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# Éditorial

Jean-François Gerkens

Dans l'éditorial de la *RIDA* 64, nous déplorions la disparition de Joseph Mélèze-Modrzejewski, membre de notre comité de rédaction. Avec le décès de Hans Ankum, c'est un nouveau membre de notre comité de rédaction qui est venu à manquer. Il y était entré pour le numéro 36 (1989), il y a donc environ 30 ans, en même temps que Giovanni Pugliese.

Hans Ankum a fait l'objet d'une commémoration lors de l'assemblée générale de la SIHDA d'Édimbourg, ainsi que lors d'une rencontre du « Forum romanum », société savante qu'il avait fondée au sein de son Université d'Amsterdam. Lors de cette réunion du 18 octobre 2019, Eric Pool a évoqué « le maître et ami Hans Ankum », Laurens Winkel « le romaniste », Edgar du Perron le « professeur de l'Université d'Amsterdam » et l'auteur de ces mots, « Hans Ankum et la SIHDA ». La *RIDA* commémorera Hans Ankum dans son prochain numéro.

Au demeurant, le présent numéro commémore, comme annoncé, Joseph Mélèze-Modrzejewski sous la plume de Jakub Urbanik. Il rend également hommage à Berthold Kupisch à l'initiative de Jeroen Chorus.

Enfin, le premier article du présent numéro constitue l'élaboration du texte de la conférence introductive à la session internationale de la SIHDA de Bologne. Pascal Pichonnaz l'avait prononcée le 12 septembre 2017,en ouverture de la session internationale dont la chronique est parue dans le numéro précédent de la *RIDA*. Le présent numéro contient quant à lui, la chronique de la SIHDA de Cracovie de 2018.

Au titre des nouveautés éditoriales, la rédaction de la *RIDA* a décidé de publier — dans le futur et en plus de la revue — des monographies sous forme de « Hors-série la *RIDA* ». Nous espérons que l'initiative trouvera également son lectorat.

Excellente lecture à toutes et tous !

Chaudfontaine, le 11 novembre 2019.
Jean-François Gerkens

# Chirographs in Classical Roman Law
# Constitutive or Probative? *

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## 1. Introduction

A chirograph is a one-sided written document, containing a declaration by the person issuing it (the 'author') that certain legally relevant facts have taken place,[1] such as the receipt of money (e.g. *numeratio* in *mutuum*), the conclusion of a contract (e.g. *stipulatio*) or the making of an oath.[2] Until recently the prevailing view in modern literature was that in Roman law chirographs were used for purposes of evidence only.[3] It would be difficult for the person issuing a chirograph

* The author would like to thank prof.dr. J.A. Ankum (Amsterdam) and prof.dr. J. Platschek (Munich) for their valuable comments.

1. In this contribution I will use the term 'author' in order to designate the person whose obligations (e.g. as a borrower [*mutuum*] or promissor [*stipulatio*]) or other legally relevant acts (e.g. the receipt of money, the release of a debt) are recorded in the chirograph. The verbs to issue, write and execute will be used interchangeably for the acts (writing, signing, sealing) giving the document its final form. I will use these terms even when the writing itself has been done by someone else, for instance because the author was illiterate.

2. From Herculaneum we have submissions to court proceedings in the style of chirographs about the status (free or freed [wo]man) of one of the litigating parties. J.G. Wolf, «Documents in Roman Practice», in D. Johnston (ed.), *The Cambridge Companion to Roman Law*, Cambridge, 2015, p. 61–84, 73. On chirographs, see L. Wenger, *Die Quellen des Römischen Rechts*, Vienna, 1953, p. 736–740; E.A. Meyer, *Legitimacy and Law in the Roman World. Tabulae in Roman Belief and Practice*, Cambridge, 2004, p. 148–158; E. Jakab, «Chirographum in Theorie und Praxis», in K. Muscheler (ed.), *Römische Jurisprudenz — Dogmatik, Überlieferung, Rezeption. Festschrift für Detlef Liebs zum 75. Geburtstag*, Berlin, 2011, p. 275–292; Wolf, *l.c.*, p. 63–65.

3. According to J. Platschek, *Das Edikt de Pecunia Constituta. Die römische Erfüllungszusage und ihre Einbettung in den hellenistischen Kreditverkehr*, München, 2013 (*Münchener Beiträge zur Papyrusforschung und Antiken Rechtsgeschichte*, 106), p. 1–5, as a matter of Roman law chirographs were only evidentiary. So also (among many others), D. Simon, *Studien zur Praxis der Stipulationsklausel*, München, 1964 (*Münchener Beiträge zur Papyrusforschung und Antiken Rechtsgeschichte*, 48), p. 29; M. Kaser, *Das römische Privatrecht. Erster Abschnitt. Das altrömische, das vorklassische und klassische Recht*, 2nd ed., Munich, 1971, p. 231–232, 234, 540; W. Litewski, «*Non numerata pecunia* im klassischen römischen Recht», in *IURIS VINCULA. Studio in onore di Mario Talamanca VIII* 1994, p. 405–456, 406.

by his own hand and/or with her own seal to deny in court that the facts described in it were untrue. Some years ago Eva Jakab and, more recently, Boudewijn Sirks have challenged the prevailing view and argued that as a matter of Roman law chirographs were constitutive and functioned as an independent source of obligation.[4] The chirograph itself created obligations for its author, also when this person was a Roman, independently from any recognised type of contract (e.g. *mutuum*, *stipulatio*). As such the chirograph would need to be added to the closed list of Roman contracts, as a *contractus litteris*. As these interpretations may find their way into the general textbooks,[5] it is important to subject them to closer scrutiny and to examine whether they can withstand the confrontation with the jurists' opinions, imperial constitutions and the epigraphic sources.[6]

In order to get a better insight into the classical Roman law on chirographs, we will first have a look at how chirographs were executed in practice on wooden waxed writing tablets and the role of writing in the law of evidence (section 2). We will then examine the constitutive effect of Greek-Hellenistic chirographs and Gaius's reference to this style of documents in Gai. *Inst.* 3.134 (section 3). After that, we will turn our attention to the central question of this contribution, whether the legal significance of chirographs went beyond evidence. In particular I will assess the proposition of Jakab and Sirks that chirographs were an independent cause of action.[7] This assessment will be made with reference to the use of chirographs in Roman practice (section 4), the elements of Roman chirographs (section 5)[8]

4. Jakab, *l.c.* (n. 2). B. Sirks, «Chirographs: negotiable instruments?», *ZRG RA* 133 (2016), p. 265–285, 267, observes that Jakab's 'argument needs proof': this proof he purports to give in his contribution to *Savigny's Zeitschrift*.

5. M. Kaser – R. Knütel – S. Lohsse, *Römisches Privatrecht, Ein Studienbuch*, 21nd ed., Munich, 2017, § 41.19, states, with reference to Jakab, *l.c.* (n. 2) and Sirks, *l.c.* (n. 4), that in legal practice chirographs were already in the late-republican period regarded as independent sources of obligation.

6. The research for this contribution is based on an analysis of all the fragments of the Digest and the Code which contain the word '*chirographum*'. Also texts in which the words *epistula*, *cautio*, *litterae*, *instrumentum*, *scriptura* or *scribere* occur have been reviewed for this contribution, although not as comprehensively as *chirographum*. Imperial constitutions have only be reviewed up to (including) Diocletian.

7. The 'dispositive', 'obligatory' or 'constitutive' effect of chirographs could also manifest itself in their 'negotiable' character. Jul. D. 32.59 says that the sale of a chirograph counts as a sale of the debt evidenced thereby. Can this be extrapolated to the law of property, as Sirks argues (*l.c.* [n. 4], p. 275–279), in the sense that transferring possession of a chirograph results in an actual transfer of the obligations and/or claims based on the debt evidenced by the chirograph? I have found no evidence in the normative sources that the highly personal contractual rights and obligations under classical Roman law could be made transferable by issuing a chirograph. This issue, as well as other aspects of the alleged negotiabable character of chirographs, will be addressed in a separate publication.

8. This contribution focusses on chirographs evidencing the conclusion of contracts and the acknowledgment of debts. In the abovementioned separate publication the use of chirographs as receipts and instruments for releasing debts will be more elaborately discussed.

and the treatment in the writings of the Roman jurists (section 6) and imperial constitutions (section 7).

## 2. Archive of the Sulpicii and other epigraphic sources

### 2.1. Archive of the Sulpicii

Kunkel once observed that '[t]he writings of the jurists and imperial constitutions in general show us legal practice only through the lens of juristic abstraction and reflection.' [9] By focussing on actual transaction practices one gets a better view on how legal institutions were used by the members of Roman society in everyday situations. For this contribution I have paid special (but not exclusive) attention to the chirographs that are included in the so-called archive of the Sulpicii (sometimes also referred to as the 'Murecine documents'). [10] The Sulpicii were a family of freedmen who, before they moved to Pompeii, carried out banking activities in Puteoli, at the time of the Sulpicii the most important emporium for Rome. [11] The documents of the Sulpicii archive demonstrate that Roman law was not a purely intellectual construct of members of the élite, but rather that the Roman legal system — in all its complexity — was actually used in financial and commercial practice, even by relatively small bankers such as the Sulpicii. [12] In these documents we see how freedmen, women and slaves conducted their legal affairs. The archive even contains customer files, consisting of (mostly) chirographs documenting individual bank-customer relationships over several years. [13] The fact that the environment of the Sulpicii archive was Campania and not Rome does not detract from their significance for Roman law at all. It is beyond doubt that the documents

9. W. Kunkel, «Epigraphik und Geschichte des römischen Privatrechts», *Vestigia* 17 (1973), p. 197, as translated by E. Metzger, *Litigation in Roman Law*, Oxford, 2005, p. 2. This should not obscure that, as will be shown in this contribution, there are many jurists' opinions in the Digest (e.g. from Scaevola) which cite actual transaction documents.

