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

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II The law of obligations real contracts

I Introduction

The real contracts considered in this chapter, *depositum* (deposit; the care of someone else's thing free of charge[1]) and *mutuum* (loan for consumption), but also the other real contracts of *pignus* (pledge) and *commodatum* (loan of a thing for use free of charge[2]) differed from the consensual contracts considered in the previous chapter. The latter only required the consensus between two parties to be valid. The former, however, were entered upon via an additional requirement[3]. In addition to the will to come to an agreement, which is the sole requirement of consensual contracts, the *res* concerned in the contract must have been handed over for real contracts to be valid. Upon delivery the receiving party obtained the *dominium* in case of *mutuum*. In case of *pignus* the receiving party received the thing into his possession. In cases of *depositum* and *commodatum* the receiving party was considered to be a mere *detentor*[4].

Turning to 'real contracts' in Attic law and in Hellenistic legal cultures, it can be said that, according to Lipsius, real contracts as found in Roman law were absent in Attic law[5]. Both in Attic and in some Hellenistic legal cultures, however, contracts comparable to Roman real contracts had a real character, meaning that the 'real moment' of handing over the thing was a requirement for the formation of the contract. The real character of these contracts is, as

1 Cf. Dig. 16.3.1 (Ulp. 30 *ad Ed.*).
2 Zimmermann 1992, 188.
3 See Kaser 1971, 525. See Gaius, *Inst.* III 90-91, Dig. 44.7.1.4-5 (Gaius, *Res Cott.*) and Just. *Inst.* III 14.2-4.
4 For *depositum* see Dig. 16.3.17.1 (Flor. 7 *Inst.*).
5 Lipsius, who to this end cites Demosthenes, denies the existence of stipulations and real contracts in Attic law: '*Förmliche Stipulationen mit verba concepta haben, soviel wir sehen, die Griechen überhaupt nicht, Realkontrakte wenigstens das attische Recht nicht gekannt*' (Lipsius 1915, 687). He does, however, leave the option open that other legal systems in the Greek sphere of influence had real contracts.

argued by Wolff, found in the *Zweckverfügung* which created the obligations[6]. The difference between these Attic and Hellenistic contracts constituted by *Zweckverfügung*, and Roman real contracts, was that the former group of contracts was not enforceable after mere delivery of the goods, but only after non-compliance with the conditions of the contract by one of the contracting parties[7], whereas the second group of contracts was immediately enforceable upon handing over the goods. This non-compliance would cause one of the contracting parties damage (*βλάβη*), from which a claim could originate[8]. Both Wolff and Kastner remark that these Greek/Hellenistic contracts did not resemble Roman real contracts, but were closer to the Roman innominate contracts, as described in Dig. 19.5.5*pr*[9].

In this chapter six *responsa* from the Digest concerning bilingual real contracts are analyzed in order to examine whether Roman jurists treated legal terms regarding real contracts cited in Greek in a purely Roman way, or took the Greek/Hellenistic nature of these legal terms into account. Four are on a form of *depositum,* namely the well-researched Dig. 16.3.26.1 (Paul. 4 *Resp.*), Dig. 32.37.5 (Scaev. 18 *Dig.*) and Dig. 40.5.41.4 (Scaev. 4 *Resp*.). In addition, Dig. 31.34.7 (Mod.12 *Resp*.) can be mentioned as *παρακατατίθεμαι* is used in the codicil quoted in that text. The text itself, however, is primarily concerned with marital (dotal) law. The remaining two bilingual real contracts from casuistic Roman legal literature are on *mutuum* and *pseudo-mutuum* (*ἀσφάλεια*) found in Dig. 31.88.15 (Scaev. 3 *Resp.*) and Dig. 50.12.10 (Mod. 1 *Resp.*) respectively. A complicating factor is that next to the law of obligations, inheritance law also played a role in the legal problems in all but the first and last *responsum* mentioned. The Roman law of inheritance is notoriously complex and on occasion departs from the general rules of the law of obligations.

6 Wolff *SZ* 74 (1956), 63-65. A difference between Roman real contracts and contracts constituted by *Zweckverfügung*, for example, is important in cases where the contractual obligations and the performed actions do not coincide. Such a case can be found in Dig. 12.1.11.1 (Ulpian. 26 *ad Ed*.), in which Proculus is quoted. In cases of *mutuum*, if the creditor gave the debtor ten sesterces but contractually agreed that only nine were to be returned, the creditor would receive a *condictio* to recover nine. If, however, a creditor gave a debtor ten sesterces and contractually agreed that eleven had to be given back (*ut undecim debeas*), a *condictio* was only given to recover ten. The rationale is that this real contract only existed for as much sesterces as the creditor *really* transferred to the debtor. Greek/ Hellenistic contracts based on *Zweckverfügung* did not have this problem and the creditor would be able to recover eleven sesterces.

7 On *Zweckverfügung* I have paraphrased Wolff's text. See also Ernst 2005, 31 and Mrsich 2018, 288. See Scheibelreiter 2020, 36-41 (esp. 41) for the latest, revised concept of *Zweckverfügung*.

8 Wolff *SZ* 74 (1956), 63 and Thür, G. (2006), '*Zweckverfügung*' in: *Der Neue Pauly*.

9 In this I paraphrase Wolff *SZ* 74 (1956), 66 and Kastner 1962, 51-52. For examples from the papyrological corpus see Kastner 1962, 51 & 86-99.

II *Depositum*

Under a contract of *depositum* in Roman law, a contracting party A, the depositor, agreed with a contracting party B, the depositary, that B would take care of a thing (the deposit) for A, after which the thing was handed over and the contract came into being[10]. In this contract there are no economic benefits for the depositary. The contract is based on altruism and reciprocity. No compensation may be given by the depositor, otherwise the contract must be seen as a contract of *locatio/conductio*[11]. No benefits were to be derived from the deposited things themselves, as the use of them by the depositary was strictly forbidden. Use of the things deposited, qualified as *furtum usus* (theft of the use of a thing), and whether out of gross negligence or on purpose, would make the depositary liable to an *actio furti*[12]. Because of the altruistic nature of *depositum*, it is logical that the depositary's duty of care is limited to not committing acts of gross negligence or *dolus* (wrongful intent)[13]. The risk of depositing a thing with a somewhat negligent depositary falls upon the depositor. A depositary would also be liable to an action if he could not or would not immediately hand over the deposited thing upon request, because he would then act with wrongful intent (*dolus*) according to Julian[14]. If matters were brought to trial and the depositary received a judgement against him, it would inevitably lead to his *infamia*[15].

10 This is stated, for example, in Dig. 44.7.1.5 (Gaius, 2 *Aur.*): *Is quoque, apud quem rem aliquam deponimus, re nobis tenetur* (Also he, with whom we deposit a certain thing, is bound to us by (handing over) the thing).

11 See Dig. 16.3.1.8 (Ulpian. 30 *ad Ed.*).

12 Gaius, *Inst.* III 196.

13 See Gaius' Dig. 44.7.1.5, in which the jurist also mentioned that gross negligence falls within the scope of *dolus* as well. Ulpian also stated that the depositary was only liable in cases of *dolus* in Dig. 13.6.5.2 (Ulpian. 28 *ad Ed.)* and Dig. 50.17.23 (Ulpian. 29 *ad Sab.*).

14 See Dig. 16.3.1.22 (Ulpian. 30 *ad Ed.*), in which Ulpian cited from the 13th book of Julian's Digest. In the same text, however, Ulpian applied some nuance to the claim that the depositary always acted with wrongful intent by not immediately handing over the thing deposited. Ulpian does this by quoting Marcellus, who stated that the depositary does not always act with wrongful intent if unable to comply, for example when the deposit is in a storage in a Roman province, which cannot be opened at the time of the request of the depositor, or if a depositary does not hand over the thing deposited because the conditions of the contract have not been fulfilled.

15 Gaius, *Inst.* IV 182.

In the Roman East *depositum* is known as either *παρακαταθήκη* or *παραθήκη*[16] (to place a thing in another's care)[17]. Even though contracts of *depositum* are most prevalent from the Roman Principate[18], the legal concept of *παρακαταθήκη* in the East[19], in any case, preceded the Roman conquest of Egypt, for *παρακαταθήκη* has been attested in Greek documents from Ptolemaic Egypt, such as Chr. Wilck. 198 (Arsinoite nome, 240 BC). In this document (l. 16) goods of the author are summed up of which some are *ἐμ* (read: *ἐν*) *παρακαταθήκηι*[20].

In the documentary papyri[21] the term *παρακαταθήκη* is found c. twenty times, while *παραθήκη* is attested c. hundred times. In the Digest the term *παρακαταθήκη,* and not *παραθήκη,* is used for this legal concept. Because of the prevalence of *παρακαταθήκη* in the Digest and *παραθήκη* in the papyrological sources, sources with both terms will be included in this chapter. An example of this legal concept is the contract of P. Lips. II 143 (Oxyrhynchus, 169-176 or 180-192 AD), in which a certain Tiberius Claudius Serenus received as a deposit seventeen *artabae* of wheat from the son of Heraclas[22]. The wheat was to be returned immediately upon request[23]. The contract states that if Tiberius did not adhere to that request, the depositor could by the law of deposits (*κατὰ τὸν* // [*τῶν παραθηκῶν νό*]*μον*), perform personal execution[24] on him and all of his goods[25].

Even though *depositum* and *παρακαταθήκη* are similar concepts, they have had different uses from the start. Strict rules applied to the Roman contract of *depositum*. The Hellenistic version of this contract could often

16 In ChLA XLIV 1300 (Arsinoites or Heracleopolites, late II AD), a contract drawn up in Latin on a papyrus which must be placed in a military context, the latinized / transliterated Greek *paratheca* is attested, in lines 3, 5 and 6. The interpretation of this document is difficult. ChLA XLIV 1300 can be interpreted as a regular *depositum* or a dowry disguised as a *depositum*. See Iovine *Tyche* 32 (2017), 64-67.

17 Kastner, however, argued that there is a slight difference between both terms: '*... der παραθήκη als Grundform, und den ihr artverwandten Rechtsinstituten der παρακαταθήκη die sich durch ein, die reine Vertragsbindung übersteigendes, Treueverhältnis auszeichnet…*' (Kastner 1962, 84). See also, without further argumentation, Frezza 1956, 172. In one contract which is PSI IX 1063 (provenance unknown, 117 AD) contracting parties referred to this contract as *δηπόσιτον* in l. 5 of the document. The contracting parties of the contract in PSI IX 1063 were three Roman *signiferi* of the first Lusitanian cohort, the centurion Tituleius Longinus and sixty infantrymen.

18 Kastner 1962, 3.

19 The Hellenistic contract of deposit is also found in other parts of the Roman East, for example in Dura-Europus, P. Dura 29 (251 AD).

20 The oldest attestation of *paratheke* in the papyri is from the Zenon archive. See P. Cair. Zen. IV 59579, 3 (Philadelphia, before 9 May 257 BC): *ἐν παραθήκηι*.

21 These attestations are found using the Duke database of documentary papyri (DDbDP).

22 P. Lips. II 143, 3-4: *ἐν* // [*παραθέσει*].

23 This can be seen in ll. 9-12 (partly supplemented).

24 For the execution clause (*praxis* clause), see pp. 108-109 and p. 138.

25 P. Lips. II 143, 9-10: *κατὰ τὸν* // [*τῶν παραθηκῶν νό*]*μο̣ν*. In c. 25 other papyri *ὁ τῶν παραθηκῶν νόμος* is mentioned. See also Scheibelreiter 2020, 101.

exceed the boundaries of traditional Roman *depositum*[26]. This divergence, as this chapter will explain, is one of the causes of the numerous cases of 'illegitimate' use of this contract type in Roman Egypt during the second century AD. For example, P. Warr. 6 (Ptolemais Euergetis, 198-199 AD)[27] and BGU I 114[28] (Arsinoites, after the 26th of August 142 AD)[29] are well-known cases in which a dowry was disguised as a deposit to circumvent the law on marriages regarding the Roman military[30].

In this section, four replies on *depositum* or *παρακαταθήκη* will be analyzed starting with Dig. 32.37.5 (Scaev. 18 *Dig.*) and Dig. 16.3.26.1 (Paul. 4 *Resp.*), because they are both centered around the theme of a *depositum irregulare*, after which Dig. 40.5.41.4 (Scaev. 4 *Resp.*) and Dig. 31.34.7 (Mod.12 *Resp.*) will be discussed. Both of these two responses feature *deposita* uncharacteristic for Roman law.

II.1 Dig. 32.37.5 (Scaev. 18 *Dig.*): A legacy of deposited money

The following text from Scaevola in which a Greek codicil mentioning a deposit is quoted, is fragment 68 in Lenel's *Palingenesia* under the title *de legatis et fideicommissis* (on legacies and testamentary requests). The fragment as a whole (Dig. 32.37) contains more Greek elements than only the codicil cited in Dig. 32.37.5. Another Greek document can be found, part of a testament, in Dig. 32.37.6[31]. In Dig. 32.37.1 two girls are mentioned, namely Glauce and Tyche Elpis, who presumably were freed (Greek?) slave-girls, and in Dig. 32.37.2 Greek '*λάγυνοι* of wine' are mentioned, which are 'vessels of wine'. The eight replies in the fragment are thematically bound by questions on the validity of the decisions made in testaments or codicils. It seems that the texts are otherwise not connected to each other. There are, with the exception of the two Greek documents, no explicit references to the Roman East.

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26 In the contracts P. Yadin 5 (110 AD) which is written in Maoza, Jordan, and found in Palestina and P. Yadin 17 (128 AD) for example, a much broader usage of deposit than is known from classical Roman legal writing can be seen. In the former contract the deposit must be considered a dowry. In the latter contract a wife 'deposited' money with her husband, which was actually a loan. See Czajkowski 2017, 29-32. P. Yadin I 17 is examined in more detail on p. 54.

27 See also P. Yadin I 5. See for other cases Manning 2014, 274-275 or Kastner 1962, 79.

28 BGU I 114 = FIRA III 19 = Chr. Mitt. 372.

29 BGU I 114, Col. I, 9-10: *Λοῦπος εἶπεν· νοοῦμεν ὅτι αἱ παρακαταθῆκαι προῖκές εἰσιν.* (The *Praefectus Aegypti* Marcus Rutilius) Lupus said: 'We know that the *deposita* are in fact dowries'. This judgement by Marcus Rutilius Lupus originates from 117 AD. The papyrus on which this and other sentences were written is from a later date (after 26 Aug. 142 AD). The papyrus contains extracts from cases and prejudicial decisions.

30 Illegitimate use of a contract type, in which contracting parties misuse a contract type to circumvent the rules of another contract type, could not lead to valid obligations according to Modestin. This is evident from Dig. 44.7.54 (Mod. 5 *Reg.*): *Contractus imaginarii etiam in emptionibus iuris vinculum non optinent, cum fides facti simulatur non intercedente veritate* (Fictitious contracts, even in sales, do not constitute a legal bond, for the sincerity of the act is simulated without recourse to the truth).

31 This text is discussed at pp. 171*sqq*.

The case in Dig. 32.37.5 is complicated[32]. Three parties play a role, which are the unnamed writer of the codicil; a young man named Maximus, who was a minor when the codicil was written and who was its intended beneficiary; and lastly Maximus' uncle named Julius Maximus, the depositor. The relation between the writer of the codicil and the minor Maximus is not completely clear. In the codicil Maximus is called *ὁ κύριός μου*[33], which may imply that the codicil writer was of lower social status than Maximus and his uncle[34]. It, however, could also just have a meaning similar to 'mister'. The writer may have been a freedman[35]. Kübler assumes that he probably was the freedman of Julius Maximus. It is, however, more likely that he was the freedman of Maximus' father, who was presumably deceased.

> Dig. 32.37.5 (Scaev. 18 *Dig.*)
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> Codicillis ita scripsit: "Βούλομαι πάντα τὰ ὑποτεταγμένα κύρια εἶναι. Μαξίμῳ τῷ κυρίῳ μου δηνάρια μύρια πεντακισχίλια, ἅτινα ἔλαβον παρακαταθήκην παρὰ τοῦ θείου αὐτοῦ Ἰουλίου Μαξίμου, ἵνα αὐτῷ ἀνδρωθέντι ἀποδώσω, ἃ γίνονται σὺν τόκῳ τρὶς μύρια, ἀποδοθῆναι αὐτῷ βούλομαι· οὕτω γὰρ τῷ θείῳ αὐτοῦ ὤμοσα". Quaesitum est, an ad depositam pecuniam petendam sufficiant verba codicillorum, cum hanc solam nec aliam ullam probationem habeat. Respondi: ex his quae proponerentur, scilicet cum iusiurandum dedisse super hoc testator adfirmavit, credenda est scriptura.
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> Someone wrote in a codicil the following: "I want all the following to be valid. To Maximus my lord, I want the fifteen thousand *denarii* to be given, which I took as a deposit from his uncle Julius Maximus in order to give the money to him upon reaching manhood, which with interest amounts to thirty thousand, for this I swore to his uncle". It is asked, whether the words of the codicil sufficed to claim the deposited money, since he only has this as evidence and nothing else. I have answered: from the facts presented to me, it is evident that the writing must be given credence, because in addition to this the testator has given confirmation by an oath.

Before the codicil was put in writing, Julius Maximus had given the testator 15.000 *denarii* as a *depositum*. The money was not to be returned to him as is normally the case with *depositum*, but to the nephew of the *deponens*

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32 Most recently this case is discussed by Éva Jakab in *Parakatatheke und letztwillige Verfügungen: Zum Hintergrund von D. 32,37,5* in *SZ* 138 (2021), 338-378.

33 *Κύριός μου* cannot be translated as 'my master' since Maximus is a minor and if the testator were a slave who had a master, he would not have had legal capacity. The term is often used as a polite way of addressing people, as is the case in P. Wisc. II 73, 1-2 (Oxyrhynchus, 122-123 AD): *Δίδυμος Ἡφαιστίωνι τῶι // κυρίῳ μου ἀδελφῶι χαίρειν* (Didymus greets his lord brother Hephaestus).

34 Jakab also states that the exact relationship between Maximus and the testator remains unknown. See Jakab *SZ* 138 (2021), 345-346.

35 Kübler *SZ* 28 (1907), 183, Scarcella *AUPA* 40 (2012), 633 Spina 2012, 245 and Häussler *SZ* 133 (2016), 432.

with interest. The agreement as attested in the codicil was confirmed by an oath by the testator to Julius Maximus. The depositary, however, had died, and a quarrel arose between presumably the heirs of the depositary and the depositor Julius Maximus / the beneficiary Maximus who had by the time of the testator's death come of age.

The total amount of money which is to be given to the beneficiary Maximus is 30.000 *denarii*, meaning that the interest is an amount equal to the initial deposit of 15.000 *denarii*[36]. This can be explained by *ἀνδρωθέντι* (coming of age). The young Maximus needed to come of age to receive the money. During the time it took for Maximus Junior to come of age, the testator could invest the capital. That the deposit could bear interest is remarkable, taking the classical Roman law on *depositum* into account. If this coming of age will take as much as 10 years, the interest rate would only be approximately 7%. If the depositor, however, had asked the standard interest of 12% per year[37] in Roman Egypt (one *drachma* per *mina* per month), a total some of 30.000 *denarii* implies that the minor Maximus would have come of age in six years and a month. Due to the illogical timespan of six years and one month it is unlikely that this standard interest rate was asked. Because the interest rate and the timespan of the *depositum* cannot be harmonized into round figures it seems implausible that the testator had a real interest rate in mind. It is more likely that the contracting parties agreed upon a fixed amount of money in lieu of interest for the deposit, which can be explained by the Hellenistic nature of *παρακαταθήκη*. The amount in this case is exactly the *duplum* (twice the value of the original sum). In Hellenistic legal documents, it often occurs that the payment of the *duplum* of a deposit is mentioned as a penalty clause. The writers of these penalty clauses may have used them to hide the interest rate[38].

II.2 Roman and Hellenistic law on *depositum* and *parakatatheke* with regard to Dig. 32.37.5

The money deposited by Julius Maximus could not sit idly, otherwise it would not have yielded the promised interest of 15.000 *denarii*. The testator / depositary had to make use of the money to make a profit, even though according

36 That a third party (Maximus) could be beneficiary to a contract between his uncle and the testator is not conform Roman law, which might have been the reason for the contracting parties to opt for this Hellenistic legal concept. See Jakab *SZ* 138 (2021), 358*sqq*. Jakab argues that based on among others pseudo-Demosthenes, that *parakatatheke* with two contracting parties and a beneficiary was normal practice in Attic law. See also Jakab *SZ* 138 (2021), 368.

37 This maximum rate of interest is attested in the *Gnomon Idiologi* (§ 105), in Ptolemaic times the maximum interest was as high as 24%, meaning two *drachmae* per *mina* per month. Because the contract in Dig. 32.37.5 is a *depositum* and not an interest-bearing loan, it cannot be said that the regulations on interest applied.

38 The subject of the *duplum* will be elaborated later in this chapter. See pp. 109-110.

to Gaius the use of a thing deposited is explicitly forbidden and considered to be theft[39]. Scaevola, however, seems to have had no problem with this type of *depositum*, which is known as a *depositum irregulare* to modern scholars[40]. The contract of *depositum irregulare* is a type of deposit, in which a certain amount of money (or in some cases wheat or other fungible goods) is placed into the care of the *depositarius*. As such, the contract was known in Attic law[41]. The contract was beneficial to both contracting parties as the depositary could use the money to make a profit, while the depositor could ask for interest in various ways[42]. In this section two functions of *depositum irregulare* are highlighted, namely the banking function of *depositum irregulare* and its function as 'pseudo-credit'. The banking function was used by depositors, so that their money was safe and immediately due upon request. The depositors handed over their money to a banker, who could invest the money as the use of the deposit was permitted by the depositors. This is different from the function as 'pseudo-credit', in which a *mutuum* is feigned. The depositor would 'deposit' money with the depositary, who could use the money as if it were a loan. The rules of *depositum* can be used to the advantage of the depositor / creditor, meaning that the deposit is immediately due upon request and that transfer of ownership of the coins only occurs when the coins are no longer traceable under the depositary. This type of pseudo-credit gave a creditor a stronger position towards the debtor and third parties than a regular *mutuum* or *δάνειον*. Due to the stronger position of the creditor than under a regular *mutuum*, this construction is used in regions where obtaining credit is difficult. In addition, if a person in need of a loan was of a low socio-economic status, he could have had no other choice than to accept this type of 'pseudo-credit'. The wording of the Greek text in Dig. 32.37.5 is an indication that the *depositum irregulare* was used here as pseudo-credit too. Given the facts of this case a banking context is unlikely.

