C. 4.29.19, a rescript of Diocletian

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I

In this paper I shall try to show how essential it is that in interpreting a rescript one takes full account of the special character of the source, namely the rescript. To illustrate this point I have chosen a rescript of Diocletian concerning the *SC Velleianum*, namely C. 4.29.19.

In recent Romanist literature Vogt (1) and Medicus (2) have dealt with this rescript in their discussion of the content of the *SC Velleianum*. Their discussion centred on whether the *SC Velleianum* has always been applicable in cases where a woman had borrowed money from some person on behalf of a third party so that the third party would not have to borrow money from that person; the question was: when the creditor asked the woman to repay the money, could she defend herself by invoking the *SC Velleianum*? Vogt and Medicus both give different answers to this question. According to Vogt, in such

(1) H. VOGT, *Studien zum Senatus Consultum Velleianum*, Bonn 1952, 44 sqq.; reviews by M. TALAMANCA in AG 143 (1952), 173 sqq. and H. KRELLER in SZ 72 (1955), 400 sqq.; see also H. KRELLER, *Das Verbot der Frauenintercession von Augustus bis Justinian*, Anz. der phil. hist. Klasse der Österr. Akad. der Wiss. 1956, 1 sqq.

(2) D. MEDICUS, *Zur Geschichte des Senatus Consultum Velleianum*, Graz-Vienna-Cologne 1957, 112 sqq.; reviews by E. KADEN in SZ 75 (1958), 422 sqq. and M. TALAMANCA in Labeo 4 (1958), 99 sqq. In connection with this book by Medicus, H. VOGT wrote again about this subject in *Miscellanea ad Senatus Consultum Velleianum* in TR 35 (1967), 116 sqq.

a case a woman generally could not defend herself by invoking the *SC Velleianum*; according to Medicus she could. In my opinion the view of Medicus on this matter is more credible than that of Vogt, but the important factor here is that the arguments Medicus uses, at least as far as they refer to C. 4.29.19, are unsound. The reason is that Medicus, like Vogt, took no account of the fact that he was dealing with a rescript. I shall now indicate how I think the text should be tackled if the interpretation is to be a valid one.

I have divided my paper into several sections. I shall begin by reproducing the rescript and giving my own translation. Thereafter I shall examine the ways in which Vogt and Medicus have interpreted C. 4.29.19, giving my criticism. Finally I shall give my own interpretation of the rescript and try to show how essential it is to take full account of the special character of the rescript.

II

C. 4.29.19 runs as follows:

Impp. Diocletianus et Maximianus AA. et CC. Faustinae. Cum ad eas etiam obligationes, quae ex mulieris persona calliditate creditoris sumpserunt primordium, decretum patrum, quod de intercessione feminarum factum est, pertinere edicto perpetuo declaratur, si tamen creditor, qui contrahere cum alio proposuerat, mulieris personam elegit, exceptione contra petitores secundum ea quae adseveras defendi potes. (a.294)

The emperors Diocletian and Maximian Augusti and Caesares to Faustina. Because it is laid down in the *edictum perpetuum* that the *senatusconsultum* which was issued in connection with the intercession of women also relates to those obligations which had their beginnings in the person of the woman due to the cunning of the creditor, you can, if in fact the creditor who had intended to enter into a contract with another, thereafter chose the person of

> a woman, defend yourself with an exception against the plaintiffs in accordance with what you assert.

This rescript, which dates from the year 294, has come down to us in title C. 4.29 *Ad Senatus Consultum Velleianum*. The text does not say precisely what kind of intercession is meant; on the basis of the words *"obligationes ... primordium"* it is generally assumed that it was intercession by means of *mutuum*: the woman has borrowed money from someone with the intention of giving it to a third person. However, in the Romanist literature one finds rather different interpretations of the rest of C. 4.29.19. Particularly troublesome was the phrase that it is laid down in the edict that the *SC Velleianum* should also apply to intercession by means of *mutuum*, because the *SC Velleianum* itself already decreed that this should be so. Since the beginning of this century it has been assumed, by Lenel (3) and others (4), that this rescript must have been interpolated or at least drastically altered by later revisers. Vogt, in his monograph on the *SC Velleianum*, disagreed with this view (5). One of the notions which Vogt supports in this

(3) O. LENEL, *Das Edictum perpetuum*, Leipzig 1927³, 287 note 7.