10. G. Camodeca, Tabulae Pompeianae Sulpiciorum. *Edizione critica dell'archivio puteolano dei Sulpicii*, Rome, 1999 (*Vetera*, 12); J.G. Wolf, *Neue Rechtsurkunden aus Pompeji,* Tabulae Pompeianae Novae, 2nd ed., Darmstadt, 2012. The texts and references in this contribution are taken from Camodeca's edition (*TPSulp*), but in the annex there is a table of conversion to Wolf's edition (*TPN*).

11. See D. Jones, *The Bankers of Puteoli. Finance, Trade and Industry in the Roman World*, Stroud, 2006, p. 23.

12. J.G. Wolf, *Aus dem neuen pompejanischen Urkundenfund. Gesammelte Aufsätze*, Berlin, 2010 (*Freiburger Rechtsgeschichtliche Abhandlungen. Neue Folge*, 60), p. 126 ('*kein blutleeres Normengerüst ohne Wirklichkeitsgehalt*'). So also J.A. Crook, «Legal History and General History», *Bulletin of the Institute of Classical Studies* 41 (1996), p. 31–36. 34, who writes that documents like those contained in the Sulpicii archive "help us to show that many, at least, of the complications of Roman law were not just professional 'overkill'; by and large, the whole system, as we learn of it, was a living and practised one".

13. For instance, the file C. Novius Eunus discussed below. For an excellent historical account of the banking activities of the Sulpicii, see Jones, *o.c.* (n. 11).

of the Sulpicii archive are representative for a much wider area (including Rome itself).[14] The form (*tabulae ceratae*, diptychs/triptychs), style (chirographs) and content (e.g *mutuum cum stipulatione*) of these documents, are found not only in the other Campanian (Pompeii, Herculaneum) tablets, but also in writing tablets from Dacia, Frisia (Tolsum), and in the recently published writing tablets from Roman London.[15] A comparison of these more or less contemporary documents from entirely different regions, from both the centre of the Roman Empire and its fringes, shows how widespread and uniform the practice of chirographs recorded on writing tablets was.

## 2.2. *Tabulae ceratae*; triptychs

While in Greek-Hellenistic practices chirographs were usually written down on papyrus, it appears from the archive of the Sulpicii and other epigraphic sources that in the western part of the Roman Empire for chirographs wooden wax tablets (*tabulae ceratae*) were commonly used.[16] Wooden tablets were thought to last longer than papyrus and could be reused.[17] These writing tablets were rectangular pieces of wood which were (with the exception of a small margin) hollowed out and coated with wax or similar material (e.g. shellac), to which (black or red) dye was added.[18] The letters were incised into the wax with a pointed metal, wooden or bone instrument (*stilus*).[19] From Nero's time (AD 61) there is a senate-consult, which provides in detail how writing tablets containing the text of a public or private contract should be bound together and sealed in the presence of witnesses.[20]

14. Meyer, *o.c.* (n. 2), p. 127. Several of the agreements to appear in court (*vadimonia*) concern the appearance before the praetor in the Forum of Augustus in Rome (TPSulp 13–15).

15. For a brief description of the most important collections of writing tablets, see Wolf, *l.c.* (n. 2), p. 62. For the London documents, see R.S.O. Tomlin, *Roman London's first voices. Writing tablets from the Bloomberg excavations, 2010–14*, London, 2016 (*MOLA Monograph*, 72). These documents will be referred to as *Tab. Lond. Bloomberg [WT number]*.

16. Meyer, *o.c.* (n. 2), p. 125-134; Wolf, *l.c.* (n. 2), p. 62–65.

17. Meyer, *o.c.* (n. 2), p. 2, 35, mentioning that Nero was fooled to believe that forged wooden tablets on the Trojan War were original 'contemporary' accounts and thus had lasted for 1,300 years. Among the Bloomberg tablets there are several legal chirographs which were reused: Tab. Lond. Bloomberg, 26, 28, 32, 34 and 39.

18. See Wolf, *l.c.* (n. 2), p. 62–63, who notices that shellac was used for the Sulpicii tablets (*l.c.* [n. 10], p. 19 n. 7). The Sulpicii tablets often have a width of 13 to 13,5 cm and a height of 8,5 to 9,5 cm, but other formats are present as well (e.g. 15,2 × 11,6 cm; 11 × 9 cm). See Wolf, *o.c.* (n. 10), p. 19 n. 6.

19. For a description, see Meyer, *o.c.* (n. 2), p. 22.

20. Wenger, *o.c.* (n. 2), p. 77. The senate-consult was adopted after the notorious forging of the will of senator Domitius Balbus by members of the Roman aristocracy in 61 AD. This affair is described in Tacitus, *Ann.* 14.40. See Meyer, *o.c.* (n. 2), p. 167–168. The text of the senate-consult is reproduced (several centuries later) in PS 5.25.6. The senate-consult and its purpose of counteracting forges is mentioned by Suetonius, *Nero* 17. PS 5.25.6 states that if the prescribed formalities are not followed, the tablets shall not have probative value (*Aliter tabulae prolatae*

The waxed tablets which were found in Pompeii, Herculaneum and elsewhere confirm that the requirements of the senate-consult were followed in practice.[21]

In particular, it seems that the use of triptychs considerably increased after the adoption of the senate consult.[22] Roman chirographs were often executed as 'double documents' in the form of triptychs.[23] The *scriptura interior* contained the authentic text of the chirograph and was normally written, often in vulgar Latin, by the author of the chirograph himself.[24] The contents was repeated in the *scriptura exterior*. This exterior text was written in standard Latin and executed by professional scribes, or at least by persons who habitually assisted in the execution of documents.[25] In the case of triptychs the three tablets were — in accordance with the senate-consult, connected together with a string drawn through holes on one of the longer sides of the tablets to form a *codex*, which could be handled like a book.[26] The first two tablets would be bound together by winding a string around them. This string was led through a groove (*sulcus*) carved in side 4 (the back side of the second tablet).[27] This had the consequence that the *scriptura interior* was only accessible by breaking the seals or cutting the string.[28] This reduced the possibilities of tampering with it. The *scriptura exterior* could be consulted without

*nihil momenti habent*). In modern literature this is often regarded as a late- or postclassical addition. Meyer, *o.c.* (n. 2), p. 167 (with further references).

21. As Jakab notices, the drafters of the senate-consult must have been well aware of existing practices, as many triptychs executed before 61 AD were already compliant with it. E. Jakab, «Seneca's Misttrauen in Brief und Siegel», in Rena van den Bergh *et al.* (eds.), Meditationes de iure et historia. *Essays in honour of Laurens Winkel*, 2014 (*Fundamina. Editio specialis* 2014 [20–1]), p. 416–426, 421, 423.

22. According to Camodeca (*o.c.* [n. 10], p. 34) 27% of the documents included in the Sulpicii archive are diptychs, 47% are triptychs, while for the remaining 26% of the documents it cannot be determined whether they are diptychs or triptychs. Camodeca, *o.c.* (n. 10), p. 34. Meyer has demonstrated that from the later thirties AD triptychs were preferred for chirographs in Campania and that their use further increased after the enactment of the senate-consult. Meyer, *o.c.* (n. 2), p. 152–153.

23. Double documents used by the Greeks in Egypt are attested since 311/310 BC (P. Eleph. 1). Similar documents were found in Near-Asia. Wolff suspects that the Egyptian and Near-Asian forms descend from a common archetype. H.J. Wolff, *Das Recht der griechischen Papyri Ägyptens in der Zeit der Ptolemaeer und des Prinzipats. Erster Band. Bedingungen und Treibkräfte der Rechtsentwicklung. Herausgegeben von Hans-Albert Rupprecht*, Munich, 2002, p. 62.

24. For instance, the documents forming the file C. Novius Eunus: TPSulp 45, 51, 52, 67 and 68. Camodeca, *o.c.* (n. 10), p. 123.

25. Wolf, *o.c.* (n. 10), p. 29–30. In the Sulpicii archive three chirographs have survived with *scriptura interior* and *exterior*: TPSulp 45, 51 and 54.

26. Wolf, *o.c.* (n. 2), p. 63.

27. For detailed descriptions (with clear illustrations) see Meyer, *o.c.* (n. 2), p. 126–132; Tomlin, *o.c.* (n. 15), p. 16–17, 22–27.

28. Folding the first two tablets together would considerably reduce the risk of the interior text being smeared or damaged. Wolf, *l.c.* (n. 2), p. 63.

breaking the seals of the document.[29] Writing tablets recording chirographs were sealed by their authors and witnesses.[30] In accordance with the Neronian senate-consult the seals were placed at the end of the string in the groove.[31]

## 2.3. Chirographs written on behalf of others

In the Sulpicii archive only four of the thirty chirographs have not been written by their authors personally. In two of these chirographs it is stated expressly that they were written by someone else because the author lacked the ability to write.[32] One of the other chirographs was written on behalf of a woman (TPSulp 82): it seems that women never personally wrote legal chirographs.[33] Where a master has undersigned a chirograph written by his slave, the master is liable under the *actio quod iussu* (Ulp. D. 15.4.1.4).[34] Chirographs were also excecuted by free Romans acting on behalf of someone else. In TPSulp 72 we see that a freedman (Gaius Sulpicius Cinnamus) issues a chirograph in his own name, acknowledging the

29. The edges of the tablets often contain certain specifications (*index*) which would facilitate retrieving them from an archive: the style of the document (e.g. chirograph), the name of the author, the legal nature and value of the transaction and its date. The index of TPSulp 51 (reproduced below) reads as follows: *Chirographum C*(*aii*) *Novii Euni HS X mutuorum Put*(*eolis*) *XIV k*(*alendas*) *Ìul*(*ias*) *Proculo et Nigrìno co*(*n*)*s*(*ulibus*). Camodeca, *o.c.* (n. 10), p. 135.

