆς πωλεῖν καὶ ὑποτίθεσθαι ἃ ἐὰν αἱρῆται* (and it is possible for Apollonarion on her own account to sell, place under hypothec these goods, whenever she chooses) and SB VIII 9642.4, 17 (2nd century AD, Tebtynis, BL VII, 213; VIII, 353): *ἔχειν αὐ]τὸν κατὰ τῶν ἑαυτοῦ ὑπαρχ[όντων] ὁλ[οσχερῆ ἐξου]σίαν πωλεῖν ὑποτίθεσθαι, μεταδιατίθεσθαι* (that he has complete authority over his own property to sell or place under hypothec and to devise it by will).

55 Other sources from the second century AD are P. Basel 7 (Soknopaiou Nesos, 117-138 AD), P. Oxy. III 507 (146 AD, Oxyrhynchus), M. Chr. 237 (Arsinoite nome, 149 AD), P. Oslo. II 40A-B (Oxyrhynchus, 150 AD) and P. Strass. I 51 (Hermopolis, 151 AD).

56 Dig. 41.1.9.4 (Gaius, 2 *Res Cott.*) is examined in more detail below on p. 59.

alienate in the Greek contract to which Scaevola is responding is indicative of a Hellenised legal context[57], as the explicit mention of such power is not necessary in a Roman legal sphere. Modestinus however, a jurist who presumably came from a Hellenised Roman province[58], stated only a century later than Dig. 17.1.60.4 and P. Freib. II 9 that the power to alienate property must be explicitly granted by the mandator to the mandatary:

> Dig. 3.3.63 (Mod. 6 *Diff.*)
>
> Procurator totorum bonorum, cui res administrandae mandatae sunt, res domini neque mobiles vel immobiles neque servos sine speciali domini mandatu alienare potest, nisi fructus aut alias res, quae facile corrumpi possunt.
>
> The procurator of all goods, to whom the management of goods is mandated, does not have the power to alienate goods of the owner, whether they are movable, immovable or slaves without a special mandate of the owner, unless they are fruits or other goods that can easily spoil.

Apart from particular goods of the mandator, the question also rises whether a mandatary can alienate the landed estate, which he is mandated to manage. On this issue the emperors Diocletianus and Maximianus issued a rescript at the end of the third century AD, half a century after the *Constitutio Antoniniana*. The emperors wrote that mandators needed to have explicitly granted the *potestas alienandi* to *procuratores* and *actores* appointed to manage a landed estate, if such an alienation of the estate were to be valid:

> Cod. 2.12.16 (293 AD)
>
> *Imperatores Diocletianus, Maximianus AA. et CC. Paconiae.* Procuratorem vel actorem praedii, si non specialiter distrahendi mandatum accepit, ius rerum dominii vendendi non habere certum ac manifestum est. Unde si non ex voluntate domini vendentibus his fundum comparasti, pervides improbum tuum desiderium esse dominium ex huiusmodi emptione tibi concedi desiderantis.
> *S. non. April. Byzantii AA. conss.*
>
> *The Emperors Diocletianus and Maximianus and Augusti and Caesares to Paconia.* It is certain and clear that a procurator or an administrator of a landed estate does not have the power to sell the ownership of the property, if he did not explicitly receive a mandate to alienate. Thus, if you will realise that if you have purchased land from those, who sold it without the will of the owner, your desire for ownership is base, wishing it would be bestowed upon you from such a purchase. *Signed on the fifth of April in Byzantium during the consulate of the Emperors.*

57 Solazzi 1924, 11-12.

58 There are indications that Modestinus was from Asia Minor or from Dalmatia. Conclusive evidence, however cannot be given (Kunkel 1967, 260).

The rescript above refers to a situation similar to BGU I 300. A procurator has been granted extensive powers to manage a landed estate. The question then rises if this also implies the power to alienate the entire estate, which would make it impossible to continue to manage the estate. The emperors denied this in this rescript, in which it is stated that the power to alienate the estate had to be granted explicitly (*specialiter*).

II.3.3 Examining the question and the reply from Dig. 17.1.60.4

Having discussed the Greek text of the three papiry regarding mandates, the next paragraph will turn to the second part of Dig. 17.1.60.4, which consists of the first legal question and Scaevola's reply. The first question concerns the exact range of the *mandatum generale*: that is to say whether transactions[59] done *fraudulenter*[60] or *non administrandi animo* are valid. Is the mandator who has given the broadest possible mandate liable to creditors of the mandatary to uphold transactions done by his *procurator omnium bonorum* fraudulently, or without the intent of proper administration? Scaevola replies that although a broad mandate has been granted (*plene mandasse*), it is still limited by good faith[61]. As mentioned by Arangio-Ruiz[62], Scaevola appears to reply to the Greek contract in epistolary form with a very Roman observation[63]. Since all contracts of mandate are governed by *bona fides*[64], the principal is only obligated to uphold transactions entered by Seius the child in good faith[65].

From Roman legal writings it can be deduced that very broad general mandates incorporating the *potestas alienandi* could be given, as well as mandates which specifically granted the power to alienate specific goods. In the Hellenistic practice of Roman Egypt, on the other hand, only examples of

59 These transactions are for this question limited to alienation of property and / or the extension of mandates by Seius the child. Seius the child, as Lucius Titius' *procurator*, could have mandated a third contracting party to lend money to him. In this way he could make Lucius Titius a surety for his own loans (*mandatum qualificatum*). In this (hypothetical) construction Lucius Titius was the mandator who instructed a third party (the mandatary) to lend money (*mutuum*) to Seius the child. This means that the third party in question could claim the money from Seius the child using a *condictio,* but he could also claim the money from Lucius Titius using the *actio mandati contraria*, because he incurred costs while executing the mandate. Lucius Titius, however, was not present in this scenario, but via the document in Greek, which gave an abundance of powers to Seius the child, Seius the child could mandate a third party in Lucius Titius' name. Because *mandatum* is a consensual contract in Roman law, it existed by virtue of the consensus of the contracting parties and Lucius Titius' will to engage in such a contract can be deduced from the document in Greek as Lucius Titius validated all acts by Seius the child.

60 Kübler explains this as „*nicht im wirtschaftlichen Interesse des Vertretenen*" (Kübler 1908, 221). Cf. Angelini 1971, 145.

61 Cf. Gaius, *Inst.* III 155 on *mandatum*: *quod vel me tibi vel te mihi bona fide praestare oportet* (that, which either I have to do for you or you for me in good faith).

62 See Arangio-Ruiz 1949, 11.

63 Cf. Kübler 1908, 222.

64 Cf. Dig. 3.3.46.4 (Gaius, 3 *ad Ed. Prov.*), but also Cic. *de off.* III 17.70.

65 Cf. Rodríguez Diez 2016, 122.

specific mandates are known. These subtle differences between the contractual practice of Roman Egypt and Roman legal writings could have caused the contracting parties and a judge to need help in the interpretation of the contract. The question posed to Scaevola is therefore more prudent than it would seem from a purely Roman legal point of view. If the tasks of the mandatary were commonly clearly defined in the contract, as can be seen in the contracts cited above, a mandate as broad as that in Dig. 17.1.60.4 was easily misunderstood. As discussed earlier, a concept of mandate was already present in Ptolemaic Egypt, but in a Hellenistic legal culture, the mandate to alienate or pledge, a power that usually rest with the owner, is often framed in very specific terms that strictly define the exact range of powers and the object in question[66]. An example of this can be seen in SB V 7573, 5-22 (provenance unknown, 116 AD), a contract of mandate in Greek with a summary in Demotic, which has been registered by two *agoranomi* (public notaries)[67]. In this contract, the principal described the grant of a *potestas alienandi,* and clearly defined the object to be sold[68]:

SB V 7573[69], 5-22 (Upper Egypt, 116AD)

5 ὁμο[λογεῖ Ταουερσηοῦς]
Ὀννώφρεος, μη̣[τ(ρὸς) Τ]α̣νεσε[-ca.?- ἀπὸ]
Ἐλεφαντίνη[ς ὡς (ἐτῶν)] μα, μ[-ca.?-]
μετὰ κ(υρίου) Παχομ[παονν]ώφρεος Φα̣[. . . ἱερέως Ἄμ-]
μωνος θεοῦ μ[εγίσ]του Παχ[ομπετενεφώτη̣]
10 Ὀννώφρεως μητ(ρὸς) Τισάτις ἰε[ρεῖ Ἴσιδος θ]ε̣-
ᾶς μεγίστης ἐπίτροπον [πεποιηκέναι α(ὐτὸν)] ἐπὶ
τῷ̣ πωλῆσαι τὸν ὑπάρχον[τα] αὐτῇ̣ οἰ[κογεν]ηι
δοῦλον, ᾧ̣ ὄνομα Νάρκισσ[ος], ὡς (ἐτῶν) η, οὐ[λὴ χειρ]ὶ
δεξιᾷ̣ ἐκ τῆς ὑπαρχούσης [αὐ]τῇ̣ καὶ με[τηλλαχ]υ-
15 ειης δούλης Ἀφροδείτης [ἐ]φ’ ᾧ̣ πωλ[ήσει ὁ]
Παχομπετενεφώτης τὸ[ν δο]ῦλον Νάρ[κισσον καὶ]
ἀποκαταστήσ[ει τὴ]ν τούτου τειμὴν [τῇ̣ ἑαυτοῦ]
πίστει τῇ̣ προγεγ[ραμ]μένῃ Ταουερσηοῦ[τι ἐκ πλή-]
ρους, ἐξέσται δ[ὲ αὐ]τῷ̣ οἰκονομεῖν π[ερὶ] τὸν
20 δηλούμενον δ̣[οῦλο]ν ὡς ἐὰν αἱρητ[αι καὶ ἢ]ν
ἐὰν ποιήσηται [περὶ το]ύτου ἀσφάλεια[ν κυρί]α̣ν
εἶναι ὡς καὶ ἑ[αυτῆς?] παρούσης.
(Ten lines of Demotic follow)

l. 12: οἰ[κογεν]ῆ, ll. 14-15: με[τηλλαχ]υ|ίας, l. 17: τιμὴν

66 Solazzi 1924, 11.

67 The names are not preserved on the papyrus. From lines 4 and 5 can be deduced that the two *agoranomi* were N.N. son of Ammonius and N.N. son of Gaius.

68 For a similar contract see P. Oxy. I 94 (Oxyrhynchus, 83AD).

69 See BL VII, 195, BL VIII, 328 and BL IX, 247. The dating of this papyrus is based on the Demotic subscription (still unpublished, see BL VII, 195).

> Taouerses, daughter of Onnophis, whose mother is Taneseus (?), from Elephantine, forty-one years of age, with as guardian[70] Pachompaonnophris, son of Pha[…](?), priest of Ammon the greatest god, agrees with Pachompetenephotes, son of Onnophris, whose mother is Tisatis, priest of Isis the greatest goddess, to grant him agency (*ἐπίτροπον πεποιηκέναι*) with the purpose of selling her slave, homebred, whose name is Narcissus, about eight years of age with a scar on his right hand, born from the deceased slave-girl belonging to her, named Aphrodite, on condition that Pachompetenephotes will sell the slave Narcissus and that he will restitute the price he received for him acting 'in his own good faith' to the aforementioned Taouerses in full, and that he will be allowed to proceed with regard to the slave mentioned, as he chooses, and that,whichever contract he shall make about him will be valid as if she were there herself.

In the Greek contract above Taouerses (represented by her guardian Pachompaonnophris) granted the *potestas alienandi* of a slave to Pachompetenephotes, after which he had to hand over the received price to her. Having the power to sell the slave boy, he is granted the power to proceed with the sale in whatever way he would like (ll. 19-20). This second century AD document of mandate with Egyptian contracting parties writing in Greek is far more definite concerning the contents of the mandate than the Roman documents of Dig. 17.1.60.4 and even of BGU I 300 and P. Oxy. IV 727. In SB V 7573 the power to alienate the slave is explicitly given, as is the case in a reply by Modestinus (Dig. 3.3.63). In contrast, the doctrine under classical Roman law on the powers of a procurator was that a special authorization was by no means required, i.e. that there were no limitations to the administration of a *mandatum generale*[71]. In the second century AD Gaius denied the necessity of an explicit grant of the power to alienate, as can be read in Gaius Dig. 41.1.9.4 (Gaius, 2 *Res Cott.*):

> Dig. 41.1.9.4 (Gaius, 2 *Res Cott.*)[72]
>
> Nihil autem interest, utrum ipse dominus per se tradat alicui rem an voluntate eius aliquis. Qua ratione si cui libera negotiorum administratio ab eo qui peregre proficiscitur permissa fuerit et is ex negotiis rem vendiderit et tradiderit, facit eam accipientis.
>
> It, however, makes no difference, whether the owner himself transfers a thing to someone, or someone else with his approval. And for this reason, if someone to whom the unrestricted management of affairs has been permitted by a person who is commencing a foreign voyage, sells and transfers trade goods based on this management, he makes the receiving party owner of the thing.

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70 That Taouerses had a guardian is added, because Hellenistic legal customs dictate that it is mandatory for women to be accompanied by a guardian whilst performing legal acts. In Egyptian law this is not necessary and for this reason the 'guardian' has been left out in the Demotic text. Cf. Pestman 1994 no. 27 in which he presents a reedition of the text.

71 This is a paraphrase from Rodríguez Diez 2016, 118.

72 See also Gaius, *Inst.* II 64, Dig. 6.1.41.1 (Ulpian. 17 *ad Ed.*) and Just. *Inst.* II 1.42-43.

Having discussed the range of the mandate and the validity of the contracts entered by the mandatary and having concluded that the exact range of powers mandated is not entirely clear by means of the contract from Dig. 17.1.60.4, the question at hand is the following: did the mandatary exceed the boundaries of the mandate and, if he did, could an action be brought against the mandatory? Similarly, the question arose, whether in this case certain objects of the mandatory were validly pledged by the mandatary.

To understand these questions, it is necessary to reconstruct the case first. Seius the child had become a magistrate, who dealt with public money. Such magistrates were personally liable to the municipality for *damnum rei publicae* (loss of municipal capital)[73] during their tenure[74]. The magistrates were also personally liable for debts during their office. To secure this potential liability the magistrates gave a warranty (*cautio*) at the beginning of their term. This caution was the *cautio rem publicam salvam fore*, for which either personal sureties (*fideiussores*) or pledges were required[75]. An example of such a personal surety is, for example, attested in the papyrus P. Princ. III 121 (Theadelphia, 140-141 AD). In this contract an unknown[76] citizen nominated Theon as *sitologus* (keeper of the public granary and a tax collector) and offered to stand surety for the magistrate himself to the extent of his entire property. A *fideiussio* in Dig. 17.1.60.4 is, however, not likely as the *fideiussio* is a contract which could only be entered via *formulae* that were spoken by the contracting parties[77]. This case concerns a *mandatum* in a written document, therefore a *fideiussio* is impossible. It could be the case that using his uncle's mandate, Seius the child nominated himself to be magistrate. In such a case the *nominator* (Lucius Titius) would be liable for the debts (*quasi fideiussor*[78]) made by Seius the child in his capacity as magistrate[79].