(4) See G. BROGGINI, *Index Interpolationum quae in Codice Iustiniani inesse dicuntur*, Cologne-Vienna 1969, 79; in addition the following authors should be mentioned: G. BORTOLUCCI, *Actio quae instituit obligationem*, Macerata 1915, 24 sqq.; E. CARRELLI, *L'actio institutoria ex Vellciano senatusconsulto*, Riv. it. N.S. 12 (1937), 89 sq. and recently D. MEDICUS, *Zur Geschichte des Senatus Consultum Velleianum*, Graz-Vienna-Cologne 1957, 112 sqq.

(5) VOGT's opinion has been followed by H. KRELLER, *Das Verbot der Frauenintерzession von Augustus bis Justinian*, Anz. der phil.-hist. Klasse der Österr. Akad. der Wiss. 1956, 8. An intermediate view is held by L. PALAZZINI FINETTI, *Ancora in tema di actio institoria*, BIDR N.S. 8-9 (1947), 184 sq.; he thinks that the compilers omitted part of the original text, namely the part in which Faustina had explained the case to the emperor, without noticing that the beginning of the text now contradicted the end. As far as the rest of the text is concerned, PALAZZINI FINETTI thinks that the compilers did not change the words

book is that originally the *SC Velleianum* did not apply to intercession by borrowing money but was only made applicable to this later, when the edict was extended for that purpose. According to Vogt the best proof of this notion is to be found in C. 4.29.19. Another notion supported by Vogt is that the purpose of the *SC Velleianum* was to keep the women at home with their families. This notion fits in with a second point which Vogt deduces from this rescript, namely that a creditor who lends money to a woman on behalf of a third party must have intended to evade the *SC Velleianum*. Vogt deduces this from the words "*calliditate creditoris*". According to Vogt these words mean that the creditor originally intended to enter into an agreement with another person; the creditor wanted more surety than this person could give him. A woman was prepared to give him this surety; the creditor, however, refused to have her as a *fideiussor* because she could then invoke the *SC Velleianum*, but he wanted her to be his debtor rather than the person to whom he had previously wished to lend money. The choice of a woman as debtor in preference to a man is something which is mentioned in quite a number of texts on this theme and, according to Vogt, is always an allusion to the *calliditas creditoris*.

As far as the construction of the rescript is concerned: it is generally held that the first part (*cum ... declaratur*) is meant to be a contrast to the second part (*si tamen ... potes*). Vogt however does not think so; according to Vogt the adverbial conjunction "*cum*" is not used concessively but causally, and "*tamen*" does not mean "nevertheless" but in the combination "*si tamen*" it means "if in fact" (6). The second sentence there-

of the constitution. Vogt does not refer to this article. In my view the explanation of Palazzini Finetti is not convincing; first of all he does not indicate clearly which factual details were omitted, and what is more, his remark that the original creditor had been replaced by more creditors who claimed to know nothing about the intercession does not tell us how the phrase « *si ... elegit* » should be explained.

(6) H. Vogt, *Studien zum Senatus Consultum Velleianum*, Bonn 1952, 45 note 5, and also in *Miscellanea ad Senatus Consultum Velleianum*, TR 35 (1967), 117 sq.

fore serves to explain the first. Vogt thinks that the rescript should be interpreted as follows: it is stated here that a special edict has laid down that the *SC Velleianum* can be applied to intercession through borrowing money but only if the creditor decided not to make a contract with a man, but instead lent money to a woman because he regarded her as being more creditworthy than the first debtor and because in this way he could evade the *SC Velleianum*.