30. Meyer, *o.c.* (n. 2), p. 158–163, argues that sealers (*signatores*) and witnesses (*testes*) have different historical origins, but eventually converged.

31. *Tabulae* not bound and sealed as prescribed in the senate consult could be tampered with, by loosening the string and sliding the tablets apart. Jakab, *l.c.* (n. 21), p. 421. The sealing may have been a Roman innovation. Meyer, *o.c.* (n. 2), p. 151 with further references. See also Jakab, *l.c.* (n. 21), p. 422–423. Greek-Hellenistic syngraphs, however, may also have been sealed. See section 5.5 below.

32. TPSulp 46 ([*q*]*uod is negaret se litteras scire*); TPSulp 78 (*quod is litteras nesciret*); TPSulp 98 ([*is negaret se*] *litteras sc*[*ire*]). See also one of the Dacian documents: *FIRA* III, nr. 150 (*quia se lit*[*ter*]*as scire negavit*). For an example from Ptolemaic Egypt (Pathyris, 28 May 109 BC), see P. Adl. 4, described and translated in J.G. Keenan – J.G. Manning – U. Yiftach-Firanko, *Law and Legal Practice in Egypt from Alexander to the Arab Conquest. A Selection of Papyrological Sources in Translation, with Introductions and Commentary*, Cambridge, 2014, p. 43–44: 'Dionysios son of Archimedos, of the demos Berenike, wrote on behalf of Psemminis by his request as he is illiterate'. See also P. Vindob. L 135 cited in section 3.4 below.

33. Wolf, *l.c.* (n. 2), p. 64. There are, however, Campanian wall paintings of women holding writing tablets and a *stilus*. See E.A. Meyer, «Writing Paraphernalia, Tablets, and Muses in Campanian Wall Painting», *American Journal of Archaeology* 113 (2009), p. 569–597, 570 (fig. 1 and 2) and 584 (fig. 16 and 17).

34. In TPSulp 45 Diognetus expressly declares that the chirograph was written 'on the order of my master Cypaerus' (*scripsi ìussu Cypaerì dominì meì*). This may be a deliberate reference to the *actio quod iussu*. M. Miceli, *Studi sulla «rappresentanza» nel diritto romano*, Milano, 2008 (*Università di Palermo. Facoltà di Giurisprudenza*, 17), p. 99. Wacke suggests that *iussum* could refer to the master guaranteeing — by way of *fideiussio* — the slave's obligations. A. Wacke, «'*Fideiussio*' = '*iussum*'?», *Index* 27 (1999), p. 523–549. One would rather expect this in cases where the slave would act on his own behalf, in particular in managing his *peculium*.

receipt of a payment which was owed to his patron (Gaius Sulpicius Faustus).[35] This can be regarded as a case of agency by a free person (the receipt of a payment on behalf of someone else), although the chirograph itself was executed in Cinnamus' own name.[36] In Modestinus D. 20.1.26.1 a borrower had asked his emancipated son to write down in a chirograph an acknowledgement of indebtedness addressed to the lender. When one free person would authorize another free person — Modestinus mentions expressly that the son (Seius) was emancipated — to issue a chirograph on his behalf, the same effects could be created as under modern laws of agency. The chirograph written by the (emancipated) son would legally count as an acknowledgement of indebtedness by the father and serve as evidence of the latter's indebtedness as borrower vis-a-vis the lender.[37]

## 2.4. *Epistulae* and *cautiones*

The chirograph was one of the oldest and certainly the most important type of documents emerging from Greek-Hellenistic legal practice.[38] In a Greek-Hellenistic chirograph the author acknowledged certain legally relevant facts, such as that a contract (e.g. a loan) had been entered into or that a payment had been received, often accompanied by a promise relating to a future performance.[39] In their earliest form Greek-Hellenistic chirographs were drafted in the first person in the form of a letter addressed to the counterparty.[40] In the Greek-Hellenistic chirographs from the Roman period, where they continued to be used (it even seems that their use increased),[41] we still do encounter the letter form.[42] In west-Roman *legal* chirographs (i.e. evidencing a contract or other legally relevant act) the letter

35. See also TPSulp 74.

36. See the opinion of Celsus in Paul D. 12.6.6.2 and Ulp. D. 46.3.12 pr. A debtor can validly discharge the debt by paying to a *procurator*. Cinnamus must have been authorised by Faustus to receive payments as a *procurator* on the latter's behalf. P. Gröschler, *Die tabellae-Urkunden aus den pompejanischen und herkulanensischen Urkundenfunden*, Berlin, 1997 (*Freiburger Rechtsgeschichtliche Abhandlungen. Neue Folge*, 26), p. 122–123; Camodeca, *o.c.* (n. 10), p. 171, who calls Cinnamus a '*libertus procurator* del suo *patronus* C. Sulpicius Faustus'.

37. Scaev. D. 44.7.61 pr. discusses an *epistula* written by the procurator of a banker acknowledging the indebtedness of his principal. See on this text, Platschek, *o.c.* (n. 3), p. 222–223.

38. H.J. Wolff, *Das Recht der griechischen Papyri Ägyptens in der Zeit der Ptolemaeer und des Prinzipats. Zweiter Band. Bedingungen und Treibkräfte der Rechtsentwicklung*, Munich, 1978, p. 106.

39. Wolff, *o.c.* (n. 38), p. 107.

40. Chirographs were not only used for everyday transactions — small loans, receipts, animal purchases —, but also for dispositions of valuable assets like slaves and real estate. Wolff, *o.c.* (n. 38), p. 111.

41. Wolff, *o.c.* (n. 38), p. 112.

42. The letter form was, according to Wolff, already abandoned during the course of the Ptolemaic period. Wolff, *o.c.* (n. 23), p. 63. From the Roman period, there are Hellenistic 'soldier's chirographs' in the form of a letter. See for instance BGU I 69, reproduced in Platschek, *o.c.*

form is not used in the Campanian, Dacian, Frisian and London writing tablets. It is, however, used in *epistulae* quoted in the Digest. These *epistulae* can also be regarded as chirographs.[43] For instance, in Papinian D. 16.3.24 a letter is quoted, in which a deposit banker expressly declares that he has received the money by 'this letter written in my own hand' (*hac epistula manu mea scripta*).[44] We find exactly the same expression in two other *epistulae* quoted by Scaevola (D. 17.1.62.1 and D. 39.5.35 pr.). As in several fragments by different jurists exactly the same words are used, it is likely that this was a standard clause inserted in order to indicate that the letter was a chirograph. There are other examples in the Digest of letters which are chirographs. For instance, in D. 13.5.5.3, Ulpian recalls an opinion by Julian on a letter (*epistula*[*m*]), in which the author of the letter wrote that he would pay any debt shown to be due to the addressee.[45] The words *scripsi me … soluturum* indicate that we are dealing with a chirograph.[46] For our purposes an interesting fragment is Scaevola D. 2.14.47.1, because what in the beginning is referred to as a 'letter' (*epistula*[*m*]) is later called '*hoc chirographum*'.[47] Like *epistula*, also the term *cautio* does often refer to documents, which are executed by debtors to confirm the receipt of (borrowed) money, acknowledge a debt or promise payment, or by creditors in order to confirm the discharge of an obligation.[48] In particular the imperial rescripts on the *exceptio non numeratae pecuniae*, which will be discussed in section 7.2 below, often concern *cautiones* which are likely to have been executed

(n. 3), p. 250. The 'soldier's chirograph' by L. Caecilius Secundus (P. Vindob. L 135), cited in section 3.4 below, is not in the letter form.

43. Wenger defines a *chirographum* as a document containing a 'subjectively styled declaration' (*eine subjektiv stilisierte Erklärung*). When this declaration is given in the form of a letter starting with a salutation it is called an *epistula*. In other words, each *epistula* is a chirograph, but not each chirograph is an *epistula*. Wenger, *o.c.* (n. 2), p. 736, 737–738. See also Platschek, *o.c.* (n. 3), p. 156. Scaev. D. 38.4.7 distinguishes — with regard to transferring (*adsignare*) the patronage of freedmen — between letters, testimonies and chirographs (*per epistulam vel testationem vel chirographum*). See also Scaev. D. 2.14.47.1 mentioned in the main text to n. 47. TPSulp 71 is a chirograph in which the author declares to have received from the slave of Caesia Priscilla 'three thousand sesterces in cash from the letter' (*s*[*e*]*stertia tria millia nummum ex epistula*). TPSulp 80 is a letter (line 1: *Theophilus Aphrodisio fratrì sal*[*utem*]), in which a peregrine (Theophilus) confirms to his associate (Aphrodisius) in Puteoli that the latter has received amphoras with wine consigned by Theophilus.

44. According to Platschek the letters quoted in D. 16.3.24, D. 16.3.26.2 and D. 16.3.28 are 'un-Roman' in character and show parallels with Greek documents. Platschek, *o.c.* (n. 3), p. 214.

45. *Scripsi me secundum mandatum Seii, si quid tibi debitum adprobatum erit me tibi cauturum et soluturum sine controversia.*

46. Platschek, *o.c.* (n. 3), p. 7.

47. Moreover, the *instrumenta* and *cautiones* which were cancelled by this chirograph, may themselves also have been chirographs. Gröschler, *o.c.* (n. 36), p. 286.