39 Gaius, *Inst.* III 196 (Just. *Inst.* IV 1.6).

40 The term cannot be found in the works of the Roman jurists or glossators. Cf. Litewski *RIDA* 21 (1974), 215.

41 The *depositum irregulare* in Attic law is often used in a banking context. The following passage of Demosthenes (Dem. 16.13), in which Phormio managed the daily affairs of a bank in Piraeus, is indicative for this: *καὶ ἐμίσθωσεν ὕστερον Ξένωνι καὶ Εὐφραίῳ καὶ Εὔφρονι καὶ Καλλιστράτῳ, καὶ οὐδὲ τούτοις παρέδωκεν ἰδίαν ἀφορμήν, ἀλλὰ τὰς παρακαταθήκας καὶ τὴν ἀπὸ τούτων ἐργασίαν αὐτὴν ἐμισθώσαντο* (and thereafter he rented out to Xenon and Euphraeus and Euphro and Callistratus, and to them he did not hand over a capital of his own, but they leased the deposits, and the interest that would be generated by the deposits). In this fragment the banker Apollodorus is using the deposits he received to gain profit, as he is renting them out to the contracting parties mentioned in the text. The verb *μισθόω*, which is used twice, indicates that Apollodorus does not do this free of charge.

42 The classic form of Roman *depositum*, however, was free of charge, as stated above.

II.2.1 Roman law on depositum

The functions and context of *depositum irregulare* in Roman legal writing of the first and second century AD and Hellenistic contracts will be the subject of this section. At the end, Scaevola's Dig. 32.37.5 will be discussed in the light of Roman law and these Hellenistic contracts. Scaevola must have been familiar with the *depositum irregulare* because two other replies of his allude to it. In Dig. 36.1.80.1 (Scaev. 21 *Dig.*) a deposit is mentioned and the author added explicitly, that the money deposited had to be given to her grandchildren without interest: '*uti omnis substantia mea sit pro deposito sine usuris apud Gaium Seium et Lucium Titium, … ut hi restituant nepotibus meis prout quis eorum ad annos viginti quinque pervenerit*[43]. The facts from the provisions of this testament resemble those from the codicil of Dig. 32.37.5. A deposit is made by a testator in favor of her grandchildren who are minors. The heirs, in this case her two sons, are entrusted to hand over the testator's belongings as a deposit to Gaius Seius and Lucius Titius, who will safeguard them and hand them over to the testator's grandchildren *sine usuris*. This last addition only has meaning if a concept of a *depositum* that does bear interest, i.e. a *depositum irregulare*, is acknowledged by both Scaevola and the contracting parties.

A second case, comparable to Dig. 32.37.5, is mentioned in Dig. 34.3.28.8 (Scaev. 16 *Dig.*)[44]. Here, an unnamed testator wrote that the money which Apronianus received as a deposit had to be given to the testator's son upon reaching the age of twenty. The testator explicitly forbade to claim interest on the deposited money: *eiusque pecuniae usuram exigi veto*[45]. In light of these three *responsa* it seems that such *deposita* via a *fideicommissum* in favor of a minor usually bore interest. Interestingly, in his replies Scaevola did not waste any words on the validity of this kind of contract.

Scaevola was not the first jurist who became familiar with *depositum irregulare*. One of the earliest attestations of *depositum irregulare* can be found as early as the first century BC. The jurist Alfenus Varus[46], a pupil of Servius, must have been familiar with this contract type, as can be deduced from Dig. 19.2.31 (Alfenus, 5 *Dig. a Paul. Epit.*).

> Dig. 19.2.31
>
> Idem iuris esse in deposito: nam si quis pecuniam numeratam ita deposuisset, ut neque clusam neque obsignatam traderet, sed adnumeraret, nihil alius eum debere apud quem deposita esset, nisi tantundem pecuniae solveret.

43 Dig. 36.1.80.1: 'that all my belongings are deposited without interest with Gaius Seius and Lucius Titius … in order that they restore it to my grandchildren, when they reach the age of twenty-five years'

44 See for both cases Litewski *RIDA* 21 (1974), 245-247.

45 Dig. 34.3.28.8: 'I forbid that interest from this amount of money is demanded'.

46 Cf. Litewsky *RIDA* 21 (1974), 232.

> The same is legally so in case of a deposit, for if someone would have deposited money in cash in this way, that he handed over the money neither in a closed container nor provided with a seal, but counted it out, then he, who received the money as a deposit, is indebted in no other way, than to pay the same amount of money.

In Dig. 19.2.31 Alfenus, if correctly summarized by Paul, acknowledged the existence of two forms of deposit concerning money in cash. In the first case the money is deposited after it is put into a container or in a *saccus* (moneybag) which is closed off, or after the money has been made recognizable by adding a seal to its container. In the second case, the money has only been counted and then deposited. In this second case, according to Alfenus, the depositary is only obligated to give back an equivalent amount of money, but not exactly the same coins, contrary to when these coins are put into a container or provided with a seal. By allowing the depositary to give back an equivalent amount of money, Alfenus implied that the depositary could use the money deposited. The innovation that the use and consumption of the deposited goods is permitted is the essence of a *depositum irregulare*.

Scaevola was also not the last Roman jurist who was familiar with *depositum irregulare*. An occurance of the *depositum irregulare* can also be seen in the works of the second/third century AD jurist Ulpian, who also recognized this form of deposit[47]. Persons deposited money at *nummularii* or *mensularii*[48] entering a contract of *depositum* (*irregulare*). This would benefit both contracting parties, as the depositor's money would be safe and readily available upon request, while the depositary, the *mensularius* who was the depositary of a multitude of depositors, had a large sum of money to invest in for example real estate or interest-bearing loans. Even though the 'banker' had spent a large quantity of the money, he could still remain solvent as long as not all the depositors requested their deposits simultaneously, which would only happen in cases similar to a modern-day bank run. There are, however, cases in the Digest, dealing with the insolvency of *nummularii*, such as Dig. 16.3.7.2:

> Dig. 16.3.7.2 (Ulpian. 30 *ad Ed.*)
>
> Quotiens foro cedunt nummularii, solet primo loco ratio haberi depositariorum, hoc est eorum qui depositas pecunias habuerunt, non quas faenore apud nummularios vel cum nummulariis vel per ipsos exercebant. Et ante privilegia igitur, si bona venierint, depositariorum ratio habetur, dummodo eorum qui vel postea usuras acceperunt ratio non habeatur, quasi renuntiaverint deposito.
>
> Whenever money brokers go bankrupt, it is customary to take the depositors into account first, which means those who have deposited money, not those who put their money to use with interest at, together with or through money brokers.

47 Litewski *RIDA* 22 (1975), 294.

48 As is the case in Dig. 2.14.47.1 (Scaev. 1 *Dig.*) and Dig. 42.5.24.2 (Ulpian. 63 *ad Ed.*).

> And therefore, if goods will be sold, one must take the depositors into account before privileged creditors, provided those are not being taken into account who received interest afterwards, as if they had revoked the deposit.

In this passage from Ulpian's commentary on the edict of the *praetor,* the parties who have deposited money can get their deposits back in case of insolvency of the banker, even before privileged creditors, which by this time for example could be the *fiscus*. The condition is that the depositors have not received monetary gain from their deposits at any time. In the last sentence Ulpian adds a second case, in which the original contract between parties was a regular deposit of money, but parties later agreed that the depositary could use the money to make a profit in exchange for interest. Apparently, if a depositor would willingly expose his deposit to certain risks in order to gain profit, a protection from losses in case of insolvency of the depositary was no longer seen as reasonable.

This text, however, is allegedly interpolated[49]. One of the reasons to assume an interpolation in this case is Ulpian's text in Dig. 42.5.24.2. In this text Ulpian states that the depositors came not *ante* but *post privilegia*, preferring the position of the privileged creditor to that of the depositor:

> Dig. 42.5.24.2 (Ulpian. 63 *ad Ed.*)
>
> In bonis mensularii vendundis post privilegia potiorem eorum causam esse placuit, qui pecunias apud mensam fidem publicam secuti deposuerunt. Sed enim qui depositis nummis usuras a mensulariis acceperunt a ceteris creditoribus non separantur, et merito: aliud est enim credere, aliud deponere. Si tamen nummi exstent, vindicari eos posse puto a depositariis et futurum eum qui vindicat ante privilegia.
>
> It was decided that in case of the sale of the goods of a banker those, who had deposited money with a bank, trusting to its creditworthiness, had the best position after privileged creditors. But those who accepted interest on deposited money from the bankers must not be separated from the other creditors, and this is correct. After all being a creditor is something different than a depositor. If the coins are still traceable, however, I think they can be revindicated by the depositors and that he who revindicates will be preferred over privileged creditors.

Similar to Dig. 16.3.7.2 Ulpian stated in this fragment that no special protection must be accorded to depositors who deposited money to gain profit. The chances of a reward deprive them of this protection. In the last sentence,

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49 Litewski *RIDA* 22 (1975), 291*sqq*. Litewski claims this text to be interpolated in post-classical times because of several grammatical issues, for example the change of tenses in *habuerunt* and *exercebant,* the inversion of *quas non* to *non quas* and the repetition of the expression *rationem habere*. Furthermore, the apparent antinomy between the two texts by Ulpian cited is for Litewski a reason to assume interpolation.

Ulpian writes that the *reivindicatio* can be used when the coins are still traceable. The consequence of this line of reasoning is that in case of *depositum irregulare* the coins that were not used and were still identifiable were considered by Ulpian to remain in the *dominium* of the depositor, because the *reivindicatio* is an action only given to owners. The first line in Dig. 42.5.24.2 is concerned with depositors, who did not receive interest and whose coins were no longer identifiable. In this text these depositors must be taken into account *'post privilegia'*. *'Post privilegia'* is contrasted by Dig. 16.3.7.2 in which these depositors must be taken into account '*ante privilegia*'. Efforts to reconcile the antinomy between the two texts date back as far as the glossators. In the *Gl. 'post' ad Dig. 45.5.24.2*[50] and *Gl. 'habetur' ad Dig. 16.3.7.2*[51], the glossators mention some options to reconcile the texts. First of all, the glossators mention that between the two texts a law may have been enacted to privilege the depositors, meaning that Dig. 45.5.24.2 is older than Dig. 16.3.7.2. Another, more plausible way to reconcile the texts is to say that the depositors are admitted before some privileged creditors, namely the creditors with a personal privilege, but after other privileged creditors, namely the creditors with a real privilege. Therefore, the alleged contradiction between the two texts does not necessarily mean that one of the texts is interpolated, as both can be reconciled.

In both texts, in any case, Ulpian seems to accept the usage of *depositum irregulare* in banking practice and grants depositors who do not intend to make a profit a privileged position over unsecured creditors. Furthermore, because both texts are from Ulpian's commentary on the edict of the Roman praetor, it may be assumed, that by the second century AD *depositum irregulare* was not only known from *responsa* and incidental occurrences, but was a contract commonly used in Roman society.

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50 *Gl. 'post' ad Dig. 45.5.24.2*: *imo ante privilegia debent deponentes admitti: ut supra deposi. l. Si hominem. § quotiens. qui est contra. Solutio: Dic hic post privilegia, id est, postquam facta est lex quae dat privilegium deponentibus. 2. Vel post privilegia, scilicet quaedam cum post funerariam: ut supra de relig. l. pen. 3. Vel solutio: ut ibi in d. § quotiens in glo. ii.* (On the contrary before privileged creditors depositors must be admitted: as is the case in Dig. 16.2.3.7.2 which is against this. Solution: say 'after privileged creditors', such as here, that is to say, later a law has been made which gives a privilege to depositors. 2. Or after some privileged creditors: such as after the privilege of the undertaker: as seen above in Dig. 11.7.45. 3. Or solution: as seen there in the second gloss on Dig. 16.3.7.2).

51 *Gl. 'habetur' ad Dig. 16.3.7.2*: *Vel admittuntur ante privilegia personalia; sed postea realia. Sed & quaedam personalia eis praeferuntur ut dotis: ut Cod. qui po. in pig. hab. l. fin. Item funeraria: ut supra. de relig. & sumpt. fune. l. penul. Item eius, qui in refectionem rei credidit: ut infra. qui po. in pign. ha. l. interdum. vel dic ut ibi.* (Or they are admitted before personal privileges, but after real privileges. But some personal privileges are preferred above them, such as the privilege of the dowry: as seen in Cod. 8.17.12. And in the same way also funerary privileges: as seen above in Dig. 11.7.45. And in the same way the privilege of him, who lent money to restore a thing: as seen under in Dig. 20.4.5, or say as is written there).

II.2.2 Hellenistic law on depositum / parakatatheke

In papyrological sources from the second century AD, contracts of money deposit constitute the most frequent form of deposit[52]. The contract for this form of deposit, *para(kata)theke*, has some peculiarities when it is used as 'credit in disguise'. Contracting party A would deposit money or fungible goods with B, in order to gain a profit. Because of the nature of this contract, the things deposited must be returned upon request. This also holds true for the amount of money deposited. In this case the pseudo-debtor found himself in a rather uncomfortable situation. The depositary could use the money, but the request to return the deposit already invested, and the corresponding penalties for non-compliance at any time, would hang over his head[53]. The terms of this contract type, which can be qualified as disadvantageous for the depositary, did not, however, deter parties in search of credit. In SB X 10722, 3-6 (Tebtynis, II AD) a woman named Didyme supplied a hypothec on a quarter share of her house and registered it with the officers of the property registry in order to obtain a loan of 240 *drachmae*. This real security, however, was apparently not enough for the creditor and instead of a loan, the contracting parties agreed upon a deposit. In order to illustrate a typical *depositum irregulare*, a contract template, attested in P. Oxy. XXXIII 2677 (Oxyrhynchus, II AD), is shown:

P. Oxy. XXXIII 2677 (Oxyrhynchus, II AD)

Τίς τινος τοῦ τινος μητ(ρός) τινός ποθέν
τινί τινος τοῦ τινος μητ(ρός) τινός ποθεν
χαίρειν. Ὁμολογῶ ἔχειν παρὰ σοῦ διὰ
χ[ει]ρ[ὸ]ς ἐν παραθέσει ἀργ(υρίου) (δραχμὰς) ποσὰς γί(νονται) (δραχμαὶ) ποσαί·
ἃς κ[α]ὶ [ἀ]ποδώσω σοι ὁπηνίκα ἐὰν αἰρῇ ἀνυπε[ρθ]έτως. Εἰ δὲ μή, ἐκτείσω σοι κατὰ τὸν
[τῶν] παραθηκῶν νόμον γεινομένης
σοι τῆς πράξεως ἔκ τε ἐμοῦ καὶ ἐκ τῶν ὑπαρχόντων μοι πάντων καθάπερ ἐκ
δίκης. Κυρία ἡ χεὶρ τῆς παραθήκης οὖσά μου
τοῦ τινος ἰδιόγραφος [δισ]σὴ γραφεῖσα παντταχῇ ἐπιφερομένη καὶ παντὶ τῷ ὑπὲρ σοῦ
ἐπιφέροντι. (Ἔτους) . [.]

N.N., son of N.N., whose mother is N.N. originating from N.N. greets N.N. whose father is N.N. and whose mother is N.N. originating from N.N. I agree to have received from you in cash as a deposit of X silver *drachmae*, makes X *drachmae*, which I will return to you directly upon your request. If I do not, I will pay you the fine according to the law of deposits while you have the right

52 Taubenschlag 1955. 351.
53 Roth 1970, 18.

> of execution on me and all my belongings as if there had been a judicial decision. This handwritten contract of deposit being written in twofold by me, N.N., personally, is valid, wherever it is produced and for everyone who produces it on behalf of you. In the year…

In lines 6-7 of the template the author mentions a law of deposits (*τὸν τῶν παραθηκῶν νόμον*), which is common in such contracts. The exact meaning of this 'law of deposits' remains unclear, but its use is always connected with the penalty clause of the contract[54]. The expression is attested no earlier than the first century AD[55]. The contract P. Athen. 28, 23-24 (Theadelphia, 86 AD) is one of the first attestations of this law on deposits: *ἀκολούθως τῶι τῶν // παραθηκῶ*[*ν ν*]*όμωι* (according to the law of deposits). P. Tebt. Wall. 9, 15-18 (Tebtynis, 33 AD) may be the first document containing such an expression, but a different word is used instead of *nomos* as the papyrus reads *τήν*[56]. The youngest contract with this formula comes from the fourth century AD: P. Ryl. IV 662, 15-16 (Antinoopolis, 364 AD). Due to the fact that references to this *nomos* only appear in Roman times, Kastner theorizes that it could derive from a first century imperial constitution that is no longer preserved[57]. Roth theorizes that such a *nomos* came into existence to fortify the penalty clause of the *duplum* discussed shortly. The Roman *depositum* is a contract that would be interpreted by judges using their own standard of *depositum.* Fearing that Roman judges would not uphold the *duplum* without it being incorporated into a broader legal framework, the *nomos* was created, or so Roth suggests[58]. Although neither theory is backed by papyrological evidence, Roth's theory seems more plausible, since Roman Egypt had its own distinct and hard-wearing legal practice, which would perhaps not be as easily affected by a 'foreign constitution' as Kastner suggests[59].

The exact benefits for the depositor remain unclear from the template of P. Oxy. XXXIII 2677. For example, no exact formula for interest is mentioned. Contracts of *para(kata)theke* mentioning interest are rare. One of the few, if not the only, example is Roman. In P. Hamb. I 2 (Babylon (Heliopolites), 59 AD) Lucius Vettius, a cavalryman of the *Ala Vocontiorum*, deposited

54 Scheibelreiter 2020, 100-101.

55 Between the first (I AD) and last (IV AD), attestations are plentiful. Examples per century are: P. Athen. 28, 23-24 (Theadelphia, 86 AD), SB VI 9291, 24-28 (Theadelphia, 93 AD), BGU XI 2042, 16-17 (Soknopaiou Nesos, 105 AD), BGU II 637, 6-9 (Arsinoite Nome, 212 AD) and P. Oxy. XL 3134, 7-9 (Oxyrhynchus, 258-259 AD). For a complete list of attestations, see Scheibelreiter 2020, 101.

56 P. Tebt. Wall. 9, 15-18: *ἐὰν δὲ μ*[*ὴ ἀπ*]*ο*ḍ[*ῶ ἐκτίσει τῷ*] // *Χράτῃ κατὰ τὴν τῶν παρ*[*αθηκῶν . . . . .*] (if he will not return it, he will pay it back in full to Chrates according to the … of deposits).

57 Kastner 1962, 43. See also Taubenschlag 1955, 349.

58 Roth 1970, 95. In Roman law there is no penalty clause for double the value in cases of *depositum*, except for the (exceptional) cases mentioned, such as the *depositum miserabile.*

59 An overview of literature has been given in Scheibelreiter 2020, 101-102. He mentions that the *nomos* could have been a "*Verweisnorm in gewohnheitsrechtliche Vorstellungen*".

600 *drachmae* without interest (l. 14: *ἀτόκους*)[60]. In the contract another form of interest is mentioned, namely default interest (*Verzugszinse*). When the deposit was not paid back in time the depositaries were contractually bound to pay interest over the extra time and in the case of P. Hamb. I 2 an additional fine of 120 *drachmae*[61]. Unless otherwise agreed upon, the deposited sum is due immediately and has to be given back at first demand. If the depositary could not immediately perform, he would be in default. The concept of interest in case of default (*post moram*) on an obligation to return deposited money is not only known from Hellenistic legal sources, but also from Roman legal writing. An example of this can be found in the replies of Papinian, namely Dig. 16.3.25.1 (Papinian. 3 *Resp.*): '*Qui pecuniam apud se non obsignatam, ut tantundem redderet, depositam ad usus proprios convertit, post moram in usuras quoque iudicio depositi condemnandus est*'[62].

Furthermore, to circumvent mentioning interest, it is possible that the depositor described the amount of the deposit in the contract as higher than the actual amount deposited. This strategy is customary in Demotic and Greek loan contracts[63], but it is without effect in a purely Roman legal context in which only Roman law is used as it does not conform to the 'real' character of *depositum*.

The penalty clauses in the contracts of deposit were often framed to the advantage of the depositor. In ll. 6-10 of the template cited earlier, these penalties are mentioned. If the depositary did not hand over the deposit immediately upon request, he risked execution of all of his property. This may not seem beneficial to the depositor. The amount to be paid after the execution, however, was usually computed as a *duplum* (the amount of the deposit in twofold). Although it does not appear as such in the template, this *duplum* is attested in many contracts of *depositum*, e.g. SB XIV 12105 (Theadelphia, 129 AD): '*… ἀποτεισάτω παραχρῆ- // μα τὴν παραθήκην διπλῆν καὶ // τὸ βλάβος ἀκολούθως τῶι [τῶν] παρα- // θηκῶν νόμωι*'[64]. This condemnation to double the value of the deposit seems to reflect an older Mediterranean trade practice, as according to Lipsius it is also attested in Attic law and the code of Gortyn[65]. Moreover, this *duplum* is also attested in Archaic Roman law, as

60 The word *ἄτοκος* in Greek contracts can be deceptive, for it could also mean 'while their addition (i.e. interest) is in them' following Demotic contracts as argued by Vandorpe (2002, 109). See also Pestman *JJP* 16-17 (1971), 22-23.

61 P. Hamb. I 2, 18-20: '*καὶ [τ]οὺς τόκους τοῦ ὑπερπεσόν-// το[ς] χρόνου καὶ ἐπίτιμον ἄλλας ἀργ(υρίου) (δραχμὰς) ἑκατὸν // εἴκοσι*' (and interest if the term is exceeded and a fine of an additional 120 *drachmae*).

62 Dig. 16.3.25.1: He who puts money to his own use, which was deposited with him unsealed, in order that he would return the same amount, should also be condemned to pay interest in case of default with the action based on deposit.

63 Vandorpe 2002, 108-110.

64 SB XIV 12105, 20-23: '… let him immediately pay double the amount of the deposit [i.e. 200 silver drachmae] and damages according to the law of deposits'. See also P. Lond. II 298, 17-19 (Krokodilopolis, 124 AD). See (also for more literature) Kastner 1962, 43.