Returning to Scaevola's reply, Seius the child had borrowed money while performing his public duties. The creditors collected the money from the municipality and because Seius the child was liable for these debts, the municipality tried to collect the money from Seius the child. Seius the child, however, was apparently not solvent enough to pay[80]. At some point

73 See Dig. 50.1.17.15 (Papinian. 1 *Resp.*) and Dig. 50.1.21*pr* (Paul. 1 *Resp.*).

74 For an overview of Roman legal texts on this subject see Petersen Wagner 1978, 57, e.g. Dig. 50.1.2.5 (Ulpian. 2 *ad Ed.*).

75 If personal sureties were insufficient, the lands of the soon to be magistrate had to be hypothecated. See Petersen Wagner (1978), 58: "*… en caso que la garantía personal sea insuficiente, se debe reforzar a través de una hipoteca de fincas*".

76 The papyrus is extensively damaged at the topside and therefore the name of the *nominator* is not preserved.

77 See Gaius, *Inst.* III 118-119.

78 See Dig. 50.1.11.1 (Papinian. 2 *Quaest.*)

79 See Koops 2010, 30-31.

80 In this period creditors in Roman Egypt did not need to sue the debtor before the surety (Taubenschlag 1955, 312). For this reason, a debtor assured her surety that she would transfer 24 5/12 *arourae* of her land in case the surety would be sued before her, in the contract of P. Oxy. II 270 (Oxyrhynchus, 94 AD).

the muncipality turned to his surety. In this scenario, Seius had made Lucius Titius his surety through the broad powers of the mandate. Such a surety would potentially also be beneficial for Lucius Titius, as his family became more powerful in the municipal government. With Seius not paying his debts, however, the municipality now turned to Lucius Titius, as they wanted to recover their claims from the assets of the surety.

The second legal question can be divided into two parts. In the first part the question is raised whether Lucius Titius could be sued personally based on the wording of the contract. In the second part it is asked whether Lucius Titius' goods were pledged (*res obligatae*) based on the wording of the contract.

A reason why Lucius Titius might be sued personally, might be the following: Lucius Titius could have become a surety based on a *mandatum pecuniae credendae* given by Seius the child (the construction has been briefly discussed above). The first legal question already hinted on this type of mandate with *sed fraudulenter … mandasset*. In the name of his uncle, Seius the child may have mandated a third party to lend money to him (Seius). By doing so Seius would have made his uncle surety for his loans. In Dig. 46.1.13 (Iul. 14 *Dig.*) such a construction is mentioned:

> Dig. 46.1.13 (Iul. 14 *Dig.*): Si mandatu meo Titio decem credideris et mecum mandati egeris, non liberabitur Titius: sed ego tibi non aliter condemnari debebo, quam si actiones, quas adversus Titium habes, mihi praestiteris. Item si cum Titio egeris, ego non liberabor, sed in id dumtaxat tibi obligatus ero, quod a Titio servare non potueris.
>
> If mandated by me you will have lent ten to Titius and you will have brought action against me based on the mandate, Titius will not be freed from his obligation: however, I must not be condemned unless you will have granted me the actions which you have against Titius. In the same way I shall not be freed if you have brought action against Titius, but I will be liable to you for no more, than the sum you could not collect from Titius.

Analogous to the I-figure with the *actio mandati contraria* in this legal opinion by the second century AD jurist Julianus, Lucius Titius would have been liable for the sum of money which could not have been collected from Seius, to a third party who was both creditor and mandatary[81]. However, Lucius Titius was not liable, or so Scaevola concluded without further reasoning.

Continuing with the second part of the question, it must be examined in what manner Lucius Titius' property could have been pledged. In the contract in epistolary form of Dig. 17.1.60.4 the power to pledge the property of Lucius

81 Applying Dig. 46.1.13 to our case, Lucius Titius (mandator), would not have been freed from paying, when the creditor/mandatary addressed Seius (debtor) due to process consumption. The process only consumed the action out of loan, which would leave the creditor with an action out of mandate.

Titius was explicitly granted to Seius the Younger (*εἴτε ὑποτίθεσθαι*). Placing his uncle's property under hypothec could have been part of the aforementioned *cautio*. This caution is also known from other sources, namely the *Lex Malacitana* (CIL II 1964, I AD) and the *Lex Tarentina* (CIL I 590, I BC). From both bronze *tabulae* it becomes apparent that either sureties (*praedes*) had to be given or landed estates (*praedia*) pledged to ensure that the magistrate of a municipality would properly render account. These *praedia* (*Lex Malacitana,* 63) were pledged as is evidenced by the Latin: *subdita subsignata obligatave*. Therefore, this *cautio rem publicam salvam fore* could have been the reason why Lucius Titius' property was pledged. Furthermore, in day-to-day practice, in which Seius handled the property of an absent Lucius Titius '*ὡς κυρίῳ ὄντι τῶν ἐμῶν*', it could certainly appear to creditors that Seius had a larger estate to secure loans than was actually the case.

The question arose, whether via this mandate Seius the child was allowed to pledge Lucius Titius' property as security for a loan solely in his own interest or that of the city. Scaevola denied this. In his way of interpreting this *mandatum generale*, it did not encompass the ability to pledge goods over which one was instituted as procurator, if such a pledge was not in the explicit interest of the principal. Later legal scholars such as Dernburg concur: *Denn das ist eben auch bei illimitirter Vollmacht Voraussetzung und Bedingung, daß der Procurator im Interesse des Geschäftsherrn agirte*[82]. Lucius Titius had no patrimonial or economical interest in the pledges Seius gave to become a magistrate and therefore his goods (*res*) were not pledged (*obligatae*). This interest apparently must be interpreted solely as patrimonial or financial interest. The social importance of having a family member (nephew) as a magistrate, which enhanced the family status in the municipality, was not taken into consideration.

II.3.4 Two Hellenistic legal formulae *in the contract from Dig. 17.1.60.4*

Lucius Titius had declared in the contract that all acts done by his nephew in his name were considered to be *κυρία (valid) by him: ἐμοῦ πάντα κύρια τὰ ὑπὸ σοῦ γινόμενα ἡγουμένου*. This last clause is a so-called *κυρία*-clause. One of the earliest papyrological examples of the *κυρία*-clause is P. Eleph. 1, 13-14 (Elephantine, 311/310 BC): *ἡ δὲ συγγραφὴ // ἥδε κυρία ἔστω πάντηι πάντως ὡς ἐκεῖ τοῦ συναλλάγματος γεγενημένου, ὅπου ἂν ἐπεγφέρηι*[83]. The

82 Cf. Dernburg 1864 II, 159.

83 P. Eleph. 1, 13-14: Let this contract be valid in every way at every place, as if the agreement was drawn up there, where he may produce it.

κυρία-clause is a frequently used legal formula[84], common in many Greek legal systems such as Attic law and in Greek documentary papyri from Greco-Roman Egypt[85] and Dura-Europus. It is employed in different types of contracts, such as sales, leases and contracts of hypothec, and during a wide timespan ranging from the Ptolemaic until the late Byzantine era[86]. Originally, in the time of the Greek city-states it insured that, independent of the diversity of the laws in the different *poleis*, the rules of the contract were protected[87]. Due to '*das landesweit zuständige Justizwesen … in Ägypten*', according to Hengstl, the *κυρία*-clause was no longer needed for a contract to be valid throughout Egypt[88]. Usage of the *κυρία*-clause must from that time on be considered to come from '*ein bemerkenswertes Beharrungvermögen der Urkundenschreiber*'[89]. It warrants further investigation, however, whether the diversity of legal systems in Ptolemaic and Roman Egypt was an additional reason for (professional) scribes to preserve the clause next to their perseverance. The *κυρία*-clause seems to have been intended for the benefit of third parties. It functioned as a reassurance to third parties that all acts done by Seius the child in Lucius Titius' name fell within the limits of the mandate and would therefore legally bind the mandatory. Scaevola, however, mitigated this formula. The jurist breaks open the contract to add the test of *bona fides*. Only acts done in good faith were valid and legally binding.

Lastly, another clause is examined, which was added as a reinsurance, namely *μηδὲν ἀντιλέγοντός σοι πρὸς μηδεμίαν πρᾶξιν*. This clause directly follows the '*κυρία*-clause'. It was, however, not a reinsurance to third parties, but to Seius the child himself. Lucius Titius here stated that he or someone else would not make use of his right to claim an act as invalid. This clause is known as a '*Nichtangriffsklausel*', which is similar to the Roman *pactum de non petendo*. In the case that Lucius Titius brought action against Seius the child, Seius the child could use an exception because of the *pactum de non petendo.* The use of such an exception was, however, also subjected to a test of *bona fides.* In Hellenistic contracts this clause is attested often, for example in contracts of sale or cession of land, e.g. P. Mich. VI 427, 20 (Karanis, 134 AD).

84 Wolff 1978, 155 and Hengstl 1996, 367.

85 See, for example P. Oxy. III 727, 26-29 and BGU I 300, 12-13. Both these texts are quoted above.

86 Hässler 1960, 13 and Hengstl 1996, 368. For Attic law see Demosthenes 35.13 (*Against Lacritus*).

87 Cf. Wolff 1978, 157.

88 Often documentation in a register made contracts valid and the corresponding documents producible in court.

89 Both German quotes are from: Hengstl 1996, 368. Wolff also comments on this clause (Wolff 1978, 158): '*So kam es, daß sie bald zur bloßen, routinemäßig eingefügten Floskel verblaßte.*'

II.4 Dig. 44.7.61*pr* (Scaev. 28 *Dig.*): A contract of *procuratio*

Another bilingual reply on *mandatum* is Dig. 44.7.61*pr*, which was included by the compilators in the title *De Obligationibus et Actionibus*. The *responsum* is taken from the 28th book of the *Digesta* of Scaevola of which two fragments are found in the Justinianic Digest. Lenel has categorized these *responsa* under the title *de Stipulationibus* as fragments 120 and 121. Both fragments show features indicating a provincial provenance, more specifically a provenance from the Hellenistic East. Lenel's fragment 121, found in the title *de Verborum Obligationibus,* contains the well-known *foenus nauticum* of Callimachus from Dig. 45.1.122.1, referred to earlier at p. 50 in note 41. In the *principium* of Dig. 45.1.122 a legal controversy arose on a contract of *mutuum* in a faraway province (*in longinqua provincia*), while in Dig. 45.1.122.3 a gift agreement of a slave via stipulation is discussed in which the *donator* was the presumably Greek freedman Flavius Hermes. The context of Lenel's fragment 120 described, the bilingual *responsum* is now examined:

> Dig. 44.7.61*pr* (Scaev. 28 *Dig.*)
>
> Procurator Seii admisit subscriptionem ad argentarium vascularium in verba infra scripta: "Λούκιος Καλάνδιος ἐπέγνων, καθὼς προγέγραπται· ἐστὶν λοιπὰ παρ' ἡμῖν ὀφειλόμενα τῷ δεῖνι, τόσα": quaero, an Gaium Seium obligare potuit. Respondit Seium, si alioquin obligatus non esset, non propter quod ea scriptura quae proponeretur interposita sit, obligatum esse.
>
> The estate manager of Seius admitted a written approval to the silversmith in the words written below: I, Lucius Calandius, acknowledged the things as they are written above. There is a residual amount of x [*denarii*] due by us to person N.N.: I ask, whether this can put Gaius Seius under an obligation. [Scaevola] responded that Seius, if he is not otherwise under obligation, is not under obligation on account of the fact that this document was produced, containing words to that effect.

In this *responsum* Lucius Calandius is the mandatary and the *procurator* of *mandator* Gaius Seius. During the operational management of Seius' estate, Lucius Calandius has done business with a silversmith, as the *mandatarius* of Gaius Seius. The original contract could be *mutuum*, for there is a residual debt (*λοιπὰ ὀφειλόμενα*). It seems, however, in view of facts presented plausible that this contract was *locatio conductio*. Calandius hired the silversmith to fabricate something (a silver object). The costs for the silversmith including his labour, were not paid in full. For this reason, a residual amount remained and Calandius confirmed this with the Greek text cited. In this *responsum* the existence of the obligation, on which the residual debt is based, is doubted by the *mandator.* No questions were asked whether the mandatary Lucius Calandius could within the terms of his mandate enter a contract with the silversmith. Furthermore, no questions arose regarding the good faith of this Lucius Calandius as a mandatee.

The name of the mandatee, the *gentilicium* Calandius, is extremely rare and even a *hapax legomenon* in legal texts and literature[90]. Furthermore, the name cannot be found in Roman material culture or in Greek papyri. Although a certain *Marcus Ulpius Calendius*, an imperial freedman, is known from second century AD *Pannonia Superior* in CIL III 10938 & 10944 (Carnuntum, II AD). The name might be scarcely attested, which does not, however, necessarily mean that it has to be considered a *Deckname*. On the contrary, Talamanca believes it to be the real name of Seius' *procurator*, although he admits it cannot be said with certainty[91].

As an estate manager, Lucius Calandius was apparently also tasked with the financial administration of the estate as in the *responsum* he conceded to having debts via a written approval. This approval is a *subscriptio*[92], which has been included in the *responsum* in the Greek text. From this *subscriptio* the controversy and subsequent legal question arose.

The *subscriptio* in the fragment of Scaevola is a written confirmation of a debt[93]. This *subscriptio* is frequently used as an authorisation or a confirmation of a previous statement. This statement is often written by someone other that the writer of the subscription[94]. In most cases this *subscriptio* contains just a name or a single word. The best-known example of such a subscription is the practice in the Roman imperial chancery in which texts are authorised

90 There is, however, an attestation of a female "Calandia" in IG X (2) (1) 195,7 & 196, 8 (Macedonia, III AD). From the Greek inscription it is clear that Aurelia Calandia (*Αὐρηλία Καλανδία*) has erected two alters for her late husband. See Nigdelis 2010, 619-620 and Talamanca 2009, 551. The name *Calandia* or *Καλανδία* is also known from a funerary stele, which this woman dedicated for her daughter. The stele, *Inscr. Apameia* 54, from the Roman province of *Bithynia-Pontus* cannot be dated other than after 212 AD. See Nigdelis 2010, 622.

91 He argues that in the *Digest* and the *responsa* the *Decknamen* of Roman citizens, whether translated or transliterated into Greek or not, were far more generic that *Lucius Calandius*. Furthermore, the anonymization in the Greek text has been done using *τῷ δεῖνι*. It would be illogical to have two anonymization strategies in one fragment. In my view, the text has been incompletely anonymized and the compilers, possible influenced by the generic name Lucius, forgot to anonymize *Calandius.*

92 A written approval is defined by Paul in Dig. 50.16.39*pr* (Paul. 53 *ad Ed.*): '*Subsignatum*' *dicitur, quod ab aliquo subscriptum est: nam veteres subsignationis verbo pro adscriptione uti solebant* (The word 'undersigned' means, that which has been *subscribed* by someone: in the past people were wont to use the word 'undersigned'). Unfortunately, Paul did not further specify the legal consequences of such a written approval in what is left of the 53rd book of his commentary on the Edict (only three short fragments).

93 For a bilingual papyrological attestation of a *subscriptio* in case of a debt, from approximately the same timeframe as the jurist Scaevola, see P. Mich. VII 438, 12-13 (Karanis 140 AD): (hand 2) *Ἀντώνι(ος) Ἡρωνιανὸς [ἔλαβον] [ἀργ(υρία) (δενάρια)] // οθ δαν[εισ]μὸν καὶ ἀπο[δώσω ὡς πρόκ(ειται)]* (I, Antonius Heronianus, have received the 79 silver *denarii* as a loan and I will repay them as written above). This text is reprinted in the *Corpus Epistularum Latinarum* no. 159.