48. E. Seckel (ed.), *Heumanns Handlexikon zu den Quellen des romischen Rechts*, 9th ed., Jena, 1914, p. 61 (with references to Digest and Code).

as chirographs. A good example from the Digest is Paul D. 12.1.40, citing a '*cautio*' which clearly is a chirograph recording a *mutuum cum stipulatione*

Although *epistulae* and *cautiones* may also have been written on waxed tablets,[49] they may often not have been executed in accordance with the senate-consult of AD 61. There are no indications that they were diptychs or triptychs bound by a string and sealed by witnesses. This may have had consequences for their evidentiary value. Nevertheless, one would think that they would still be treated as strong evidence if the courts accepted that they were written by the author himself. For instance, in Scaevola D. 20.1.34.2 the borrower had written a letter (*epistula … emissa sit*), on a writing tablet, to the lender. In this letter he acknowledged that he had borrowed 500 denarii and had asked the lender to accept a pledge instead of a guarantee. According to Scaevola when the parties were in agreement about the pledge, the facts that the letter was without date, did not mention the consuls and the *tabulae* were not sealed (*tabulae signatae non sint*) did not mean that the pledge contract did not exist.[50]

## 2.5. The Roman 'law of evidence'

It is often stressed in modern literature that there was no elaborated Roman law of evidence.[51] This is not to say, however, that there were no principles of evidence at all. With respect to the burden of proof, such principles were already recognised in early classical law.[52] Generally, the claimant would have to prove the elements inserted in the *formula* of his *actio*, the defendant those referred to in his *exceptio* et cetera.[53] Moreover, we have seen that from Nero's time we do have a senate-consult on how *tabulae ceratae* should be executed in order to serve as reliable evidence. The scantiness of legal rules of evidence in the early classical period particularly concerned the question which forms of evidence were admitted in the second stage (*apud iudicem*) of the formula procedure and the appreciation thereof. Here the judge originally had a large measure of freedom which was not restricted by specific legal rules of evidence. This left room for recourse by judges to techniques developed by forensic rhetoric, although here also a 'juridification' took place over time.[54] There is a passage from the *Noctes atticae* which nicely

49. See Scaev. D. 20.1.34.2 (discussed below). The writing tablets found in London (Bloomberg), Vindolanda, Vindonissa and elsewhere often record informal letters on a variety of subjects.

50. See also Mod. D. 20.1.26.1.

51. For instance E. Meyer, «Writing in Roman Legal Contexts», in D. Johnston (ed.), *The Cambridge Companion to Roman Law*, p. 85–96, 85. See also R. Zimmermann, *The Law of Obligations, Roman Foundations of the Civilian Tradition*, Cape Town, 1990, p. 70.

52. M. Kaser – K. Hackl, *Das römische Zivilprozessrecht*, 2nd ed., Munich, 1996, p. 364.

53. Kaser – Hackl, *o.c.* (n. 52), p. 363.

54. Kaser – Hackl, *o.c.* (n. 52), p. 361–363.

illustrates this evolution.[55] This account by Gellius, which may be based on his own experiences as a *iudex*,[56] indicates which forms of written evidence were commonly used in order to prove indebtedness and that chirographs were among them. Gellius's narrative can be located on an evolutionary path of the Roman law of evidence, in which a *rhetorical* doctrine of evidence considering the personal characteristics of the litigating parties as highly relevant, is gradually superseded by a *legal* doctrine of evidence focusing on the truthfulness of the litigating parties' assertions.[57] Gellius' account suggests that at his time it was still possible for a judge to escape from the 'too rigorous parameters of the legal doctrine of evidence'.[58] Kaser and Hackl observe that even when forensic evidence became more rational and dependent upon objective legal criteria, legal rules of evidence would still be far more flexible than other legal rules.[59] When the objective rules on evidence had been established, the free judicial assessment of means of evidence had already become 'one of the secured accomplishments of Roman legal culture'.[60] This also applied to the judicial assessments of written evidence.[61] Nevertheless, in the late-classical period we find, precisely on chirographs, a number of imperial constitutions formulating rules for judicial assessment of documents. For instance, a rescript by Caracalla from AD 215 (C. 4.30.3) rules that, if the debtor would raise the *exceptio non numeratae pecuniae*, the burden of proof that the money had been paid out came to rest on the creditor.[62] From Alexander Severus we do have several constitutions on the evidentiary force of documents and at the end of the

55. *Noctes atticae*, XIV.2. Latin text and translation in J.C. Rolfe (tr.), *Gellius, Attic Nights*, Volume III, Books 14–20, Cambridge (MA), 1927 (*Loeb Classical Library*, 212), p. 23–24. See recently J.E. Spruit, «Aulus Gellius als Richter. Eine Betrachtung zu Gellius, *Noctes Atticae* XIV, 2», *RIDA* 63 (2016), p. 227–261.

56. On whether Gellius's account accurately reflects his own experience as a judge, see L. Holford-Strevens, *Aulus Gellius. An Antonine Scholar and his Achievement*, revised ed., Oxford, 2004, p. 297. See also Spruit, *l.c.* (n. 55), p. 235 and *passim*.

57. D. Nörr, «L'esperienza giuridica di Gellio (*Noctes Atticae* XIV 2)», in *Historia Iuris Antiqui. Gesammelte Schriften. Band* 3, Goldbach, 2003 (*Bibliotheca Eruditorum*, 28), p. 2149*–2172*, 2172* (56). See also (without specific reference to Gellius) Kaser – Hackl, *o.c.* (n. 52), p. 362–363. For a discussion of Seneca's moral contempt for the increased use of (witnessed and sealed) documents, which according to this philosopher entailed that the *fides* among transacting parties was ousted by formalities, see Jakab, *l.c.* (n. 21), p. 416–423.

58. 'Più rigorosi parametri della dottrina giuridica delle prove'. Nörr, *l.c.* (n. 57), p. 2172* (56). According to Nörr, Gellius's withdrawal from the case can be regarded as a symptom of a (personal or epochal) crisis.

59. Kaser – Hackl, *o.c.* (n. 52), p. 363.

60. Kaser – Hackl, *o.c.* (n. 52), p. 363 (my own translation from the original German).

61. Kaser – Hackl, *o.c.* (n. 52), p. 369.

62. See further section 7 below.

classical period Diocletian issued several constitutions on the evidentiary force of chirographs.[63]

## 2.6. Writing in classical law

As such documents, or certain types of documents (such as *tabulae*), did not have a privileged status in the Roman law of evidence.[64] For classical law Gaius D. 20.1.4 gives an acute description of the function of writing: '[t]he purpose of writing is to prove the transaction more easily, but if it can be proven otherwise, it is valid without writing…'[65] Jolowicz and Nicholas define the 'dispositive' (constitutive) effect of writing as follows: 'it may embody, in permanent form, the expression of the will which becomes effective only through this embodiment'.[66] They also observe that '[s]uch dispositive effect may again exist either because the law requires the expression of the will to be in writing or because, the law being indifferent in the matter, the parties have chosen this method of expression'.[67] In the latter case the writing itself has constitutive effect, is in itself capable of generating enforceable obligations. As the Gaius fragment demonstrates, Roman law did never require promises or other legally relevant acts to be in the form of a chirograph, so in the first sense they did not have dispositive effect. Roman law only required writing in respect of the (very narrow) category of *contractus litteris* and the mancipatory will (which also required *mancipatio* and *nuncupatio*).[68] *If* chirographs had dispositive effect, it must have been in the second sense. We

63. For instance: Dio./Max. C. 8.42.14 (a. 293): a written receipt constitutes better proof than the return of a chirograph recording the acceptance of the borrowed money; Dio./Max. C. 8.42.15 (a. 293): in the absence of writing the creditor can still prove the debt by any other means. See also Dio./Max. C. 8.25.7 (a. 287): return of deed of pledge implies release of the pledge.

64. Meyer, *l.c.* (n. 51), p. 89, claims that for Cicero and Quintilian *tabulae* were 'a wonderful kind of superproof'. According to Meyer Cicero held the opinion that *tabulae* had the special and potent quality of *auctoritas* ('authority') and were 'difficult' to get around. The passages in Cicero and Quintilian which Meyer calls upon to reach this conclusion do not sufficiently support this rather bold conclusion. In *Topica* 24 Cicero says that 'extrinsic arguments depend principally on authority', but he says nothing at all about whether such authority can be derived from *tabulae*. *De Oratore* 1.250 does deal with *tabulae*, but merely implies that they can prevent difficulties of proof, in the same way as viewing the actual spot when dealing with boundary disputes. Quintilian, *Institutio Oratoria*, 5.1.2, discusses the distinction made by Aristotle between 'technical' and 'non-technical' proof. The latter category consists of means of evidence on which the 'major part of forensic disputes rests'. They include previous decisions, rumours and evidence from torture, *tabulae*, oaths, and witnesses. Where *tabulae* are included on a relatively long list of means of proof, it seems an exaggeration to say that they were 'superproof'.

65. *Fiunt enim de his scripturae, ut quod actum est per eas facilius probari poterit: et sine his autem valet quod actum est…* See also Scaev. D. 20.1.34.2; Mod. 20.6.9.1; Paul D. 44.2.30.1.

66. H.F. Jolowicz – B. Nicholas, *Historical Introduction to the. Study of Roman Law*, 3rd ed., Cambridge, 1972, p. 416.

67. Jolowicz – Nicholas, *o.c.* (n. 66), p. 417.

68. Jolowicz – Nicholas, *o.c.* (n. 66), p. 417.

have now arrived at the central question of this contribution. Did Roman law give parties the freedom to create obligations by way of chirographs, outside the closed list of legally recognised contracts (*stipulatio*, *mutuum, emptio venditio* etc.)? It will appear this question must be answered negatively.