65 Lipsius 1915, 737-738. See the law code of Gortyn III, 14*sqq*. For this *duplum* see also Exodus 22.7 and Coll. X 1.1.

can be seen in *Collatio*[66] X 7.11, which refers to the Twelve Tables as cited by Paul in his second book of the *Sententiae*: *Ex causa depositi lege duodecim tabularum in duplum actio datur*[67]. Various classical Roman jurists such as Neratius Priscus, Ulpian and Modestin connect this *duplum* to cases of the so-called *depositum miserabile*[68]. An example can be found in Dig. 16.3.1.1 (Ulpian. 30 *ad Ed.*)[69]:

> Dig. 16.3.1.1
>
> Praetor ait: 'Quod neque tumultus neque incendii neque ruinae neque naufragii causa depositum sit, in simplum, earum autem rerum, quae supra comprehensae sunt, in ipsum in duplum, in heredem eius, quod dolo malo eius factum esse dicetur qui mortuus sit, in simplum, quod ipsius, in duplum iudicium dabo'.
>
> The praetor says: "When things are given as a deposit, not in cases of tumult or fire or collapse or shipwreck, I will give an action for once the amount, in the cases previously summed up however I will give an action against [the depositary] himself for double the amount and against his heir, when it is said that the deceased did something fraudulently, I will give an action for once the amount, when the heir did this himself I will give an action for double the amount."

Because the Hellenistic documents on deposit generally do not indicate interest, it has been argued that the penalty of the *duplum* acted as a substitute[70] for interest. These *deposita* had to have had some sort of economic value to the depositors or pseudo-creditors in order for them to be engaged in these contracts. With the *duplum* acting as interest, the *depositum irregulare* had clear advantages to the depositor over a regular money loan, as the penalty of the *duplum* was imposed whenever the depositary failed to return the money on first demand. An advantage for the pseudo-debtor was that the amount of the interest was fixed, so that it would not go beyond twice the sum deposited, which would happen in a little over six years at the maximum interest rate in case of a normal loan. Therefore, it is, as stated above, no coincidence that the interest in Dig. 32.37.5 for the *parakatatheke* is exactly the *duplum*, known

66 The *Collatio Legum Romanarum Mosaicarum* itself, however, is a source from the fourth century AD, in which the author aims to reconcile Roman legal writings with the laws of Moses. See for the *duplum* in Coll. X 7.11, Scheibelreiter 2020, 115.

67 Coll. X 7.11 (Paul. 2 *Sent.*): An action on account of deposit is given for twice the value based on the law of the Twelve Tables. This *duplum* must be connected either to theft or (and this is more likely according to Evans-Jones) *depositum miserabile*. Cf. Evans-Jones *LABEO* 34 (1988), 188-208. See below.

68 When a person deposits his belongings because of a dire situation, such as tumult, fire, collapse or shipwreck, the deposit is categorized as a *depositum miserabile*. An action will be given for twice the amount of the *depositum*, because to the Romans it is reprehensible to defraud a person in need. For post-classical Roman law on *depositum miserabile* see Just. *Inst*. IV. 6.17. see for Dig. 16.3.1.1 also Scheibelreiter 2020, 146-147.

69 See also Dig. 16.3.18 (Nerat. 2 *Membr.*) and Coll. X 2.7 (Mod. 2 *Diff.*).

70 This is argued by scholars such as Roth 1970, 18, Wenger 1953, 802 and Frezza 1956, 142.

from many Hellenistic contracts. The contractual profit in fact originated from this *duplum*, which is mentioned as such in this contract to adjust it to the Roman practice.

Barring contractual terms to the contrary, a sanction such as the *duplum* would not necessarily befall the depositary in every case of non-compliance. The duty of care for a depositary was so low under Roman law, that the depositary would only be liable in cases of *dolus*. A high liability threshold for the depositary must also be assumed in Roman Egypt. Taubenschlag states that the depositary was liable in cases of *casus* (accidental loss) too[71]. However, contractual liability as known from practice differed from the standard regulations regarding *depositum*. *Paratheke* documents often transfer all the risk from the depositor to the depositary with an *ἀκίνδυνος*-clause. An example of this can be found in the *paratheke* contract of BGU XI 2042, 9-15 (Soknopaiou Nesos, 105 AD):

BGU XI 2042, 9-15 (Soknopaiou Nesos, 105 AD)

ἔχειν παρ᾽ αὐτοῦ
τὸν ὁμολογοῦντα ἀργυρίου ἐπισήμου νομίσμα-
τος κεφ[αλ]αίου διὰ χ̣ειρ[ὸς ἐ]ξ [οἴ]κου [δραχ]μὰς
διακοσίας παραθήκην ἀκίνδυνον [πα]ντὸ[ς]
κινδύνου καὶ ἀνυπόλογον παντὸς ὑπολόγου,
ἃ[ς κ]αὶ [ἀπο]δώ̣σει[ν τὸν ὁμολ]ογοῦντα [τῶι]Ὥρωι
ὁπηνίκα ἐὰν αἱρήσῃ ὁ Ὧρος ἄνευ πάσης ὑπερ-
θέσεως καὶ εὑρησιλογείας.

…that the contracting party has received from him two hundred *drachmae* consisting of minted silver coinage, being the capital sum, in cash out of his house as a deposit guaranteed against all risks and subject to no claim, which the contracting party will give back to Horos at the moment of Horos' choosing without any delay or subterfugues.

In this document of pseudo-credit (the author even wrote *κεφαλαίου*, which is the term used for the capital sum in a loan)[72] all risk has been shifted from the depositor to the depositary. Due to the clauses in the contract, the depositary was liable for all the risks which could befall the deposit. If such a *κινδύνος*[73] would occur and the depositary would not be able to give back the deposited amount, the depositor was entitled to receive double the

71 Taubenschlag 1955, 351. He comes to this conclusion by assuming that the transfer of ownership of the deposited money or fungible goods is conditional on the return of an equivalent amount to what was deposited.

72 The formula is almost exactly the same as in P. Mich. III 188, 6-7 (Bacchias, 120 AD), which is a document of loan.

73 Even though the text specifies all risks, some risks are excluded from this according to Kastner, such as war, catastrophe and other cases of *vis maior*, to which end he cites Wenger 1953, 802 & 785[552]. Kastner 1962, 36.

value of the deposit in case of a non-timely payment, because of the penalty clause of the *duplum*. With such an attribution of risks by which means the 'depositary' is liable for almost all forms non-conformity, the *duplum* could transform from a penalty clause in cases of breach of his contractual duties by the depositary, into an instrument used by the depositor to gain a profit.

II.2.3 Dig. 32.37.5 in light of Roman and Hellenistic law on depositum / parakatatheke

Two other cases from the *responsa* of Scaevola resemble Dig. 32.37.5, namely Dig. 34.3.28.8 and Dig. 36.1.80.1. In both cases a sum of money is deposited with a person, who has to keep it until the beneficiary comes of a certain age. In these two cases, however, the testator unambiguously forbade the use of the money by stating that no interest was due. Even though they superficially resemble Dig. 32.37.5, these cases cannot be categorized as *deposita irregularia*. A text by Scaevola that can be categorized as a *depositum irregulare* however, is Dig. 2.14.47.1 (Scaev. 1 *Dig.*). In this reply a deposit with interest is mentioned in a banking context (*mensularius*). There are no indications that this case has a Hellenistic background[74]. In the reply of Dig. 16.3.28 (Scaev. 1 *Resp.*) too, a distinctive Roman case[75] of *depositum irregulare* can be found with strong connections to banking practices. The banker Quintus Caecilius Candidus administered money deposited in his *ratiuncula* (account for small amounts), with the promise that he would use the money to generate profit (*ut usuras eorum accipias, curae habebo*[76]).

The facts of the case in Dig. 32.37.5, however, are not quite the same as in the *depositum irregulare* contracts from the Hellenistic East. In these contracts the money deposited had to be given back to the depositor and not to beneficiaries. As seen above, in the template of P. Oxy. XXXIII 2677, for instance, the depositary must give the money deposited to the depositor and not to a third party (a beneficiary). Such constructions are not attested in papyrological sources. It is perhaps no peculiarity, therefore, that the testator in Dig. 32.37.5 confirmed these terms by taking an oath. Scaevola's *responsum* and the Hellenistic *para(kata)theke* documents have in common that they both feature a *depositum* which can be used by the depositary and that the *duplum* from these Hellenistic contracts can be found in the interest mentioned in the *responsum*, which increased the deposit to exactly the amount of the *duplum*. The other terms in the contract, however, do not fit the standard contract of *depositum* from the Hellenistic East. As the contract of *parakatatheke* in

74 That the Latinized Greek *chirographum* is mentioned cannot be taken as indication for a Hellenistic context, because by the second century AD this instrument was already well-known in Roman financial spheres. See, for example, Terpstra 2013, 62.

75 This can be said with some certainty, because this case has not been anonymized. The contracting parties are Quintus Caecilius Candidus and Paccius Rogatianus.

76 Dig. 16.3.28: "… I will attend to it so that you will receive interest from them [i.e. the coins deposited].

Dig. 32.37.5 does not fit within the Roman concept of *depositum,* but is strongly rooted in Hellenistic legal culture, Scaevola could have denied the validity of this contract[77]. Scaevola, however, validated the contract because of an oath.

II.3 *Iusiurandum* and the legal question in Dig. 32.37.5

According to the codicil quoted by Scaevola the testator had sworn an oath to Julius Maximus to give the deposit plus interest to Maximus minor upon coming of age. The oral swearing of the oath is reflected in the text by the Greek verb *ὤμοσα* (to swear an oath). This *ὤμοσα* may hint to a verbal contract in the form of a *stipulatio*. This would be understandable, because the agreement to hand over the money and interest to Maximus upon coming of age would not fall within the scope of the Roman (or Hellenistic) right of *depositum*. In the papyri of Roman Egypt, however, the standard phrase to express a Roman stipulation is *καὶ ἐπερωτηθεὶς ὡμολόγησα* (*and after the formal question had been asked, I acknowledged*). It is uncommon in the first and second century AD, with only a few attestations. Two early attestations are P. Eirene I 4, 30-31 (Oxyrhynchus, 178 AD), which is partly reconstructed, and P. Mich. XII 606, 15 (Theadelphia, 224 AD), which is from the first quarter of the third century AD. This expression only gains popularity in the late third and fourth century AD after the *Constitutio Antoniniana* of 212 AD in which emperor Caracalla gave Roman citizenship to all free persons in the empire.

In his reply Scaevola connects *ὤμοσα* to a form of *iusiurandum*, which is to solemnly swear an oath, as can be seen in *iusiurandum dedisse*[78]. In this case the written codicil is the only proof that money has been deposited at all. Scaevola is asked, whether the wording of the codicil alone provides enough proof to claim the deposited money. Scaevola confirmed this was the case, because the testator had sworn an oath to affirm the obligation[79]. In this case Scaevola needed no further proof of the oath than the codicil which mentioned it. Perhaps Scaevola reasoned that due to the strong religious context of such an oath the testator would not have taken it lightly. Another reason to assume the oath is real, is that it is not in the interest of the testator to lie about the oath. Had the testator not mentioned the oath, his heirs would have had a stronger position regarding the 30.000 *denarii*. Frezza claims that the use of swearing an oath (*religio iurisiurandi*) is a typical element of Greek cases on *parakatatheke*, which he discusses[80]. This *religio iurisiurandi* can also be seen in Dig. 31.77.23 (Papinian. 8 *Resp.*), in which a testator requested his

77 Jakab *SZ* 138 (2021), 353.

78 Kübler, however, believes this line to be an interpolation based on the Latin, which allegedly exhibits a change of style, and a contradictory case by Scaevola in Dig. 32.37.6 (Scaev. 18 *Dig.*). See Kübler *SZ* 28 (1907), 186.

79 See also Jakab *SZ* 138 (2021), 374-375, where she (convincingly) argues that this oath is one of the '*innere Gründe für Scaevolas Entscheidung*'.

80 Frezza 1956, 150-152.

heir to swear an oath to fulfill the *fideicommissa* from the testament by *religio iurisiurandi*[81].

Using an oath, a contracting party could in some special cases constitute obligations, as discussed by Gaius[82]. This is, however, seemingly not the case here. It is more likely that the oath was added for its evidentiary function and its function as reassurance, both known in Roman Egypt[83]. To this end it is being used by the testator. Even though oaths in a Hellenistic legal culture did not have the function of constituting obligations[84], the use of oaths to strengthen obligations is attested in Roman Egypt in the second century AD[85]. A formula used to fortify obligations is *ὤμοσα τὸν ὅρκον ὡς πρόκειται* (I have sworn the oath as written above)[86]. The practice of taking an oath to reassure an obligation cannot be found in classical Roman law[87]. This practice took flight in post-classical Roman law[88] according to Seidl[89]. Wenger concurs that this usage of oaths could not stem from classical Roman law[90]. As the last sentence in the reply of Scaevola does not need to be considered an interpolation by the compilers, in contradiction to Kübler's argumentation based on stylistic evidence[91], it is quite possible that Scaevola took into account the Hellenistic practice of oath swearing in order to reinforce an obligation, which was not a standard obligation in light of Roman law and might even be invalid from a Roman legal point of view. By doing so Scaevola shows himself to be accommodating Hellenistic practice.

II.4 A *kyria*-clause in a Roman codicil

The testator wanted all the provisions in the codicil to be valid. For this reason, the Greek codicil cited by Scaevola starts with a *κυρία*-clause. In the previous chapter on consensual contracts, the *κυρία*-clause has already been

81 See also Spina *Legal Roots* 4 (2015), 254-255 & 270-271.

82 In Gaius, *Inst* III 96 a freedman can constitute an obligation by swearing to his *patronus*, that he will either give a thing, or fulfill some kind of duty or labor: *ex qua iureiurando contrahitur obligatio,* in which cases the obligation is contracted by oath. Cf. Kübler *SZ* 28 (1907), 185.

83 Seidl 1935, 127-128.

84 See Seidl 1935, 122 and Wenger *SZ* 23 (1903), 228.

85 See, for example, P. Oxy. LX 4063 (Oxyrhynchus, 183 AD) and SB X 10293 (Theadelphia 198 AD).

86 The use of oaths to strengthen *parakatathekai* is also attested in Attic law as evidenced by Demosthenes 25.2 and Isocrates *ad Demonicum* 22. See also Frezza 1956, 144.

87 The only mention of a reassuring oath from classical Roman legal writing is in Dig. 2.14.7.16 (Ulpian. 4 *ad Ed.*), in which Ulpian cited the second century AD jurist Marcellus on the use of an oath to strengthen obligations which deviate from *ius commune*. Generally speaking these obligations are not to be enforced. According to Seidl this text has been fabricated by the compilers (Seidl 1935, 115), but no additional argumentation is given to support this.

88 See, for example, Cod. 2.2.41.1 (395 AD), Cod. 4.30.16 (531-532 AD) and Nov. 48 (537 AD).

89 Seidl 1935, 115.

90 Wenger *SZ* 23 (1903), 230.

91 The arguments given by Kübler are based on the 'incorrect' grammar of the Latin. Also, he deems it unbelievable that Scaevola declared the deposit to be valid. Kübler 1907, 186-187.

discussed (see pp. 62-63). It is quite possible that the formula in Dig. 32.37.5 is a meaningless *Floskel.* The clause is also added by the testator in a codicil in Dig. 34.4.30.1 (Scaev. 20 *Dig.*): *βούλομαι βέβαια εἶναι τὰ ὑποτεταγμένα*. The validity of the wording in codicils and testaments will be discussed alongside Dig. 34.4.30.1 in the following chapter.

II.5 Dig. 16.3.26.1 (Paul. 4 *Resp*.): A case of *depositum irregulare*

In Dig. 32.37.5 *ἔλαβον παρακαταθήκην* is written in the Greek text cited. In Dig. 16.3.26 a similar expression is used, namely *Ἔλαβον καὶ ἔχω εἰς λόγον παρακαταθήκης* in a text from the jurist Paul, one of Scaevola's students. Strikingly, he was also asked to provide a *responsum* on an interest-bearing *depositum*. The facts of the case are clear. A depositor (no name is specified in the text) gave to Lucius Titius ten thousand *denarii* in deposit and both parties agreed upon a fixed interest rate. Later, questions arose concerning the agreed interest, more specifically whether the interest could be claimed at all.

> Dig. 16.3.26.1
>
> Lucius Titius ita cavit: "Ἔλαβον καὶ ἔχω εἰς λόγον παρακαταθήκης τὰ προγεγραμμένα τοῦ ἀργυρίου δηνάρια μύρια, καὶ πάντα ποιήσω καὶ συμφωνῶ καὶ ὡμολόγησα, ὡς προγέγραπται· καὶ συνεθέμην χορηγῆσαί σοι τόκον ἑκάστης μνᾶς ἑκάστου μηνὸς ὀβόλους τέσσερας μέχρι τῆς ἀποδόσεως παντὸς τοῦ ἀργυρίου". Quaero, an usurae peti possunt. Paulus respondit eum contractum de quo quaeritur depositae pecuniae modum excedere, et ideo secundum conventionem usurae quoque actione depositi peti possunt.
>
> Lucius Titius declared the following in writing: "I have received and I took under the title of a deposit the sum of ten thousand silver *denarii*, mentioned above and I will do everything and I will approve in words everything and I have agreed, as is written above. And I consented to pay you four *obols* per *mina* per month as interest, until the entire sum of silver has been given back". I ask if an action can be brought to recover the interest. Paul responded that the contract in question exceeds the extent of deposited money and therefore in accordance with the agreement the interest can be recovered by an action on account of deposit.

The text itself is not without controversy because it has allegedly been altered by the compilers. One indication that this text has been interpolated is the grammatical structure of the *et ideo* sentence, which in this text 'should' have an *accusativus cum infinitivo* construction[92]. From this, Gordon concludes with proper nuance: 'One must, therefore, be prepared to admit some inter-

92 The two parts of the sentence, which both depend on *respondit* thus form an anacoluthon. If, however, a full stop is inserted before *et ideo,* this problem ceases to exist. The use of *ideo* according to Litewski is problematic and leads to a *contradiction logique entre les deux phrases* and therefore has to be an interpolation. Litewski *RIDA* 22 (1975), 299.

ference with the text – but the question remains how extensive the interference was and who was responsible for it'[93]. Litewski, however, concurs with the Roman law specialists of the (early) twentieth century and interprets the alteration of the '*et ideo*-clause' as indicative of a negative response to the question by Paul. Geiger, however, argues that the *et ideo*-clause can be authentic, if one adds *non* before *modum excedere*[94].

Regardless of possible interpolations, it seems implausible that Paul was unfamiliar with the concept of a *depositum irregulare*, since his teacher Scaevola, at whose *disputationes* he was present, was acquainted with it and did not question the validity of such documents in his *responsa*[95].

This case is undoubtedly Hellenistic, which is evident not only from the Greek document cited by Paul. The *cheirographon*-style of the document, in which the first person is one of the contracting parties (in this case the depositary), is typical for the Roman East. The coins used by the contracting parties, *oboloi* and *drachmae,* were commonly used in the eastern part of the empire. The use of *drachmae* is very common in Roman Egypt. The interest formula 'per *mina* per month' (*ἑκάστης μνᾶς ἑκάστου μηνός*) is characteristic for contracts from the East too, for example in BGU III 741, 12-13[96] cited earlier. The interest itself is lower than the maximum interest set by the *Gnomon Idiologi* (§ 105: *δραχμιαίου τόκου*), as four *obols* equalled two-thirds of a *drachma*, which amounted to an eight percent interest rate per year for as long as the depositary did not return the deposit.

In the document cited by Paul there are no indications that one of the contracting parties was a *mensarius* or a *nummularius* or that the deposit is used as a banking instrument. In fact, the wording in this case of *depositum irregulare* points more to a contract of pseudo-credit as found in the papyrological contracts of Roman Egypt[97]. This type of *depositum irregulare* can

93 Gordon 2007, 67.

94 Geiger comes to this suggestion: *da offenes Gelddepot im wirtschaftlichen Leben den modum depositae pecuniae nicht überschritt*. Geiger 1962, 42. The argument is that Paul, like Ulpian, distinguished two types of deposits. In this reading of the text the agreement exceeded the bounderies of a *depositum regulare* and therefore an action must be given based on *depositum irregulare*.

95 That Paul knew the *depositum irregulare* can also be deduced from the fact that in Alfenus' Dig. 19.2.31 a *depositum irregulare* is discussed. These legal writings by Alfenus were epitomized by Paul. Dig. 16.3.29.1 (Paul. 2 *Sent.*) is also worth mentioning: *Si ex permissu meo deposita pecunia is penes quem deposita est utatur, ut in ceteris bonae fidei iudiciis usuras eius nomine praestare mihi cogitur* (if with my permission he, by whom the money is deposited uses the deposited money, as is the case with other judgements governed by good faith, he will be compelled to provide to me interest on this account). The contract mentioned here is a *depositum irregulare*, in which the deposited money can be used, meaning that the depositary had to give back the same amount of money and not the same coinage, and that the depositary had to provide interest to the depositor, because the depositary was allowed to use the money deposited.

96 BGU III 741, 12-13: *[τ]ῆς μνᾶς ἑκάσ- // της τοῦ μηνὸς ἑκ[ά]στου* or P. Oxy. II 243, 39-40 (Oxyrhynchus, 79 AD): *τόκου δραχμιαίου ἑκάστης // μνᾶς τοῦ μηνὸς ἑκάστου* (with an interest rate of one *drachma* per *mina* per month).

97 See Geiger 1962, 40.

also be found in other parts of the Hellenistic East. The earlier mentioned P. Yadin I 17 from the Babatha archive, which is also a contract of pseudo-credit, shows great similarities to the Greek contract in Dig. 16.3.26. In this contract *εἰς λόγον παραθήκης,* Babatha and her second husband Judas son of Eleazar agreed (l. 3: *ὡμολογήσατο*) to a *depositum* of three hundred *denarii*.

P. Yadin I 17, 6-9 (Maoza, 128 AD)

ὥστε τὸν Ἰούδαν ἀπε[σ]χηκέναι παρ᾽ αὐτῆς \εἰς λόγον παραθήκης/ ἀργ[υ]ρίου καλοῦ δοκίμ[ο]υ νομ[ίσμα]τος δηναρίων τριακοσ[ί]ων \ἐπὶ το αὐτὸν/ ἔχειν αὐτὰ καὶ ὀφείλε[ι]ν ἐν παραθήκῃ μέχρι οὗ ἂν χρόν[ου δόξῃ τῇ Βαβαθᾳ] ἢ ᾧ ἂν δι᾽ αὐ[τῆς ἢ ὑπὲρ αὐ]τῆς πράσσοντι [ἀπαιτεῖν τὸν αὐτὸν Ἰούδαν τὰ τῆς παρα]θή[κης \προγεγραμμένα δηνάρια/.

l.7: δηνάρια τριακόσια

… that Judas has received from her under the title of a deposit three hundred *denarii* in good approved coinage, that he has these with him and that he owes these as a deposit until the time upon which Babatha or someone through her or a representative of her sees fit to request the *denarii* of the deposit from the same Judas.