94 In the papyri a multitude of attestations in Greek of Roman *subscriptiones* can be found. These documents often show a change of hands for the *subscriptio.*

by the emperor[95]. In Roman Egypt more elaborate *subscriptiones* concerning documents of formal acts by Romans can be found from 131 AD onwards in papyrological sources[96], but also in epigraphical sources[97].

Moreover, Romans in the Hellenistic East used the *subscriptio* at the end of financial documents from an early date[98]. This practice is already known from Hellenistic Greeks in the Ptolemaic period. According to Arangio-Ruiz these subscriptions both reflect an Egyptian practice and a Hellenistic origin[99]. The use of a *subscriptio* by Lucius Calandius in Dig. 44.7.61*pr* can be placed in this broader Hellenistic custom of subscribing financial documents. In Dig. 45.1.126.2 (Paul. 3 *Quaest.*), a comparable financial document from one generation later, which is also subscribed, can be found.

Dig. 45.1.126.2 (Paul. 3 *Quaest.*)

"Chrysogonus Flavii Candidi servus actor scripsit, coram subscribente et adsignante domino meo, accepisse eum a Iulio Zosa, rem agente Iulii Quintilliani absentis, mutua denaria mille. Quae dari Quintilliano heredive eius, ad quem ea res pertinebit, Kalendis Novembribus, quae proximae sunt futurae, stipulatus est Zosas libertus et rem agens Quintilliani, spopondit Candidus dominus meus. Sub die supra scripta si satis eo nomine factum non erit, tunc quo post solvetur, usurarum nomine denarios octo praestari stipulatus est Iulius Zosas, spopondit Flavius Candidus dominus meus". Subscripsit dominus.

"Chrysogonus, the slave and administrator of Flavius Candidus, has written, in the presence of my master, who subscribed and sealed the document, that he had received from Iulius Zosas, agent of the absent Iulius Quintillianus, a thousand *denarii* as a loan for consumption. Zosas the freedman and agent of Quintillianus stipulated that these would be returned to Quintillianus or his heir, to whom the case will concern, on the Calends of November [i.e. the first

95 Meyers 2004, 210. Meyers also cites Mourgues, *Mélanges d'archéologie et d'histoire de l'école Française de Rome*, 107 (1995), 271-273 and Mourgues, *Journal of Roman Studies* 77 (1987), 78–87.

96 CPL 220, 2. 8-11 (Arsinoite nome, 131 AD): *Μάρκος Σεμπρώνιος Πρεῖσκος // ἀντεβαλόμ[ην τ]ὴν διαθήκην καὶ // ἐπανεγνώσθη μοι καθὼς πρό- //κειται* (I, Marcus Sempronius Priscus, collated this testament and it was read to me how it is written above). This document is a, official record of the opening of a testament and is also known as ChLA X 412. This subscription is the only Greek in an otherwise fully Latin document. See also the Roman testament of ChLA XLVII 1413 = P. Oxy. XXXVIII 2857, 34-35 (Oxyrhynchus, 134 AD): (hand 2) *Τιβέριος Κλαύδιος // Ἀλέξανδρος ἀνέγνων μου τὴν διαθήκην* (I, Tiberius Claudius Alexander, have acknowledged this testament of mine). An example from the third century AD can be found in the bilingual document (a request for *bonorum possession / diakatoche*) of SB XVIII 13610, 14-17 (provenance unknown, 223? AD).

97 See, for example, CIL VI 10247 (Rome, 252 AD): *Statia Irene i(us) l(iberorum) h(abens) donationi monumenti // s(upra) s(cripti) sicut supra scriptum est consensi sub // scripsi* (I, Statia Irene, having the right of three children, consented to the donation of the above-mentioned monument, as is written above and I subscribed).

98 Meyers 2004, 208.

99 Arangio-Ruiz 1974 and Meyers 2004, 209.

> of November], which were in the foreseeable future, and my master Candidus promised it solemnly. Iulius Zosas stipulated that, if on this issue payment will not have been made on the above written date, on account of interest eight *denarii* will then be imposed on the date after which is payed. My master Flavius Candidus promised it solemnly". The master subscribed.

Next to the fact that both texts are subscriptions added to a financial document, in both texts indications for a Hellenistic context are present. The names of both the administrators, Chrysogonus and the freedman Zosas, are both of Greek origin and might be an indication that this slave and former slave served their Roman masters in the Roman East. A significant difference between Dig. 44.7.61*pr*. and Dig. 45.1.126.2, however, is that the former only mentions the *debt,* while in the latter, next to the text mentioning a contract of loan for consumption (*mutuum*), also a written stipulation clause is added[100].

The legal question regarding the *subscriptio* could have originated from the Hellenistic dependency on written documents, which could be produced in court. The physical document symbolized the agreement, which is why it is so often found crossed out or with an added text that the document had been given back to the debtor. Presumably, the silversmith produced this document in court under the impression that it was enough to convince the judge to rule in his favour.

That the written document in the Hellenistic East was of greater importance than in Rome can be explained using the legal concept of *apocha*. *Apocha* (*ἀποχή*) or quittance was known to classical Roman jurists[101], such as Scaevola[102], Ulpian[103] and Paul[104]. In Roman legal literature *apocha* is often juxtaposed to *acceptilatio* (a formal discharging from debt by verbal declaration). The difference between these two legal concepts, however, is that the latter can terminate an obligation, while the former is only the proof of the

100 Written *stipulationes* became frequent after the *Constitutio Antoniniana* (see Kaser 1975, 375-376). In Greek they are written as *ἐπερωτηθεὶς ὡμολόγησα* (being asked the formal question, I solemnly promised), for example in P. Vind. Tand. 23, 13 (Herakleopolis, 225 AD), which is a contract of loan for consumption to which a *stipulatio*-clause is added. Ulpian, a contemporary of Paul, wrote that via these written *stipulatio*-clauses, *the actio ex stipulatu* could be brought by the contracting parties. See Dig. 2.14.7.12 (Ulpian. 4 *ad Ed.*).

101 This legal concept is also mentioned in the later Roman legal literature such as the *Codex Justinanus* and the *Novellae*, e.g. Cod. 3.28.35.2, Cod. 4.2.17 and Nov. 90.2.

102 See Dig. 12.6.67.2 (Scaev. 5 *Dig.*), Dig. 46.3.89 (Scaev. 29 *Dig.*) and Dig. 46.3.102.2 (Scaev. 5 *Resp.*). Dig. 46.3.102.2 does not have the distinctive '*scripsi me accepisse*'-formula, known from Roman legal *tabulae* from the archive of the *Sulpicii*, such as TPSulp 52 (AD 37, tab. I. ll. 4-6) and from Roman legal literature, such as Dig. 12.1.40 (Paul. 3 *Quaest.*). Instead it has the form of *accepi a te,* which can also be found in P. Aberd. 61, 3 (Soknopaiou Nesos, AD 48/49). This formula is attested in earlier Greek papyri from Ptolemaic Egypt, e.g. P. Tebt. III.2 995 (Tebtynis, 114 BC), PSI XVI 1638 (Tebtynis, 73 BC), which could betray some Hellenistic influence in the Scaevola text.

103 See Dig. 46.4.19 (Ulpian. 2 *Reg.*) and Dig. 47.2.27.2 (Ulpian. 41 *ad Sab.*).

104 See Dig. 12.1.40 (Paul. 3 *Quaest.*) and Dig. 26.7.46.5 (Paul. 19 *Resp.*).

payment, that terminated the obligation[105]. In Roman Egypt, however, influenced by a Hellenistic legal culture, these *apochae* could, just like the *acceptilatio*, have had the power to terminate obligations (*obligationsauflösende Kraft*). The example of the Greek *apocha* indicates that in the Roman West the functions of written documents differed from those in the Roman East. Due to this difference the legal question of Dig. 44.7.61*pr* can be explained, as can the accompanying reply by Scaevola, who stated that the wording of the document alone is not enough to assume that an obligation existed. Analogous to Dig. 45.1.126.2 the contracting parties in Dig. 44.7.61*pr* had to add a stipulation-clause to make the document enforceable. In this way there would be more proof of the existence of an obligation. By disregarding the written document in this *responsum*, Scaevola did not take the Hellenistic context of the question into account.

II.5 Conclusion on the bilingual contracts of *mandatum* in Dig. 17.1.60.4 and Dig. 44.7.61*pr*

Dig. 17.1.60.4 features a *procuratio omnium bonorum* and Dig. 44.7.61*pr* a *procuratio* which is not further specified, other than that it entailed the financial *administratio* of the *mandator*. Both Greek documents cited contain clauses and formulaic language found in contracts from the Hellenistic East. The *responsum* in Dig. 17.1.60.4 has been fully anonymised, while Dig. 44.7.61*pr* was only partially anonymised. The legal question combined with the real name *Lucius Calandius* is an indication that this legal controversy arose between a Roman citizen (*Lucius Calandius* and/or Gaius Seius) and a native (the silversmith). From the question can be deduced that the silver-

105 See Dig. 46.4.19 (Ulpian. 2 *Reg.*): *Si accepto latum fuerit ei, qui non verbis, sed re obligatus est, non liberatur quidem, sed exceptione doli mali vel pacti conventi se tueri potest. Inter acceptilationem et apocham hoc interest, quod acceptilatione omni modo liberatio contingit, licet pecunia soluta non sit, apocha non alias, quam si pecunia soluta sit.* (If formal release is granted to him, who is not bound by words, but by real obligation, he is not freed, however he can defend himself with the exception of bad faith or of a pact agreed upon. This difference exists between formal release and *apocha* (quittance): in every way, formal release discharges from debt, even though no money has been paid, by *apocha* on the other hand you will only be discharged when the money has been paid). Apparently, Ulpian felt the need to explain the difference between *apocha* and *acceptilatio*, which can be an indication that the two legal concepts were used interchangeably. Cf. Kaser 1975, 442: "*Die Quittung unterlag im klassischen Recht der freien Beweiswürdigung. Eine Selbständige schuldbefreiende Wirkung, wie sie das Griechische Recht kennt, lehnt Diokletian noch ab*." Cf. Cod. 8.42.6 (Gordianus, 239 AD), Cod. 8.42.13 (Diocletianus and Maximianus, 293 AD) and Cod. 8.42.23 (Diocletianus and Maximianus, 294 AD). Rabel concurs that *apochae* could have *schuldbefreiende Wirkung* in Hellenistic law; See Rabel *SZ* 28 (1907), 334, Weiss 1923, 441 and Taubenschlag 1955, 420. Rupprecht brings nuance into the debate by distinguishing between *Dispositivwirkung im weiteren* and *im engeren Sinne* (Rupprecht 1971, 70-71).

smith produced the document, not only as proof of the agreement, but as the agreement itself, which is fitting in a Hellenistic legal context. Regardless of this context, Scaevola only saw this document as possible evidence. The document, however, was not the agreement itself. Therefore, the document alone was in his view not enough to prove the agreement.

In Dig. 17.1.60.4 the mandatary has an unlimited mandate to act on behalf of the *mandator*, making him either personally liable towards creditors, who entered a contract with the mandatary using his mandate, or at any case liable via the *actio mandati contraria*. Scaevola did not apply the strict 'parole evidence rule' to interpret the contract, but used a *bona fides* test to review the contract, which is conform the Roman legal perspective on *mandatum*.

III *Hypotheca*

By Scaevola's time, Roman jurists were quite familiar with the Greek/Hellenistic legal contract of *ὑποθήκη*. In the first century BC, the advocate Marcus Tullius Cicero already referred to a contract of *ὑποθήκη* by means of the Latin transliteration *hypotheca* in a letter he sent to his friend Q.M. Thermus[106] (*Epistulae ad Familiares* XIII, 56). This example is taken from the Greek-oriented Roman East, for at the time Cicero was proconsul of Cilicia while Thermus was the propraetor of Asia. The senator and ex-consul, however, might not be completely illustrative for the rest of the Roman world, because, as a wealthy and successful Roman aristocrat, Cicero belonged to the highest of Roman elites. Two centuries after this letter from Cicero cases concerning *hypotheca* can be found in the response practice of Scaevola. Letters in Greek, in which legal questions were asked, were sent to him by inhabitants from the East. The authors of these letters sometimes used forms of the Greek word *ὑποθήκη*. Scaevola, however, predominantly used the Latin word *pignus* in his texts to denominate this contract, but forms of the Greek word *ὑποθήκη*

106 For Q.M. Thermus see IG VII 308 (*Hoi Epigraphes tou Oropou,* Petrakos 1997). Cicero *Epistulae ad Familiares* XIII 56: 'Praeterea Philocles Alabandensis *hypothecas* Cluvio dedit. Eae commissae sunt. Velim cures ut aut de *hypothecis* decedat easque procuratoribus Cluvi tradat aut pecuniam solvat' (Furthermore, Philocles from Alabanda gave hypothecs to Cluvius, which are now due. I would be grateful if you would see to it that he either cedes the hypothecs and hands them over to the agents of Cluvius or that he pays the money). The Latin text is taken from Shackleton Bailey's edition *Epistulae ad Familiares* (italics done by author). In the last sentence (*aut - tradat*) Cicero referred to a Greek form of forfeiture pledge. See Schanbacher *TvR* 70 (2002), 263, Weiß and Hitzig 1895, 84. Hitzig compares this fragment with the case of Pantaenetus against Nicobulus, the latter defended by Demosthenes (Or. 37: *Against Pantaenetus*).

are also used[107], as well as the term *actio hypothecaria*[108]. Notably, the 'Greek' *hypotheca* is in most of these cases juxtaposed to the Latin *pignus*[109], e.g. Dig. 18.1.81 (Scaev. 7 *Dig.*) *dedit pignori sive hypothecae praedia* (he gave lands in pledge or in hypothec) and Dig. 32. 38 (Scaev. 19 *Dig.*): *pignoris hypothecaeve nomine* (on account of pledge or hypothec). The use of both words *pignus* and *hypotheca* does not necessarily mean that two different contracts are meant or that both contracts operated differently. *Pignus* and *hypotheca* in the Roman West did, however, differ from Greek-Hellenistic forms hypotheca, which will be discussed in the following section.

III.1 *Hypotheca* in a Roman and Greek-Hellenistic context

Similar to *mandatum, hypotheca* was a consensual contract in Roman law. Both types of agreements belong to the Roman law of obligations. This means that they constitute a legal bond, that implies 'a duty of one towards another'[110]. Even though the contract of hypothec was a *ius in personam*, the resulting right of *hypotheca* was a *ius in re*. This means that a legal bond was formed between a person and an object, with force *erga omnes* (towards all). When securing credit by placing a house under hypothec, the receiver of this right obtained several powers concerning that house, e.g. to sell and transfer the property and to deduct the yield from the original loan, after which the *superfluum* is to be given back to the former house owner.