## 3. Greek-Hellenistic chirographs and Roman law

### 3.1. Gaius, *Institutes* 3.134: Greek-Hellenistic chirographs and syngraphs

Gaius must have had Greek-Hellenistic laws and documentary practices in mind when he wrote in his Institutes that the creation of obligations by chirographs and syngraphs 'is peculiar to peregrines'.[69]

> Gai. *Inst.* 3.134: *Praeterea litterarum obligatio fieri uidetur chirografis et syngrafis, id est si quis debere se aut daturum s<e> es<se> scribat,*[70] *ita scilicet, si eo nomine stipulatio non fiat. Quod genus obligationis proprium peregrinorum est.*
>
> "Moreover, an obligation by writing appears to arise by chirographs and syngraphs; that is to say, where anyone writes that he owes or that he will give something, in such a way of course, that a stipulation is not entered into on this account. This kind of obligation is peculiar to peregrines."[71]

A widespread theory in late nineteenth/early twentieth century legal-historical literature, particulary as elaborated by Mitteis, was that in Greek-Hellenistic laws chirographs and syngraphs were 'constitutive acts', whose binding force was based on their execution in writing.[72] This theory of constitutive Greek-Hellenistic chirographs and syngraphs has come under severe criticism in the past decades. The idea of a constitutive document incorporating an abstract indebtedness,

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69. F. Pringsheim, «Stipulations-Klausel», in *Gesammelte Abhandlungen. Zweiter Band*, Heidelberg, p. 205; M. Kaser, *Das römische Privatrecht. Zweiter Abschnitt. Die nachklassischen Entwicklungen*, 2nd ed., Munich, 1975, p. 375 (n. 5); Wolff, *o.c.* (n. 38), p. 143; Platschek, *o.c.* (n. 3), p. 1–2. The practices to which Gaius refers are not necessarily pure Greek ones, but may very well have been Greco-Egyptian ones. J. Platschek, «*Contra fidem veritatis*. Documenti greci nella prospettiva romana. Con un excursus sui nomina arcaria negli archivi campani», in C. Cascione – C. Masi Doria (eds.), Quid est veritas? *La verità e le forme giuridiche nel mondo romano*, Naples 2013, p. 251–275, 262.

70. The manuscript reads *datvrvmsesscribat*. G. Studemund, *Codicis Veronensis denuo collati apographum confecit et iussu Academiae regiae scientiarum Berolinensis edidit Guilelmus Studemund*, Leipzig, 1874, p. 163. I follow Platschek's reading. Platschek, *o.c.* (n. 3), p. 1. The (non-Roman) chirographs that Mitteis, Wolff, Platschek and others discuss are mostly from Ptolemaic or Roman Egypt. One would expect, however, that chirographs (and syngraphs) documenting loans were common throughout the Hellenistic world. In *Colossians* 2:14 Jesus blotted out the writing of a chirograph and nailed it to the cross. See also the chirograph in Apostle Paul's letter to Philemon, discussed by Platschek, *o.c.* (n. 3), p. 243–245.

71. The translation is an adaptation of the translation of W.M. Gordon – O.F. Robinson, *The Institutes of Gaius*, 2nd ed., London, 1997.

72. L. Mitteis, *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs*, Leipzig, 1891, p. 468–498. See also sections 3.2 and 3.3 below.

arising purely on the basis of the execution of certain formalities, would be irreconcilable with Greek and Hellenistic legal thought.[73] According to Wolff it would be anachronistic to assume that Greek-Hellenistic legal thinking, which was still relatively underdeveloped, would regard chirographs as equivalents to *contractus litteris*. Rather than being an institution of substantive contract law, chirographs would be within the scope of the law of procedure. This part of the law would allow transactions with a fictitious basis (in particular: loans not [fully] paid out), which were recorded in chirographs or syngraphs, to become enforceable in court.[74] As Jolowicz and Nicholas observe, however, although the distinction between constitutive chirographs and chirographs providing irrefutable proof (of fictitious loans) 'is clear enough in theory, in practice it is not so obvious'.[75] The probative value of chirographs and syngraphs as non-rebuttable evidence in Greek-Hellenistic procedural laws, which was unknown to Roman law at his time, must have induced Gaius to state that — as a matter of substantive law — chirographs issued by peregrines created obligations by writing.[76] Moreover, although there is no doubt that pursuant to Greek syngraphs the debtor could be liable for a higher amount than the recorded amount of the loan, contrary to what Mitteis assumed, there is not a single case in which the liability would be solely created by a syngraph concerning a ficticious payment to the debtor.[77] In all cases syngraphs recording ficticious loans were executed in order to re-arrange already existing debts, arising under a previous loan, for the payment of a purchase price or for the contribution to a partnership.[78] In other words, syngraphs were less 'abstract' than Mitteis and others assumed.

73. Wolff, *o.c.* (n. 38), p. 143. In Hellenistic law chirographs (or any other document type) were never a formal requirement for the validity of a legal transaction. Wolff, *o.c.* (n. 38), p. 111, 136. See also Platschek, *o.c.* (n. 3), p. 2–3.

74. Wolff, *o.c.* (n. 38), p. 143–144. See also H.-A. Rupprecht, *Untersuchungen zum Darlehen im Recht der Graeco-Egyptischen Papyri der Ptolomäerzeit*, Munich 1967 (*Münchener Beiträge zur Papyrusforschung und antiken Rechtsgeschichte*, 51), p. 131–141; Simon, *o.c.* (n. 3), p. 73 (n. 143); Meyer, *o.c.* (n. 2), p. 18–19; Platschek, *o.c.* (n. 3), p. 2–3.

75. Jolowicz – Nicholas, *o.c.* (n. 66), p. 419.

76. Wolff, *o.c.* (n. 38), p. 144; Platschek, *o.c.* (n. 3), p. 2–3. According to Wolff, dogmatically the Hellenistic deed was something completely different from the Roman *contractus litteris*. Wolff notices that this fundamental distinction has eluded Gaius.

77. T.G. Thür, «Marginalien zum fiktiven Darlehen», in H. Altmeppen *et al.* (eds.), *Festschrift für Rolf Knütel zum 70. Geburtstag*, Heidelberg, 2009, p. 1269–1280, 1278: '*kein einziger Fall, in dem die Haftung allein durch eine* syngraphe *über eine fiktive Zuzählung begründet wurde, wie das* Mitteis *annahm*'.

78. Thür, *l.c.* (n. 77), p. 1278.

## 3.2. Syngraphs in Cicero

In the Codex and Digest there are no references to syngraphs: only chirographs appear (frequently) in the Corpus iuris civilis.[79] In the works of Cicero there are, however, various references to syngraphs (often in connection with cases of usury).[80] These references are extremely interesting, not only because they give relatively early Roman accounts of syngraphs. More importantly, as Bianchini observes, the writings of Cicero show us how syngraphs were effectively used in legal relationships between *cives* and *peregrini*.[81]

It is therefore not surprising that Mitteis elaborately used Cicero in order to substantiate his conclusion that syngraphs were constitutive documents. Cicero introduced an exception into his provincial edict as governor of Cilicia, giving a debtor a defense reading 'except where the transaction has been such that in good faith its terms ought not to be respected' (*extra quam si ita negotium gestum est ut eo stari non oporteat ex fide bona*).[82] Mitteis argues that this defense applied to contracts between *Publicani* and (peregrine) provincials and that it would have been senseless if syngraphs were merely evidentiary. For, in that case a defense based on good faith would not have been necessary if it could be demonstrated that the syngraph documented a fictitious loan. This defense would only be meaningful if such counterproof was irrelevant, because of the constitutive nature of syngraphs.[83] Another argument in favour of constitutive syngraphs forwarded by Mitteis is based on Cicero's account of how Verres's friend, the *liberta* Chelidon, accepted both cash and documents as payments.[84] According to Mitteis a shrewd

79. According to Platschek the role and special characteristics of syngraphs (albeit without the use of this term), as described by Pseudo-Asconius (see section 3.3 below), are also present in the Campanian '*tabellae*-documents' (e.g. TPSulp 60). Platschek, *o.c.* (n. 3), p. 258–262.

80. See Mitteis, *o.c.* (n. 72), p. 480–482; E. Costa, *Cicerone Giureconsulto. Nuove edizione riveduta e ampliata dall'autore en in parte postuma,* vol. I, Bologna, 1927, p. 170–175; Kaser, *o.c.* (n. 69), p. 374–375. The most important contribution is M. Bianchini, «Cicerone e le singrafi», *BIDR* 73 (1970), p. 229–287. On p. 240–241 of this contribution there is a list of all the places where Cicero mentions syngraphs.

81. Bianchini, *l.c.* (n. 80), p. 231, 232–233. Earlier references to syngraphs are to be found in Plautus (*Asin.*, 746; *Capt.*, 450, 506). Bianchini, *l.c.*, p. 232.

82. *Cicero ad Atticum*, VI 1, 15. D.R. Shackleton Bailey (ed. and transl.), *Letters to Atticus*, Volume II, Cambridge (MA), 1999 (*Loeb Classical Library*, 8), p. 120–121.