At the beginning of this chapter, it is shown that Scaevola, Paul's teacher, implied that the *actio depositi* was available in cases of *depositum irregulare*. In Dig. 16.3.26.1 Paul seemingly concurs with his teacher in such cases of deposit. Kübler, however, questions whether such a contract can be characterized as a *depositum*[98] and Litewsky[99] has remarked that this *responsum* stands in contrast to Paul's opinion as presented in the *Collatio.* There, Paul acknowledged the existence of a *depositum irregulare*, but compared it to another type of contract, namely *mutuum* (loan for consumption)[100]. In Coll. X.7.9 (Paul. 5 *Resp.*): *Si pecuniam deposuero eaque [uti] tibi permisero, mutua magis videtur quam deposita ac p[e]r hoc periculo tuo erit*[101]. Paul, however, does not say that this construction entails a contract of *mutuum*. He merely stated that this type of deposit seems to have more in common with a loan for consumption than with a regular *depositum*[102]. Paul's usage of the verb *videtur* shows that the question was still under debate and no clear decision had been reached. This means that Coll. X.7.9 is not necessarily an argument in favor of assuming an interpolation of Dig. 16.3.26.1. Furthermore, it is little argument

98 Kübler *SZ* 29 (1908), 191.

99 Litewski *RIDA* 22 (1975), 299.

100 Ulpian, referring to Nerva Proculus, described the *depositum irregulare* as *quasi mutuum* in Dig. 12.1.9.9 (Ulpian. 26 *ad Ed.*).

101 Coll. X.7.9 (Paul. 5 *Resp.*): If I have deposited money and I have permitted you the use of it, it is considered to be more a loan for consumption than a deposit and because of this you will be liable for it. See also Dig. 12.1.9.9 (Ulpian. 26 *ad Ed.*).

102 The jurist Caecilius Africanus is more explicit in Dig. 17.1.34*pr* (Afric. 8 *Quaest.*), simply stating that pseudo-credit in the form of a *depositum* is a form of credit (*credita fiat*).

that in this case the contracting parties could not use the *actio depositi*. Since the depositary is no longer without profit, Paul is inclined to transfer the risk from the depositor to the depositary. This practice is attested in a multitude of Hellenistic documents, as shown above with the example of BGU XI 2042.

II.6 A conclusion on *depositum irregulare* in light of Dig. 32.37.5 and Dig. 16.3.26.1

In the literature on *depositum* and *parakatatheke* there seems to be no doubt that the Roman jurists, possibly proceeded by Roman contractual practice, adopted the use of *depositum irregulare* from the Hellenistic world. This concept, in which the objects deposited may be used and consumed, is also attested in Attic law as found in Demosthenes, where it is mentioned in the context of banking.

It was, however, difficult to fit the concept of *parakatatheke* into the fabric of Roman law. Adjustments had to be made by the Roman jurists to translate the concept of *parakatatheke* into an acceptable Roman legal contract (*institutional translation*, as coined by Alonso). In Roman writing clauses on interest were made explicit, whereas they are mostly omitted in Greek documents. In the Greek documents, the profit of the pseudo-creditor was probably connected with the penalty clause of the *duplum*. A possible explanation for the explicit Roman mentioning of interest as opposed to the Greek/Hellenistic style of hidden interest, is that this penalty clause ran the risk of not being considered equitable by Roman judges, since a contract of *depositum* was constructed taking *bona fides* into account. This can be seen in Dig. 32.37.5, in which the *duplum* was translated into an amount which came down to twice the deposit when combined with the interest (in this case thirty thousand *denarii*). Furthermore, in both Hellenistic law and Roman legal law the standard duty of care for the depositary, which was low, was contractually raised. The effect of this was that it made the depositary liable in almost all cases of non-performance. In Roman law this becomes apparent from the jurist Paul (Coll. X.7.9) and for Hellenistic law it is part of the in standard clauses in *parakatatheke* contracts.

Contrary to the Roman East, where the function of pseudo-credit is predominantly present in the documents, the *depositum irregulare* was mainly used by the Romans in documents as banking instruments. A banking context in Hellenistic documents is rare[103]. In the two bilingual texts from Scaevola and Paul a banking context seems to be absent as well and a context of pseudo-credit is far more likely. This pseudo-credit in the form of *depositum irregulare* had major disadvantages for the pseudo-debtor. There are no indications in the papyri that these possible disadvantages were somehow mitigated. Contrary to Hellenistic law, Roman law had no disadvantageous penalty clause like the *duplum* in cases of default in normal cases

103 Kastner 1962, 19.

of *depositum* (i.e. not a *depositum miserabile* or the like), which is why from Roman times onward the '*νόμος τῶν παραθηκῶν*' was invented to safeguard the *duplum*. What is more, contracts in which other contract types are feigned (*contractus imaginarii*) in order to circumvent certain rules and regulations, did not constitute a legal bond between the contracting parties, as seen in Dig. 44.7.54. These factors could explain why the potential of the *depositum irregulare* was not applied to construct contracts of pseudo-credit by the Romans.

III Two responsa on *parakatatheke*

The following two *responsa* on *parakatatheke* (Dig. 40.5.41.4 and Dig. 31.34.7) have no connection to the *depositum irregulare* treated in the previous section. A regular form of the contract of *depositum* seems to absent in these *responsa* as well. In both cases *parakatatheke* is used to express a different legal concept, which cannot be categorized using the contract types of Roman law. First Scaevola's *responsum* will be treated, after which Modestin's Dig. 31.34.7, which is a century younger, will be discussed.

III.1 Dig. 40.5.41.4 (Scaev. 4 *Resp.*): Two slaves entrusted into your care

Scaevola's Dig. 40.5.41 contains no less than eighteen cases in which the overarching topic is the manumission of slaves by means of a *fideicommissum*. In all cases, problems arose regarding the (interpretation of the) conditions set by the testator. The most frequent condition in this fragment is that in order to be freed the slaves had to render account (*rationes reddere*), as is the case in Dig. 40.5.41.4[104]. Due to the slave context 'archetypical' Greek slave names are used, such as Thais, Stichus, Damas, Pamphilus / Pamphila and Spendophorus. By no means should this be understood as indicative of a Hellenistic context. Whatever Hellenistic context is present, is provided by the Greek language of the testament alone.

> Dig. 40.5.41.4 (Scaev. 4 *Resp.*)
>
> Sorore sua herede instituta de servis ita cavit: "βούλομαι καὶ παρακαλῶ, γλυκυτάτη μου ἀδελφή, ἐν παρακαταθήκῃ σε ἔχειν Στίχον καὶ Δάμαν τοὺς πραγματευτάς μου, οὓς ἐγὼ οὐκ ἠλευθέρωσα, ἄχρις ἂν τὰς ψήφους ἀποκαταστήσωσιν: ἐὰν δὲ καὶ σοὶ ἀρέσωσιν, ἐμήνυσά σοι τὴν γνώμην μου". Quaero, si paratis actoribus rationes reddere heres libertatem non praestet, dicendo eos non placere sibi, an audienda esset. Respondit non spectandum, quod heredibus displiceret, sed id quod viro bono posset placere, ut libertatem consequantur.

104 This rendering account is also featured in Dig. 40.5.41.7, Dig. 40.5.41.10-13 and Dig. 40.5.41.16-17, but never in Greek (*τὰς ψήφους ἀποκαταστήσωσιν*) as in the reply discussed below.

> Having instituted his own sister as his heir, he declared in writing the following concerning his slaves: "I wish and request from you, beloved sister, that you receive Stichus and Damas, who I have not yet manumitted, my administrators, as a deposit entrusted into your care, until they have rendered account: if they please you as well, I have revealed my opinion to you about the matter". I ask, if the heir did not bestow freedom upon the administrators, who were prepared to render account, whether the heir was in the right, saying that they did not please her. He answered that one must not consider, what would displease heirs, but what could please a *vir bonus*, in order for them to obtain their freedom.

In this case a brother made his beloved sister his heir[105]. The inheritance of the sister consisted among other things of two slaves, who took care of the testator's accounts[106]. The quantity of cases on this in particular makes it likely that it was common practice for slaves to do their master's accounting. By means of a *fideicommissum*[107], the slaves were to be manumitted by the sister after they had properly rendered account. The other condition of the manumission is more open to interpretation. If the slaves would please the heir, she would know the opinion of the testator on the matter, namely that the slaves should be granted their freedom. The interpretation of this condition is the reason for this response.

The testator and his sister appear to be Roman citizens living in a Greek-speaking area of the Roman East. The part of the testament cited looks like a translation of a Roman will of a type not uncommon in the second century AD, e.g. BGU I 326 (Arsinoites, 194 AD)[108]. The condition set for manumission of the slaves is typically Roman, and the wording of *rationes reddere* in Greek, *τὰς ψήφους ἀποκαθίστημι,* seems to be a calque[109] which is not attested in papyrological sources. In this light the expression *βούλομαι καὶ παρακαλῶ* must be seen as a Greek variant of Roman testamentary language, as mentioned in the previous chapter on Dig. 26.7.47 (Scaev. 2 *Resp.*), which contains exactly the same formula[110].

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105 In the letter his brother addressed his sister as *γλυκυτάτη*. This is also seen in Dig. 32.101*pr* in the previous chapter. Many attestations can be found in papyrological sources, such as P. Hamb. II 192, 2-3 (Antinoopolis, III AD): *γλυκυτάτηι ἀδελφῆι χαίρειν.*

106 See Frezza 1956, 146; Spina *RIDROM* 16 (2016), 42-43; Kübler *SZ* 28 (1907), 192-193; Wolff SZ 88 (1971), 332 and Simon *SZ* 82 (1965), 65.

107 The validity of this *fideicommissum* in Greek is beyond dispute. See with regards to this *responsum* Scarcella, *AUPA* 55 (2012), 649-652.

108 In this Greek translation of the original Latin will, the author used *παρακατατίθεσθαι* in combination with *πίστις* to express the word *fideicommitto*. See BGU I 326, 14-16: *'ὑπεύθυνος ἔστω δῶναι ποιῆσαι παρασχέσθαι ταῦ- // [τα] πάντα, [ἃ ἐ]ν ταύτῃ τῇ διαθήκῃ μου γεγραμμένα εἴη, τῇ τε πίστι // [α]ὐτῆς παρακατατίθομαι'* (Let him be bound to give, make or guarantee (*damnas esto dare facere praestare*) all the things written in this testament of mine and I leave this to his trust (*fideicommitto*)).

109 Avotins, *Glotta* 60 (1982), 251.

110 See pp. 174-175.

III.2 An interpretation of *ἐν παρακαταθήκῃ ἔχειν* in Dig. 40.5.41.4

In the will quoted by Scaevola the word *parakatatheke* cannot be interpreted as referring to a form of *depositum*. It is not logical that the testator wants to deposit the slaves with the heir and give ownership (*dominium*) of them to someone else. Furthermore, were this to be the case, the heir would not be able to free the slaves at a later point in time if the requirements were met. Kübler suggests that the phrase must be seen as a translation of *commendo*: *commendatum habere*[111], which is also used later in this fragment (Dig. 40.5.41.15). This *commendare* (to entrust) is used as a layman's term[112], but is to be equated to *deponere*, as seen in the rhetorical question in Dig. 16.3.24 (Papinian. 9 *Quaest.*) and in Dig. 50.16.186 (Ulpian. 30 *ad Ed.*): *Commendare nihil aliud est quam deponere*[113].

The phrase *ἐν παρακαταθήκῃ ἔχειν* is attested in legal documents with regards to *depositum* and *depositum irregulare*. In two third century-documents the phrase is used, both of which come from Roman Syria. The two documents are P. Euphr. 12, 7-9 (Beth Phouraia, 244 AD) which is on parchment and P. Dura 29, (Dura-Europus, 251 AD).

P. Dura 29, 15-17 (Dura-Europus, 251 AD)

15 καὶ ἔχει ἐν παρακαταθήκῃ ἡ Γαίᾳ παρὰ τῆς Ἀμαθθαβεί̣λης
τὰ δηλούμενα δηνάρια ἑκατὸν καὶ ἀποδώσειν ὁπότε ἂν ἀ̣π̣[αι]̣τ̣η̣[θῇ, καὶ ὤ]μ̣ο̣σεν τὸν Σεβάσμιον ὅρκον ταῦτα οὕτως κ̣α̣λ̣ῶ̣ς̣ γενέσθαι

and that Gaia has received from Amathabeile the mentioned hundred *denarii* as a deposit and that she will give it back, when asked, and she swore the imperial oath that these things will happen so and rightly.

111 Kübler *SZ* 28 (1907), 192. This expression can also be found in Dig. 33.1.18.1 (*Scaev.* 14 *Dig.*) and in Dig. 17.1.12.12 (Ulpian. 31 *ad Ed.*). The term is used as '*commendatos habeas*' in Dig. 40.5.41.15*: 'quos in ministerio filii mei esse volo: te autem, Severe fili carissime, peto, uti Decembrem et Severum commendatos habeas, quibus praesentem libertatem non dedi, ut idonea ministeria haberes'* (I want them to be in the service of my son: I ask that you, my dear son Severus, however, hold December and Severus in your care, whom I have not granted their immediate freedom, so that you could have their services to your satisfaction). Here, the verbs *volo* and *peto* are used as well to indicate the *fideicommissum libertatis*.

112 *Commendare*, however, cannot be used in a *fideicommissum* according to (Pseudo-) Paul in PS IV 1.6: *Nam si dicat quis: DIMITTO HOC ILLI vel COMMENDO, quia verba directa sunt, fideicommissi locum habere non possunt* (For if one would say: I leave this to him or I entrust, because these words are directed to an end, they cannot be valid in a *fideicommissum*). For this layman's term see Zimmermann 1992, 215.

113 Dig. 16.3.24: *quid est enim aliud commendare quam deponere?* Dig. 50.16.186: 'To entrust is no different than to deposit'.

The contract is most likely a *depositum irregulare* used as pseudo-credit. The depositary acknowledged that she received the money and to strengthen the agreement she affirmed it with an oath. P. Euphr. 12 is a contract of a deposit. The objects are clothes and jewellery, which must be guarded and kept safe for a minor until coming of age. The goods deposited under this contract are characteristic for dowries[114]. As noted, the Greek text cited by Scaevola used the term *ἐν παρακαταθήκῃ σε ἔχειν* as a layman's term meaning 'to put in someone's care' or 'to entrust'. An example of such an occurrence, where exactly the formula *ἐν παρακαταθήκῃ σε ἔχειν* is used, can be seen in a letter from the third century AD archive of Heroninus who was the estate manager of Aurelius Appianus. The letter SB VI 9466, 3-9 (Theadelphia, 255 AD), was written by a person named Syrus: *πολλάκις σοι ἐνε- // τειλάμην περὶ τῶν // παιδίων Ποντικοῦ, // τοῦ ἐν παρακατα- // θήκην* (read: *παρακαταθήκῃ*) *ἔχειν, οὐ // γάρ εἰσιν τῆς οἰκίας // ἀλλότριοι* (On many occasions I have asked you about the slaves (slave-children) of Ponticus, which were entrusted to you, because they do not belong to another's household). Both in the letter and in Dig. 40.5.41.4 the entrusted objects are slaves and the same formula is used *ἐν παρακαταθηκῃ ἔχειν*. In SB VI 9466 ownership of the slaves must lie with the writer of the letter, because he stated that they were *οὐ τῆς οἰκίας ἀλλότριοι*. In Dig. 40.5.41.4, however, the outcome of what the testator stated in *ἐν παρακαταθήκῃ σε ἔχειν* must have been that ownership of the slaves (*dominium*) passed to the heir, to whom he had entrusted them, as is common with slaves who are conditionally manumitted[115]. Furthermore, the Latin text of the question implies that the heir was indeed owner of the slaves, because apparently, she had the authority to manumit them, but refused to do so.

III.3 The legal question and the reply in Dig. 40.5.41.4

The testator wanted the slaves to be free eventually, but explicitly does not want that to happen before the slaves have rendered account and if they have pleased the heir. One of the benefits of a manumission via *fideicommissum* in opposition to a *manumissio testamento* is the right of patronage that existed between the *manumittor* and the freedmen. In the latter case the *manumittor* (the heir) is still alive and will be the *patronus*, whereas in the former case the patron would be the deceased *manumittor*[116].

What can be deduced from the question in Dig. 40.5.41.4 is that the testator's sister did not free the slaves because they did not please her, which was one of the conditions of manumission. The question asked is whether this was proper. Scaevola answered that this question must be answered by applying

114 Feissel & Gascou *Journal des Savants* (2000) 169-170.
115 See TCU II. 2 (attributed to Ulpian).
116 See Gaius, *Inst.* II 266. Cf. Kaser 1971, 295.

the standard of the *boni viri arbitrium*, the judgement of a good man[117]. This was an age-old socio-legal term deeply rooted in Roman culture[118]. It is attested in epigraphical sources as early as the third century BC in the epitaph of Lucius Cornelius Scipio as '*duonoro optumo viro*' (the best of good men) and in literary sources as early as the second century BC[119]. The expression, frequently found in Roman law, is also used by Labeo (I BC-I AD), who is cited by Pomponius in a similar case in Dig. 40.7.21*pr* (Pomp. 7 *ex Pl.*). Another example of the application of the standard of the *boni viri arbitrium* to manumit by *fideicommissum* is Dig. 40.5.46.3 (Ulpian. 6 *Disp.*), in which Ulpian also referred to a Greek case which had been sent to the emperor.

Dig. 40.5.46.3

(…) Nam et ita relictum 'si voluntatem meam probaveris' puto deberi: quemadmodum 'si te meruerit' quasi virum bonum vel 'si te non offenderit' quasi virum bonum vel 'si comprobaveris' vel 'si non reprobaveris' vel 'si dignum putaveris'. Nam et cum quidam Graecis verbis ita fideicommissum dedisset: 'τῷ δεῖνι, ἐὰν δοκιμάσῃς, ἐλευθερίαν δοθῆναι βούλομαι', a divo Severo rescriptum est fideicommissum peti posse.

Because I also consider it [i.e. freedom] to be due when it has been bequeathed as follows 'if you will have approved my will': just as with the phrase 'if he will have earned merit with you', as if you were a *bonus vir* or 'if he will not have offended you', as if you were a *bonus vir*, or 'if you will have approved' or 'if you have not disapproved' or 'if you will have deemed him worthy'. And also, when someone gave a *fideicommissum* using the following Greek words: 'I wish that freedom is bestowed upon so and so, if you will approve of him', it has been stated by the late Severus in a rescript that an action to recover the *fideicommissum* can be brought.

In this text Ulpian specifies that the you-figure in the clauses must act in accordance with the standard of a *bonus vir* (*quasi virum bonum*). The first clause quoted in Ulpian's text, and the Greek condition of *ἐὰν δοκιμάσῃς*, are similar to *ἐὰν δὲ καὶ σοὶ ἀρέσωσιν* from Scaevola's *responsum*. In the various exemplary clauses which all entail conditions that are open to interpretation

117 This advice by Scaevola is completely in line with an adage from the *regulae iuris antiqui* in book 50. In Dig. 50.17.22.1 (Ulpian. 28 *ad Sab.*): *Generaliter probandum est, ubicumque in bonae fidei iudiciis confertur in arbitrium domini vel procuratoris eius condicio, pro boni viri arbitrio hoc habendum esse* (In general it must be assumed, that, wherever a condition is incorporated, which is to be judged by a master or a procurator, in court procedures based on good faith, it must be considered a judgement such as one of a *bonus vir*). In Dig. 40.5.41.4 the decision is left to a 'master', namely the master of the two slaves, but as Ulpian wrote, this judgement must not be assessed by the standards of the master or procurator in question, but by the standards of the *boni viri arbitrium*. Scaevola argued in similar fashion in his reply.

118 Fiori *Aequum Ius* 197. Fiori 2013, 33.

119 Cato *De Agricultura* § 144-149.

the judge must not focus on the contracting party in question, but the standard of the *bonus vir* must be applied. The rescript from emperor Septimius Severus (193-211 AD) showed that the *fideicommissum* in Greek, which contains an open norm, can been claimed at law if a *bonus vir* would approve of the slave's conduct regardless of whether the fideicommissary personally approved or not.

To set conditions for the release of a slave via *fideicommissum* appear to be a truly Roman construction. If by the wording of those conditions there seemed to be room for interpretation, as is the case in Dig. 40.5.41.4, one had to consider how a *bonus vir* would have acted. By applying the standard of the *bonus vir,* Scaevola answered the question in a purely Roman manner. Without knowledge of this term in its proper context of fideicommissary manumission it cannot be understood correctly, which is a further indication that the testator and the heir are Roman citizens, who just so happen to live in the Roman East and therefore wrote in Greek.

III.4 Dig. 31.34.7 (Mod. 10 *Resp*.): A case from Syria coele

The following case is the fourth and final case in the Digest on *parakatatheke*. Thematically, this case is mostly about dotal law. It has some aspects in common with Dig. 40.5.41.4, because both texts feature a testator who wants the heir to take care of certain members of the *familia*. The contracting parties mentioned in the text are connected to the vicinity of the *vicus Naclenorum*, a village which may have been located in the Roman province of Syria Coele near the city of Heliopolis[120], though the exact location of this village (*κώμη*) remains unknown. Among the other replies contained in Dig. 31.34 is another bilingual text, which is Dig. 31.34.1[121]. This text refers to an estate in Gaza, which is in the Roman province of Syria Palaestina. That this fragment (Lenel fr. 318) contains multiple bilingual responses strengthens its Greek/Hellenistic context. In the *responsum* of Dig. 31.34.7 three persons are mentioned. A testatrix Titia who is the mother of the heiress; Gaius Seius, the husband of the late testatrix; and a daughter who is the heiress. The daughter is not named in the text and it has been hypothesized that she is a daughter from a former marriage of Titia, so that she is not the daughter of Gaius Seius[122].

120 See Häussler *SZ* 133 (2016), 442. Häussler refers to RE XVI, 2 Col. 2000, s.v. *Νάκλη*.

121 This *responsum* is discussed at pp. 194*sqq*.

122 Spina discusses this possibility in *RIDROM* 16 (2016), 51. She is in favor of this interpretation, as is Kübler, who does not exclude the possibility that she is Gaius Seius' daughter, but deems it very unlikely. See Kübler *SZ* 28 (1907), 189-190. Spina, however, also states that Troje is against this interpretation because of the lack of compelling arguments in Troje 1971, 227.