In Attic law the right of *hypotheca* was mostly constructed as a forfeiture pledge. The creditor could take possession of the hypothecated land (*ἐμβατεύειν*) and by doing so acquire ownership. Even so, the debtor was still entitled to the *superfluum*[111]. The law code of Gortyn from the fifth century BC ensured that the hypothecated property was at the desposal of the creditor by prohibiting buying hypothecated property unless it was released by the creditor (Col. X, 25-32). In the contractual practise of the second century AD in Roman Egypt, references to forfeiture hypothecs are attested in a multitude of documents, e.g. P. NYU II 29, 4-5 (Oxyrhynchus, II AD): *εἰ δὲ μή, συνχωρῶ μένειν π*[*ερὶ σὲ ἀντὶ τοῦ κεφαλαίου καὶ*] // [*τῶν τόκων τὴν κράτησιν*

107 See Dig. 17.1.60.4 discussed above and Dig. 20.1.34.1.

108 See Dig. 32.38, Dig. 20.1.34*pr*, Dig. 45.1.122.1 & Dig. 18.1.81. According to Schulz the instances of the term *hypotheca* are cases of interpolations. Cf. Schulz, 1955, 252: "*Sicher ist nur – wenn man bedenkt, daß das Wort hypotheca, wie gesagt, in den weströmischen Rechtsquellen der nachklassischen Zeit nicht vorkommt -, daß in den klassischen Vorlagen das Wort hypotheca noch fehlte*". In my view the word *hypotheca* in Scaevola's texts does not necessarily qualify as an interpolation, because as is apparent from his Greek texts he must have known this word.

109 It must not be assumed that the phrase *pignori sive hypotheca* is an interpolation. Cf. Schanbacher *TvR* 70 (2002), 251.

110 Schulz 1951, 456. Cf. Kaser 1971, 479 and Zimmermann 1992, 1.

111 Cf. Lipsius 1915, 702.

κ]ạ̣ὶ κυρείαν εἰς τὸν ἀεὶ χρόνον[112]. References to the *superfluum* in this century are, however, rare. It is attested in SB VI 9254, 6-7 (Arsinoites, II AD), in which the debtor explicitly mentioned that the *superfluum*, must be returned: *καὶ ἔστω ἡ πρᾶξις Ἀφροδοῦτι ὡς προγέγραπται, τὰ δ' ἄλλα ἐκ [τῶν ὑπε]ρόχων ἀπεδό̣τ*[*ω* (r. *ἀποδότω*)[113]. Most hypothec documents from this area and timeframe, however, do not mention the forfeiture of the hypothecated property. The reason for this might be found in the *embadeia* procedure. The *embadeia*[114] procedure was a procedure in which the property of the debtor placed under hypothec was claimed by the creditor[115], if a debtor was not able to pay his debt. After a successful *embadeia* procedure the property under hypothec was transferred from the debtor to the creditor. Furthermore, the right of execution in case of default is often stipulated by means of a *praxis* clause e.g. P. Oxy. III 506, 43-49 (Oxyrhynchus, 143 AD).

III.2 Dig. 20.1.34 (Scaev. 27 *Dig.*): A *taberna* placed under hypothec

From the 27th book of Scaevola's Digest three fragments were included in the Digest of Justinian. These fragments were categorized by Lenel in two separate titles[116]. Dig. 20.1.34 and Dig. 20.4.21[117] deal with pledge and hypothec and Dig. 44.4.17 contains four cases, in which the *exceptio doli mali* is applicable. Scaevola's legal opinions in Dig. 20.1.34 on hypothecs all concern to some degree a form of credit securitization. The *responsa* contain elements distinctive for the Hellenistic legal world of the Roman East.

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112 P. NYU II 29, 4-5: If I will not pay, I agree that possession and proprietary rights (*of the hypothecated property*) will eternally remain with you. See also the contracts P. Flor. I 81 (Hermopolis Magna, 103 AD), BGU III 832 (Arsinoite nome, 113 AD), P. Bas. 7 (Soknopaiou Nesos, 117-138 AD), P. Strass. I 52 (Hermopolis Magna, 151 AD), P. Flor. I 1 (Hermopolis Magna, 153 AD), P. Oxy. XXXIV 2722 (Oxyrhynchus, AD 154), P. Oxy. XVII 2134 (Oxyrhynchus, 170 AD), P. Erl. 60 (provenance unknown, II AD), P. Mert. III 109 (Oxyrhynchus, II AD).

113 Let Aphrodous have the power to execute, as previously mentioned, but let her pay the other things from the remainder (the papyrus is later used for writing excercises). See Kalbfleisch *Archiv für Pap.* 15 (1953), 106-107. Kalbfleisch refers to Mayser to explain *ἀπεδότω* instead of *ἀποδότω*. Epsilon is sometimes written instead of o-mikron. See Mayser 1906, 94. For another attestation of *superfluum* from the second century AD see P. Oxy. XXIV 2411 (Oxyrhynchus, 173 AD). This document is a petition, in which after the execution of a hypothec a second creditor requested the *superfluum*. To strengthen his claim he added a precedent, namely a petition signed by Mallius Crassus, *dioicetes* to the strategus Herodes, in which Crassus urged the magistrate to allocate the *superfluum* to a second creditor.

114 Cf. Rupprecht, in Keenan, Manning and Yiftach-Firanko 2014, 250 & 261.

115 Wolff 1978, 205.

116 See Lenel 1889, 264-265. The titles are labeled by Lenel as *De pignoribus et hypothecis* and *de doli mali exceptione.*

117 Fragment (Scaevola) 117 & 118 in Lenel 1889, 264-265.

Dig. 20.1.34 (Scaev. 27 *Dig.*)

pr. Cum tabernam debitor creditori pignori dederit, quaesitum est, utrum eo facto nihil egerit an tabernae appellatione merces, quae in ea erant, obligasse videatur? Et si eas merces per tempora distraxerit et alias comparaverit easque in eam tabernam intulerit et decesserit, an omnia quae ibi deprehenduntur creditor hypothecaria actione petere possit, cum et mercium species mutatae sint et res aliae illatae? Respondit: ea, quae mortis tempore debitoris in taberna inventa sunt, pignori obligata esse videntur. (1) Idem quaesiit cum epistula talis emissa sit: δανεισάμενος παρὰ σοῦ δηνάρια πεντακόσια παρεκάλεσά σε μὴ βεβαιωτὴν ἀλλ᾽ ὑποθήκην παρ᾽ ἐμοῦ λαβεῖν· οἶδας γὰρ ἀκριβῶς, ὅτι καὶ ἡ ταβέρνα καὶ οἱ δοῦλοί μου οὐδενὶ κατέχονται ἢ σοὶ καὶ ὡς εὐσχήμονι ἀνθρώπῳ ἐπίστευσας, an pignus contractum sit an vero ea epistula nullius momenti sit, cum sine die et consule sit. Respondit, cum convenisse de pignoribus videtur, non idcirco obligationem pignorum cessare, quod dies et consules additi vel tabulae signatae non sint. (2) Creditor pignori accepit a debitore quidquid in bonis habet habiturusve esset: quaesitum est, an corpora pecuniae, quam idem debitor ab alio mutuam accepit, cum in bonis eius facta sint, obligata creditori pignoris esse coeperint. Respondit coepisse.

pr. When a debtor pledged his shop to his creditor, it was asked, whether he had accomplished nothing by doing this or whether by using the word 'shop', the trade goods present there appeared to be pledged? And if he had sold these trade goods after a while, and had replaced them with others and brought these into that shop and then died, whether the creditor could claim all the goods located there, with the *actio hypothecaria,* even though the type of trade goods had changed and other things had been brought in? He responded that the things found in the shop at the time of the debtor's death appeared to be subject to the pledge. (1) The same asked, whether the letter constituted a valid contract of pledge or if the letter, missing day and year, had no legal effect, having been sent with the following content: 'Having borrowed from you five hundred denarii, I urged you not to take a surety but to receive a hypothec from me. Because you know well that my shop and my slaves are bound to no-one other than you and you have put faith in me, as the pious man I am'. [Scaevola] responded that because there seemed to have been an agreement concerning pledged goods, the contract of pledge is not void on account of a missing date and year or because the document is not signed. (2) A creditor took as a pledge from a debtor everything he had and would have *in bonis*: it is asked if sums of money, which the same debtor received as a loan from another, after they have become *in bonis,* began to be subject of the pledge. He responded that they did.

The *principium* of Dig. 20.1.34 is a well-known *responsum*[118] on hypothec that has often been discussed due to the similarities to a 'floating charge'[119]

118 Van Hoof 2015, 47 & 64-66, Schanbacher 2015, 75-81 (in: Harke, J. (2015), *Facetten des römischen Pfandrechts*, Würzburg). For an elaborate bibliography see Verhagen 2014, 139 note 46.

119 Verhagen 2013, 65-66 & 2014, 139. (in: Koops, E. & W.J. Zwalve (2014), *Law & Equity, Approaches in Roman Law and Common Law*, Leiden).

of the right of pledge on the trade goods (*merces*). In this reply the word *pignus* is used to describe the right of pledge. The author continues however with a question whether an action of hypothec (*hypothecaria actione*) can be brought[120]. The code-switching from *pignus* to hypothecaria might be explained by the non-possessory nature, which is often ascribed to *hypotheca*[121]. In Dig. 20.1.34*pr* it is most likely that the debtor stayed in charge of his shop and the trade goods, which were pledged. The creditor, therefore, had a non-possessory pledge, which could be the reason for the code-switching.

In the subsequent text (Dig. 20.1.34.1), in which a Greek letter is cited, Scaevola again used the term *pignus* to refer in Latin to the Greek *ὑποθήκη*, mentioned in the letter. The last of the three fragments features a charge on everything a person has and will have '*quidquid in bonis habet habiturusve esset*[122]' (*generelles Pfandrecht*[123]). A variation of this formula is attested in Greek papyri as '*πάντων ὑπαρχόντων καὶ ὑπαρξόντων*'[124]. The phrase in Greek is relatively young, however, and cannot be found in papyrological sources before the fifth century AD[125], while the majority of occurrences is from the sixth century AD. Therefore, the origin of this formula is probably Roman.

In Lenel's *Palingenesia,* the three *responsa* (Dig. 20.1.34*pr*, 20.1.34.1 and 20.1.34.2) are positioned together, all of them being grouped under fragment 117[126]. The first two texts (20.1.34*pr* and 20.1.34.1) are clearly linked. Both *responsa* feature a *taberna* (*ταβέρνα*), while the third *responsum* is thematically connected to the first, because of the shared theme of establishing 'the object of pledge'. Furthermore, Dig. 20.1.34*pr* and 20.1.34.1 are linked[127] by the use of the active *idem quaesiit*, instead of the passive *quaeritur* or *quaesitum est*. This implies that in both cases the same person asked Scaevola to give a *responsum*.

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120 According to Kaser, this action presumably has its origin provincial in jurisdiction (Kaser 1971, 473). He adds no argumentation to this statement.

121 See Dig. 13.7.9.2 (Ulpian. 28 *ad Ed.*) and Just. *Inst.* IV 6.7.

122 The phrase in Dig. 20.1.34.2, '*Quidquid in bonis habet habiturusve esset*' (Whatever he has or shall have *in bonis*) is mirrored in Dig. 20.4.21 (Scaevola 27. *Dig.*), '*Omnia bona sua quae habebat quaeque habiturus esset*' (all his own goods, which he had and which he will have). See also Cod. 8.25.11*pr*-1 '*verbum futurarum rerum, quod in generalibus hypothecis poni solutum est*' (a clause concerning future goods, which is usually placed in contracts of general hypothec).

123 This case concerns a non-possessory pledge according to Kaser 1971, 466.

124 For example: CPR VII 40, 21 (Hermopolite nome, 492 AD), SB VIII 9770, 10 (Arsinoite nome, 511 AD) and P. Münch. I 14, 78-79 (594 AD, Syene)

125 This is with the exception of one papyrus, namely P. Strass. VIII 748 (provenance unknown, III AD) and here the pertinent phrase in line 5 of the contract has been supplemented by the editor to fill a lacuna: … *[τ]ῶν ὑπα[ρχόντων καὶ ὑπαρξόντων μοι]* (…the things that belong and will belong to me). Because this is the only attestation from before the fifth century AD, the supplement must be considered incorrect.

126 Lenel 1889, 264.

127 See also Manigk 1904, 104.

III.2.1 A description of the Greek contract of Dig. 20.1.34.1

In this section the Greek *cheirographon* contract is examined, the ethnicity of the contracting parties and the form of security with regard to the credit is addressed.

The contracting parties have agreed upon a loan for consumption (*mutuum* or *daneion*) of five hundred *denarii*. The debtor in return pledged his shop and his slaves to secure the loan. Due to the nature of the pledged objects[128], it appears logical to assume that this is a contract of non-possessory pledge. In this case the owner could keep using his shop and slaves to earn a living and pay back the five hundred *denarii*. Another – be it economically improbable – possibility is that the contracting parties entered a contract of possessory pledge, after which the pledged objects were leased back to the debtor[129], as is the case in Dig. 13.7.37 (Paul. 5 *ad Plaut*.): '*Si pignus mihi traditum locassem domino, per locationem retineo possessionem*'[130]. In this scenario the creditor would earn his profit not from the secured loan of five hundred *denarii,* but from payments under the lease. In the epistolary contract, clauses on interest are not mentioned[131].

The word *taberna* might be an indication of a Roman ethnicity of one of the contracting parties. To refer to the *taberna*[132] or shop, both texts employ the Latin word, which is only transliterated into Greek letters and not translated into a Greek equivalent such as *ἐργαστήριον* in the letter cited in Dig. 20.1.34.1. A possible explanation is that the term was deemed untranslatable, because *tabernae* were so closely associated with Roman culture and Roman commerce[133]. The contracting party, having a Roman styled 'shop' could have

128 A characteristic of the hypothecary action of slaves is that such hypothecs have a similar non-possessory nature as hypothecs on land *('mit dieser den Charakterzug der Besitzlosigkeit teilt'),* which according to Manigk can be deduced from the clauses containing *Verfügungsbeschränkungen*. His idea is that in cases of possessory pledge *Verfügungsbeschränkungen* were to a lesser extent needed in the Hellenistic East. Cf. Manigk *SZ* 30 (1909), 279.

129 Cf. Dig. 13.7.35.1 (Flor. 8. *Inst.*).

130 'If I lease a pledged thing, that has been handed over to me, to its owner, I retain possession through the lease'. It can, however, be argued that *pignus mihi traditum* in this legal opinion by Paul is an interpolation for *fiducia mihi tradita* made by the compilers. *Fiducia cum creditore* became obsolete, when the mandatory way of transfer for the *fiducia cum creditore*, the *mancipatio*, fell in disuse and was abolished by Justinian in Cod. 7.31.1.5 (531 AD) (see Kaser 1975, 50 & 274). Cf. Noordraven 1988, 12. In the Digest *fiducia cum creditore* has often been replaced by *pignus.* See Kaser 1971, 460.

131 A common practice in Roman Egypt however, is to enter a contract of loan for consumption for an amount, when in fact a lower amount is given to debtor. The difference between the amount given and the amount agreed upon is then the interest. See Vandorpe 2002, 108-110.