83. Mitteis, *o.c.* (n. 72), p. 481–482.

84. *Cicero in Verrem*, II 1, 52, 137. L.H.G. Greenwood (ed.), *The Verrine Orations. Volume I: Against Caecilius. Against Verres*, Part 1; Part 2, Books 1–2, Cambridge (MA) 1928 (*Loeb Classical Library*, 221), p. 268–271. Although here Cicero does not use the word 'syngraph', it is likely that the phrase *tabulae obsignabantur* does refer to this type of document. Bianchini, *l.c.* (n. 80), p. 247. *Tabulae obsignatae* are also listed as means of proof by Gellius, *Noctes Atticae*, XIV, 2. See section 2.5 above.

courtesan like Chelidon would never have accepted a worthless piece of paper instead of money.[85]

A much more nuanced interpretation of the appearance of syngraphs in the writings of Cicero, with a far more interesting perspective for this contribution, is given by Mariagrazia Bianchini.[86] What is most important for our purposes is that, although the syngraph was a legal institution which was not recognised as a matter of Roman law, Bianchini has made it plausible that syngraphs executed between Romans and peregrines were enforceable before Roman courts.[87] She observes that, with one exception (Chelidon's case), most of the syngraphs mentioned by Cicero were executed between Roman creditors and peregrine debtors.[88] In credit relationships between Romans and provincials syngraphs could be used to satisfy the requirements of the laws of both contracting parties. Where borrowed money was paid by the lender to the borrower and a syngraph would record this, the *numeratio* required by Roman law (*mutuum*) would be combined with the written document required by Greek law. In the relationships between Romans and peregrines the syngraph would not be a constitutive document, but rather evidence of a contract already entered into (albeit difficult to prove with other means).[89]

### 3.3. Pseudo-Asconius: Greek-Hellenistic chirographs and syngraphs

In modern legal-historical literature syngraphs are usually discussed with reference to a nameless commentator on Cicero who lived in the fifth century AD. From Mitteis to Platschek, however, it is accepted that this author must have relied on older materials.[90] This so-called Pseudo-Asconius discusses (like Gaius) both chirographs and syngraphs and refers (again like Gaius) to their Greek-Hellenistic context.

> Ps.-Ascon. in Cic. Verr. 2.1.36.91: *Inter syngraphas et cetera c<h>irographa hoc interest, quod in ceteris tantum quae gesta sunt scribi solent. In syngraphis etiam contra fidem veritatis pactio venit, et non numerata quoque pecunia aut non integro numerata pro temporaria voluntate hominum scribi solent more*

85. Mitteis, *o.c.* (n. 72), p. 482.

86. Bianchini, *l.c.* (n. 80).

87. Bianchini, *l.c.* (n. 80), p. 243–253.

88. Bianchini, *l.c.* (n. 80), p. 241–242.

89. Bianchini, *l.c.* (n. 80), p. 250, 253.

90. Platschek, *l.c.* (n. 3), p. 251. Mitteis has the impression that Pseudo-Asconius must have followed a well-informed informant, who used a very clear and precise notion of syngraphs. Mitteis, *o.c.* (n. 72), p. 468.

*institutoque Graecorum. Et cetera<e> tabulae ab una parte servari sole<n>t; syngraph(a)e <d>e utriusque manu utrique parti servandum tradunt<ur>.*[91]

"Between syngraphs and other chirographs the difference is that in the other (chirographs) usually is written solely that what has happened. In syngraphs a pact is written also contrary to fidelity to the truth, and these usually record also money not, or not fully, paid, according to a temporary wish of men, in conformity with the custom and the institution of the Greeks. And the other documents (chirographs) are usually safekept by one of the parties; a syngraph of both hands is handed over for safekeeping to both parties."

According to Pseudo-Asconius the syngraph is a form of chirograph, which in contrast with 'other chirographs' (which are executed by one party only) is executed by both contracting parties, probably in two copies.[92] More importantly, Pseudo-Asconius states that it is a Greek practice that syngraphs are executed 'contrary to fidelity to the truth' (*contra fidem veritatis*) that money has been (fully) paid out.[93] Therefore, syngraphs also record an indebtedness out of *mutuum* in case of a ficticious payment of the borrowed sum. This brings Mitteis to the conclusion that the syngraph is an 'an abstract literal contract in the form of a loan'.[94] The 'unnecessary extremeness' (Meyer) of Mitteis's view has been recognised in modern legal-historical literature.[95] It is recognised that also the syngraphs discussed by Pseudo-Asconius are much better interpreted as constituting very powerful evidence against the persons who executed these documents. If this is true for syngraphs, it is even more so for chirographs generally. In fact, what distinguishes — according to Pseudo-Asconius — syngraphs from other chirographs is that the

91. T. Stangl, *Pseudoasconiana*, Paderborn, 1909, 244. Citation from Platschek, *o.c.* (n. 3), p. 251–252.

92. Mitteis, *o.c.* (n. 72), p. 461, states that syngraphs were sealed by both parties, but as. Platschek, *o.c.* (n. 3), p. 254 (n. 8) observes this is not expressed by Pseudo-Asconius. The sealing may have been a Roman innovation: see n. 31 above. On the execution of two copies (rather than depositing one copy with a common custodian, as held by Mitteis), see Platschek, *o.c.* (n. 3), p. 258. According to Wolff there is no sharp distinction between chirographs and syngraphs. Wolff, *o.c.* (n. 38), p. 137.

93. We are not necessarily dealing with fraudulent or abusive practices. It may be that the document was already executed in anticipation of the actual loan. Also, the agreed amount could be a purchase price, in respect of which seller and purchaser have agreed that the latter would owe as if borrowed from the seller. Platschek, *o.c.* (n. 3), p. 256. The Greek syngraph of 223 BC recording a ficticious loan discussed by Thür was executed in order to arrange for the payment of a pre-existing debt (arising under a settlement of a real loan). Also all the other ficticious loans examined by Thür were entered into in order to rearrange existing debts. Thür, *l.c.* (n. 77), p. 1273, 1278. In Alex. C. 8.32.2, on the other hand, the document executed *contra fidem veritatis* was clearly abusive.

94. Mitteis, *o.c.* (n. 72), p. 468–469 ('*ein abstracter Literalvertrag in Form des Darlehens*'). Contra, Platschek, *o.c.* (n. 3), p. 254–255. See also Meyer, *o.c.* (n. 2), p. 18–19.

95. Meyer, *o.c.* (n. 2), p. 19. See also Platschek, *o.c.* (n. 3), p. 254–255 (including n. 10 with references), 257 (n. 12).

latter *do* purport to state the true state of affairs. Chirographs are therefore even less likely to have been constitutive than syngraphs.

### 3.4. Chirographs from Roman Egypt

Gai. *Inst.* 3.134 indicates that constitutive chirographs (as perceived by Gaius) are *not* part of the *ius gentium*, in the sense of the law common to all peoples.[96] Only peregrines can create obligations through the chirograph itself, not Romans.[97] Nevertheless, one cannot exclude that in actual practice 'the Romans living in Egypt used dispositive documents of the Greek type even for transactions between themselves'.[98] From the papyrological sources we have several chirographs executed by Roman soldiers in Latin, recording contractual promises made to other Romans which are neither cast in the form of a stipulation nor expressly mention the conclusion or performance (receipts, discharge) of any of the other recognised Roman contracts. An early example is a chirograph which was executed by a Roman soldier in Alexandria on 25 August 27 AD.[99]

> P. Vindob. L 135: *L. Caecilius Secundus eques ala Paullini turma Dicaci C. Pompeio militi cohor*(*te*) *Ae…*[.] *Habeti* (*centuria*) *Betiti salut*(*em*). *Fateor me tibei debere dr*(*achmas*) *Aug*(*ustas*) *et Pt*(*olemaicas*) *ducentas quas tibi solvam stipendio proxumo et eorum usuras in menses singulos in dr*(*achmis*) *C a*(*ssibus*) *III sine ulla controversia. Extra alias dr*(*achmas*) *Aug*(*ustas*) *et Pt*(*olemaicas*) *CCCC ob pignera cassidem inargentatam et insigne inargentatum et vaginam pugionis argenteum*[100] *subiecto eboreo. Actum Alexandr*(*eae*) *ad Aegypt*(*um*) *IIX K*(*alendas*) *Septe*(*mbres*) *C. S*[*allus*]*tio Crispo L. Lentulo Scipione co*(*n*)*s*(*ulibus*) *…*[……]*… illis scripsi quod litteras* ].[101]
>
> "L. Caecilius Secundus, cavalryman in the regiment of Paullin(i)us, squadron of Dicac(i)us, greetings to C. Pompeius, soldier of the Ae … cohort of Habet(i)

96. Bianchini, *l.c.* (n. 80), p. 231; Platschek, *o.c.* (n. 3), p. 2.

97. Pringsheim, *l.c.* (n. 69), p. 205; Bianchini, *l.c.* (n. 80), p. 231; Platschek, *o.c.* (n. 3), p. 1–2. See also TPSulp 78, executed in Greek by Menelaos, a citizen of Keramos in Asia Minor. Wolf, *o.c.* (n. 12), p. 161. The author of the *Pauli Sententiae* observes that a 'naked pact' to pay interest has no legal effect, as between Roman citizens no action arises under a 'naked pact' (*Si pactum nudum de praestandis usuris interpositum sit, nullius est momenti: ex nudo enim pacto inter cives Romanos actio non nascitur*). PS 2.14.1. According to Pringsheim this must have related to the East, where written agreements lacking a stipulation were still used. See Pringsheim, *l.c.* (n. 69), p. 206.

98. Jolowicz – Nicholas, *o.c.* (n. 66), p. 417.

99. Thür, *l.c.* (n. 77), p. 1269–1274, elaborately reviews a syngraph executed in Greece in 223 BC and recording a ficticious loan.

100. One would expect this adjective to refer back to *vaginam* and to have read *argente**a**m*.

101. H. Harrauer–R. Seider, «Ein neuer lateinischer Schuldschein: P. Vindob. L 135», *Zeitschrift für Papyrologie und Epigraphik* 36 (1979), p. 109–120. See also J.F. Gilliam, «Notes on a New Latin Text: P. Vindob. L 135», *Zeitschrift für Papyrologie und Epigraphik* 41 (1981), p. 277–280. The document ends with a statement in Greek by L. Kaikilios Sekondos (not cited).