Dig. 31.34.7 (Mod. 10 *Resp.*)

Titia cum nuberet Gaio Seio, dedit in dotem praedia et quasdam alias res, postea decedens codicillis ita cavit: "Γάιον Σέιον τὸν ἄνδρα μου παρακατατίθεμαί σοι, ὦ θύγατερ. ᾧ βούλομαι δοθῆναι εἰς βίου χρῆσιν καὶ ἐπικαρπίαν μετοχὴν κώμης Νακλήνων, ἣν ἔφθασα δεδωκυῖα εἰς προῖκα, σὺν σώμασι τοῖς ἐμφερομένοις τῇ προικί, καὶ κατὰ μηδὲν ἐνοχληθῆναι αὐτὸν περὶ τῆς προικός· ἔσται γὰρ μετὰ τὴν τελευτὴν αὐτοῦ σὰ καὶ τῶν τέκνων σου". Praeterea alia multa huic eidem marito legavit, ut quamdiu viveret haberet. Quaero, an propter[123] haec, quae codicillis ei extra dotem relicta sunt, possit post mortem Gaii Seii ex causa fideicommissi petitio filiae et heredi Titiae competere et earum rerum nomine, quas in dotem Gaius Seius accepit. Modestinus respondit: licet non ea verba proponuntur, ex quibus filia testatricis fideicommissum a Gaio Seio, postquam praestiterit quae testamento legata sunt, petere possit, tamen nihil prohibet propter voluntatem testatricis post mortem Gaii Seii fideicommissum peti.

When Titia married Gaius Seius, she gave landed estates and some other belongings as a dowry and later at her death she declared the following in a codicil: "I place my husband Gaius Seius into your care, my daughter. I want him to be given the use for life and the right of usufruct of the estate that I hold in joint ownership[124] in the village of Naklenoi, which I have already given as a dowry, including the slaves, which belong to the dowry, and let him not in any way be troubled concerning the dowry, because after his death it will belong to you and your children". In addition, she bequeathed to the same husband many more things, that he could have for as long as he lived. I ask whether based on the *fideicommissum* the daughter and heir of the testatrix has an action for these things, which have been bequeathed to him through the codicil as not being part of the dowry after the death of Gaius Seius. Modestinus responded: although the exact words are not put forth, based on which the daughter of the testatrix can bring an action to recover the *fideicommissum* from Gaius Seius, after she has performed the bequests left as legacies in the testament, even so nothing prevents her from bringing an action to recover the *fideicommissum* after the death of Gaius Seius because of the intention of the testatrix.

In this case, Titia the *testatrix* made her daughter her heiress. She asked her daughter as an heir to take care of Titia's husband. To this end, she must enable him for the remainder of his life to use certain estates, slaves and property, some of which were a part of her mother's dowry, as described in the Greek codicil, and some were not. After the death of the husband, the daughter was to own the estates, slaves and other property of the dowry unencumbered.

123 In his *Editio Maior* Mommsen questions whether *propter* must be replaced by *praeter* as Pothier suggests.

124 *Μετοχή* is *mutatis mutandis* the Greek term for the Roman *condominium* and is found both in early papyri, for example from the archive of Zenon, P. Cair. Zen. III 59369, 2 (Philadelphia, 240 BC), and in late papyri such as the testament of Flavius Phoebammon, P. Cair. Masp. II 67151, 206 (Antinoopolis, 545-6 AD). In the papyri it is always mentioned with regard to houses or land. Next to co-owner, *μέτοχος* can also have the meaning of colleague with regard to certain funtions and liturgies.

III.5 *Παρακατατίθεμαι* in Dig. 31.34.7

The testatrix used the Greek term *παρακατατίθεμαι* in the same context as the testator in Dig. 40.5.41.4, that is to say to indicate a *fideicommissum*. Therefore, no context of *depositum* (regular or irregular) is apparent. In Dig. 40.5.41.4 the ones entrusted to the care of an heir were slaves. In this case, however, the daughter and heir of Titia is entrusted with the care of the husband of the testatrix, who is a free person. Such a use of *παρακατατίθεμαι* is also attested in the testament of Epicrates, known from an inscription from Nakrason, which is located at the west coast of modern-day Turkey[125]. The testament is published as SEG LIV 1221 (Nakrason, I AD) and lines 112-116 of the inscription read:

> SEG LIV 1221, 112-116 (Nakrason, I AD)
>
> Ὁμοίως παρακαλῶ
> τὸν κληρονόμον ἔχειν ἐν παραθήκῃ Μετρᾶν τὸν πρό-
> γονόν μου καὶ προνοῆσαι αὐτοῦ τῆς εὐσχημοσύνης
> ἀξίως ἐμοῦ τὸν τῆς ζωῆς αὐτοῦ χρόνον.
>
> Ἐπικράτης Ἐπικράτους διατέθειμαι.
>
> In the same way I request that my heir takes Metras my ancestor into his care and that you provide for adequate maintenance for him worthy of me for the rest of his life.
>
> I, Epicrates son of Epicrates, have devised this by will.

As is the case in Dig. 31.34.7, after the death of a testator a person is entrusted to the care of the heir. The testator by no means could have meant a *depositum*, because the 'deposit' is a free man, namely an elder relative of the testator. The heirs were asked to take care of this elder for the rest of his life in a way worthy of the testator. A parallel can be drawn to Dig. 31.34.7, where the heir is also asked to take care of a family member of the testator.

III.6 The *fideicommissum* of Dig. 31.34.7

The testatrix began the *fideicommissum* with *βούλομαι δοθῆναι,* which is perfectly conform the Latin *volo* followed by *dare* as a standardized clause for a *fideicommissum*[126]. The objects of the *fideicommissum* came in two parts,

125 The Greek text is derived from Hermann 1969, 8-14. Hermann also discusses the dating and cautiously concludes that the inscription is from the first half of the first century AD. See Hermann 1969, 23.

126 See Gaius, *Inst.* II 249 cited above and see TCU XXV 2 (Kübler *SZ* 28 (1907), 177). See for *βούλομαι δοθῆναι* also the earlier cited Dig. 40.5.46.3 (Ulpian. 6 *Disp.*).

which can be categorized as the property, of the dowry of the testatrix and the property *extra dotem*. The property of the dowry is further specified as a share of a landed estate in the *vicus Naclenorum*, while the extra-dotal property remains undefined. The validity of the *fideicommissum* is not questioned by the author of the legal question nor by Modestin.

The heiress is obliged to permit Gaius Seius the lifelong use of the dotal property of which ownership can be reclaimed after his death. This lifelong use is reflected by the words *χρῆσιν καὶ ἐπικαρπίαν* in the codicil cited. This phrase can only be found in post-classical sources from the Roman East. Examples can be found in two contracts from the sixth century AD, namely a cession of land in P. Michael. 41, ll. 21 & 33[127] (Aphroditopolis, 539/554 AD) and P. Lond. III 1044, 19-22 (Hermopolis Magna, VI AD), in which Aurelia Aphtonia ceded a share of land to her son, but retained the right of inhabitation.

P. Lond. III 1044, 19-22 (Hermopolis Magna, VI AD)

ἅμα δὲ τῇ ἐμῇ τελευτῇ ἔχειν καὶ τὸν τούτο\υ/
20 οὐσο\ύ/φρο\υ/κτον ἤτοι χρῆσιν καὶ ἐπικαρπίαν καὶ χρήσασθαι
τὸ τηνικαῦτα τούτῳ [καὶ οἰ]κ[ο]νομεῖν καὶ διοικεῖν περὶ αὐτο(ῦ)
οἵῳ τρόπῳ ἂν βουληθῇς

…, that at the moment of my death, you shall have the right of usufruct (of the land), meaning the use and revenue and that by that time you may use it and manage (the land) and administer it in whatever way you wish.

Aurelia Aphtonia bestowed her share of the land to her son, but wished to retain the right of lifelong use which can be seen in ll. 11-12, so that she could live from the earnings. As implied by *ἤτοι* in this document, it is almost certain that the right of *χρῆσιν καὶ ἐπικαρπίαν* must be translated as part of the right of *usufructus*, because the writer of the instrument preceded the term by *τὸν οὐσούφρουκτον*, a Greek transliteration of *usufructus*.

Furthermore, *χρῆσιν καὶ ἐπικαρπίαν* is not only encountered in the contracts mentioned, but also in two Justinianic legal sources, namely in Nov. 18.3[128] and in a sixth century Greek introduction to Justinian's Institutes, known as the *Paraphrasis Institutionum* by Theophilus. In his commentary on *Inst.* II 1.9[129] Theophilus discussed the troubles of creating a *locus religiosus*

127 P. Michael 41, 19-21: *ὥστε σε κατὰ παραχωρητικὴν καὶ ἐγχωρητικὴν ὁμολογίαν τούτων // κρατεῖν καὶ δεσπόζειν, καὶ κτᾶσθαι τὴν τούτων // παντοίαν πρόσοδόν // τε καὶ νομὴν και δεσποτείαν καὶ χρῆσιν καὶ ἐπικαρπείαν* (that through this agreement of cession and surrender you have the power to possess these lands and you are the legal proprietor of it and you may possess the proceedings of all sorts of the lands and the possession and the ownership and the right of use and earnings [i.e. usufruct]). In the text cited the powers of the new owner are summed up and one of these powers is the right of usufruct.

128 See for both attestations: Avotins, *Glotta* 60 (1982), 279-280.

129 See the edition of Lokin et al. on p. 184-185.

on land which has an owner and a usufructuary[130]. In Nov. 18.3 Justinian decreed that children must receive the legitimate share of their father's or mother's estate. The emperor criticized 'unmanly' conditions in testaments by which the testator left his lands to his children (*δεσποτείαν γυμνήν*), but the right of usufruct (*τὸν οὐσουφρούκτον*) to his or her spouse, leaving the children impoverished:

> Nov. 18.3
>
> Οὐκ ἐξέσται τοίνυν τὸ λοιπὸν οὐδενὶ παντελῶς παῖδας ἔχοντι τοιοῦτο τι πράττειν, ἀλλὰ πάντως αὐτοῖς τοῦ νομίμου τούτου μέρους, ὅπερ νῦν ἀφωρίσαμεν, καὶ τὴν χρῆσιν καὶ τὴν ἐπικαρπίαν πρὸς τῇ δεσποτείᾳ καταλιμπανέτω, εἰ βούλεται παίδων οὐκ εὐθὺς λιμῷ τελευτώντων, ἀλλὰ καὶ ζῆν δυναμένων, καλεῖσθαι πατήρ. Καὶ ταῦτα πάντα φαμὲν οὐκ ἐπὶ πατρὸς μόνου ἀλλὰ καὶ μητρός…
>
> From now onwards it will not be in any way permitted to a testator with children to do this, but by all means it is necessary that he bestows upon them of that share ordained by law, which we have now determined, the right of use and earnings combined with the ownership, if he wants to be called a father of children who not forthwith die of starvation, but are able to live. And all this we say not only to the father but also to the mother…

The case described by Justinian bears resemblance to the case mentioned by Modestin, in which the testatrix bequeathed the right of lifelong use to the spouse[131]. The *responsum* by Modestin, however, predates these Justinianic sources by three centuries. From the second century AD the term *ἐπικαρπία* is known in BGU I 101 (Arsinoite nome, 115 AD)[132], where it is used to refer to the use of a land [i.e. to sell the fruits] for as long as a loan of 240 *drachmae* was not paid. In the *Tabula Heracleensis*, a large inscription on bronze tablets presumably from the fourth century BC, the term *ἐπικαρπία* is also used in a similar fashion[133]. It is striking that this term is not attested in the papyrological sources of the fourth and fifth century, but re-emerges in two papyri in the sixth century AD and in two legal sources. It could well be that via the reception of Modestin's work in the sixth century AD Digest the term came into use again.

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130 Theophil. II.1.9: '*Usufructos δέ ἐστι δίκαιόν τι φανεροῖς τρόποις συνιστάμενον, νῷ καταλαμβανόμενον, ὃ ποιεῖ με κατὰ τῆς ἑτέρου δεσποτείας ἔχειν χρῆσιν καὶ ἐπικαρπίαν* (Usufruct is a right, established via approved ways and seized with the mind, that grants me the right of use and earnings (of a land), while someone else is its owner)'.

131 This right of use of the late spouse's dowry by her husband is common in Roman Egypt, as will be explained below.

132 BGU I 101 (= Chr. Mitt. 249), 18-20: *ἐφ' ὃν ἐ- // ἂν [δ]ἐῳ ἦν ἐπικαρπίας χρόνον, // μέχρι οὗ ἀποδῶ* (upon which during the time, until I will have given it [i.e. 240 *drachmae*] back a right of usufruct will be established).

133 See Tab. Herc. I = IG XIV 645 lines 107 & 108.

III.7 The law of dowries and Dig. 31.34.7

As stated, the *responsum* from Modestin is also concerned with the law of dowries. In the Greek codicil the testatrix reassured her heir and daughter that after the lifelong use of the *dos* by her husband, full ownership, including the right of use, would be restored to her. This is conform the Hellenistic legal views on dowry. The Roman law on dowries, however, differed from its Hellenistic counterpart. In the writings of the Roman jurists, a discussion of the various rules concerning dowries can be found with Ulpian. Ulpian distinguished different forms of *dotes* in the fragments brought together in the *Tituli ex Corpore Ulpiani* (TCU), in which the sixth title is concerned with dowries (*de Dotibus*). This work containing texts attributed to Ulpian is believed to be from the mid-fourth century AD. Two different forms of *dos* are mentioned[134]. Ulpian's discussion covers a case similar to the *responsum* of Modestin. In TCU VI 4-5, the allocation of ownership of the dowry is discussed when a marriage ends because of the death of the wife:

> *Tituli ex Corpore Ulpiani* VI.4
>
> Mortua in matrimonio muliere dos a patre profecta ad patrem revertitur, quintis in singulos liberos in infinitum relictis penes virum. Quod si pater non sit, apud maritum remanet. 5: Adventicia autem dos semper penes maritum remanet, praeterquam si is, qui dedit, ut sibi redderetur, stipulatus fuit; quae dos specialiter 'recepticia'[135] dicitur.
>
> When a marriage is dissolved due to the wife's death, the dowry derived from the father is returned to the father, after a fifth share per child is left unrestrictedly in the care of the husband. In the case that there is no father, it remains with the husband. 5. But a dowry 'given by another than the father' always remains with the husband, except when the one who gave it has stipulated that it is to be returned to him; and this dowry in particular is named 'reserved'.

134 See TCU VI 3: *Dos aut 'profecticia' dicitur, id est quam pater mulieris dedit; aut 'adventicia', id est ea, quae a quovis alio data est* (the dowry is either called 'profectitious', this is because the father of the wife gave it, or it is called 'adventitious', this is a dowry given by anyone else [other than from paternal side]). See also Dig. 23.3.5 (Ulpian. 31 *ad Sab.*), Dig. 23.3.79 (Lab. 6 *Post. a Iav. Epit.*) and Dig. 23.3.81 (Papinian. VIII *Quaest.*).

135 The use of this word is also explained by Aulus Gellius, who described its use by Cato the Elder on the Voconian Law in *Noctes Atticae* XVII 6.5: *quando mulier dotem marito dabat, tum, quae ex suis bonis retinebat neque ad virum tramittebat, ea "recipere" dicebatur* (when a woman gave a dowry to her husband, which is retained of her own goods and is not transferred to her husband it is called 'reserved'). For *dotes recepticiae* see also Dig. 39.6.31.2 (Gaius, 8 *ad Prov. Ed.*), in which Gaius quoted Julianus.

According to Kübler the *dos* in the response by Modestin was a *dos adventicia*[136] and indeed there seems to be no reason to assume that the dowry was a *dos profecticia*, which in this case would have been pertinent information. Furthermore, Modestin was well aware of the differences between the two *dotes*, as he mentioned the *dos profecticia* by name in Dig. 23.3.63 (Mod. 1 *de Heur.*)[137]. In case of a *dos adventicia,* the dowry would have remained with the husband and in case of a *dos profectitia* the dowry would have been given back to her *pater familias.* If there was no longer a *pater familias*, because he had died, the dowry also remained with the husband, as Ulpian stated. This is not what happens in Dig. 31.34.7, in which the lifelong use of the dotal property is given to the remaining spouse, after which full ownership is bequeathed to the daughter of the testatrix and only a right of usufruct is granted to the remaining spouse. In Roman law, however, it was not possible for the wife to determine what happened to the *dos* after her death[138] and a stipulation made to give the wife the competence to dispose of the *dos* by testament was considered to be null and void, as is clarified by Paul[139].

In light of the Greek context of this case, however, Roman legal concepts may simply not be applicable here. Both Attic law and Doric law, as known from the Gortyn code[140], are more easily applied to the facts of the case without inserting a hypothetical fact pattern. In Attic law the dotal property belonged to the wife, as can be seen in pseudo-Demosthenes 47.57 (Against Evergus)[141]. Furthermore, in pseudo-Demosthenes 40. 50 & 59 (Against Boeotus II)[142], Mantitheus whose mother had died could claim her dowry,

136 Kübler *SZ* 28 (1907), 188. Kübler does not provide further information. Spina argues that a *dos adventicia* is more likely, because there is no mention of paternal authority. Spina *RIDROM* 16 (2016), 54. Furthermore, there is no indication of a stipulation, which would 'reserve' the dowry for someone. The latter would have made the dowry a *dos recepticia.* If the dowry, however, was 'reserved' for the daughter by the stipulator, the statements of the mother / testatrix would make more sense from a Roman legal point of view.

137 Dig. 23.3.63 (Mod. 1 *de Heur.*): *si modo ea dos non ab ipsa profecta sit, quam alius permissu eius stipulatus est, tunc enim consensus eius non est necessarius* (if in some way this dowry is not derived from herself, but has been promised to another with her permission, then it is not necessary to have her consent).

138 Stagl 2009, 258.

139 See Paul in FV 98: *Paulus respondit stipulationem quidem in hunc casum conceptam 'cum moriar dari' utilem esse, etiamsi mixti casus non intervenirent; ut autem de dote sua, quam apud maritum habet, mulieri testari liceat, inutiliter convenisse videri* (Paul replied that the stipulation '*that will be given when I die*' made for this case was indeed valid, even if no mixed cases would arise; but that the stipulation permitting a wife to bequeath her dowry, which she had with her husband, must be seen as null and void.

140 Gortyn Code Col. VI. 31-36: *αἴ δέ κ' ἀ- // ποθάνεῖ μάτε͂ρ τέκνα καταλιπό- // νσα, τὸν πατέρα καρτερὸν ε͂με͂ν // τὸν ματροῖον, ἀποδόθαι δὲ με͂// μεδέ καταθέμε͂ν, αἴ κα με͂τά τέκ- // να ἐπαινε͂σει δρομέες ἰόντες* (And if the mother dies having left children, the father remains in control of the maternal property, however, he is not able to alienate it or place it under hypothec without the consent of the children and only after they have come of age). See also Kübler *SZ* 28 (1907), 190, Spina *RIDROM* 16 (2016), 57 and Häge 1968, 92.

141 See Lipsius 1915, 492*sqq*.

142 See Biscardi 1982, 103.

which still remained in the estate of his deceased father, because of the Attic laws on dowry[143].

Demosthenes *Against Boeotus* II 40. 50 & 59

Ὑμεῖς δ᾽ ἐνθυμεῖσθ᾽ ὅτι ἐμὲ μὲν ἡ μήτηρ παῖδα καταλιποῦσα ἐτελεύτησεν, ὥστε μοι ἱκανὸν ἦν ἀπὸ τοῦ τόκου τῆς προικὸς καὶ τρέφεσθαι καὶ παιδεύεσθαι· (…) 59 ἄλλως τε καὶ ὅτι οὐ περὶ τῆς οἰκίας, πότερα ἐώνηται Κρίτων αὐτὴν ἢ μή, νυνὶ δικάζομαι, ἀλλὰ περὶ προικός, ἣν ἐνεγκαμένης τῆς μητρὸς οἱ νόμοι κελεύουσιν ἐμὲ κομίζεσθαι.

But you, please consider that my mother died having left a child, me, so that to me the interest of the dowry had to suffice to nourish me and to complete my upbringing. (…) 59 and above all because I am not suing for the house, whether Crito had bought it or not, but for the dowry, which derived from maternal side the laws commend me to recover.

The orator placed great emphasis on the fact that the mother left a child behind (*ἡ μήτηρ παῖδα καταλιποῦσα*), which is similar to the wording in the Doric Gortyn code cited below (*μάτερ̄ τέκνα καταλιπόνσα*). Presumably the orator did this to bring the regulations on dowry to mind.

In marital contracts from Egypt in the Ptolemaic times, terms were drawn up to ensure that the dowry would remain the property of the wife's family by ensuring that the husband would give it back after the death of his spouse[144]. Furthermore, the right of usufruct of the dowry for the rest of the surviving husband's life is already attested in the second century BC, in Chr. Mitt. 284 (provenance unknown, II BC) and Chr. Mitt. 280 (Memphis, 157-6 BC), in which a man claimed his late mother's dowry from the heirs of his late father, meaning that his father was able to control the dowry and use it until his death[145]. The Roman law on dowries seems not to have been taken up in Roman Egypt. In Roman times, documents such as P. Oxy. X 1273 (Oxyrhynchus, 280 AD) and P. Oxy. VIII 1121 (Oxyrhynchus, 295 AD)[146] show that dowries belonged to the mother and were given back to the mother's side in case of an untimely death, as is evident from the marital contract of P. Oxy. III 496, 13-14 (Oxyrhynchus, 127 AD).

P. Oxy. III 496, 13-14 (Oxyrhynchus, 127 AD)

ἐὰν δὲ ἡ γαμουμένη προτέρα τελευτήσῃ τέκνων αὐτοῖς μὴ ὄντων ἐξ ἀλλήλων ἢ καὶ τῶν γενομένων μεταλλαξάντων ἀτέκνων ἀποδότω ὁ γαμῶν τὰ ἐ[ν φερνῇ -ca.?- ἀργυρίου δραχμὰς τετρα-]

143 See Lipsius 1915, 496.
144 This is, for example, seen in the reconstructed P. Freib. III 29 (Philadelphia, 179-178 BC). Cf. Häge 1968, 96.
145 See Kreller 1919, 16.
146 See Kreller 1919, 142*sqq*.