132 The word *ταβέρνα* is not attested in payrological sources.

133 For instance, the 'architectural topology and the terminology' of commercial shops in Eastern provinces differed from Roman Italy and the West. See Holleran *Papers of the British School at Rome* 85 (2017) 144.

been a Roman or a 'Romanized' citizen. Without further argumentation, Kübler, however, states that this dispute has in all likelihood arisen between a Greek and a Roman citizen[134] and indeed having a Roman styled shop does not make the owner a Roman citizen per se. Next to hypothec, the Greek letter writer mentions another legal term, namely *katochè* (sequestration). The usage of the right of *katochè* (the contents of this right will be elaborated later) is characteristic for the Hellenised Roman East. That one of the contracting parties uses the term *katochè* adds weight to the assumption that this legal dispute did not occur between two Roman citizens.

In the Greek contract, the owner of the *taberna* asked his creditor not to insist on a personal surety (*βεβαιωτής*), even though personal security (*fideiussio*) was seemingly preferred to hypothec and pledge by Romans of all times[135]. In papyrological sources credit secured by personal surety is less common than hypothec. In the second century AD this specific form of surety is attested in about fifteen documents from the local legal context[136]. Credit secured by hypothec in this century is attested in over fifty documents. An example of credit secured with personal surety is P. Thomas 5, 3-6 (Philadelphia, 46 AD). In this document a man of both 'Greek' and 'native' descent, swore a Roman-styled oath making him surety for the amount of the loan and interest of the debtors to the Roman officer (Lucius) Cattius Catullus[137].

Apparently, the creditor in Dig. 20.1.34.1 agreed not to take personal surety but to settle for a hypothec on the debtor's *taberna* and slaves instead. The debtor brings forth two arguments, which persuaded the creditor. Firstly, he stated that the *taberna* and the slaves did not fall under *katochè* of third parties and secondly, that the creditor knew him to be a pious man or a man of honor. The first argument refers to the unencumbered state of the property of the debtor. *Katochè* is mentioned in the Digest only once. The Roman jurist Paul (II-III AD), a student of Scaevola, placed it alongside the Roman conception of *possessio* in his 54th book *ad Edictum*, codified in Dig. 41.2.1*pr* (Paul. 54 *ad Ed.*). In this text Paul gave an etymology of the word *possessio.* He added the example of the Greek word *κατέχω* 'to hold fast', 'to hold under' or 'to occupy'. This meaning of (physical) occupation seems to be in the same semantic field as *a pedis sedibus* or *a pedum positione*.

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134 Kübler 1908, 213.

135 Kaser 1971, 457. For the contrary see Pomponius' famous adage in Dig. 50.17.25 (Pomp. 11 *ad Sab.*): '*Plus cautionis in re est quam in persona*' (there is more security in an object than in a person).

136 Examples of documents with personal surety are P. Oxy. III 508 (Oxyrhynchus, 102 AD), P. L. Bat. XIX 9 (Arsinoite nome, 128 AD), P. Oxy. LXI 4113 (Oxyrhynchus, 138 AD).

137 See for this person P. Sijp. 15 (50-51 AD, Philadelphia) and P. Mich. X 582 (Philadelphia, 49-50 AD). P. Thomas 5, 3-6: *τοῖς π[αρὰ] // [Κα]ττίου Κατύλου ἑκατοντάρχου. ὀμνύω Τιβέρι[ον] // [Κ]λαύδιον Καίσαρα Σεβαστὸν Γερμανικὸν Αὐτοκράτορ[α] // [εἶ] μὴν ἑκουσίως ἐγ[γεγ]υῆσθαι Πραξίαν Διοδώρ[ου]* (To the representatives of Cattius Catullus, centurion: I swear by Emperor Tiberius Claudius Caesar Augustus Germanicus that I willingly made myself surety for Praxias son of Diodorus).

> Dig. 41.2.1*pr*
>
> Possessio appellata est, ut et Labeo ait, a sedibus quasi positio, quia naturaliter tenetur ab eo qui ei insistit quam Graeci κατοχήν dicunt[138].
>
> The word possession is derived from 'seats' (sedes), as Labeo also says, as if it were a 'position', for naturally it is held by him, who positions himself upon it, what the Greeks call *katochè*.

In the context of Dig. 20.1.34.1, however, the term *katochè* must mean something different than its use in Dig. 41.2.1*pr*. The term *katochè* was apparently also used in Hellenistic legal cultures for real security interests or for a right to distrain certain property when the money due was not paid in full. According to Kübler citing Mitteis, the *katochè* in Dig. 20.1.34.1 is a form of *Pfandnexus*[139], meaning that the objects mentioned are subject to a right of pledge. Manigk argues that the *katochè* mentioned in the letter refers to a real right of hypothec[140]. This is in line with many other documents from the Roman East in which guarantees are given that the obligated object is not already under hypothec and is presented free of any burden. Such guarantees can also be found in other *responsa* in the Digest. Kaser notes on those guarantees: *"Die Gefahren, die wegen der fehlenden Publizität den Nachpfandgläubiger bedrohen, werden abgeschwächt durch Zusicherungen des Verpfänders, daß die Sache noch niemandem oder nur einem bestimmten Gläubiger verpfändet sei."*[141] This lack of publicity might be the case for Rome, but in Roman Egypt publicity was given to such contracts via registration in the *βιβλιοθήκη ἐγκτήσεων* which was a property record office instituted around the year 72 AD[142]. These registered documents could be accessed in

138 Instead of *a sedibus* ('derived from the word seats') another version is *a pedis sedibus* (H. Cannegieter?) followed by Mommsen in the *Editio Maior*, which means 'derived from places occupied by the feet', or as found in Bartolus *a pedum positione* 'derived from a placing of the feet'.

139 Kübler 1908, 215.

140 Manigk *SZ* 30 (1909), 323.

141 See Kaser *SZ* 78 (1961), 471 & Out 2005, 55. Both authors connect this element with Dig. 20.6.9.1 (Mod. 4 *Resp.*) '*…inveniebatur autem Maevius instrumento cautionis cum re publica facto a Seio interfuisse et subscripsisse, quo caverat Seius fundum nulli alii esse obligatum* (but Maevius was found to have been present and to have signed when the document with the guarantee was made between the city and Seius, in which Seius had guaranteed that the estate was not charged (*obligatum*) to anyone else)," and to Dig. 20.1.15.2 (Gaius 1 *ad Form. Hyp.*): *Qui res suas iam obligaverint et alii secundo obligant creditori, ut effugiant periculum, quod solent pati qui saepius easdem res obligant, praedicere solent alii nulli rem obligatam esse quam forte Lucio Titio…* (Those who have already pledged their belongings and who want to pledge their property to a second, other creditor, tend to proclaim that a certain thing is pledged to no-one else other than Lucius Titius, in order to escape the risk, which they tend to face who for instance pledge the same goods more than once). See also Dig. 13.7.36.1 (Ulp. 11 *ad Ed.*). The Greek *οὐδενὶ ἢ σοὶ* from Dig. 20.1.34.1 is comparable to *nulli alii* in the previously mentioned legal opinions.

142 Alonso *JJP* 40 (2010), 16.

the *βιβλιοθήκη* by third parties. This *βιβλιοθήκη* was created as an inventory for documents concerning (the change of) ownership of real property, such as lands and houses, and possibly also of slaves[143]. Only officially registered documents such as those in the *βιβλιοθήκη ἐγκτήσεων* could be produced in court. Therefore, this clause in Greek papyri reassuring the creditor was not necessarily used due to a lack of publicity.

In BGU III 741 two Roman citizens[144], namely Lucius Valerius Ammonianus, administrator of the *Cohors Scutata Civium Romanorum,* and a fleet soldier of the Augustean and Alexandrian fleet named Quintus Gellius Valens, agreed on two loans secured by a hypothec. According to Mitteis, BGU III 741 (= FIRA III 119) is a *synchoresis*[145] directed to a high-ranking judge[146], the *archidicastes*[147]. The text contains typical Hellenistic guarantees from the debtor to the creditor that the estate which would be the object of pledge was not in any way charged.

BGU III 741, 32-40 (Alexandria, 143 AD)

καὶ ἐάν, ὃ μὴ γείνοι[το], συμβῇ κίνδυνόν τινα
περὶ [τὴ]ν ὑποθήκην [ἣ μέ]ρος αὐτῆς ἐπακο[λ]ου-
θῆσ[αι], καὶ οὕτως γειν[έ]σθαι τῷ δεδαν[ει]κότι
τὴν π[ρᾶ]ξιν καθὼς κα[ὶ ἐ]πὶ τοῦ ἐνλίμματ[ος] δε-
δήλωται, παρέχεσθαι δὲ αὐτὸν τὴν [ὑπ]οθή-
κην καθαρὰν καὶ ἀνέπαπον καὶ ἀν[επι]δά-
νειστον ἄλ[λ]ου δαν[είου] καὶ πάσ[η]ς ὀφειλ[ῆς κ]αὶ
μηδένα αὐτῆς ἐμπ[οιο]ύμενον τρόπ[ῳ μη-]
δεν[ὶ][148]

143 Wolff 1978, 51.

144 The two parties are presumably Roman because of their *tria nomina*. What is more, Quintus Gellius Valens may be the same person mentioned in BGU III 709 as ceding a *clerus* with his brother Quintus Gellius Clemens and his sister Gellia Didyme. In this document from Karanis (Arsinoite nome, AD 138-161) Quintus Gellius Clemens acted as *kyrios* to his sister, because as an unmarried woman without a *pater familias* exercising *patria potestas*, she needed to be under *tutela*.

145 Mitteis 1912, 276. See for modern literature on *synchoreseis,* see, for example, Lerouxel in: Keenan, Manning and Yiftach-Firanko 2014, 247-248. Another *synchoresis* can be found in P. Freib. II 9. This document is addressed on p. 54.

146 See BGU III 741, 1-3: *Εὐδαίμονι τῶν κεκοσμητευκότων // ἱερεῖ ἀρχιδικαστῇ καὶ πρὸς τῇ ἐπιμελ[εί]ᾳ τῶν χρη- // ματιστῶν καὶ τῶν ἄλλων κριτηρίω[ν]* (To Eudaemon former kosmetes, priest, chief judge and superintendent of the circuit judges and the other tribunals).

147 It was necessary to register credit secured by hypothec, as can be seen in the petition of Dionysia in P. Oxy. II 237 (Oxyrhynchus, 187 AD) in which the validity of the registration of a form of lien is questioned and therefore the lien itself. If the document was not properly registered, the contract could not be produced in court. Furthermore, if the document was properly registered, the officials of the property archive were expected to deny their authorization for the sale of the estate charged, as long as the debtor still owed the money due to the creditor. Alonso *JJP* 40 (2010), 17-18.

148 These lines (*μηδένα τρόπ[ῳ μη-] // δεν[ὶ]*) resemble the Greek from Dig. 20.1.34.1 '*οὐδενὶ ἢ σοί*' in both meaning and functionality.

l.35: ἐνλείμματος

> And when – may this not happen – it occurs that some kind of risk regarding the hypothecated property or a part of it befalls it, also in that case the right of execution will belong to the creditor, as it was also made clear for the case of default, and that he presents the hypothecated property free of debt, without encumbrance and free from any other loan or any debt and upon which nobody in any way can lay claim.

The contract states that the hypothecated property, which was 75 *arourae* of land, was not encumbered in any way[149] and that the debtor was liable for any risks concerning the 75 *arourae* of land[150]. The scope of the guarantees presented by the debtor to ensure the creditor that his money will be returned is extensive. This was, however, common in Roman Egypt of the second century AD[151].

The guarantee given by the debtor in Dig. 20.1.34.1 is that his *taberna* and slaves do not fall under *katochè.* In the letter, *κατέχονται* must refer to a right of a third party concerning the taberna and slaves, which are to be hypothecated. In case of an existing *katochè* in Roman Egypt, public notaries would prevent further sale or hypothecation of the property by denying authorization and registration of the second transfer or encumbrance[152]. This refusal written in an *epistalma* would make the position of the new owner secondary to the position of the creditor[153]. Therefore, the *katochè* protected a creditor not by fortifying the position of the creditor regarding the charged property, but by weakening the position of the new owner (or a second creditor)[154]. That the debtor in Dig. 20.1.34.1 guaranteed his creditor that his position would not be weakened by another (*οὐδενί* in the Greek cited by Scaevola) through a right of *katochè* (*κατέχονται*) of a previous creditor, would from a

149 These so-called *παρέχεσθαι*-clauses, in which guarantees were given regarding the hypothecated property, predate Roman times and were already used in contracts of hypothec from the second century BC (Ptolemaic Egypt). It is attested in three papyri from this time period: P. Tebt. III.2 970 (Tebtynis, II BC), P. Hamb. I 28 (Arsinoite nome, II BC) and P. Tebt. III.1 817, 21-23 (Tebtynis, 182 BC): *βεβαιούτω δὲ Σώστρατος Ἀπολλωνίωι τὴν ὑποθήκην ταύτη[ν] // καὶ παρεχέσθω αὐτὴν ἀνέπαφον καὶ ἀνενεχύραστον καὶ ἀνεπι- // δάνειστον ἄλλου δανείου καὶ καθαρὰν ἀπὸ βασιλικῶν* (Let Sostratus guarantee the hypothecated property to Apollonius and let him present it without encumbrance, not liable to distraint and on which no money has been borrowed and free from public taxes.)'.

150 According to Weiss risks such as rapid devaluation of the property are improbable. The statement must, therefore, be formulaic (Weiss 1909, 16). Such a legal *formula* is more logical with regard to movables which can easily get damaged or lost.

151 For examples see Alonso *JJP* 40 (2010), 14.

152 Alonso *JJP* 40 (2010), 51.

153 See for papyrological sources, such as P. Lond. III 1157 (Hermopolite nome, 146 (?) AD), Alonso *JJP* 40 (2010), 21-22.

154 Alonso *JJP* 40 (2010), 51.

Roman Egyptian perspective not be illogical. A parallel can be found in, for example P. Oxy. III 483, 24-27 (Oxyrhynchus, 108 AD)[155]:

P. Oxy III 483, 24-27

εἶναι
25 τὰς προκ[ειμ]ένας ἀρούρας εἰδίας μου κα[ὶ]
καθαρὰς ἀ[πὸ π]άσης κατοχῆ[ς] δημ[ο]σίας τ[ε]
καὶ ἰδιοδι[κῆς] εἰς τὴν ἐνεστῶσαν ἡμέρα[ν]

l. 27: ἰδιωτι[κῆς]

That the previously mentioned *arourae* of land are my property and free from any right of *katochè*, both public and private, up until this day.

Through this contract a certain Achilles (name preserved on the verso) wanted to hypothecate six *arourae* of land to secure a loan (the name of the creditor is not preserved on the papyrus). As can be seen in the part of the text cited, Achilles guaranteed that his lands are free from any possible rights of *katochè* (*πάσης κατοχῆς*), which must not be interpreted as narrow as just a right of hypothec, but any right of distraint which would weaken the position of the creditor with regard to the property to be charged.

Katochè as a legal concept, however, was subject to changes. Alonso states that in the second century AD the *katochè* underwent a transformation, giving flexibility to the system of real security and making it more similar to the Roman system: 'The katoche is transmuted, from a strict hold blocking the alienation, into a guarantee for the creditor that his registered right will prevail over the provisionally registered buyer'[156]. It is not unlikely that the debtor in Dig. 20.1.34.1 wanted to give the same broad guarantee encompassing more than merely a right of hypothec.