III

Vogt's views and assertions have been extensively disputed by Medicus in his monograph *Zur Geschichte des SC Velleianum*; Medicus, in interpreting C. 4.29.19, supported in the main the older views as expressed by Lenel et al.: namely that the rescript could not be genuine because it contradicted the wording of the *SC Velleianum*, as it is known to us from D. 16.1.2.1. This text, which comes from Ulpian's commentary on the edict, runs as follows:

Ulpianus libro vicensimo nono ad edictum. Postea factum est senatus consultum, quo plenissime feminis omnibus subventum est. Cuius senatus consulti verba haec sunt: "Quod Marcus Silanus et Velleus Tutor consules verba fecerunt de obligationibus feminarum, quae pro aliis reae fierent, quid de ea re fieri oportet, de ea re ita censuere: quod ad fideiussiones et mutui dationes pro aliis, quibus intercesserint feminae, pertinet, tametsi ante videtur ita ius dictum esse, ne eo nomine ab his petitio neve in eas actio

Ulpian in the 29th book of his commentary on the edict. Thereafter a *senatusconsultum* was drawn up which gave very generous help to all women. The words of this *senatusconsultum* are these: "After Marcus Silanus and Velleus Tutor the consuls had made statements concerning the obligations of women who make themselves debtors on behalf of others, they gave their views on what should be done about this: that the senate, with regard to standing as surety and borrowing money on behalf of others for

detur, cum eas virilibus officiis fungi et eius generis obligationibus obstringi non sit aequum, arbitrari senatum recte atque ordine facturos ad quos de ea re in iure aditum erit, si dederint operam, ut in ea re senatus voluntas servetur".

whom women have interceded, although it seems that according to earlier law an action could not be instituted by these women nor could an action be granted against them, thinks that they will act fairly and properly to whom people turn for justice in this matter, if they have done their best to carry out the wish of the senate, since it is not fair that these women should perform men's duties and bind themselves through obligations of this kind".

The last part of the 29th book of Ulpian's commentary on the edict is devoted to the *SC Velleianum* (7). According to this text the *SC Velleianum* applied to intercession by means of *fideiussio* as well as intercession by means of *mutuum*. It was on the basis of this text of Ulpian that Lenel thought that the rescript C. 4.29.19 of Diocletian had probably been interpolated. In Lenel's opinion the comment, that the edict lays down that the *SC Velleianum* also relates to *mutui dationes*, certainly cannot have been in the original text of the rescript. In the first place Lenel maintains that already the *SC Velleianum* itself stated that it could be applied to intercession by means of borrowing money, and in the second place he maintains that it was very unlikely and had never been proved that this ruling would later have been extended in the edict. Furthermore, although the first half of the rescript, "*cum ... declaratur*" would seem to contradict the second half, "*si tamen ... potes*", the *SC Velleianum* is considered by Diocletian's jurists to be applicable in both cases. Lenel therefore

(7) O. LENEL, *Palingenesia Iuris Civilis* II, Leipzig 1889 (re-printed Graz 1960), 609 sq.

assumes that according to Diocl. C. 4.29.19 the *SC Velleianum* has, since the clause in the edict, applied to intercession by means of *mutuum* and that this statement had probably not been in the original rescript.

Medicus (8) too thinks that the first sentence of the rescript, "*cum ... declaratur*", must have been added by a later reviser as a general opening sentence and that at the same time the following sentence was adjusted accordingly. To Medicus it is particularly the words "*callididate creditoris*" and the reference to the *edictum perpetuum* which make the text suspect. According to Medicus the words "*calliditate creditoris*" must be regarded as a reference — albeit a rather ill-chosen one — to the fact that the creditor was aware that the woman intended to use the money for a third party. The mention of the *edictum perpetuum* Medicus sees as a mistake made by Diocletian's chancery or by a later reviser. The edict already contained a clause about what should happen when a woman had interceded by means of a *mutuum* and had afterwards dismissed the request for repayment by invoking the *SC Vellcianum*: the creditor in that case would be able to institute an *actio institutoria* against the person who had received the money from the woman. According to Medicus the clause was worded in such a way that it could have given the (false) impression that the ban on intercession was thereby extended. In short, Medicus thinks that C. 4.29.19 is not a reliable source of information about how the *SC Velleianum* worked at the time of Diocletian.

IV

In my view neither Vogt nor Medicus has really interpreted Diocletian's text C. 4.29.19 correctly. Vogt is right in translating *cum* by "weil" and *si tamen* by "wenn nämlich, wenn nur"; this translation is in complete accordance with the rules

(8) D. MEDICUS, *Zur Geschichte des Senatus Consultum Velleianum*, Graz-Vienna-Cologne 1957, 112 sqq.

of late Latin (9). However, the hypothesis developed by Vogt on the basis of the text is not borne out by the text itself. Medicus on the other hand is too quick to regard this text — which is certainly not easy to follow — as unreliable and to dismiss it as practically worthless. Both authors make the same fundamental mistake in their interpretation in that they see the text as a general pronouncement. They fail to realize that they are dealing with a rescript which is a piece of advice given by the imperial chancery in connection with a specific juridical problem put to it by a member of the public. They seem to have ignored the fact that the advice offered in the rescript must have related to a specific case that had actually occurred.