> κισχιλίας ἑκατὸν ἐν ἡμέραις ἑξ[ή]κοντα καὶ ἀναπεμπέσθω εἰς τοῦς αὐτοὺς περὶ τὴν γαμουμένην τὰ ἄλλα αὐτῆς πάντα.
>
> If the wife dies first without there being children from each other or when the children born from them die childless, let the husband give back the dowry which is four thousand one hundred silver *drachmae* within sixty days and let him send back all her other property to those persons from the wife's side.

In P. Oxy. III 496 emphasis is placed on the children or grandchildren, because if they were present, the dowry was to be given to them after the death of their (grand-)father (Sarapion son of Eudaemon), who would have kept it for the remainder of his life in accordance with Hellenistic law on dowry. If no surviving children or grandchildren were present, however, the husband needed to return the dowry within sixty days (l. 14). The receivers of the dowry were the family members of his deceased wife, who were still alive, as is stated in P. Oxy. III 496, 14: *εἰς τοῦς αὐτοὺς περὶ τὴν γαμουμένην*. In case of such a *dos* in Roman law possible children and grandchildren had nothing to do with the return of the dowry and neither did other family members besides the *pater familias*. In P. Oxy. III 496, therefore, the prevalence of Greek/Hellenistic law over Roman law in Roman Egypt can be seen.

Concerning dotal law the texts from pseudo-Demosthenes, the Greek inscription and the papyri cited above show respectively Attic, Doric and Hellenistic law. The rules and regulations from these documents seem to be more in line with the Greek codicil in Dig. 31.34.7 than Roman law is, as seen in Ulpian and other Roman jurists. The use of the dowry for the remainder of the husband's life and the subsequent handing over of it after his death to the children of the mother is attested in Greek/Hellenistic law, but not in Roman legal writing. Because concepts such as marriage and dowry are so intrinsically bound to a social context, it is understandable that the local practices and regulations are used instead of Roman law. The Roman jurist Modestin showed himself more than accommodating to these Hellenistic practices.

III.8 The legal question and reply by Modestin in Dig. 31.34.7

Neither the author of the question nor Modestin in his reply questioned the validity of the lifelong use of the property which was part of the dowry. Both seemed to accept and respect the Greek/Hellenistic rules and regulations regarding dowry. What is more, it is accepted that 'after the death of Gaius Seius' the dotal property belonged to the heiress. This sentence seems to hint to a form of time-bound ownership[147], which is atypical for classical Roman

147 This expression is borrowed from Kaser, who writes this to be *Eigentum auf Zeit*. Kaser 1971, 449. Kaser also mentions FIRA III 139 and two responses by Scaevola, in which this *Eigentum auf Zeit* can be found. The responses are Dig. 33.2.35 (Scaev. 22 *Dig.*) and Dig. 33.2.36 (Scaev. 25 *Dig.*). In these cases, according to Kaser, a later vulgarization of Roman law is prepared. In Justinianic law the existence of time-bound ownership must be inferred from Cod. 8.54(55).2.

law[148], but is frequently attested in Hellenistic sources. A document, in which this time-bound ownership is present, is P. Oxy. II 237 (Oxyrhynchus, 186 AD)[149].

The author of the legal question was, however, not concerned with the dotal property. The legal question so it appears, was whether the property left *extra dotem* for as long as Gaius Seius lived (*ut quamdiu viveret haberet*), was to be returned to Titia's daughter after his death. This leads to the question whether it was possible in classical Roman law to own property for the duration of a lifetime. This property for the duration of a lifetime can be understood as *Eigentum auf Zeit*, which considering the Hellenistic views on 'ownership' is not implausible, as stated by Kaser[150].

Another possibility is that the Latin '*quamdiu viveret habere*' must be understood as the right of usufruct and that Titia's daughter held the 'bare ownership'. The Roman *usufructus* is a highly personal right that by its nature cannot exceed the lifespan of the usufructuary. Usufruct, however, is the 'use of' property, whereas the *habere* in the *responsum* implies that the testatrix wanted Gaius Seius to have ownership.

In the fragment, the property *extra dotem* assigned to Gaius Seius for the remainder of his life is not explicitly legated to her daughter. The heirs of the deceased Gaius Seius subsequently denied the claim of Titia's daughter to the property. Modestin, however, granted Titia's daughter an action to recover the extra-dotal property. His reason for doing so stems from his interpretation of the words in the codicil. The jurist inferred that it was the intention (*quaestio voluntatis*) of the testatrix that the property would be restored to her daughter. This interpretation of the intention of a testator, even though not explixitly mentioned in the testament, is attested in many Roman sources[151].

III.9 Conclusion on *parakatatheke* in Dig. 40.5.41.4 and Dig. 31.34.7

The category of *parakatatheke* as *depositum irregulare*, found in Dig. 16.3.26.1 and Dig. 40.5.41.4 is not applicable to the two *responsa* discussed in this last part. In these two responses, *parakatatheke* has a 'pseudo-legal function' or functions as *Quasi-Paratheke* as framed by Dieter Simon[152]. As confirmed in

148 Zwalve, however, argues that classical Roman law did not have a dogma which stated that time-bound ownership was impossible. The existence of such a dogma is derived from an emendation on *Fragmentum Vaticanum* 283. See Zwalve 2006, 40.

149 P. Oxy. II 237, 35-36: *καὶ τὰ τέκνα ταῖς τῶν γονέων οἷς ἡ μὲν χρῆσεις διὰ δημοσίων τετήρηται χρηματισμῶν, ἡ δὲ κτῆ- // σις μετὰ θάνατον τοῖς τέκνοις κεκράτηται* (and the children must register title deeds of their parents as well, in cases where the right of life ownership is retained via public legal instruments, and after their death the right of ownership of the property is granted to the children).

150 See Kaser 1971, 449.

151 For an abundance of examples in both literary and legal sources, where the inferred will of the testator is given prevalence over the exact wording in a codicil or a testament, see Babusiaux 2015, 298.

152 Simon *SZ* 82 (1965).

both the documentary and epigraphical practice, the 'pseudo-legal' meaning of *parakatatheke* is in this case to 'take care' of beloved family members, whom the testator leaves behind after his death. In Dig. 16.3.26.1 these are two well-loved slaves, in Dig. 40.5.41.4 the spouse of the deceased and in the inscription SEG LIV 1221 one of the male ancestors of the testator.

Apart from the use of Greek and more specifically the word *παρακατατίθημι* both fragments show no further similarities. What is more, in the fragment of Modestin elements of Hellenistic law are visible and both contracting parties, the writer of the question and the jurist took Hellenistic law into account. The jurist did this by interpreting the dowry in its Greek/Hellenistic legal context, respecting its specific rules instead of applying Roman dotal law to the case. Contrary to this reply is the codicil in Dig. 16.3.26.1, which although written in Greek seems to be purely Roman in content. Here, seemingly Greek legal concepts are merely Roman calques. The corresponding reply in Latin by Scaevola must also be seen as purely Roman, for it contains elements distinctive of the Roman legal discourse.

IV *Mutuum*

To validly enter a contract of *mutuum* or loan for consumption, two requirements had to be met, since *mutuum* was a real contract. These requirements were consensus between the contracting parties regarding the basic elements of the loan, and a form of *datio* due to which an immediate transfer of ownership took place[153]. Due to the transfer of ownership of the goods loaned (mostly money and other fungible goods) the creditor can only recover these goods by means of a *condictio*. All *condictiones* were governed by strict law (*actiones stricti iuris*) and were only intended to recover the worth of the objects under contract, from which it follows that no interest could be claimed under a *condictio*. In this aspect differences appear between the Roman *mutuum* and the Greek / Hellenistic types of loans.

In the Hellenistic legal world, different contracts of loan for consumption existed such as *χρῆσις* and *δάνειον*. The difference between *χρῆσις* and *δάνειον* was that *χρῆσις* was considered to be a favor among friends and family, while a *δάνειον* was a 'busines credit'. In the second century AD, however, the fundamental differences between the two types of loan were becoming less meaningful as *χρῆσις* gradually became a proper business loan

153 A rationale for the transfer or *datio* is in the contract of *mutuum* is the etymology from Dig. 12.1.2.2 (Paul. 28 *ad Ed.*), which undoubtedly stems from Gaius, *Inst*. III 90: *ex meo tuum fit* (from mine it becomes yours). To this end Paul wrote as seen in Dig. 12.1.2.3 (Paul. 28 *ad Ed.*): *item mutuum non potest esse, nisi proficisciatur pecunia* (likewise, there cannot be a contract of *mutuum* if money does not pass [i.e. from someone's *dominium* to another one's]). Kaser and Zimmermann describe this case as a pseudo-etymology (see Kaser 1971, 531 and Zimmermann 1992, 158). A more suitable term would be *folk etymology*.

similar to *δάνειον*[154]. A few differences between *χρῆσις* and *δάνειον* remained. The latter in general involved a larger amount of money and had a longer term. Furthermore, loans categorized as *χρῆσις* were to a much lesser extent secured by real security[155].

In the Greek text quoted by Scaevola in Dig. 31.88.15 (Scaev. 3 *Resp.*), discussed in par. IV.1 the *mutua pecunia* is derived from the Greek *δανείζεσθαι*. This type of loan for consumption had its own characteristics. Characteristic for the Greek/ Hellenistic *δάνεια* was that they were almost always in writing with a fixed term and a fixed interest rate. Furthermore, the contracts mostly included clauses for default interest, the penalty of the *ἡμιόλιον*, by which means the debtor had to pay one and a half times the amount of money loaned, and a clause stating that the debtor was liable to personal execution[156]. One of these characteristics is, as Tenger adds, that these Hellenistic *δάνεια* were characterized by "*eine häufig dingliche – hypothekarisch oder hypallagmatisch – Sicherung des Darlehens*"[157]. In the Greek text quoted by Modestin in Dig. 50.12.10 (Mod. 1 *Resp.*), discussed in IV.5, a *pseudo-mutuum* is mentioned, which can be deduced from the use of the word *ἀσφαλιζομένη*.

IV.1 Dig. 31.88.15 (Scaev. 3 *Resp.*): Ownership without the power of alienation or hypothecation

In Scaevola's Dig. 31.88.15 a large fragment of a Greek testament[158] is quoted. The Greek is, however, not the only distinctive feature of this text and also not the only distinctive Hellenistic feature of this text. The legal question mentions the name of a contracting party Flavia Dionysia. According to Talamanca, this Flavia Dionysia is the real name of the person in question[159]. Her 'Flavian' name[160], be it as a freedwoman or otherwise, connects her to the imperial family from that dynasty, while her Greek name Dionysia is held to be a further indication of Hellenistic context. Mostly, however, the Hellenistic context can be inferred from the contents of the Greek text cited, as will be shown below. This text is largely concerned with the conditions stated in the

154 Tenger 1993, 31. The terms that he uses are *Gefälligheidscharakter* and *Geschäftskredit*.

155 Tenger 1993, 30-31.

156 See Tenger 1993, 9.

157 Tenger 1993, 9. Roth mentions that the practice to secure a *δάνειον* by real security grew exponentially in Roman times: '*… während sich die Tendens zur dinglichen Sicherung so verstärkt, daß das δάνειον von nun fast ausnahmslos in Verbindung mit einem Pfandrecht auftritt*' (Roth 1970, 12-13).

158 That the Greek belonged to a testament is evident from the Latin *condicio testamenti* in the legal question.

159 That Flavia Dionysia was her real name is also mentioned by Scarcella *AUPA* 40 (2012), 632 and Häussler *SZ* 133 (2016), 436. Furthermore, Talamanca adds that another real Dionysus can be found in a rescript by emperor Septimius Severus to Dionysus Diogenes on matters of municipal government in one of the provinces, as quoted by Macer in Dig. 47.10.40 (Macer 2 *Pub. Iud.*). Kübler does not address this point, while discussing this case in Kübler *SZ* 29 (1908), 194-196.

160 See Keenan *ZPE* 13 (1974), 301-302.

Greek testament, and therefore the Roman law of inheritance, which will be treated in more depth in the coming chapters, played an important role.

> Dig. 31.88.15 (Scaev. 3. *Resp*.)
>
> Instituto filio herede et ex eo nepotibus emancipatis testator ita cavit: "βούλομαι δὲ τὰς ἐμὰς οἰκίας μὴ πωλεῖσθαι ὑπὸ τῶν κληρονόμων μου μηδὲ δανείζεσθαι κατ' αὐτῶν, ἀλλὰ μένειν αὐτὰς ἀκεραίας αὐτοῖς καὶ υἱοῖς καὶ ἐκγόνοις εἰς τὸν ἅπαντα χρόνον. ἐὰν δέ τις βουληθῇ αὐτῶν πωλῆσαι τὸ μέρος αὐτοῦ ἢ δανείσασθαι κατ' αὐτοῦ, ἐξουσίαν ἐχέτω πωλῆσαι τῷ συγκληρονόμῳ αὐτοῦ καὶ δανείζεσθαι παρ' αὐτοῦ. ἐὰν δέ τις παρὰ ταῦτα ποιήσῃ, ἔσται τὸ χρηματιζόμενον ἄχρηστον καὶ ἄκυρον". Quaeritur, cum filius defuncti mutuam pecuniam a Flavia Dionysia acceperit et locatis aedibus pro parte sua pensiones sibi debitas creditrici delegaverit, an condicio testamenti exstitisse videatur, ut filiis suis fideicommissi nomine teneatur. Respondi secundum ea quae proponerentur non exstitisse.
>
> After appointing his son as heir and having emancipated his grandchildren, a testator declared the following in writing: "I do not want my houses to be sold by my heirs nor that money is borrowed upon them, but that they remain unencumbered for them and their sons and their grandsons until the end of time. When someone of them wishes to sell his share or borrow money upon it, let him have the power to sell it to his coheir or borrow money from him. When someone acts contrary to these conditions, let such a transaction be useless and invalid". It is asked, when the son of the deceased received money as a loan from Flavia Dionysia and, having rented out the house for his own share, delegated to her as a creditor the payments due to him, whether the condition of the testament appeared to be fulfilled, so that he is liable to his sons on the basis of the *fideicommissum*. I have responded that in accordance with the facts presented the condition had not been fulfilled.

The case presented to Scaevola is fairly uncomplicated. Three contracting parties are important, namely, a testator, who had a son and grandchildren; an heir, who is the son of the testator; and the litigants, who are the children of the heir and grandchildren of the testator. Because the testator had emancipated his grandchildren per his right as *pater familias*, they can be plaintiffs in the trial. The testator bequeathed his houses to his heirs under the condition that these houses would not be alienated to third parties or encumbered. Encumbering the property could give rise to the eventual alienation of the houses, which was contrary to the intention of the testator. Because the testator's intent was that his houses would remain with his family forever, alienation to co-heirs was permitted as was encumbering the property for loans between co-heirs.

IV.2 The legal question concerning the loan in *Dig. 31.88.15*

In the legal question a third party is introduced. The heir mentioned in the testament and Flavia Dionysia have entered a contract of loan for consumption (*mutuum* or *δάνειον)*. To repay the money loan and possibly in lieu of

interest, the heir delegated (*delegare*) the payment of rent for his share of the houses to Flavia Dionysia, to whom the tenants can now duly pay their rent[161]. The authorization to receive payment of the rent meant the tenants (*conductores*) could pay directly to the *creditrix*.

In particular, the testator did not want his houses to be in any way encumbered by a loan (*δάνειον)*. From a Roman point of view houses, or any other goods for that matter, were not encumbered by a contract of *mutuum* at all. What the testator seems to have meant is that alienation to a third party was null and void and that the same went for a loan which was secured by a real right having as object (a share of) the houses. The *δάνεια* as indicated by Tenger and Roth, are often characterized by and closely associated with real securities such as hypothec (or pledge) and *hypallagma*. Due to this conceptual association with real security, the testator forbade the act of *δανείζεσθαι*. In the Latin question the Greek *δανείζεσθαι* has been translated as *mutuum*, which did not bear such a close relation with real security rights such as *hypotheca* or *pignus*.

Strictly interpreting the word *δανείζεσθαι* as a (non-secured) loan seems to be favourable to the plaintiffs, as the heir did enter a contract of *δάνειον* concerning his share of the houses (*κατ' αὐτῶν*). Doing so, however, does not do justice to the intentions of the testator, because the question remains whether the *creditrix* had a claim on the house in case of default. In this response, however, nothing shows that the *creditrix* had such a claim on the house. She could merely receive rent from the tenants. Therefore, this type of loan would not have been in violation of the testator's intention. The wording of the testament might be inept to express the testator's intention, but in Roman hereditary law inept wording can be amended by using a broad interpretation of the testament, to bring it into conformity with the testator's presumed intention[162].

The plaintiffs could have tried to use a literal explanation of the testament to obtain their father's share of the houses or they might have thought that his share of the houses really was encumbered. The heirs could have mistaken the ability of the *creditrix* to receive the rent from the tenants with the authorization to collect rent from the tenants. The latter is a well-known legal contruction in Roman Egypt, called an antichretic loan (*ἀντίχρησις*), which is a real right. Antichretic loans concerning the right to inhabit the debtor's house or rent it out to a third party and collect rent are called *ἐνοίκησις* (right of habitation)[163]. P. Mich X 585, 16-23 (Bacchias, 87 AD) provides an example:

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161 See Dig. 50.17.180 (Paul. 17 *ad Plaut.*) in which *delego* can be understood from *iussu*. Cf. Heumann/Seckel 1907, 131 s.v. *delegare*.

162 See for example the adage in Dig. 50.17.12 (Paul. III *ad Sab.*): *In testamentis plenius voluntates testantium interpretamur* (regarding testaments we interpret the intentions of the testators broadly).

163 The concept of *enoikesis* (the right of habitation), combined with a loan for consumption is can be found in papyri from a wide span of time ranging from papyri from third century BC Ptolemaic Egypt, such as BGU XIV 2395 (Takona, 222-221 BC) up to third century AD Roman Egypt, such as P. Princ. III 144 (Ptolemais Euergetis, 219-? AD).

P. Mich X 585, 16-23 (Bacchias, 87 AD)

καὶ παρεχέσθω ὁ ὁμολογῶ(ν)
μηδένα κωλύ[οντα] τ̣[ὸ]ν Ἑρμᾶ̣[ν] μηδὲ τοὺς παρ᾽ αὐτοῦ ἐνοικ(οῦντας)
ἐν τῶι σημαιν[ομένῳ καὶ] ἑτέρους ἐνοικίζοντας καὶ τὰ ἐνοίκ(ια)
ἀποφερομένους κ[αὶ χρωμένο]υς τοῖς τούτων χρηστηρίοις πᾶσι
ἀδιακωλύτω[ς. καὶ μετὰ] τὸν χρόνον ἀποδότω ὁ ὁμολογῶ(ν)
τῶι Ἑρμᾶ̣ τὰ[ς] τ[ο]ῦ ἀργυρίου δραχμὰς ἑξήκοντα, τῆς πράξεως
οὔσης τῶι Ἑρμᾶ̣ ἔκ τε τοῦ [ὁ]μολογοῦντος καὶ ἐκ τῶν ὑπαρχώ(ντων)
αὐτῶι πάντων καθάπερ ἐγδίκης.

And let the contracting party assure that no-one hinders Hermas or his representatives to live in the property in question or in letting it to others and collecting the rents and using all the appurtenances belonging to it without impediment. And after the expiration date of the loan let the contracting party give sixty silver *drachmae* to Hermas, while the right of execution on the contracting party and his property as if in accordance with a legal decision belongs to Hermas.

In P. Mich X 585 the debtor, whose name is not preserved on the papyrus, has agreed upon a loan for consumption of sixty silver *drachmae*, to which end he gave the creditor the enjoyment of his share of a commonly owned house. The Hellenistic right of *ἐνοίκησις*, however, did not leave a house *ἀκεραία* (unencumbered). This right was often registered at the office of the district administrators (*νομάρχαι*). It often functioned as real security for a loan as is the case in SB XXII 15849 (Karanis, 121 AD), in which a right of *ἐνοίκησις* is registered on a third share of the house of the *debtrix* Vibia Crispina for a loan of three hundred *drachmae*.[164] The notion that the house in Dig. 31.88.15 would be encumbered with the right of *ἐνοίκησις*, which went against the *fideicommissum* of the testator, may have led to the lawsuit by the testator's grandchildren. The case in Dig. 31.88.15 could easily have been confused with a situation such as described in P. Mich X 585, especially by laymen. Furthermore, in Dig. 31.88.15 the notion remains that the *delegare* of the heir is a form of security for the *creditrix* Flavia Dionysia. The constant income of the debtor from the tenants could have given the *creditrix* the assurance she needed to enter a contract of money loan with the heir, which in this form was not against the testator's intention. In this way the father can monetize his assets, obtaining a large amount of money at once just as would have been the case if he were to sell the house. This construction of delegating the tenants does not appear to have been against the testator's intention, however.

IV.3 The *fideicommissum* in Dig. 31.88.15

In Dig. 31.88.15 both the author of the legal question and Scaevola interpreted the non-alienation clause in the Greek testament cited as a *fideicommissum* (*fideicommissi nomine*). In previous *responsa* and other texts, it has been

164 See also P. Oslo.l III 118 (Arsinoite nome, 111-112 AD).

shown that through the phrasing of *fideicommissa,* Roman legal *formulae* are reflected in the Greek text[165]. This translation is necessary, because Roman jurists could show great strictness when it came to legal concepts and their compulsory wording[166]. In the Greek text in Dig. 40.5.41.4 the testator in question used the proper wording prescribed by the jurists[167]. In the *responsum* of Dig. 31.88.15, however, Scaevola acknowledged the existence of a *fideicommissum* by interpreting the testament. The testament itself lacks the wording normally used. In the Roman East, there was often no noticeable discrepancy in the wording of *fideicommissa* and *legata* and prescribed Roman forms were observed to a lesser degree. *Fideicommissa* were form-free testamentary bequests which gave the beneficiary an action *in personam* to claim the bequeathed property. To create *legata* the testator had to use compulsory wording in his testament. In case of a *legatum per vindicationem* the legatee had an action *in rem*, while in case of a *legatum per damnationem* the legatee had an action *in personam* to claim the bequeathed property. Influenced by the legal practice of the Hellenized East these legal concepts were eventually equated with one another and deemed equally valid through Justinianic legislation[168]. By the sixth century AD the intention of the testator was considered to be more important than the compulsory wording, as can be seen in Cod. 6.43.2 (Justinian. 531 AD)[169].

For various reasons this *fideicommissum* is noteworthy, one of which are the restrictions placed on the heirs in *μὴ πωλεῖσθαι … μηδὲ δανείζεσθαι*. The testator intended, that this *fideicommissum* worked in perpetuity (*εἰς*

165 See Dig. 40.5.41.4, Dig. 26.7.47, discussed at pp. 119*sqq* and pp.174*sqq* respectively, P. Mich IX 549 and SEG LIV 1221.