Having stated that there is no-one who has *katochè* over the debtor's property in Dig. 20.1.34.1, the debtor adds that the creditor knows him to be a most pious man or a man of honor (*εὐσχήμων*). As mentioned, Roman citizens often placed more confidence in sureties than in real security. Not being able to find a person to act as surety may be taken as a sign of social isolation and a corresponding lack of trustworthiness[157]. In Roman Egypt the social fabric is fundamentally different from that of Rome or the Italic peninsula and therefore an inability to find a surety for a credit did not have the same meaning in Roman Egypt[158]. Presumably, the owner of the *taberna* knew that

155 See also P. Wisc. I 16 (provenance unknown, 140 AD), P. Oxy. XXXIV 2722 (Oxyrhynchus, 154 AD), P. Ryl. II 164 (Hermopolite nome, 171 AD), P. NYU II 29 (Oxyrhynchus, II AD) and SB VI 9526 (Alexandria, 200 AD).

156 Alonso *JJP* 40 (2010), 51-52. For the papyrological sources see Alonso *JJP* 40 (2010), 52-53.

157 Koops 2010, 35.

158 In the second century AD hypothec is more common in the papyrological sources than suretyship to secure a loan.

the social meaning of providing a surety was different in Rome, which is why he added that, even though he requested his creditor to be content with a *hypotheca*, his Roman contracting party knew him as a man of honor. Such statements are not further found in the papyri of the Roman East.

III.2.2 Examining the legal question and corresponding reply in Dig. 20.1.34.1

After Scaevola's quotation of the Greek *epistula,* the legal question posed to Scaevola is as follows. Due to the fact that the contract partially cited in Dig. 20.1.34.1 lacked a date (using a day and the consuls of that year) and was not signed (properly), Scaevola is asked to advise on the validity of a contract of hypothec. This question[159], which is asked in Latin betrays the influence of the Roman East as much as the Greek of the *epistula* does. Its author had in mind that the document (*epistula*) itself constituted the hypothec. A similar chain of thought can be found in the previous reply on *subscriptio* in Dig. 44.7.61*pr*.

The letter quoted must be read as the contract, as was the case with the *cheirographon*[160] contract of Dig. 17.1.60.4 on *mandatum*[161]. The contract differs from the other hypothec contracts in *cheirographon* form of the second century AD in its imprecise wording. Contracts[162] of hypothec from Roman Egypt from the second century AD used concise formulae to give substance to the contract[163]. Consequently, in accordance with Hellenistic legal thought, the question was asked whether the contract was valid even though it lacked standard documentary elements, among which a dating formula and a proper

159 Due to the imprecision of the wording Kübler (Kübler 1908, 213) and Dernburg (Dernburg 1864, I 182) saw irony in Scaevola's reply to it: "*Der Jurist weist nicht ohne Ironie auf die Ungenauigkeit der Frage mit den Worten hin …*" I believe that in Scaevola's brief reply to the question he analyses the question and gives a proper reply to it according to Roman law, without any trace of irony or disdain for the author of the question.

160 Agreements entered via unregistered contracts such as a *cheirographon* could be valid, but the property transfer or a loan secured by hypothec would not be registered. The document would be without value in court proceedings and no executive claim could be laid on the property. By sending a *cheirographon* to the *βιβλιοθήκη ἐγκτήσεων* the contracting parties could ensure that the creditor had a claim on the property charged. In another procedure known from Alexandria documents were sent to the *archidicastes*, who placed a copy (or the original version) of the document in the *katalogeion*, after which both contracting parties could validly produce the document in court. See Alonso *JJP* 40 (2010), 19*sqq*.

161 In Dig. 17.1.60.4 more of the original letter has been quoted. In the quotation of the letter in Dig. 20.1.34.1 a greeting such as in Dig. 17.1.60.4 has been omitted. Both *cheirographa* are drafted in the subjective style.

162 See, for example, such as P. Strass. I 52 (Hermopolis Magna, 151 AD), P. Oxy. XVII 2134 (Oxyrhynchus, 170 AD) and P. Mert. III 109 (Oxyrhynchus, II AD).

163 A parallel for the beginning of the contract in Dig. 20.1.34.1 can be found in BGU I 301, 5-6 (Arsinoite nome, 157 AD). In this contract the debtor hypothecated four *arourae* of land to secure a loan of 900 *drachmae*. After a standard greeting, BGU I 301 opens with '*ἐπὶ* (l. *ἐπεὶ*) *ἐδανισά- // μην* (l. *ἐδανεισάμην*) *παρὰ σοῦ*' (when I loaned from you), while in the letter in Dig. 20.1.34.1 *δανεισάμενος παρὰ σοῦ* is written. BGU I 301 is an addition to an already existing contract which can also be the case in Dig. 20.1.34.1.

signature, or if the *epistula* was of no legal consequence. The last part of the question results from the assumption that only registered documents can constitute obligations[164], which is a more common thought in the practice of Hellenistic legal cultures than in legal doctrine of the Roman West. If the question asked of Scaevola had been posed by a Roman from the West, he would probably not have focused on the *epistula* itself other than it being a document that proved the existence of an agreement. He would rather have focussed on the question: is this a valid contract, even though only the will of one of the contracting parties becomes evident from the letter.

The reply to the question adheres strictly to Roman law. Scaevola replied briefly in his response: *cum convenisse de pignoribus videtur*, referring to *consensus* as the only requirement for this type of agreement. Here, Scaevola possibly had more information on the situation than has been handed down to modern scholars, because he distilled from the letter that the contracting parties had achieved consensus, which does not necessarily follow from the quoted part of the letter[165]. Documentation merely helps to prove the existence of a *consensus*, which is the real cause of the hypothec. On this exact matter of formation of the contract of hypothec Scaevola's contemporary Gaius wrote: *and it does not matter with which words it happens, as is the case with obligations formed by mere consensus*[166]. Gaius stated further that the grant of a hypothec is valid when both parties have agreed upon it, whether in writing or not. It is striking that in Scaevola's reply, he replaced the Greek *ὑποθήκη* of the letter by the Latin word *pignus* in both the legal question and the reply, indicating that he saw no real difference between the two. He used the two terms interchangeably[167]. This conforms to Marcian's remark in Dig. 20.1.5.1 (Marcian. 1 *ad Form. Hyp.): Inter pignus autem et hypothecam tantum nominis sonus differt*[168].

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164 Alonso *JJP* 40 (2010), 19.

165 It could be deduced from Dig. 20.1.34*pr*: *Cum tabernam debitor creditori pignori dederit.*

166 Dig. 20.1.4 (Gaius, 1 *ad Form. Hyp.*): *Contrahitur hypotheca per pactum conventum, cum quis paciscatur, ut res eius propter aliquam obligationem sint hypothecae nomine obligatae: nec ad rem pertinet, quibus fit verbis, sicuti est et in his obligationibus quae consensu contrahuntur. Et ideo et sine scriptura si convenit ut hypotheca sit et probari poterit, res obligata erit de qua conveniunt. Fiunt enim de his scripturae, ut quod actum est per eas facilius probari poterit: et sine his autem valet quod actum est, si habeat probationem: sicut et nuptiae sunt, licet testationes in scriptis habitae non sunt* (A contract of hypothec is formed by an agreed upon pact, when someone agrees, that because of some obligation his goods are charged by way of hypothec: and it does not matter with which words it happens, as is the case with obligations formed by mere consensus. And therefore, even without documentation if he agreed that there would be a hypothec and this can be proven, the thing, on which they have agreed, will be bound. Documentation is drawn up in this matter, in order to easier prove by this what has been done: and without this what has been agreed upon is still valid, if he can prove it: similarly, a wedding ceremony is valid although there are no testimonies of it in writing). This statement is also known from Dig. 22.4.4 (Gaius, 1 *ad Form. Hyp.*).

167 This can also be seen in Dig. 32.101*pr* (Scaevola, 16 *Dig.*).

168 Dig. 20.1.5.1 (Marcian. 1 *ad Form. Hyp.)*: The difference between pledge and hypothec is only the sound of the word. Cf. Dig. 41.2.37 (Marcian. 1. *ad Form. Hyp.*).

In both the question and the reply the absence of a mention of the day and of a consul (*sine die et consule*) is noted. This is a reference to the dating formula Romans use. The question here appears to have been not whether a Roman date was necessary, but any date at all. Taking the documentary praxis of the Roman East into regard, almost all contracts of hypothec are precisely dated; for an example see the dating in the contract of hypothec of BGU III 741, discussed above[169]. The practice of dating a document by using consular date cannot be found in Greek papyri from Roman Egypt in the second century AD[170]. It is, however, attested in other areas of the Roman East in this time period. Consular dating is, for example, attested in papyri from Judea, such as P. Yadin I 17,1 (Maoza, 128 AD)[171]. In Roman Egypt, the date is normally given by referencing the regnal year of the emperor and the 'Egyptian month' and day. The fact that the consular date is mentioned and that this manner of dating is not attested in documents in Roman Egypt, does not, however, warrant the conclusion that the author of the question did not come from Roman Egypt, because *sine die et consule* must be read as 'dated' and not as 'dated in a prescribed manner'.

Scaevola not only mentioned the dating of the document as irrelevant for the validity of the contract of *pignus*, but also whether the *tabulae* were signed or sealed. The latter is not mentioned by the author of the question. In the West this practice is connected with the anti-forgery laws of a *Senatus consultum Neronianum*[172], as known from Suetonius[173]. Suetonius wrote that Nero had implemented new laws to stop the forgery of documents. Documents (i.e. wooden tablets) were only considered to be properly signed when the holes through the tablet were passed with a cord three times[174]. Even though Scaevola mentioned legal tablets in his reply (*tabulae signatae*), he refers to the contract as an *epistula* earlier on. It is more likely that the letter was on a papyrus than on *tabulae*. Scaevola's reply to the question seems to originate solely from a Roman legal perspective. The formal requirements for a contract of hypothec which were in effect in the Hellenistic East, were not considered. Scaevola exclusively used a purely Roman principle, namely the

169 BGU III 741, 48-51: '*ἔτους ἑ[β]δόμου //Αὐ[το]κράτορος Καί[σαρ]ος Τίτου Αἰλίου Ἁδ[ρι]ανοῦ //Ἀντωνείνου Σε[βα]στοῦ Εὐσεβοῦς μη[ν]ὸς //Σεβ[α]στοῦ Εὐσεβ[είο]υ ις*' (In the seventh year of Emperor Caesar Titus Aelius Hadrianus Antoninus Pius Augustus, the 16th of the month Sebastus Eusebeius [i.e. 14 September 143 AD]).

170 For a list of Digest texts concerning this usage of consular dating see Kübler 1908, 215.

171 Another example is P. Yadin I 16, 5-9 (Rabbath, 127 AD). The papyri P. Yadin or P. Babatha are from the so-called Babatha archive which included documents from 96 until 134 AD and centered around a Jewish woman called Babatha. For this and an overview of the documents see Chiusi 2020, 101-102.

172 See Babusiaux 2015, 173.

173 *De Vita Neronis* XVII.

174 Sueton. *De Vita Neronis* XVII.1: '*Adversus falsarios tunc primum repertum, ne tabulae nisi pertusae ac ter lino per foramina traiecto obsignarentur*' (Then for the first time it was devised against forgery that tablets were not properly signed if they were not perforated and the holes not passed with a cord three times).

consensus principle, to advise on this case, not taking the legal pluralism of the Hellenistic Roman East into account.

III.2.3 Conclusion concerning Scaevola's reply in Dig. 20.1.34.1

Dig. 20.1.34.1 addresses a problem that arose because of the lack of formal requirements of the contract of hypothec in Roman law. To enter effective contracts of hypothec in the Hellenistic East, however, the contracting parties had to observe strict formal requirements. In order to acquire an executive claim on property charged, the inhabitants of Roman Egypt used a registration system using the *βιβλιοθήκη ἐγκτήσεων* from the first until the fourth century AD and a system of transforming unregistered contracts into public deeds by registering them via the office of the *archidicastes*. This created a formalistic system of passing deeds. Therefore, the contractual praxis shows a rigid usage of key legal *formulae*. Almost all of these *formulae* are not present in the letter quoted by Scaevola in Dig. 20.1.34.1. Because of the lack of these formalities, the validity of the hypothec was called into question. These formalities were important in a Hellenistic legal context, but were of no consequence in a Roman legal context.

III.3 Dig. 32.101*pr* (Scaev. 16 *Dig.*): Hypothecated lands in Roman Syria

The fourth and final text from the works of Scaevola treated in this section is also on *pignus* or *hypotheca* in the Roman East. Dig. 32.101*pr*, from the 16th book of his *Digesta*, contains part of a codicil in Greek, a legal question and a reply in Latin. The codicil and its author are most certainly from the Roman East, as the province in which the author was raised and where he had his lands was Roman Syria (*ἐν Συρίᾳ*)[175]. From the text following this fragment in the Digest (Dig. 32.101.1), no Hellenistic context can be derived. Both texts concern uncertainties regarding which specific things bequeathed by the testator. Furthermore, both texts have in common that they deal with landed estates and their current state. In Dig. 32.101*pr* this is '*χωρία πάντα σὺν πᾶσιν τοῖς ἐνοῦσιν*', while in Dig. 32.101.1 an estate is mentioned '*ita, uti est*' (in such state, as it is). Dig. 32.101 is incorporated in Lenel's *Palingenesia* as fragment 55. In his reconstruction fragments 53-57 are part of a section *de Legatis et Fideicommissis*. Some provincial elements can be found in these fragments, such as two Greek names, namely Aretho in Dig. 32.34.2 (fr. 53) and Aurelius Symphorus in Dig. 34.3.28*pr* (fr. 57) and a 'Greek' *chirographum* in Dig. 34.3.28.13 (fr. 57). Furthermore, allusions are made to the provinces in Dig. 32.34*pr* (fr. 53), Dig. 33.7.6 (fr. 54) and Dig. 33.7.27.1 (fr. 56). The provincial context is, however, not an overarching theme in these fragments.

175 This can be deduced from the text by combining the elements *Qui habebat in provincia, ex qua oriundus erat, propria praedia* and *χωρία πάντα ὅσα ἐν Συρίᾳ κέκτημαι*. According to Talamanca the *πατρίς* is also in Roman Syria. Cf. Talamanca 2009, 557 and Scarcella 2012, 638.

The overarching themes of this palingenetically reconstructed section are "pledge" and "*praedia (funda) instructa*".

> Dig. 32.101*pr* (Scaev. 16 *Dig.*)
>
> Qui habebat in provincia, ex qua oriundus erat, propria praedia et alia pignori sibi data ob debita, codicillis ita scripsit: τῇ γλυκυτάτῃ μου πατρίδι βούλομαι εἰς τὰ μέρη αὐτῆς δοθῆναι ἀφορίζω αὐτῇ χωρία πάντα ὅσα ἐν Συρίᾳ κέκτημαι, σὺν πᾶσιν τοῖς ἐνοῦσιν βοσκήμασιν δούλοις καρποῖς ἀποθέτοις κατασκευαῖς πάσαις. Quaesitum est, an etiam praedia, quae pignori habuit testator, patriae suae reliquisse videatur. Respondit secundum ea quae proponerentur non videri relicta, si modo in proprium patrimonium (quod fere cessante debitore fit) non sint redacta.
>
> Someone who had estates of his own in the province from which he came, and had received other estates as pledge in return for a loan, wrote in a codicil as follows: "I wish that to my most beloved hometown as part of the inheritance [the following] is given and I bestow upon it all the lands that I possess in Syria, including all the present livestock, slaves, fruits, provisions and all the equipment". It is asked, whether the estates which the testator held in pledge are to be considered bequeathed to his hometown, or not. He [Scaevola] replied that according to the facts presented they must not be considered bequeathed, if they had not been brought into his patrimony (which often happens when the debtor is in default).