> us' centuria of Betit(i)us. I declare that I owe you two hundred imperial and ptolomaic drachmes, which I will pay to you without dispute from the next pay day with interest in monthly instalments of 100 drachmes and 3 asses. In addition [I owe you] 400 imperial and ptolomaic drachmes against a pledge of a helmet inlaid with silver, a silvered insigne and a silver scabbard for a dagger adorned with ivory. Done in Alexandria in Egypt on the 8th [day] before the Kalends of September under the consuls C. Sallustius Crispus and L. Lentulus Scipio. I […] have written for them, because they [could not] read and write."

A soldier's chirograph executed in AD 83 in Wales (*Britannia*) also does not include a stipulation clause. In this document the soldier acknowledges to be indebted (*scribsi me debere*), without mentioning the legal basis of the debt. We also find this in the Sulpicii archive (e.g. TPSulp 52 and TPSulp 55). The fact, however, that the legal basis of the acknowledged debt is not mentioned, still leaves open the possibility that this was a *mutuum*, *stipulatio*, *emptio venditio* or other recognised Roman contract. The debts (200 + 400 drachmes) acknowledged in P. Vindob. L 135 could also have had their legal basis in a traditional Roman contract, *mutuum* in particular. For, where the 600 drachmes had actually been paid out to L. Caecilius Secundus this would be the *numeratio* giving rise to this type of contract. However, the promise to pay interest seems to be a fresh one and is certainly not cast in the form of a stipulation.

According to Camodeca the loan documents from Roman Egypt are totally different from the Campanian documents and are the expression of a Hellenistic practice which is alien to Roman law.[102] As Platschek observes, it is remarkable that less then sixty years after the Roman conquest of Egypt (30 BC), the stipulation is not used between Roman citizens.[103] The soldier's chirograph of P. Vindob. L 135 represents a provincial Roman legal practice influenced by its Greek-Hellenistic environment and does not reflect the standards of 'imperial' law as applied in Rome and the Western part of the empire. Perhaps Roman soldiers could be subject to a court that would apply peregrine law to their legal acts.[104] Alternatively, it could be assumed that chirographs such as P. Vindob. L 135 were enforceable as matter of Roman law. The action which would make this possible would be the *actio de pecunia constituta*, which (arguably) could be used to enforce an informal promise to pay interest over an existing debt.[105]

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102. Camodeca, *o.c.* (n. 10), p 133 (n. 25). See also M. Kaser, «'Mutuum' und 'stipulatio'», in *Ausgewählte Schriften II*, Napels, 1976, p. 273–300, 284 (166); Platschek, *o.c.* (n. 3), p. 250–253, cites eight chirographs, two of which expressly refer to a stipulation, while four others certainly did not include this Roman contract.

103. Platschek, *o.c.* (n. 3), p. 253. Jolowicz and Nicholas observe with respect to the distinction between probative and constitutive: 'in the outlying courts of the empire it was not always observed'. Jolowicz – Nicholas, *o.c.* (n. 66), p. 419.

104. Platschek, *o.c.* (n. 3), p. 253.

105. See section 5.6 below.

### 3.5. Conclusion

The theory that Greek-Hellenistic chirographs were constitutive must now be regarded as obsolete. The presently prevailing view is that chirographs and syngraphs were not constitutive, but were evidence that could not be rebutted in court. However, even if under Greek-Hellenistic laws chirographs really were to have had constitutive effect, the mere fact that a certain type of document has been borrowed from a legal system (here: Greek-Hellenistic law[s]) in which it was dispositive does not necessarily mean that in the borrowing system (here: Roman law) it also has this effect.[106] The same applies to chirographs and syngraphs as non-rebuttable evidence of indebtedness. In fact, as we will see below, also this effect was never attached to chirographs in classical Roman law.[107]

## 4. The use of chirographs in Roman practice

### 4.1. Chirographs recording stipulations

Under Hellenistic influence writing had become common for stipulations already at the time of Cicero, who even classed them among *res quae scripto aguntur*.[108] Gaius must have been familiar with these practices, given his reference to stipulation in Gai. *Inst.* 3.134.[109] When it was stated in a chirograph by the promissor himself that the required question and answer had taken place this would create a strong presumption in court that these oral formalities of the stipulation had really been complied with. Already existing contractual obligations, arising under other (real or consensual) contracts, were often confirmed or supplemented by a *stipulatio* evidenced by a chirograph recorded on a writing tablet (*tabula*). We can observe this in the widespread practice of the *mutuum cum stipulatione*, discussed below. From Herculaneum (AD 60) we have a chirograph recording a *stipulatio* which confirms a number of additional agreements made in connection with the sale of a piece of land.[110] The *stipulatio* ensured that these additional agreements were legally enforceable, while in legal proceedings the chirograph could be produced in order to prove them.[111] The construction of a document setting out the terms of the parties' agreement, which was confirmed by one or

106. Jolowicz – Nicholas, *o.c.* (n. 66), p. 417. For Greek documents specifically, Bianchini, *l.c.* (n. 80), p. 244.

107. See sections 6 and 7 below.

108. *Topica* 26. See Jolowicz – Nicholas, *o.c.* (n. 66), p. 414.

109. Platschek, *o.c.* (n. 3), p. 3.

110. V. Arangio-Ruiz, «Les tablettes d'Herculaneum», *RIDA* 1 (1948), p. 13. The undertakings are written by the debtor in the first person, while the stipulation clause is written in the third person: "*Ea omni*[*a*] *q*(*uae*) *s*(*upra*) *s*(*cripta*) *s*(*unt*) *fieri praestari stipul*[*atus*] *est A Tetteius Severus, sp*[*opondit*] *Q. Inius T*<*h*>*eophilus*". See also Ulp. D. 2.14.7.12; Paul D. 17.2.71 pr. and Paul D. 45.1.140 pr. See Pringsheim, *l.c.* (n. 69), p. 201–204.

111. Simon, *o.c.* (n. 3), p. 27.

more stipulations, was also used when it would be difficult or impracticable to formulate these in the question-and-answer form. In the Digest there is a fragment discussing stipulations concluded in connection with a partnership contract (Paul D. 17.2.71). The partners had recorded the terms of their contract of partnership (*societas*) in writing and subsequently they each promised by way of stipulation to observe these written terms and to pay a penalty if they would fail to do so.[112]

## 4.2. A typical example from the Sulpicii archive: TPSulp 51

In the archive of the Sulpicii there are many chirographs recorded on *tabulae ceratae* evidencing the conclusion of one or more contracts, usually *mutuum* and *stipulatio*, sometimes combined with *pignus*.[113] A typical example of a secured credit transaction from the Sulpicii archive is TPSulp 51. This document is a virtually intact triptych, of which both the *scriptura interior* and exterior have been preserved. The *scriptura interior* was written by its author Gaius Novius Eunus in vulgar Latin. This authentic version of the chirograph has many grammatical and spelling mistakes.[114] Below the *scriptura exterior* is reproduced.[115]

> TPSulp 51: *Cn(aeo) Acceronio Proculo C(aio) Petronio Pontìo Nigrìno co(n)s(ulibus), quartum kalendas Ìulias.*[116] *C(aius) Novius Eunús scrìpsi me accepisse mútua ab Eueno Ti(berii) Caesaris Augustì liberto Primiano apsente per Hesychum servum eìus et debere eì sestertium decem mìllia nummum, quae eì reddam cum petìerit, et ea HS X m(ilia), q(uae) s(upra) s(cripta) s(unt), p(roba) r(ecte) d(ari) stipulátus est Hesychus Euenì Ti(berii) Caesaris Augustì l(iberti) Prìmianì*

112. Another example is Scaev. D. 45.1.122.1, giving a detailed description of the terms of a maritime loan, which ends with a stipulation clause.

113. In the Sulpicii archive there are chirographs evidencing *mandatum* (TPSulp 48–49), *emptio venditio* (TPSulp 42–44), *locatio conductio* (TPSulp 45–47) and *fideiussio* (TPSulp 60–62, 64 and 78). TPSulp 51 and other epigraphic and papyrological evidence confirm that also the creation of security (*fiducia* or *pignus*) was often evidenced in writing in the style of *chirographa* or *testationes*. For instance, *FIRA* III, nr. 91 (*fiducia cum creditore*); TPSulp 51, 52, 55 and 79 (*pignus*). In Tab. Lond. Bloomberg 44 the purchaser confirms that he owes a purchase price 'for merchandise which has been sold and delivered' (*mercis quae uendita et tradita <est>*). In Tab. Lond. Bloomberg 45 someone confirms that he has entered into a contract of carriage (*locatio conductio*) with a carrier.

114. From a legal perspective the most interesting textual difference between the interior and exterior script, which goes to the heart of the nature of the *stipulatio* as a *contractus verbis*, is *spepodi* / *spopondi*. The form *spepo*(*n*)*di* is also used in other documents in the archive and is always corrected in the *scriptura exterior* to *spopondi*. Camodeca, *o.c.* (n. 10), p. 142. For detailed comments on the language of TPSulp 51, see Camodeca, *o.c.* (n. 10), p. 137–138 (with further references to literature).

115. In this contribution only the *scriptura exterior* of the Sulpicii documents is reproduced, except where only the *scriptura interior* has been preserved.

116. The date of the *scriptura interior* (*XIV k. Iul*: 18 June) is confirmed by the same date of the *index*. Nevertheless, according to Camodeca one cannot rule out entirely that the date of the *scriptura exterior* (*IV k. Iul*: 28 June) is the date at which the document was executed.