166 To illustrate this, Greek instead of Latin wording in testaments will be examined in the next chapter. Gaius, for example, opposed *legata* in Greek, but allowed *fideicommissa* in Greek. Ulpian concurred with this view, as becomes apparent from TCU XXV 9.

167 This *responsum* is discussed at pp. 119*sqq*.

168 Cf. Kaser 1975, 553-554,

169 Cod. 6.43.2 (Justinian. 531 AD): *Omne verbum significans testatoris legitimum sensum legare vel fideicommittere volentis utile atque validum est, sive directis verbis, quale est 'iubeo' forte, sive precariis utetur testator, quale est 'rogo', 'volo', 'mando', 'fideicommitto', sive iuramentum posuerit, cum et hoc nobis audientibus ventilatum est, testatore quidem dicente 'ἐνορκῶ', partibus autem huiusmodi verbum huc atque illuc lacerantibus* (Every word legitimately portraying the intent of the testator, who wants to legate or to fideicommit is effective and valid, whether the testator uses straightforward words such as 'I order' or requesting words, such as 'I ask' or 'I want', 'I request', 'I commit to your trust', or he solemnly swears, because this too was uttered at our hearing, where a testator said 'I solemnly swear', but the parties to the proceeding were, however, in this way or another heckling this word). With the last example emperor Justinian also confirmed the constitutive nature of swearing oaths in the Roman East, as is shown in the previous section on *iusiurandum* in Dig. 32.37.5. Even though this text must be situated in the predominantly Greek-speaking Roman world of the VI century AD, and considering that 'our hearing' was probably done in Greek, it is striking that precisely for the solemn oath a Greek word is used after five typically Roman words.

τὸν ἅπαντα χρόνον)[170], preserving the houses for his descendants. A Latin parallel may be found in the heavily reconstructed CIL VI 10229, also known as the so-called testament of Dasumius[171]. Mommsen reconstructed the text (BRUNS 117 = FIRA III 48) in a highly tentative fashion. In line 94 of CIL VI 10229 *'pig]nore dent, cedant, condoneren[t'* can be read. In light of the lines that follow and the subjunctive mood of the verbs, it is a valid assumption that the words *ne* or *neve* must be inserted in the lacuna (so that they [i.e. the heirs] do not give it [i.e. a landed estate] in pledge, alienate or surrender it). A Greek example of such a formula in a testamentary context is the alleged testament of Plato (IV BC). In this 'testament' which is included in the *Vitae Philosophorum*[172] (III. 41) of the third century AD biographer Diogenes Laertius, who wrote in Greek, the testator forbade the alienation of a landed estate which he mentioned by precise demarcation, as is common practice in papyrological sources. This landed estate must be kept by the heir so that it could eventually be transferred to a boy called Adeimantus, presumably his grandnephew. During the time in which the heir had the estate, up until the time in which Adeimantus came of age, the estate could not be alienated[173].

A *fideicommissum* specifying such a *Verfügungsverbot* (prohibition of disposal) is a rather uncommon, but occurring, phenomenon both in Greek and Roman sources[174]. In Dig. 31.69.3 (Papinian. 20 *Quaest.*) Papinian is asked to reply to a case in which such a *fideicommissum* played a role: '*Fratre herede instituto petit, ne domus alienaretur, sed ut in familia relinqueretur. Si non paruerit heres voluntati, sed domum alienaverit vel extero herede instituto decesserit, omnes fideicommissum petent qui in familia fuerunt.*'[175]. In Papinian's

170 As Häussler comments (*SZ* 133 (2016), 437), this formula is frequently attested in contracts in Roman Egypt. It is, however, mainly used to attribute powers in perpetuity (especially the power to alienate and to hypothecate property). Furthermore, non-alienation clauses are frequently found in contracts of hypothec from this timeframe in the Roman East, as is discussed in the previous chapter on pp. 54-55.

171 This title is borrowed from Eck (*Zum neuen Fragment des sogenannten Testamentum Dasumii*) in: Eck *ZPE* 30 (1978). Cf. Tate *SZ* 122 (2005), 166.

172 The work is also known as *Βίοι καὶ γνῶμαι τῶν ἐν φιλοσοφίᾳ εὐδοκιμησάντων* (Lives and Opinions of Eminent Philosophers).

173 Diog. Laërt. III 41: *Ἰφιστιαδῶν χωρίον, ᾧ γείτων βορρᾶθεν ἡ ὁδὸς ἡ ἐκ τοῦ Κηφισιᾶσιν ἱεροῦ, νοτόθεν τὸ Ἡράκλειον τὸ ἐν Ἰφιστιαδῶν, πρὸς ἡλίου δὲ ἀνιόντος Ἀρχέστρατος Φρεάρριος, πρὸς ἡλίου δὲ δυομένου Φίλιππος Χολλείδης: καὶ μὴ ἐξέστω τοῦτο μηδενὶ μήτε ἀποδόσθαι μήτε ἀλλάξασθαι, ἀλλ' ἔστω Ἀδειμάντου τοῦ παιδίου εἰς τὸ δυνατόν* (The landed estate in Iphistiadae, which to the north is bordered by the road from the temple at Cephisia, to the south by the temple of Heracles in Iphistiadae, where the sun comes up by the estate of Archestratus Phrearrius, where the sun goes down by the estate of Phillipus Cholleides; Let it be unlawful for anyone to sell or alienate this, but for all intents and purposes let it be the property of the child Adeimantus).

174 See Saller 1994, 170.

175 Dig. 31.69.3: Having instituted his brother as heir, he requested that his house was not alienated, in order that it remained in the family. Should the heir not comply with this intention, but have alienated the house or have died after instituting an extraneous person as heir, those who belong to the family can bring an action to recover the *fideicommissum*. See also Babusiaux *SZ* 135 (2018), 118.

responsum it similarly becomes apparent that the testator wanted his house to remain in the family and therefore the property is not to be alienated. The most famous text relating to *Verfügungsverbote* in family *fideicommissa* in Roman testaments is Dig. 30.114.15 (Marcian. 8 *Inst.*):

> Dig. 30.114.15
>
> Cum pater filio herede instituto, ex quo tres habuerat nepotes, fideicommisit, ne fundum alienaret et ut in familia relinqueret, et filius decedens duos heredes instituit, tertium exheredavit, eum fundum extraneo legavit, divi Severus et Antoninus rescripserunt verum esse non paruisse voluntati defuncti filium.
>
> When a father having instituted his son as heir, from which he had three grandchildren, ordered by *fideicommissum* that he could not alienate the landed estate so that it would remain in the family, and the son, dying, instituted his two sons as heirs and disinherited the third and legated the estate to someone outside of the family, the late Severus and Antoninus stated by rescript that it is true that the son did not comply with the intent of the deceased.

In this rescript from the joint reign of emperor Septimius Severus and his son Severus Antoninus (Caracalla), the testator's intention to keep a landed estate in the family is validated, as the institution of an extraneous heir is considered to be against the intent of the testator. Because of the intention of the testator an extraneous heir could not inherit (a share of) the estate. With this rescript both emperors validated this form of family *fideicommissa*, meaning that a testator can validly impose *Verfügungsverbote* regarding the property. If these family *fideicommissa* were valid, the question arises whether these *fideicommissa* operated *in personam* or *in rem*[176]. A piece of the answer may be found in PS IV 1.15, in which Paul seems to favor the beneficiary of a *fideicommissum* over the *male fide* buyer of the object of the *fideicommissum*: *Rem fideicommissam si heres vendiderit eamque sciens compararit, nihilo minus in possessionem eius fideicommissarius mitti iure desiderat*[177]. A buyer who knows that an heir should not sell property, because it is burdened by a *fideicommissum,* must place the beneficiary in possession of that property. The question, however, remains to what extent this specific case can be extrapolated to family *fideicommissa*, as Paul does not directly refer to such *fideicommissa.* At the end of this development, emperor Justinian regulated in his *Novellae* that a family *fideicommissum* cannot be recovered with an action in or after the fourth generation, because by then it is considered too

176 Kaser also asked this question. According to him this particular *fideicommissum* initially only worked *in personam* (PS IV 1.18), but could have worked *in rem* since Hadrian and certainly operated as such since the Severan dynasty, analogous to fideicommissary manumission. Kaser 1977, 26

177 PS IV 1.15: If an heir has sold property burdened by a *fideicommissum* and someone has bought it knowingly, the person who is to receive it via *fideicommissum,* may nonetheless rightfully request to be granted possession of the property.

old, as stated in Nov. 159.2[178]. The case in the *Novella* shows that by the sixth century AD, these *family fideicommissa* were still in use, to such an extent that Justinian deemed it necessary to enact a new law on the alienation of property which is subject to a family *fideicommissum*[179].

These *Verfügungsverbote* were very common in documents of real security from Ptolemaic and Roman Egypt and must be considered common practice in the testamentary practice of Roman Egypt. The wording and the use of the non-alienation clause in Dig. 31.88.15 (*μὴ πωλεῖσθαι*) is so similar to these documents, that it must be considered to originate from the Hellenistic documents on real security. Romans influenced by these Hellenistic *Verfügungsverbote* could have adapted them in order to construct the family *fideicommissa*. It can, however, not be asserted with certainty that in this aspect the Roman jurists were influenced by Hellenistic legal practice regarding this topic. The *Gnomon Idiologi* of BGU V 1210 (Theadelphia, c. 150 AD) put restrictions on family *fideicommissa*, which because of these only had a 'temporal effect'. This, according to Babusiaux, was '*eine bedeutende Einschränkung gegenüber der lokalen Praxis dauerhafter Verfügungsverbote*'[180].

In two *responsa* predating the developments of PS IV 1.15, the rescript quoted by Marcian in Dig. 30.114.15 and *Novella* 159.2, the jurist (in both cases Scaevola) did not consider prohibitions of alienation contained in family *fideicommissa* to be enforceable. In Dig. 32.38.4 (Scaev. 19 *Dig.*)[181], Scaevola responded differently than in the response of among others Dig. 31.88.15, in which the family *fideicommissum* is left intact. Dig. 32.38.4 has also been transmitted as Dig. 32.93*pr* (Scaev. 3 *Resp.*) in a case of *Doppelüberlieferung*[182]. In Dig. 32.38.4 the testator forbade his daughter and heir by a *fideicommissum* to alienate or to place under hypothec. Scaevola judged that such an injunction was unenforceable, as it was a *nudum praeceptum* (a regulation, that cannot be enforced via an action, hence it is 'nude'). In addition, in

178 *Novella* 159.2: *ἀπιουσῶν δὲ καὶ τούτων ὡς τέσσερας ἤδη γενεὰς παρεληλυθέναι δοκεῖν, οὐκ ἂν ὑπομείναιμεν ἀρχαίαν οὕτω δικαστηρίοις ὑπόθησιν παραδίδοσθαι* (after they have died, so that it would seem that four generations have gone by, we shall not permit that a matter so old will be brought before judges.). In this *Novella* emperor Justinian used an exemplary case to impose more generally applicable regulations on family *fideicommissa*. The case is similar to Dig. 31.88.15. Hiërus a testator bequeathed houses and estates to his heir Constantinus under the condition that he was not able to alienate the property, in order that the property could remain in the family. Generations passed by and the question was asked whether an action could be brought, if the property was alienated to a third party outside of the family.

179 For an extensive overview of this debate see also Johnston *SZ* 102 (1985), 221*sqq*.

180 Babusiaux *SZ* 135 (2018), 173.

181 A detailed analysis of this *responsum* can be found in Babusiaux *Atti dell'Accademia Romanistica Costantiniana* 22 (2017), 414-419.

182 In this instance it is interesting that only one case has been anonymized (Dig. 32.93*pr*). Dig. 32.38.4 still has the original parties, which are an officer named Julius Agrippa and a certain Julia Domna. In Dig. 32.93*pr* these are called Lucius Titius and Julia. For a more detailed analysis on Dig. 32.38.4 see Babusiaux *SZ* 135 (2018), 121-122. See also Kaser 1977, 27 in which Kaser combines Dig. 32.38.4, Dig. 32.38.7 and Cod. 7.26.2 (Alex. Sev. 224 AD).

Dig. 32.38.7 (Scaev. 19 *Dig.*) a testatrix, the mother of the heirs, tried to block alienation and hypothecation of estates per *fideicommissum*, because she wanted to preserve them for posterity. In his reply Scaevola denied the very existence of a *fideicommissum* (*respondit nihil de fideicommisso proponi*)[183]. This is not the case in Dig. 31.88.15, however, where Scaevola seemed to accept the existance of a *fideicommissum*, but simply stated that the conditions were not fulfilled by the heir.

Scaevola refrained from commenting on *τὸ χρηματιζόμενον ἄχρηστον καὶ ἄκυρον*[184].Infringement of the *fideicommissum* would normally only give rise to an action against the heir to recover the property of the *fideicommissum*, but according to the Greek testament the agreement of alienation itself, e.g. a purchase agreement, would be null and void. An ability of the testator to declare obligations of the heir null and void cannot be found in Roman law. They are, however, present in Hellenistic contracts. An example is the testamentary disposition of P. Fouad 33 (provenance unknown, I AD), in which Tapeteuris made testamentary provisions for her husband, regarding his possessions. In this *ὁμολογία* agreements against the provisions are declared null and void (l. 31: *τὸ παρὰ ταῦτα πραχθησόμενον ἄκυρον εἶναι*)[185]. One reason that Scaevola refrains from commenting on this topic can be, that he did not consider it a problem. This type of clause was very common in the Hellenistic East from the second half of the first century BC up until the third century AD[186]. Another plausible reason is more prosaic: the jurist was not asked about the validity of that particular condition in the testament and simply did not bother to comment.

IV.4 Conclusion based on *mutuum* in Dig. 31.88.15

In the Greek testament quoted in Dig. 31.88.15, the testator incorporated Hellenistic clauses, such as the prohibition of alienation and encumbrance of real property and the transfer of power 'until the end of time', which frequently occur in contracts of sale and other forms of alienation. Furthermore, a typical Hellenistic *ἄκυρον*-clause was added to nullify all agreements concerning the property in question; this clause was either tacitly accepted by Scaevola, or ignored completely due to the lack of relevance for the legal question. The family *fideicommissum*, which the testator added, is attested in

183 Dig. 32.38.7: He responded that nothing was brought before him indicating a *fideicommissum*.

184 Let such a transaction be useless and invalid.

185 P. Fouad 33, 31: that an act done against these provisions will be null and void.

186 In this timeframe most of the attestations are found (the Greek *ἄκυρον* is also oftenly used to indicate that an agreement is no longer valid, for instance in documents confirming the payment of a loan). An example quite similar to Dig. 31.88.15 can be found in the contract of hypothec in P. Erl. 62, 13 (provenance unknown, II AD): *χρηματισ]θησόμεν[ο]ν ἄκυρον εἶναι* (that the transaction [i.e. a transaction between the debtor and a third party regarding the hypothecated property] be null and void). In this case the debtor fulfilled his obligations, as the text was cancelled out via crosses.

Greek sources and in Latin sources from the second century onwards (the so-called testament of Dasumius dates from the beginning of the second century AD, possibly 108 AD). The clause, however, has a long standing in the Roman East. Scaevola's acceptance of it could stem from his knowledge of the Hellenistic documentary practice.

Scaevola did not deviate from the facts proposed to him. The use of the Roman technical legal term *delegaverit* colours the interpretation of the jurist, in which only Roman law has been taken into consideration. An explanation for the legal question is the use of the word *δανείσασθαι* in Greek. The testator seemed to have in mind to prohibit an encumbrance of the houses, because a *δάνειον* is a loan, which was often secured by a real right, being closely associated with hypothec and *hypallagma*. Strictly speaking, however, the house would remain unencumbered by a *δάνειον*, as it was just a form of a contract of loan for consumption. Scaevola looked at the *voluntas* of the testator which was that the house would remain in the family in an unencumbered state and concluded that the conditions were not fulfilled. Another explanation is that the heirs mistook the ability of Flavia Dionysia to receive rent with an authorization of her to collect rent. The latter could be styled as a real right (*enoikesis*), encumbering the heir's share of the houses.

IV.5 Dig. 50.12.10 (Mod. 1 *Resp.*): Euergetism and pseudo-*mutuum*

The last *responsum* examined in this chapter is Dig. 50.12.10 from the *responsa* by Modestin. This reply is added to section 12 of book 50 of the Justinianic Digest which is called *De Pollicitationibus*. The section deals with promises and cases in which actions could be brought based on promises made. From this section, it appears that these promises were almost always connected to a form of *euergetism* towards a municipality or a city. From the fact that Justinian and his compilators devoted an entire section to these promises it may be deduced that these promises were no frivolous matter, but were awarded 'sufficient legal respect'[187].

These promises could concern the erection of edifices or statues in the public domain, but could also comprise *agones,* athletic games or contests of performance artists, such as musicians or actors. In imperial times 'Greek' games and contests flourished, which, according to the French scholar Robert, led to *une explosion agonistique*[188] in the cities of the Hellenistic East. Based on numismatic research, the number of games per four-year period is estimated to have risen to between four and five hundred from the first until the third century AD[189].

187 Ng *JRS* 105 (2015), 112.
188 Robert 1984, 38.
189 Gouw 2009, 34. See also van Nijf in: Remijsen *e.a.* 2016, 43.

In two cases from Dig. 50.12, the municipalities that were the beneficiaries of the promises were unmistakably cities in the Roman East. In Dig. 50.12.1.5 (Ulpian. 1 *de Off. Cur. Rei. Pub.*) columns were promised to the Roman city of Citium on the island of Cyprus and in Dig. 50.12.10 (Mod. 1 *Resp.*) a woman made a promise to her (not further specified) native city to organise games. The text of the promise was cited in Greek, which suggests that the city was located in the Roman East. In this bilingual reply the testator Septicia promised to pay the prizes for the winners of games, which were to be held once every four years.

Dig. 50.12.10 (Mod. 1 *Resp.*)

Septicia certamen patriae suae pollicendo sub hac condicione pollicita est, uti sors apud eam remaneat et ipsa usuras semissales ad praemia certantium resolvat[190], in haec verba: "Φιλοτιμοῦμαι καὶ καθιερῶ ἀγῶνα τετραετηρικὸν ἀπὸ μυριάδων τριῶν, τὸ τοῦ κεφαλαίου αὐτὴ κατέχουσα ἀργύριον καὶ ἀσφαλιζομένη παρὰ τοῖς δεκαπρώτοις ἀξιοχρέως ἐπὶ τῷ τελεῖν με τὸν ἐξ ἔθους τριῶν μυριάδων τόκον, ἀγωνοθετοῦντος καὶ προκαθεζομένου τοῦ ἀνδρός μου, ἐπ' αὖθις[191] δὲ τῶν ἐξ ἐμοῦ γεννηθησομένων τέκνων. Χωρήσει δὲ ὁ τόκος εἰς τὰ ἆθλα τῶν θυμελικῶν, καθὼς ἂν ἐφ' ἑκάστου ἀθλήματος ἡ βουλὴ ὁρίσῃ". Quaero, an possunt iniuriam pati filii Septiciae, quo minus ipsi praesiderent certamini secundum verba condicionemque pollicitationis. Herennius Modestinus respondit, quo casu certaminis editio licita est, formam pollicitationi datam servandam esse.

Septicia promised games to her native city by promising under the following condition, namely that the capital would stay with her and she herself would spend the interest of a half-ass per month [i.e. a rate of six percent per year] on the prizes of the contestants, in the following words: "I aspire[192] and I dedicate quadrennial games by using a capital of thirty thousand, keeping the money of the capital myself and providing assurance for this sum with the *decaproti*[193] sufficiently in order that I will pay the customary interest for the thirty thousand, and my husband will organize and preside over the games and thereafter the children who will be born from me. The interest will go to the prizes for the theatrical performers, in accordance with what the council shall decide on every single contest". I ask whether the sons of Septicia could suffer injury if they do not preside over the games according to the words and the condition of the promise. Herennius Modestinus responded, that if the organization of the games is permitted, the form of the promise must be upheld.

190 In his *Editio Maior* Mommsen suggests the emendation *rei publicae solvat* for *resolvat*.

191 Based on Salmasius, Mommsen suggests the emendation *ἐσαῦθις* for *ἐπ' αὖθις* in his *Editio Maior*.

192 Grubbs translates *φιλοτιμοῦμαι* as 'seeking honor', referring to an epigraphical practice. Grubbs 2002, 76.

193 *Decaproti* are the chief municipal authorities of a city.

In Lenel's *Palingenesia* the fragment (fr. 284) is incorporated in a section on municipal law together with three other fragments (frs. 281-283). It is the only bilingual fragment in Modestin's first book on Replies. The fragment concerns an act of *euergetism* of a woman named Septicia. From the Latin opening and the Greek text of the promise, it can be inferred that she wanted games to be hosted every four years in her hometown, taking the form of contests in the performing arts, such as musicmaking and theatre[194], and in sports. These games (*ἀγῶνες*) would be financed by Septicia on the condition that her husband, and after him her sons, would organise and preside over the games[195]. Septicia held the capital, which was to be monetized to finance the games, consisting of thirty thousand presumably *drachmae* or *denarii*[196] at her own disposal[197] and her gift consisted in the interest one could earn by investing this capital in loans. The interest was six percent per year, which amounted to four times one thousand eight hundred *denarii* or *drachmae* for each edition of the games. A similar situation can be seen in a text by Scaevola, which is Dig. 33.1.21.3 (Scaev. 22 *Dig.*). The case of Dig. 33.1.21.3 was also located in the Roman East, namely in Sebaste in Syria Palaestina[198].

In Dig. 50.12.10, the question by the author concerned the sons of Septicia. This question can be interpreted in two ways. Firstly, after the death of her husband, would Septicia's sons suffer injury (*iniuriam pati*) to such an extent that they could not preside over the games**.** In Dig. 50.12.10 it appears that the sons (or one of them) did not suffer because of an *iniuria* inflicted by a third party, but that a third party had successfully brought an action based on *iniuria* (*actio iniuriarum*) against the sons. This interpretation, however, is not completely in line with the Latin *iniuriam pati.* A conviction based on the *actio iniuriarum* led to *ignominia* according to Gaius in *Inst*. IV 182. Therefore, a valid question could have been: could persons who as a condition

194 Such games were also often bequeathed by testators via legacies. See, for instance, Dig. 33.2.12 (Scaev. 3 *Resp.*) and Dig. 30.122 (Paul 3 *Reg.*). Cf. Ng *JRS* 105 (2015), 122.