In this *responsum* Scaevola quoted a codicil in Greek, in which a testator from the Roman East bequeathed lands he had in possession to his hometown[176]. In the introductory text in Latin, Scaevola differentiated between two categories of landed estates, which are *praedia propria* (his own estates) and *alia praedia pignori data* (estates belonging to others, which the codicil writer had received under a right of *pignus*). The author of the Greek codicil, however, did not differentiate between the two, but bequeathed all the lands, that the deceased possessed (*χωρία πάντα ὅσα … κέκτημαι*) in Roman Syria. This vague formulation seems to spark the legal question and following reply.

III.3.1 Examining Greek elements in Dig. 32.101pr

In the following section two topics will be examined which are firstly the legal concept indicated by the author of the legal question as *pignus* and secondly a formula in Greek in which is defined to what extent the landed estates of the deceased were bequeathed.

Even though the text deals with the Latin term *pignus,* Kübler is not convinced that the case itself actually concerns the Roman right of *pignus*, because the word itself can also be used for other security interests[177]. It is

176 The testamentary gift of property to a municipality is a characteristic of the Principate. For sources on this theme see: Voci 1967, 424.

177 Kübler *SZ* 28 (1907), 203.

difficult to reconcile the Roman right of *pignus* with the text in the Greek codicil. In this codicil the lands in possession of the author are bequeathed to his hometown. Lands received in pledge, however, cannot be bequeathed. The codicil writer might have had in mind to bequeath the secured credit itself, on which the right of *pignus* depended, or subsequently if the debt was not paid off in time the security objects themselves. The lands received in pledge by the creditor / codicil writer were his *κτήματα* (litteraly: possessions). That the security objects were his 'possessions', however, did not, at least not from a Roman legal point of view, necessarily mean that they were in his *patrimonium*. This warrants the suspicion that Scaevola was not confronted with a Roman right of *pignus*, but with a Hellenistic legal concept of securing credit, which he also termed '*pignus*'. Kübler suggests that other security interests must be considered. An example is *fiducia cum creditore*, which he deemed unlikely, because provincial land is not susceptible to *mancipatio*. The question remains, however, whether *fiducia cum creditore* required a *mancipatio.* Scaevola seemed to have known transfer of ownership of provincial land as can be seen in Dig. 18.5.9 (Scaev. 4 *Dig.*), a case at the discretion of a provincial governor (*praeses provinciae*). In this case, a piece of land belonging to Lucius Titius was sold, because he had not paid certain (real property) taxes to the state (*vectigal*). The provincial governor, however, rescinded the sale because the yield of the sale was lower than the money owed and Lucius Titius had promised to pay the taxes. The question was: *an post sententiam praesidis, antequam restitueretur, in bonis Lucii Titii fundus emptus esset*[178]. Scaevola replied that the land was not earlier in his patrimony than either when the price was paid to the buyer or when the taxes due had been paid. Ankum, van Gessel-de Roo and Pool conclude that Scaevola had transposed *den Ausdruck in bonis alicuius esse als Eigentumsterminus auf das Eigentum an Provinzialgrundstücken*[179].

Another suggestion for the legal concept in Dig. 32. 101*pr* is *ὠνὴ ἐν πίστει* (purchase on trust[180]). *Ὠνὴ ἐν πίστει,* attested in the papyri, is a legal concept to secure credit via the sale of an object. The 'price' of the object corresponded with the amount of money which was to be lent. Ownership of the security object was transferred to the creditor and reverted back to the original owner upon payment of the capital. This trust-like construction seems to be a geographical and time-specific phenomenon, however, as it is almost exclusively attested in a few villages in the Fayum and not, for example, in a strongly Hellenized city such as Oxyrhynchus[181]. This type of contract is not associated with Roman Syria of the second century AD, but bears a strong connection with native Egyptian law.

178 Dig. 18.5.9 (Scaev. 4 *Dig.*): Whether after the decision of the provincial governor and before restitution of the land had taken place the purchased land belonged in Lucius Titius *bona.* Cf. Ankum, van Gessel-de Roo and Pool *SZ* 105 (1988), 363-365.

179 Ankum, van Gessel-de Roo and Pool *SZ* 105 (1988), 365.

180 See Urbanik in: Du Plessis, 2013, 152.

181 I paraphrase Lerouxel 2015, 169-170.

Lastly, the Attic and later Hellenistic security interest of *πρᾶσις ἐπὶ λύσει* (sale under a redemption clause) has been suggested by Kübler as the original security interest. In this construction ownership of the security objects, e.g. an estate, shifted from the debtor to the creditor. The debtor, however, had a right to redeem the security object, if the capital was paid to the creditor before or on the date upon which the loan expired. This construction shows similarities with the constructions used in Cod. 4.54.2 (222 AD) and Cod. 4.54.7 (290-294 AD) in which a sale of land is described under the condition that the land had to be returned to the seller in case the original price of the land was given to the buyer. Via the construction of *πρᾶσις ἐπὶ λύσει* the security objects, in this case all the lands in Roman Syria, fell in the patrimony of the deceased[182]. Häusler, however, rejects the idea that a *πρᾶσις ἐπὶ λύσει* contract must be assumed, stating that this security interest is a '*besitzloses pignus an fremden Liegenschaften*'[183]. In my view, Scaevola tried to deal with a 'foreign' legal concept of secured credit, be it with or without a transfer of ownership, by translating it in Roman legal terminology (*pignus*). A form of secured credit by which either ownership is transferred during the loan, or by which ownership of the security objects can be claimed after expiration of the loan, e.g. forfeiture pledge[184], would explain why the author of the question in Dig. 32.101*pr* asked if the 'pledged' goods were also bequeathed. If the debts were not paid timely, the lands which secured the debts would fall into the *patrimonium* of the deceased and could therefore be claimed by the *patria* to whom the deceased bequeathed all his lands. By translating this Hellenistic legal concept to a Roman right of *pignus,* jurists from Rome, who were not necessarily familiar with alternate forms of security interests from the Roman East, could use this case as an *exemplum* for cases involving (forfeiture) pledges and the possible transfer of ownership accompanying it without having to be au fait with Hellenistic law.

Turning to the extent to which the landed estates of the deceased were bequeathed, the author of the Greek codicil indicated that all his lands were bequeathed in an 'equipped' state. To indicate that the lands were bequeathed 'equipped', he used a formula, which is also known from Roman legal writings: '*including all the present livestock, slaves, fruits, provisions and all the equipment*'[185]. This formula is also attested in contracts from the Roman

182 If in this case the debtor paid off the debt to the heirs of the deceased, he could claim the property with his right to redeem the security object. Subsequently, the heirs had to transfer ownership of the estates to the debtor, which could be difficult if ownership had been transferred to the deceased's hometown, to whom the estates were bequeathed.

183 Häusler *SZ* 133 (2016), 430. He adds no further argumentation. He just states that this non-possessory pledge ruled out the possibility of *πρᾶσις ἐπὶ λύσει*.

184 In the Hellenistic East different forms of pledge existed. In the *papyri*, however, contracts of pledge almost always contained *formulae* indicating the transfer of ownership of the security object (forfeiture pledge). This forfeiture pledge is far less common in the surviving material culture of the Roman West, such as the Archive of the Sulpicii.

185 Dig. 32.101*pr*: '*σὺν πᾶσιν τοῖς ἐνοῦσιν βοσκήμασιν δούλοις καρποῖς ἀποθέτοις κατασκευαῖς πάσαις*'.

East. It helps to clarify the exact meaning of "the land" as an economic unit in case of e.g. a pledge, a lease, a sale or an inheritance. The Latin legal term for this is a *praedium instructum*, an 'equipped estate'[186]. Scaevola also refers to this formula in Latin as seen in Dig. 15.1.58 (Scaev. 5 *Dig.*): *Uni ex heredibus praedia legavit ut instructa erant cum servis et ceteris rebus et quidquid ibi esset*[187]. In this *responsum,* the Latin elements of *instructa, cum servis* and *quidquid ibi esset* are mentioned by the author of the codicil using the Greek translation *κατασκευαῖς πάσαις, δούλοις* and *σὺν πᾶσιν τοῖς ἐνοῦσιν* respectively. The use of this formula adds a more Roman context to the codicil in Greek. Because of this formula it is likely that the author of the codicil had some familiarity with Roman law. In papyrological sources from Roman Egypt this formula is only partially attested. An example may be found in the contract of hypothec known as P. Oxy. III 506, 27 (Oxyrhynchus, 143 AD): *σὺν τ*]*οῖς ἐνοῦσι πᾶσι*[188]. In this part of the contract the precise object of the hypothec, a third part of a former vineyard, is described as an economic unit in a similar fashion as in Dig. 32.101*pr.* The document, however, displays Roman influence as one of the names mentioned in the contract belongs to a Caecilia Polla. In contracts on papyri of later date parallels to the formula from Dig. 32.101*pr* can be found. An example is the lease contract of PSI VIII 931, 14-16 (Aphroditopolis, 524 AD), in which the start of the formula of Dig. 32. 101*pr* is used almost verbatim: *τὸ νότινον μέρ*[*ο*]*ς ἐγγὺς τοῦ ὁρίου ἐμοῦ Βίκτορος Ἑρμαυῶ*[*τος*] *// σὺν πᾶσι τοῖς ἐνοῦσι κ(αὶ) ἀνήκουσι*[189]. Another example from sixth century Aphroditopolis, which shows elements of this legal formula, was drawn up after the codification of the Digest was completed in 533 AD and contains an agreement of lease:

P. Vat. Aphrod. I, 10-14 (Aphroditopolis, 598 AD)

ὁλόκληρον σοῦ μέρος ἐξ ὁλοκλήρου κτήμ[ατος καλουμένου]
Περίωνος σὺν τῷ περιέξωθεν λάκκῳ καὶ δεξαμενῇ καὶ μονῇ καὶ πύργῳ καὶ οἰκ[ιδίῳ μετὰ ξυλίνης]
σκάλης καὶ φοίνιξι καὶ λαχανίοις τόποις καὶ βοσκήμασι καὶ ἑτέροις φυτοῖς διαφ[όροις ἐγκάρποις]
καὶ ἀκάρποις καὶ πᾶσι ἐνοῦσι καὶ ἀνηκοῦσι καὶ προσκυροῦσι τῷ αὐτῷ κτήματι

l.14: κυκλόθεν

186 For this legal term see Dig. 33.7 *De instructo vel instrumento legato.*

187 Dig. 15.1.58 (Scaev. 5 *Dig.*): To one of the heirs he bequeathed lands as they were equipped, meaning with slaves, the remaining goods and whatever was present. See also: Dig. 33.7.6 (Scaev. 16 *Dig.*), Dig. 33.7.20 (Scaev. 3 *Resp.*), Dig. 32.35.1 (Scaev. 17 *Dig.*) and Dig. 15.1.54 (Scaev. 1 *Resp.*).

188 See also P. Col. X 273, 3 (Oxyrhynchus, 204 AD), P. Freib. IV 58, 5 (provenance unknown, I-II AD) and P. Harr. I 137, 2 & 7.

189 PSI VIII 931, 15-16: 'the southern part of land near an estate, which I, Victor, son of Hermauus own, including everything present and the portico which belongs to it'.

> Your complete share from the complete estate called Perion including the lake around it and a cistern and a shelter and a tower and a little house with a wooden staircase and palm trees and lands for vegetables and livestock and various other plants carrying fruits and not carrying fruits and including everything present and belonging to and affiliated to the said estate.

The enumeration of all the constituent parts of the estate is rather extensive. It shows the same features as the codicil quoted by Scaevola in Dig. 32.101*pr*. These elements are *βοσκήμασι* and *ἐγκάρποις* in line 12 and *καὶ πᾶσι ἐνοῦσι* in line 13. Both PSI VIII 931 and P. Vat. Aphrod. I are from sixth century AD Aphroditopolis. This could indicate that the Roman formula was eventually adopted in the documentary practice of Roman Egypt due to extensive contact with Romans and Roman law over a period of more than five hundred years.

III.3.2 The legal question and reply from Dig. 32.101pr

The legal question in this *responsum* is whether the lands received under a '*pignus*' were bequeathed or not. These *alia praedia pignori data* are juxtaposed with *propria praedia*. From Scaevola's text it appears that the latter estates fell within the deceased's *proprium patrimonium*. Whether the *alia praedia* fell within his *proprium patrimonium* remained to be seen. *Proprium patrimonium* cannot mean *dominium* under Roman *ius civile* in this context, because provincial lands cannot be in a person's *dominium*[190]. Provincial land, however, could be held *in bonis* (*in bonis habere*), also known as bonitary ownership[191]. This form of 'ownership' was protected by the *praetor*. In Hellenistic legal cultures no such distinction existed. Furthermore, in most Hellenistic legal cultures there was not even a clear distinction between possession and ownership. The Greek text gave rise to debate due to the use of *χωρία πάντα ὅσα ἐν Συρίᾳ κέκτημαι*[192].

Especially the legal term *κέκτημαι* can be subjected to different interpretations[193]. The Greek '*κτάομαι*' (*κτᾶσθαι*) means to possess and *τὸ κτῆμα*[194] is often the Greek translation of the Latin *possessio* in Roman legal literature

190 See Gaius, *Inst*. II 7 & 21. In Gaius, *Inst*. II 27, Gaius mentioned that this difference between 'Italic soil' and 'provincial soil' was already used by the *veteres,* republican jurists which are 'older' than Gaius).

191 See Ankum, van Gessel-de Roo and Pool *SZ* 105 (1988), 334, in which the authors explain regarding these so-called '*in bonis*' expressions the following: *Es sind weite Eigentumsausdrücke, die die klassischen Juristen verwenden, um zu bezeichnen, daß eine Sache jemandem entweder im vollen (das heißt, im quiritischen und bonitarischen oder (nur) im bonitarischen Eigentum gehört.*

192 The form *κέκτημαι* is also attested in Greek law, e.g. IG XII 5.572 *κεκτημένοι τὸ χωρίον*. See Kränzlein 1963, 20.

193 Häusler comments, that the conflict existed because of '*eine unpräzise Formulierung*' and then adds that Hellenistic (local) law did not play a role in the legal controversy in Dig. 32.101*pr* (Häusler *SZ* 133 (2016), 430).

194 See the cited P. Vat. Aphrod. I, 10.

in Greek. In the Babatha archive from En-Gedi in Roman Judea some documents use the word *κέκτημαι* in a similar fashion as Dig. 32.101*pr*. The following contract (P. Yadin I 11) [195], which is signed and has a consular dating formula, is from that archive and concerns a loan under hypothec or perhaps a local Jewish version of this security interest translated into the Greek *ὑποθήκη*. The debtor in this case is Babatha's second husband Judah, son of Eleazar.