How should the rescript be interpreted then? In order to answer this question we must first try to find out what the juridical problem was that Faustina put to Diocletian's chancery. From the last few words of the rescript, "*exceptione defendi potes*", it can be deduced that Faustina has probably been ordered by someone to repay a sum of money that that person had lent her. However, she refused, invoking the *SC Velleianum*; it can be assumed therefore that Faustina had not borrowed the money for her own use but on behalf of someone else. Probably this third party is the person with whom the creditor had originally negotiated a loan. Apparently the creditor did not accept Faustina's refusal. She feels threatened and wants to avert a possible legal action, so she asks Diocletian's chancery for advice.

What basis is there for the creditor's insistence that Faustina must repay the money and that the *SC Velleianum* is not applicable here? An important factor is that the creditor did not give preference to Faustina as debtor until a later stage

(9) For *cum* with indicative in late Latin see J.B. HOFFMAN-A. SZANTYR, *Lateinische Grammatik*, Munich 1965², 624 sq.; for the meaning of *si tamen*, which is the late Latin equivalent of the classical expression *si quidem*, see J.B. HOFFMAN-A. SZANTYR, *Lateinische Grammatik*, Munich 1965², 673. I take this opportunity of thanking Prof. Dr. H.L.W. NELSON who helped me to translate this text.

in the negotiations. This factor is also mentioned in at least three Digest texts, each time in connection with the question of whether the *SC Velleianum* is applicable or not. These three texts are by the late classical jurists Papinian, Ulpian and Paul. It is quite likely that the jurists of Diocletian's chancery consulted these texts. They run as follows:

D. 16.1.27.1

Papinianus libro tertio responsorum. Cum servi ad negotiationem praepositi cum alio contrahentes personam mulieris ut idoneae sequuntur, exceptione senatus consulti dominum summovet: ...

Papinian in the third book of his Responsa. When slaves who have been appointed for the transaction of a business, while they are making a contract with some other man, choose the person of a woman because she is able to pay, the exception of the *senatusconsultum* wards off their owner;

D. 16.1.8.14

Ulpianus libro vicensimo nono ad edictum. Si, cum essem tibi contracturus, mulier intervenerit, ut cum ipsa potius contraham, videtur intercessisse: ...

Ulpian in the 29th book of his commentary on the edict. If when I was about to make a contract with you, a woman intervened between us because I would prefer to make a contract with her, she is considered to have interceded;

D. 16.1.29 pr.

Paulus libro sexto decimo responsorum. Quidam voluit heredibus Lucii Titii mutuam pecuniam dare et cum eis contrahere: sed quoniam facultates eorum suspectas

Paul in the 16th book of his Responsa. Someone wanted to grant a loan to the heirs of Lucius Titius and make a contract with them, but because he felt suspicious

habuit, magis voluit uxori testatoris dare pecuniam et ab ea pignus accipere: mulier eandem pecuniam dedit heredibus et ab his pignus accepit: quaero, an intercessisse videatur et an pignora, quae ipsa accepit, teneantur creditori. Paulus respondit, si creditor, cum contrahere vellet cum heredibus Lucii Titii, evitatis his magis mulierem ream elegit, et in ipsius persona senatus consulto, quod de intercessionibus factum est, locum esse et pignora ab ea data non teneri. ...

about their solvency he preferred to give the money to the wife of the testator and receive a pledge from her; the woman gave this same money to the heirs and received a pledge from them. I ask whether she is considered to have interceded and whether the things given as a pledge, which she herself received, are bound to the creditor. Paul replies that if the creditor, although he wanted to make a contract with the heirs of Lucius Titius, preferred to avoid them and chose the wife as debtor, there is a place in her person for the *senatusconsultum* which was drawn up concerning intercession and the pledges she gave are not bound.