195 A similar condition can be found in Dig. 33.1.6 (Mod. 11 *Resp.*). In this reply by Modestin a testator had bequeathed a sum of money to his hometown to organize yearly games, over which his heirs had to preside. The successors of the heirs asked whether this had to be done in perpetuity, because the testator mentioned his heirs (and not the heirs of his heirs). Modestin replied that the money was to be paid in perpetuity. See also Magioncalda 1999, 206-207.

196 Ng mentions *denarii* in Ng *JRS* 105 (2015), 113. Remijsen mentions *drachmae*. Remijsen 2015, 297. Kübler keeps both options open. Kübler *SZ* 29 (1907), 205.

197 The text mentions the *κατοχή* of the capital by Septicia. The concept of *κατοχή* has been analysed in the discussion on hypothec in chapter two on p. 79. In this case *possessio* is meant, as mentioned by Paul in his explanation of the concept of possession in which he used the Greek *κατοχή* in Dig. 41.2.1*pr* (Paul. 54 *ad Ed.*). In this case the capital had to be used to generate interest.

198 In this case Lucius Titius bequeathed a hundred (thousand?) to his hometown Sebaste in order for it to organize games every other year by using the interest made by investing the capital in loans. In Dig. 33.2.12 the testator wanted the decurions of his hometown to use the fruits (revenue) of a landed estate to organize yearly games, which is similar to Dig. 50.12.10 in which the fruits of the capital had to be used.

of the promise were to preside over the games do so, even though they had suffered an *actio iniuriarum*. Modestin replied that in organising the games the requirements as agreed upon must be upheld.

A second interpretation is more in line with the Latin *iniuriam pati* is that the author of the question wanted to know whether, if other people presided over the games, the sons of Septicia would suffer *iniuria* (*iniuriam pati*) and could subsequently bring an action based on *iniuria* against them. An argument for this interpretation is that presiding over the games was prestigious. It must therefore be considered that by asking Modestin for advice on this matter, these people (possibly, the council members of the city) tried to find a way to circumvent the conditions of the promise after the death of Septicia's husband, in order to preside over the games themselves. An argument against this interpretation is that Modestin did not answer this specific question, but simply remarked that the sons had to preside over the games, if these games were legally organized.

IV.6 The promise of Dig. 50.12.10 in the light of three inscriptions

The promise in the Greek text of Dig. 50.12.10 corresponds with the increase of contests or *agones* in imperial times. These *agones* were funded by private persons or families, and organising and presiding over such games (*ἀγωνοθετέω*) was often considered prestigious. This is evidenced by papyri from these centuries, mostly the third century AD, in which persons mentioned that they presided over the games in their titles[199]. Letting family members preside over the sponsored games is also attested in epigraphical sources, for example TAM II 301 (Xanthus, II/III AD)[200].

Examples for these privately funded games can be found in epigraphical sources[201]. Three such inscriptions will be discussed here, because they show similarities to the text of Dig. 50.12.10. These are, firstly, the inscription of C. Vibius Salutaris from the city of Ephesus from 104 AD[202], secondly, the inscription of C. Iulius Demosthenes of Oenoanda from 125 AD[203] and lastly the inscription of Lalla of Tlos also from the second century AD[204].

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199 See for example: P. Oxy. XXXIV 2711, 2 (Oxyrhynchus, 271 AD), SB VI 9421, 4-5 (Oxyrhynchus, III AD) and P. Ryl. II 117, 18-19 (Hermopolis, 269 AD): *A]ὐρήλιος δὲ Εὐδαίμων κοσμητὴς υἱὸς Εὐδαίμονος ἀγωνοθετή-// σαντος γεν[ο]μένου βουλευτοῦ τῆς αὐτῆς Ἑρμοῦ πόλεως* (Aurelius Eudaemon, *cosmetes* (a city magistrate), son of Eudaemon, former president of the games, former council member of the same city of Hermopolis). These attestations are three examples of the in total twelve cases found, of which eight are from the third century AD. Almost all attestations (nine out of twelve) originate from Oxyrhynchus.

200 Cf. Remijsen 2015, 293.

201 For more examples, see Williams 2014, 76 and Zuiderhoek 2009, 38.

202 For this inscription, the edition of Rogers is used. See Rogers 1991, 152-185.

203 See SEG XXVIII 1462 (Oenoanda, 125 AD).

204 See SEG XXVII 938 (Naour *ZPE* 24 (1977), 265-290).

In the inscription I. Eph. 27 (Ephesus, 104 AD), Salutaris promised 20.000 *denarii* for religious statues and the institution of a lottery festival, to which end the same *καθιερῶ* is used as in Dig. 50.12.10[205]. Similar to Septicia in Dig. 50.12.10, Salutaris kept the capital himself. The promised amount was to be paid to the city of Ephesus by him or his heirs, whenever it was wanted (ll. 70-73). The festival was subsidized with interest generated from the capital, similar to Dig. 50.12.10. The yearly interest at nine per cent, to which rate Salutaris would lend out the capital, amounted to a total of 1.800 *denarii*[206]. The dossier concerning C. Vibius Salutaris also contains a letter from proconsul C. Aquillius Proculus and one from legate P. Afranius Flavianus, in which Salutaris was praised and these festivities were sanctified[207].

The second inscription, from Oenoanda, concerns a man named Demosthenes who promised games to his hometown. Demosthenes considered these games a highly prestigious project as can be seen in the name he gave the games which he sponsored: the *Demostheneia*. The *Demostheneia* were, just like the games in Dig. 50.12.10, a *thymelic* festival (*τὰ ἆθλα τῶν θυμελικῶν* in the text of the Digest and the inscription reads *πανήγυρις θυμελική*[208]). The inscription gives some insight in what kind of spectacle this could have been, as a list of prizes for the various categories of *ἆθλα* has been incorporated. The *Demostheneia* included the following competitions: a competition for trumpeters and heralds, writers of eulogies (*encomia*) in prose, poets, fluteplayers accompanying a chorus, comic poets, tragic poets and singers accompanied by the cithara (ll. 38-46 of the inscription)[209]. The prizes for the *thymelic* competition amount to a total of 1.900 *denarii*.

Another list of prizes from contests is known from the second / third century AD, the timeframe of Dig. 50.12.10, from an inscription from Aphrodisias at Caria, which has been published as CIG 2759[210]. In this inscription, approximately the same contests are mentioned as in the *Demostheneia,* and Roueché mentions that such prize lists 'give a good idea of the regular structure, and the standard events of musical and gymnastic contests in the Roman imperial period'[211]. The prize for trumpeters was 500 *denarii*, for heralds 500 *denarii,* for eulogy writers 750 *denarii,* for poets 750 *denarii,* for flute-players 1.000 *denarii* and so on. The prize money in total came to over 20.000 *denarii*, meaning that either the prizes were much higher than in the games of Dig. 50.12.10 or the games from the inscription were more elaborate.

205 See, for example, lines 21 *μεγαλοψύχο*[*ις δὲ*] *καθιερώσεσιν* (with magnanimous dedications) and the reconstructed 22-23: *ὑπέσχε*[*το ἐννέα ἀ*]- //*πεικονίσ*[*ματα καθιερώσειν*] (he promised to dedicate nine statues).

206 See lines 62-71.

207 See Kokkinia *Temeria* 14 (2019), 217.

208 See line 12 of the inscription. In examining the inscription, the edition of Wörrle is used from Wörrle 1988, 4-17.

209 This list is taken from Wörrle 1988, 8.

210 The edition of the text made by Roueché is used. See text 53 of Roueché 1993, 173-174.

211 Roueché 1993, 174.

The final epigraphical source (SEG XXVII 938) mentioned is also from the second century AD and can be found in an inscription from Tlos, a citadel in the Roman province of Lycia. A woman named Lalla promised (l. 2 *ὑποσχομένη*) a gift of 12.500 *denarii* for a contest and not only this sum, but also the yearly interest which the capital would generate when invested in loans. In order to save the city the effort of finding creditors, however, Lalla guaranteed it herself[212].

IV.7 Financing the games of Dig. 50.12.10

In Dig. 50.12.10 security regarding the finances is given to the *decaproti*. Both *decaproti* and *icosaproti* were officials that had financial duties such as the collection of imperial taxes in the community[213]. Next to the financial dealings with the magistrates, Septicia in Dig. 50.12.10 also had her own conditions for her sponsorship. These are comparable to the conditions mentioned in the inscriptions. In Dig. 50.12.10 the honour of presiding over the games, the prestigious function of *agonothetes*, was to be given to Septicia's husband and after his death to her sons. Demosthenes wanted the *agonothetes* to be chosen from the council members (l. 30), who did not need to pay anything themselves, but had to render account in front of three *icosaproti*.

Furthermore, the *agonothetes* had to use a special title, namely so-and-so, son of the *agonothetes* of the first, second or third (etc.) *Demostheia* festival (ll. 33-34), to show off the ever-growing history and standing of the festival. If the regulations regarding this festival were violated, fines had to be paid of 2.500 and 5.000 *denarii* (ll. 34-37). Similar fines are mentioned in the inscription of Salutaris in I. Eph. 27, 315-332.

I. Eph. 27, 321-330 (Ephese, 104 AD)

ὁ δὲ πε[ι]ράσας ποιῆσαί τι ὑπεναντίον τῇ διατάξει ἢ τοῖς
ὑπὸ τ[ῆ]ς βου[λ]ῆς καὶ τοῦ δήμου ἐψηφισμένοις καὶ ἐπικεκυ-
ρωμέν̣[οις περὶ] ταύτης τ̣ῆς διατάξεως ἀποτεισάτω εἰς
προσκ[όσμημα τ]ῆς με[γίστ]ης θεᾶς Ἀρτέμιδος δη. δισμύρια
325 [π]ε[ν]τ̣α[κισχείλια καὶ εἰς τὸν τοῦ Σε]βαστοῦ φίσκον ἄλλα δη. β' μ(ύρια), Ε.
[ἡ δὲ προγεγραμμένη διάταξις ἔσ]τ̣ω κυρία εἰς τὸν ἅπαντα χρό-
[νον —, καθάπερ Ἀκουίλλι]ος Πρόκλ[ος, ὁ ε]ὐ̣[ε]ρ[γ]έ̣της
[καὶ ἀνθύπατο]ς, καὶ Ἀφράνιος Φλαουιανός, ὁ κράτιστος πρεσβευτὴς
κ̣α[ὶ ἀντιστ]ράτηγος, διὰ ἐπιστολῶν περὶ ταύτης τῆς διατάξε-
330 ως ἐ̣πεκύρωσ̣αν καὶ ὥρισαν τὸ προγεγραμμένον π[ρ]ό̣στειμον. [214]

212 See also Kokkinia *Temeria* 14 (2019), 230.

213 See Wörrle 1988, 162-163 and Modestin, who is quoted by the fourth century AD jurist Arcadius Charisius in Dig. 50.4.18.26 (Arc. 1 *de Mun. Civ.*). Ulpian also stated that a task of the *decaproti* was tax collection in Dig. 50.4.3.10-11 (Ulpian. 2 *Opin.*).

214 The Greek text is taken from Rogers 1991, 171.

> Let him, who endeavours to act against this disposition or against the decrees proposed and ratified by the council and the people concerning this disposition, pay twenty-five thousand *denarii* for the adornment of the greatest goddess Artemis and another 25.000 *denarii* to the imperial treasury. Let the aforementioned disposition be valid for eternity —, in the same way as Aquilius Proculus, the benefactor and proconsul, and Afranius Flavianus, the most excellent ambassador and *propraetor,* via letters have ratified concerning this bequest and have determined the above-written fine.

In the inscription, the benefactor Vibius Salutaris has set conditions with regard to his disposition. A significant fine was to be imposed if these conditions[215] were violated. The fines and the disposition itself are validated by the proconsul Aquilius Proculus and the *propraetor* Afranius Flavianus, whose letters were added to the inscription. The *Demostheneia* festival was also sanctified by a Roman authority. In this case the Roman emperor Hadrian himself sanctified the festival, in ll. 1-6 of the inscription[216]. In both cases the city council further sanctioned the dedications, as can be seen in I. Eph. 27, 104*sqq*. The validation of the promise by a government official, be it a council member, the proconsul or the emperor, seemed to be important. Such a validation must have been the reason why Modestin in Dig. 50.12.10 replied to the legal question with the condition *certaminis editio licita est*. With *licita* Modestin most likely referred to the question whether the edition of the games was permitted or sanctioned by the proper authorities. If this was the case, the requirements set by Septicia had to be met, as is the case with both the *Demostheneia* and the lottery festival of C. Vibius Salutaris.

Demosthenes is considered to be a Greek from provincial, Lycian nobility, who was included in the class of the *equites* by emperor Trajan[217]. Septicia seems to have been a woman of some standing as well, as she was well-connected to the city's ruling elite. In the Greek text she guaranteed the interest used as prize money to the leading council members which means Septicia had access to the ruling elite of the city. This close connection to Romanised (Greek) provincial magistrates betrays Septicia's Roman or Romanised nature. Another Roman aspect of Septicia is that she mentioned a 'customary interest rate': *τὸν ἐξ ἔθους τριῶν μυριάδων τόκον.* It can be asked, which customary interest rate she meant. Modestin, in the first part of this

215 In Dig. 50.12.10 the conditions set by Septicia must, according to Lepore, not be seen as *condizione sospensiva,* but as modus for the organization of the *thymelic* festival. According to him the phrase *secundum verba condicionemque pollicitationis* must be considered an a-technical use of *secundum condicionem*. See Lepore 2012, 353. In view of the reply of Modestin, it is enough to say that in organizing the festival the requirements of Septicia had to be met.

216 See Wörrle 1988, 4. Lines 3-4 of the inscription read *καὶ τὸν ἀγῶνα τὸν μουσικὸν, // ὃν ὑπέσχετο ὑ*[*μεῖ*]*ν, βεβαιῶ* (I [i.e. emperor Hadrian] sanctify this music festival, which he [i.e. Julius Demosthenes] promised you) and *Κύρια*] *δὲ ἔστω τὰ ἐπιτείμα* (r. *ἐπιτίμα*) (let the penalties be valid).

217 Wörrle 1988, 56.

reply, interpreted that to mean a six percent interest rate, which is a rate customary to Romans[218].

The text of Dig. 50.12.10 contains a mixture of characteristically Roman elements, such as the interest rate of the loan and the name Septicia, and distinctively Hellenistic elements, such as the *decaproti* of the city council and the concept of *asphaleia* ('security'). The concept of *asphaleia* in the cited Greek (*ἀσφαλιζομένη*) shared some similarities with *depositum irregulare* as they both functioned as a pseudo-loan / *pseudo-mutuum*. Septicia gave *asphaleia* to the *decaproti* of the council for the yearly interest of the capital. This must not be interpreted as a form of surety or security *in rem*. The practice of a pseudo-loan was meant. Septicia gave the *decaproti* a document, often referred to as *ἀσφάλεια*[219], in which a contract of loan was described. Having the capital with her like a debtor of a loan, the yearly interest was due to the pseudo-creditors, the *decaproti*. If the 'interest' was not paid, the *decaproti* could then bring action for the capital given by using this document and producing it in court. In this way the *decaproti* did not need to find debtors to generate interest from the capital as this was guaranteed by Septicia herself. By using this construction, the money was 'secured' by Septicia[220]. A similar use of *ἀσφάλεια* concerning the 'securing' of interest of a public donation to a city can be seen in the dedicatory inscription of Lalla of Tlos (SEG XXVII 938), mentioned above. In ll. 7-9 of the inscription can be read: '*ἠσφαλισμένης // αὐτῆς κατ' ἔτος ἐκ τοῦ τόκου διδό- // ναι*'[221]. As Naour suggests, Lalla not only promised the money, but also made the payment of the yearly sum of interest enforceable[222] by the government officials.

IV.8 Conclusion based on Dig. 50.12.10

This case from Modestin's *Responsa* fits the historical background of the Roman East of the third century, and especially of the cities of Asia Minor, in which rich private persons promised gifts to their native cities in order to found festivals, games and statues in an agonistic explosion. This custom was held up by the upper class of these cities, private persons from the strongly Romanised local Hellenistic elite, such as Demosthenes of Oenoanda. The *benefactrix* Septicia from Dig. 50.12.10, a Roman citizen, seems to have been

218 In describing the benefits of viniculture Columella made an estimation of the costs in *de Re Rustica* III, 3. 7-11. Because vines apparently did not yield profit the first two years, the husbandman had to acquire credit and Columella added that doing the accounting one must also consider a six percent interest rate on the capital. In the Digest *semisses usurae* can also be found in Dig. 17.1.34 (Afr. 8 *Quaest.*), Dig. 22.1.13 (Scaev. 1. *Resp.*) & 17 (Paul. 1 *de Usuris*) and Dig. 46.3.102.3 (Scaev. 5 *Resp*).

219 With examples from the papyrological sources, see Wolff 1978, 159. See also Jördens in Keenan *et al*. 2014, 418.

220 See also Wörrle 1988, 152-153, who also calls this a *Darlehenurkunde*.

221 The Greek is taken from Naour *ZPE* 24 (1977), 265. Ll.7-9: 'For she herself will secure that they will give it on account of the yearly interest due'.

222 Naour *ZPE* 24 (1977), 268.

part of this Romanised upper class. Modestin was aware of the Hellenistic practice of promising games as a form of euergetism, as he hinted to the practice of having these games or festivals sanctioned by an official decree, as can be seen in the inscriptions of Demosthenes and of Vibius Salutaris. In these official decrees the conditions for the benefactions were confirmed and publicized, and an officially sanctioned fine was imposed to prevent infractions. Therefore, Modestin argued that the conditions set by Septicia, namely to let her husband and later her sons preside over the games and organise them, had to be upheld. In Dig. 50.12.10 a mixture of Roman elements and Hellenistic elements can be found. Modestin deviated from classical Roman law, in which a contract had to be shaped to fit a certain contract type in order to be enforceable (*Typenzwang*). The promise of Septicia and the donation made as a pseudo-loan in the contract did not fit a prescribed form such as the Roman contract of *mutuum* or *depositum*. As evidenced by his reply, Modestin, however, implicitly validated the Hellenistic custom of promising games as a form of euergetism.

V Conclusion on bilingual *responsa* concerning real contracts

Six bilingual *responsa* concerning cases in which Roman real rights play a role, by three different jurists, were analyzed in this chapter. Four of these six *responsa* are related to *depositum* and two are related to *mutuum*. The Greek / Hellenistic counterparts to these Roman contracts, however, cannot be defined as real contracts, for they did not come into existence by virtue of a real moment. Five of the six *responsa* considered in this chapter are embedded in the Hellenistic legal world, while one must be considered entirely Roman (Dig. 40.5.41.4). The Greek cited in these five *responsa* from Scaevola, Paul and Modestin shows many features which are unmistakably embedded in Hellenistic documentary practice.

From the *responsa* by Scaevola, it is clear that Scaevola was well aware of Hellenistic law and the accompanying practice, even when it exhibited characteristics atypical for Roman law. Dig. 40.5.41.4, however, must be excluded, for in this *responsum* nothing distinctively Greek / Hellenistic can be perceived other than the Greek language of the codicil itself. The codicil should be considered as purely Roman, though it happened to be written in Greek.

The document cited in Dig. 31.88.15 is most definitely not 'a Roman codicil in the Greek language', for other than the Greek language, strong indications exist for a Hellenistic legal context. This can be concluded from the Greek name of one of the contracting parties and from clauses which are unambiguously associated with Hellenistic documentary practice. The testament quoted in Greek was in no uncertain terms accepted by Scaevola, even though other classical jurists such as Gaius and Ulpian opposed non-Latin testaments. From the testament the jurist distilled a *fideicommissum* though

it did not have some characteristics typical for *fideicommissa*. Either Scaevola was accommodating the Hellenistic contracting parties concerned, or this can be considered as the beginning of a development which is later finalized by Justinian in the East, in which the prescribed forms for *legata* and *fideicommissum* disappeared. With regard to the facts, though, Scaevola replied to the legal question in a purely Roman fashion.

In Dig. 32.37.5, Scaevola accepted a *depositum irregulare* in a case of pseudo-credit, which is a common form of credit in the Hellenistic East. From his replies analysed in this chapter, it seems that Scaevola was inclined to apply laws and regulations from the Hellenistic East or to adjust his advice to the habits of the East, where this was possible.

From Scaevola's pupil Paul one *responsum* was analysed, on *depositum*. The use of a *depositum* (*depositum irregulare*) by the depositary stems from the Greek / Hellenistic legal concept of *parakatatheke* or *paratheke*. This legal concept was discussed by classical Roman jurists such as Scaevola, Paul, Ulpian and Papinian. From his legal writings it follows that Paul already acknowledged two types of *depositum* which modern scholars have called regular and irregular deposit. From the legal writings of Scaevola, Ulpian and Papinian an acceptance of these legal concepts must be deduced, too. Paul takes both forms of *depositum* into account and decided in accordance with Hellenistic norms on *parakatatheke*. In the second and third century AD the application of *depositum irregulare* in the Roman West seems to have been limited to a 'banking function', whereas in the Hellenistic East the use as a form of pseudo-credit was more prevalent. It seems, however, that by the second and third century AD this legal concept, once it had been adjusted to suit Roman needs, had already been accepted in the Roman West, meaning that the jurists rather gave advice on a legal concept, which by their time was, albeit foreign, widespread in Rome.

Lastly, in his replies in Dig. 31.34.7 and Dig. 50.12.10, Modestin demonstrated a thorough knowledge of the Hellenistic legal practice of his time and a willingness to let this practice prevail over Roman law. In Dig. 31.34.7 Modestin showed that he knew Hellenistic dotal law and revealed a willingness to incorporate Hellenistic law in his legal advice, taking into account the differences between the legal worlds of the East and West. That Modestin took these norms into account becomes especially clear in his treatment of the dowry. Here, Modestin let Hellenistic dotal laws prevail over the Roman regulations regarding dowries. In Dig. 31.34.7 another form of *parakatatheke* / *depositum* is used and accepted, which is also present in Scaevola's reply (Dig. 40.5.41.4). This term '*ἐν παρακαταθήκῃ*' is a pseudo-legal layman's term, meaning to 'entrust someone to'. Its use is attested in Greek sources, e.g. literature, legal writings and legal epigraphy.

From Dig. 50.12.10 can be deduced that Modestin is aware of the custom in Hellenistic cities to promise games and to 'secure' a donation by leaving the capital with the donor and drawing the donation up as a pseudo-loan. Modestin validated this practice, even though it goes against the Roman contractual *Typenzwang*.