P. Yadin I 11, 7-11 (En-Gedi, 124 AD)

καὶ ἐάν σοι [μ]ὴ ἀποδώσω τῇ ὡρισμένῃ
προ[θ]εσμίᾳ καθὼς προγέγραπται τ[ὸ δίκα]ιον ἔσ[ται] σοι κτᾶσθ[αι χ]ρᾶσθ̣αι
π[ωλ]ε̣ῖν διο̣[ικεῖν τὴ]ν αὐτὴν ὑποθήκην χωρ[ὶς]
. [ ]. . . . κ̣[αὶ ἡ] π̣ρᾶξ[ις ἔσται σο]ι κα[ὶ τ]ῷ̣ [π]αρά σ̣ου καὶ [ἄλλῳ παντί τῷ δι]ά
σου ἢ ὑπέρ σο̣υ κ[υρίως]
τοῦτο τ[ὸ] γράμμα προφέροντι, ἔκ τε ἐμοῦ καὶ ἐκ τῶν ὑπαρχόντω̣ν [μου πάντῃ]
πάν[των] ὧν κέκτημαι κ̣α̣ὶ ᾧ̣ν
ἐπικ̣τήσ̣ωμαι, πράσσοντι κυρίως, τρόπῳ ᾧ ἂν αἱρῆται ὁ πράσσ̣ω[ν. – ca.12 -] vac. ?

and in the event that I have not paid you back on the aforementioned due date, yours will be the right to "possess", use, sell and manage the hypothecated property without […] and the right of execution will belong to you and your representative, and any other who through you or on behalf of you will legally bring forth this document, on me and all my belongings everywhere, which I *possess* and which I shall acquire on top of those, proceeding with full authority in the fashion as he who sets up the procedure whishes.

In this papyrus the use of *ὑπαρχόντων … πάντων ὧν κέκτημαι* in line 10 is similar to the codicil in Dig. 32.101*pr χωρία πάντα ὅσα … κέκτημαι*. The contract leaves no room for an interpretation as mere *possessio* as the debtor gives the creditor the right to seize and alienate the security objects and all the debtor's goods and future goods. The full power of disposition the debtor has over his goods expressed by the word *κέκτημαι* betrays it means more than *possessio*[196]. By the use of the future aspect of *ἐὰν ἐπικτήσωμαι,* the formula mirrors the Latin formula seen in Dig. 20.1.34.2: *quidquid in bonis habet habiturusve esset*. The Greek *κέκτημαι* in P. Yadin I 11 and in Dig. 32.101*pr* could possibly also mean *in bonis habeo*. It appears likely that the debtor would grant the right to sell off all the things he has and will have *in bonis*.

195 According to Oudshoorn the contract of P. Yadin 11 appears to be a Roman contract. Due to the specific legal terms and language used, the document remains closely connected to the indigenous legal context of En-Gedi (Roman Judea). See Oudshoorn 2007, 168.

196 It might, however, be the case (considering it from a Roman legal perspective) that mere *possessio* of a land in the Roman East could have been enough to use the land to secure a loan, as *dominium* of such a land was officially impossible.

That *κέκτημαι* must be interpreted in a broader way than mere possession, that is to say as bonitary ownership, is reinforced by the use of by *κτᾶσθαι*[197] in the enumeration of all the powers[198] of the creditor in case of default by the debtor[199]. In two bilingual contracts on papyrus (Greek / Syriac) from the Roman province of *Syria Coele* (Beth Phouraia)[200] from the third century AD *κτᾶσθαι* also needs to be interpreted more broadly than *possessio*[201]. This broader interpretation of *κτᾶσθαι* is also seen in contracts of hypothec in Roman Egypt. An example of this is attested in P. Flor. I 1, 6-7 (Hermopolis Magna, 153 AD)[202].

A broad interpretation of *κέκτημαι* is strengthened by the assumption that it is less likely that the deceased had in mind to bequeath pledged estates. It is possible, however, that by the time of his death he would have already taken possession of the pledged land because his debtors were in default. This possession must have been acquired through the provincial governor, as is known from a rescript of emperors Septimius Severus and Caracalla:

Cod. 8.13.3

Imperatores Severus, Antoninus Maximo. Creditores, qui non reddita sibi pecunia conventionis legem ingressi possessionem exercent, vim quidem facere non videntur, attamen auctoritate praesidis possesionem adipisci debent. *PP. K. Mai Antonino A. II et Geta II conss.*

197 See for the same use of *κτᾶσθαι* in this archive also P. Yadin I 19, 24 (Maoza, 128 AD) which is a deed of gift.

198 Yadin even suspects a native origin of this phrase. To strengthen this hypothesis, he points out similarities between Greek and Aramaic formulae. See the edition of these papyri: Yadin 1989, 15.

199 In a document of sale from Dura-Europus, Roman Syria, a similar attitude towards *possessio* is seen in P. Dura 26, 14-15 (Dura-Europus, 227 AD): *καὶ τὴν χώραν αὐτῷ ἔδωκεν εἰς τὸ ἔχειν αὐτὸν κυρίως καὶ βεβαίως εἰς τὸν ἅπαντα χρό- // νον κτᾶσθαι χρᾶσθαι πωλεῖν δι[οι]κεῖν τρόπῳ ᾧ ἂν αἱρῆται* (To him he gave the land to have it with full authority and guarantees and to possess it until the end of time, use it, sell it and manage it in the way he chooses). The formula can also be seen in a papyrus from Roman Palestine BGU I 316, 20-21 (Ascalon, 359 AD).

200 See also these two documents of sale from Roman Assyria for formulae containing the exact powers transferred to the new owner: SB XXIV 16167 (Marcopolis, 249 AD) and SB XXIV 16168 (Marcopolis, 249 AD) and for '*κυριευτικῶς ἃς κέκτημαι*' see P. Oxy. XXVII 2474, 37-38 (Oxyrhynchus, III AD) which is the will of a Roman citizen.

201 These contracts are SB XXIV 16169, 23 (Beth Phouraia, 251 AD) and SB XXIV 16170, 19-20 (Beth Phouraia, 252 AD). See also SB XXIV 16170, 19-20 (Beth Phouraia, 252 AD): *παρέδωκεν // [αὐτῷ τὴν αὐτὴν δού]λην εἰς τὸ ἔχειν κὲ κτᾶσθαι κυρίως* (that he transferred to him the slave-girl in question to have and to *possess* as owner).

202 Other examples of a broader interpretation of *κτᾶσθαι* than mere *possessio* are P. Brem. 68 (Hermopolis, 99 AD) and P. Flor. I 81 (Hermopolis, 103 AD). Examples of other types of contracts are P. Oxy. XVIII 2192, 41-44 (Oxyrhynchus, II AD) on the sale or lending of books, the petition of P. Oxy. XXXVIII 2854, 25 (Oxyrhynchus, 248 AD) and P. Mert. II 92, 1 (Karanis, 324 AD) which is also a petition.

> *The emperors Septimius Severus and Antoninus [i.e. Caracalla] to Maximus.* Creditors, who exercise their contractual right by entering into possession [of the goods], because money has not been returned to them, do not appear to use force, although they must acquire this possession by the authority of the provincial governor. *Published on the Calends of May during the second consulate of Antoninus and Geta* [205 AD].

In Dig. 32.101*pr* the testator could have been authorized by the provincial governor to take possession of the estates. If the testator used the verb *κέκτημαι* for this reason, then it is possible that he did intend the pledged lands to fall under '*all the lands that I possess in Syria*'. Even so, this interpretation must be deemed less likely because of Scaevola's response.

Even if the testator had in mind to bequeath the lands he received in pledge to his hometown, Scaevola, having examined the facts as presented to him, denied that these lands could be bequeathed. At the end of the *responsum*, however, Scaevola casually remarks *quod fere cessante debitore fit*, that pledged objects can come into the *patrimonium* of the creditor, which often (*fere*) happens when the debtor is in default. In this instance, that would mean that the city could inherit the lands, if the lands had entered the patrimony of the testator at some point prior to his death.

In classical Roman law the forfeiture pledge is constructed with a *lex commissoria.* If such an agreement was added and the debtor did not return the money in time, the pledged object would fall into the patrimony of the creditor, after which the debt was considered to have been paid. This form of pledge, in which the creditor owns the pledged object in case of default is frequently found in the papyri. It is for example attested in P. Oxy. XVII 2134, 21 (Oxyrhynchus, 170 AD): "If I do not pay the sum of money previously described, you will have proprietary rights over the *arourae* of land described above"[203]. Such contracts lack additional clauses to deal with the eventuality that the hypothecated property had a higher value than the secured credit (*ὑπεροχή*[204]). Without such a clause this *hyperocha* would fall to the creditor along with the property. In contrast to this earlier contractual praxis, Roman legal theory as of the third century AD imposed certain restrictions on the forfeiture pledge, meant to strengthen the position of the debtor:

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203 P. Oxy. XVII 2134, 21 (Oxyrhynchus, 170 AD): *ἐὰν δὲ μὴ [ἀπο]δῶ καθ' ἃ γέ[γρ]απται, κυριεύσεις ἀντὶ τούτων τῶν προκειμένων ἀρουρῶν.* This document is a registration of a contract of hypothec. See also P. Oxy. III 506, 22-23 (Oxyrhynchus, 143 AD), P. Erl. 60, 4 (provenance unknown, II AD), SB I 4370, 32-33 (Herakleopolis, 228-9 AD).

204 *Hyperocha* is attested in the *Digesta* in one text by Tryphoninus, a student of Scaevola, in Dig. 20.4.20 (Tryph. 8. *Disp.*). In this text it is used as a synonym for *superfluum*.

Dig. 20.1.16.9 (Marcian. 1 *ad Form. Hyp.*)

Potest ita fieri pignoris datio hypothecaeve, ut, si intra certum tempus non sit soluta pecunia, iure emptoris possideat rem iusto pretio tunc aestimandam: hoc enim casu videtur quodammodo condicionalis esse venditio. Et ita divus Severus et Antoninus rescripserunt.

Property can be pledged or hypothecated under the condition that, if the money has not been paid within a certain amount of time, the creditor may possess the property, which must then be assessed at a fair price, by right of a buyer. In this case there appears to be some sort of conditional sale. The late emperor Septimius Severus and Antoninus Caracalla have decided thus by rescript.

This clause converting the pledge to sale protected the debtor in case of *hyperocha* by assessing the value of the forfeited goods at a fair price. Such a clause is not attested in papyrological sources from the second century AD. A similar mode of thinking can be deduced from Dig. 46.3.45*pr* (Ulpian. 1 *Resp.*): "*Callippo respondit, quamvis stipulanti uxori vir spoponderit dirempto matrimonio praedia, quae doti erant obligata, in solutum dare, tamen satis esse offerri dotis quantitatem*[205]. In this response, Ulpian protected the debtor against loss of the *superfluum* in case that the value of the estates was higher than what the dowry was worth. In the reply of Dig. 32.101*pr* Scaevola made no mention of such protection in case of a forfeiture pledge. He only stated that estates can fall into the patrimony of the creditor and that this is often the case when the debtor is in default. In the papyri of the second century AD, the protection against loss of the *superfluum* cannot be found either. Protection of the Roman debtor regarding the security object could have been less common or less extensive in Scaevola's II AD Rome than in Marcian's and Ulpian's III century AD Rome. Another explanation is that in that sentence Scaevola referred to the Hellenistic practice of forfeiture pledges. This type of forfeiture pledge from the Hellenistic East was already attested by Cicero in his letter to Q.M. Thermus (*Ep. ad Fam*. XIII 56), cited at the beginning of this section on *Hypotheca*.

III.3.3 Conclusion based on Dig. 32.101pr

In Dig. 32.101*pr* the legal problem is caused by the merging of Hellenistic legal terminology and classical Roman law. The interpretation of the word *pignus* as a purely Roman right of pledge has been debated in modern litera-

205 Dig. 46.3.45*pr*: "He responded to Callippus that, even though a man promised his wife by stipulation to transfer the lands to her which were obligated to secure the dowry, in lieu of payment after the marriage was dissolved, it would suffice to offer an amount equal to the dowry". Similar thought can be detected in Cod. 8.34.1 (Alexander Severus, 229 AD). See also Zimmermann 1992, 224. In 326 AD Emperor Constantine forbade this kind of forfeiture pledge (Cod. 8.34.3) in order to protect the debtor (Seidl 1973, 206).

ture. It is a possibility that *pignus* is used by Scaevola to describe a Hellenistic contract of secured credit, be it a form of forfeiture pledge or sale under a redemption clause.

Furthermore, the legal problem arose because of the use of the Greek legal term *κέκτημαι* leading to the question whether the deceased had the possession of the estates received in pledge. If so, would these lands fall into the patrimony of the deceased, so that they could be bequeathed? The Greek *κέκτημαι* must be placed in a broader context of the Roman East and cannot be equated with the Roman legal term *possessio*. From papyrological sources it appears that the Greek *κέκτημαι* indicated that the verb's subject had powers of disposition similar to Roman *dominium*. In the last sentence of the response Scaevola made a remark on forfeiture pledges or another type of secured credit, by which means the debtor's property falls into the patrimony of the creditor. By doing so he possibly alluded to a Hellenistic practice of secured credit from that time.

IV Conclusion based of bilingual consensual contracts in the Digest

Four bilingual *responsa* with regard to consensual contracts can be found in the Digest. The first two of these documents, of which one (Dig. 44.7.61*pr*) also concerned the law of inheritance, involved a form of *mandatum*, while the last two entailed questions on *hypotheca* (Dig. 32.101*pr* also entailed the law of inheritance). These four *responsa* were taken from two works of the jurist Scaevola, namely his *Responsa* and *Digesta*.

The case in Dig. 17.1.60.4 is distinctively Hellenistic. The *formulae* of, for example, *εἴτε πωλεῖν… ἀγοράζειν* find many parallels in Greek documentary practice from Roman Egypt and the same goes for the *κύρια*-clause used and the *ἄνευ ἀντιλογίας*-clause in *μηδὲν ἀντιλέγοντός*. Scaevola, however, did not take this Hellenistic background into account and used the Roman principle of the *bona fides* to come to a decision in this case. In Dig. 44.7.61*pr* Scaevola also gave an advice using only Roman law. The Greek document cited is parallelled by many Greek contracts on papyri from the Hellenistic East and was used by both Roman and Greek contracting parties. Contrary to the Hellenistic legal culture which laid emphasis on the legal consequences of written documents, Scaevola let a purely Roman view prevail that documents could only be used for their function as supporting evidence.

The subjective style of Dig. 20.1.34.1, in which the first person singular of the contract is the debtor and the second person singular is the creditor, is often used in Hellenistic legal documents. Furthermore, the formulaic legal language of the document is typical for the Hellenistic practice. Scaevola, however, advised on the matter from a Roman point of view, namely not by ascribing constitutive force to the document, but by using the Roman doctrine of the *consensus* principle.

In Dig. 32.101*pr* the Greek *κέκτημαι* cannot be translated as *possessio,* but indicated power of disposition similar to the Roman *in bonis habere*. In this *responsum* Scaevola possibly referred to a common Hellenistic practice, namely the practice of entering contracts of forfeiture pledge. In these cases, the debtor was not protected against the loss of the *superfluum*. In the second century AD, however, Romans in the West also used forfeiture pledges, but this practice was abolished later. The advice in Dig. 32.101*pr,* must again be seen as based on Roman law, for in order to bequeath property it must first be in your *patrimonium*.