Each of these three texts deals with the question of whether the *SC Velleianum* can be applied if a creditor, while already negotiating an agreement to lend money, chooses to make this agreement with a woman. Vogt is the only Romanist to have studied this problem so far. According to Vogt (10) the fact that the creditor chooses a woman as a debtor through *mutuum* is a proof of the *calliditas creditoris,* in other words of the creditor's intention to dodge the *SC Velleianum.* This reasoning can only hold if one assumes, like Vogt, that the *SC Velleianum* originally applied only to intercession by means of *fideiussio* and not to intercession by means of *mutuum* as

(10) H. Voot, *Studien zum Senatus Consultum Velleianum*, Bonn 1952, 44 sqq.

well, and that a creditor could dodge this ban on intercession by choosing a woman not as a surety but as a debtor through *mutuum*. Medicus (11) however has already shown convincingly that this assumption is incorrect and therefore Vogt's interpretation of this problem is incorrect too. How are we to explain the circumstance that a creditor, while engaged in negotiations, has preferred his debtor to be a woman?

In this connection it is useful to find out what situations can arise in negotiations about lending money to a woman. I shall summarize four possible situations:

1. The creditor lends money to a woman. If the woman does not repay the amount she has borrowed, the creditor can take legal action to force her to pay.

2. The creditor lends money to a woman on the understanding that the money is intended for a third person. If the woman does not repay and is ordered to do so in law she can defend herself by invoking the *exceptio senatus consulti Velleiani*.

3. The creditor lends money to a woman; unknown to the creditor the woman gives the money to a third person. If the woman is ordered in law to repay the sum, she can defend herself by invoking an *exceptio* based on the *senatusconsultum*; by the end of the second century however the jurists took the view that the creditor was then entitled to a *replicatio doli*: for the woman had deceived the creditor by failing to tell him what she really intended to do with the money (12).

4. The creditor negotiates with a man about a loan but during the negotiation he suddenly decides to lend the money to a woman instead. The woman gives the money to the person with whom the creditor was negotiating in the first place,

(11) D. MEDICUS, *Zur Geschichte des Senatus Consultum Velleianum*, Graz-Vienna-Cologne 1957, 101 sqq.

(12) Cf. Pap. D. 16.1.7 and Ulp. D. 16.1.6, both relating to intercession by means of *fideiussio*; Diocl. C. 4.29.18 mentions the *replicatio doli* in connection with intercession by means of *mutuum*.

without telling the creditor. If she is required in law to repay the money she can defend herself by invoking the *SC Velleianum*. The creditor will probably then claim that he did not know she was going to give the money to a third person.

All three texts by Papinian, Ulpian and Paul probably relate to this fourth situation. These three jurists maintain here that the *SC Velleianum* is nevertheless applicable, probably on the basis of the argument that the creditor should or could have guessed from the situation that the woman intended to give the money to the third person. Diocletian's rescript C. 4.29.19 is about this fourth situation too. The creditor's argument was that the *SC Velleianum* was not applicable and that Faustina would have to pay him back the sum she had borrowed; his argument was based on the assertion that he did not know that Faustina was borrowing money on behalf of a third person.

Let us now look very closely at the reasoning of the jurists of Diocletian's chancery. In this rescript they juxtapose two cases. In the first part of the text they mention the normal case of intercession by means of a *mutuum,* to which the *SC Velleianum* was applicable if the contract was a direct result of *calliditas creditoris*. In the second part of the rescript the jurists mention a special case of intercession by means of *mutuum,* to which the *SC Velleianum* should also apply. In this second case the creditor first negotiates with a man about lending money but afterwards comes to an agreement with a woman who then gives the money to that same man. Even if the creditor later claims that he did not know that the woman was interceding it is argued that he should or at least could have deduced from the situation that the woman would give the money to the other person.

Now we shall try to ascertain why there is a reference to the *edictum perpetuum* and what is meant by the disputed term "*calliditate creditoris*". The only clauses in the edict that could have referred to the *SC Velleianum* are the *actio restitutoria* and the so-called *actio institutoria* (13). For the exception

(13) The *actio restitutoria* is mentioned in Ulp. D. 16.1.8.7-13. The

based on the *SC Velleianum* a general wording was used, which ran as follows: "*si in ea re nihil contra legem senatusve consultum factum est*" (14). The reference to the *edictum perpetuum* can therefore apply only to the *actio restitutoria* or to the *actio instituoria*. The former of the two actions was granted if the woman had interceded by giving surety; so this cannot have been the action meant. The *actio institutoria* is proposed if the woman had interceded by borrowing money on behalf of a third person; so this must be the action meant here. According to Lenel, nothing is known about the wording of the *actio institutoria*; Lenel thinks it may have been an *actio in factum* (15). This action was granted if the creditor had requested the woman to whom he had lent money to pay it back and she had successfully defended herself by invoking the *exceptio* based on the *SC Velleianum*. The creditor could then, via the *actio institutoria*, claim the money back from the person who had finally received it. The *actio institutoria* may have been worded something like this: "If it turns out that the plaintiff has lent 1000 HS to a woman in the knowledge that she would use the money for the defendant and if it turns out that the defendant has received this money from the woman, then you, as judge, should order the defendant to pay 1000 HS to the plaintiff, but if it does not turn out this way, then you must acquit him". In any case this formula must have contained the phrase to the effect that it was known that the money would be used for intercession, because otherwise the *SC Velleianum* would not have been applicable and the whole bottom would have fallen out of the *actio institutoria*. In a case of intercession by means of *mutuum* it was particularly important that it could be demonstrated that the creditor knew that the woman was interceding on

term *actio institutoria* is not used in the sources; it was introduced by GOTHOFREDUS and is now in general use. See in this connection L. PALAZZINI FINETTI, *Ancora in tema di « actio institoria ex senatusconsulto Velleiano »*, BIDR N.S. 8-9 (1947), 157 note 3, who prefers the term *actio institoria* as used by Accursius.

(14) O. LENEL, *Das Edictum Perpetuum*, Leipzig 1927³, 513.

(15) O. LENEL, *Das Edictum Perpetuum*, Leipzig 1927³, 287.

behalf of a third person; otherwise, i.e. if a woman had been able to invoke the *SC Velleianum* even if she could not demonstrate that the creditor knew about her intercession, no-one would have been prepared to give a loan to a woman! In my opinion then, the words "*calliditate creditoris*" relate to the knowledge that the woman was going to use the money for intercession, which knowledge the jurists assumed to be present in this case.

V

My arguments and analysis can be summarized as follows. I cannot support Vogt's contention that C. 4.29.19 shows that the *SC Velleianum* was not made applicable to intercession by *mutuum* until later and then only if the creditor sought to evade the ban on intercession in a deceitful way. Nor can I support the prevailing view that C. 4.29.19 is not a reliable source of information about the workings of the *SC Velleianum* at the time of Diocletian. This rescript can only be understood properly if one realizes that it is a piece of advice given by the jurists of the chancery to an individual who has put a concrete problem to them.

From the rescript one can make the following reconstruction of the problem. Faustina had borrowed money from a creditor and had given this money to a third party. When the creditor asked for the money back the woman refused, invoking the *SC Velleianum*. The creditor however maintained that she could not invoke the *SC Velleianum* because he had not realized that she would give the money to the person with whom he had originally been negotiating about a loan. Faustina puts the problem to Diocletian's chancery. In the rescript the jurists reply that she is entitled to defend herself by invoking the *SC Velleianum*. Since the creditor had originally intended to arrange to lend money to someone else and had later preferred to have Faustina as his debtor he must or at least could have realized that she was borrowing money on behalf of the person with whom he, the creditor, had been dealing

originally. The answer given by Diocletian's jurists is entirely in accordance with at least three Digest texts by the late classical jurists Papinian, Ulpian and Paul.

First of all therefore one sees that the rescript can only be understood properly if one lets the text speak for itself: whenever the text is not immediately clear one should not assume it has been altered. Secondly, it seems to be a good idea to seek out parallel texts from the late-classical period. It is often helpful and enlightening to see one and the same problem formulated in different words. Furthermore this is in fact what the jurists of the chancery did: just like their predecessors they often searched for a solution by looking back at what jurists of earlier times had written on the same subject. If one adopts these two procedures, i.e. reconstruction on the basis of the text and a search for parallel texts from the classical period, then one can obtain a balanced interpretation of a rescript. This is what I have done in the case of C. 4.29.19 — satisfactorily I hope.