*servus, spopondì ego C(aius) Novius Eunús; proque iìs séstertiìs decem m[il]libus nummum dedì eì pignoris arrabonisve nomine tritìcì Alexandrìnì modium septem mìllia 'plus minus' et cicerìs farris monocopì lentis ìn saccìs duc[en]tìs [mod]ium quattuor mìllia p(lus) m(inus), quae omnia reposita habeo penes me ìn horreìs Bassianìs publicìs Pu[teo]lanorum, quae ab omnì vì perìculo meo esse fateor: Act(um) Puteolìs.*

"Under the consuls Gnaeus Acceronius Proculus and Gaius Petronius Pontius Nigrinus on the fourthteenth day before the Kalends of July (18 June 37) I, Gaius Novius Eunus, have written that I have accepted as a loan from Evenus Primianus, freedman of Tiberius Caesar Augustus, in his absence through Hesychus his slave, and that I owe him, ten thousand sesterces in cash, which I will return to him when he demands it. And that these HS 10,000, which are written above, will be duly paid in good coin has been stipulated by Hesychus, the slave of Euenus Primianus, freedman of Tiberius Caesar Augustus, as I, Gaius Novius Eunus, have promised. For these ten thousand sesterces I have given him as a pledge or *arrabo* seven thousand modii of Alexandrian wheat, more or less, and two hundred sacks of chick peas, flour, *monocopi* (= unknown legume) and lentils, four thousand modii, more or less, all of which I keep with me in the Bassian Public Granaries of the Puteolans, which I admit is at my risk for all danger. Done at Puteoli."[117]

At the bottom of the last page (side 3) of the *scriptura interior* there are traces of a seal, which is likely to have been that of C. Novius Eunus. Side 4 of the triptych has a *sulcus* with the remains of six seals adjoined by the names of the *signatores* written in ink. The name of Eunus is recorded twice (alongside the first and the last seal). The other seals must be those of witnesses. One of these witnesses was Gaius Sulpicius Faustus, who may have acted as a financial intermediary for this credit transaction (which may explain why TPSulp 51 is part of the archive).[118]

## 4.3. *Mutuum cum stipulatione*

By producing TPSulp 51 in court the lender Euenus Primianus could prove that the borrower Gaius Novius Eunus owed him HS 10,000 pursuant to *mutuum* and *stipulatio*.[119] Although paying over (*numeratio*) the borrowed sum by lender to borrower would result in a contract of *mutuum*, the parties nevertheless also entered into a *stipulatio* with respect to the borrowed sum. It must have been common practice to execute chirographs (recorded on a writing tablet) evidencing loans, confirmed by stipulations. There are several Digest texts attesting this practice for

117. The English translation is partly derived from Jones, *o.c.* (n. 11), p. 92–93 and A.M. Riggsby, *Roman Law and the Legal World of the Romans*, New York, 2010, p. 245.

118. Wolf, *o.c.* (n. 10), p. 81.

119. See also e.g. Mod. D. 22.1.41.2 (chirograph with *mutuum* only) and Paul D. 45.1.126.2 (chirograph with *mutuum cum stipulatione*).

other periods.[120] Why was this practice followed? The contract of *mutuum* itself was after all sufficient to generate the borrower's liability. In case of a *mutuum cum stipulatione* a stipulation would have added value, where the borrower used it for promising to pay interest (which would not be actionable on the basis of *mutuum*). At the time of the Sulpicii stipulations were already used for this purpose. In one of the writing tablets of the Bloomberg documents the debtor promises — probably by way of stipulation — 'to procure the principal and the interest on them which he shall have owed'.[121] Also in the Digest we find examples of interest-bearing loans structured as a *mutuum cum stipulatione*.[122] In the Sulpicii archive, however, the *stipulatio* is *never* used — at least not expressly — for promising interest. Nevertheless, the purpose of the *mutuum cum stipulatione* might also here have been to grant loans against interest. This could be achieved by making the interest payable immediately when the loan was granted and deduct it from the money actually paid out by way of *mutuum*.[123] Pursuant to the *stipulatio* the full amount could then still be recovered.[124] It is also possible that the interest was agreed in an informal agreement. Such an informal agreement could be secured by a right of pledge (Ulpian D. 13.7.11.3) and interest that has been paid pursuant to an informal pact cannot be claimed back (Ulpian D. 46.3.5.2; Sev/Ant C. 4.32.3 [a. 200]). In TPSulp 51 the pledge did not secure such informal interest pact. However, the loan was repayable on the lender's first demand. This meant that when the borrower defaulted in an interest payment, the lender could immediately demand repayment of the full amount of the loan and auction the charged assets if the borrower was not capable of doing so. It may even have been the case that the parties had informally

120. In Paul D. 12.1.40 a chirograph is quoted, which was submitted to Papinianus as praetorian prefect: "*Lucius Titius scripsi me accepisse a Publio Maevio quindecim mutua numerata mihi de domo et haec quindecim proba recte dari kalendis futuris stipulatus est Publius Maevius, spopondi ego Lucius Titius* (…)." Mod. D. 22.1.41.2: "*ille scripsi me accepisse et accepi ab illo mutuos et numeratos decem, quos ei reddam kalendis illis proximis cum suis usuris placitis inter nos*." A difference with D. 12.1.40 is that in the chirograph quoted by Modestinus no express 'stipulation language' is used. See on this remarkable opinion by Modestinus section 6.4 below.

121. Tab Lond. Bloomberg 55: "… [*et*] *sor*[*tem et eorum u*]*s*{*s*}*uras qua*[*s*] *debuerit*." See also Tab. Lond. Bloomberg 56 (*sortis siue ussurae*). See also a writing tablet from Vindonissa dated 25 January 90 (M.A. Speidel, *Die römischen Schreibtafeln von Vindonissa*, Brugg, 1996, no. 3): "*sortem et usuras probas recte dari stipulatus est Sex*(*tus*) *Carisius Maximus*."

122. Mod. D. 22.1.41.2.

123. For instance, in TPSulp 51 instead of HS 10,000 (amount of the loan), the lender may have actually paid out HS 8,000, so that when the loan was repaid (HS 10,000) the lender would actually have received 20% interest (HS 2,000). The nature of *mutuum* as *contractus re* would, however, only allow a *condictio* for HS 8,000.

124. One century later this could have become different, when first the *exceptio doli* and later the *exceptio non numeratae pecuniae* would be granted to a debtor who promised to repay borrowed money which he never actually received. But even then, this might not have applied to cases where both parties knowingly used a *mutuum cum stipulatione* in order to construct an interest-bearing loan.

agreed, as decribed in Julian D. 2.14.4.3, that the principal was not recoverable so long as interest was paid. Julian holds that even if the stipulation was framed unconditionally, the condition must be deemed to have been incorporated in the stipulation. It may also have been the case, as Johnston suggests, that the *stipulatio* simply continued to be considered by the Romans as the archetype of contract and 'the strictness with which it was interpreted offered the welcome benefit of certainty'.[125] The combination of *tabulae*, *chirographum* and *stipulatio* seems to have been the preferred option for Romans for the contractual promises they received from their debtors.[126] In the later Principate *tabulae* seem to have lost their prominence for recording legal transactions.[127] The stipulation, on the other hand, continued to be the preferred option, even in a Hellenised Roman empire, despite the availability of a more informal alternative (*constitutum debiti*).[128]

## 4.4. Debts arising 'by chirograph'

In several documents from the Sulpicii archive a debt is expressed to arise out of a chirograph. This is one example:

> TPSulp 52: …*C(aius) Novius Eunus scripssi me accepisse muta ab Hessco Eunni Ti(berii) Cessaris Augusti l(iberti) Primiani ser(vo) et debere ei sestertia tra milia nummu, pret(er) alia HS X n(ummum) que alio chirographo meo eidem debo…*
>
> "I, Gaius Novius Eunus, have written that I have accepted as a loan from Hesychus, the slave of Evenus Primianus, the freedman of Tiberius Caesar Augustus, and that I owe him three thousand sesterces in cash, in addition to the other HS 10 in cash which by my other chirograph I owe him…"

Taken out of context and literally interpreted the words '*que alio chirographo meo eidem debo*' could be taken to be mean that the debt of 10,000 sesterces was created by the earlier chirograph itself. The reference to *alio chirographo* is, however, simply a reference to TPSulp 51, which is a chirograph in which the same borrower (Gaius Novius Eunus) confirms to have received HS 10,000 by way of *mutuum* and promises to repay this amount through a *stipulatio*. It must have been the same in TPSulp 57, recording a *mutuum cum stipulatione*, in which the borrower (P. Urvinus Zosimus) declares to have received HS 2,000 by way of *mutuum* and to owe this amount to the creditor in addition to the HS 12,000 'which I owe him

125. Johnston 1999, p. 111. On *mutuum cum stipulatione,* see Kaser, *l.c.* (n. 102); P. Gröschler, «Die Konzeption des *mutuum cum stipulatione*», *Tijdschrift voor rechtsgeschiedenis* 74 (2006), p. 261–287; Platschek, *o.c.* (n. 3), p. 253–262.

126. In TPSulp 68 an oath is even added to the *mutuum cum stipulatione*. This 'stapling' of legal acts may have served to enhance the enforceability of chirographs. Platschek, *o.c.* (n. 3), p. 260.

127. See e.g. Ulp. D. 37.11.1 pr., who observes that wills can be written upon wooden tablets, papyrus, or parchment. On the evolution of Roman documentary practices, see Meyer, *o.c.* (n. 2), p. 125–293.

128. Platschek, *o.c.* (n. 3), p. 9. On the *constitutum debiti*, see section 5.6 below.

pursuant to a chirograph in another deed' (*quae eì debeo per chirographum alis tabellis*).[129] In TPSulp 114 it is stated that

> TPSulp 114: … ———- *[C(aius)] S[ul]picius Cinnam[us Nic]e[r]oti colonorum col[oniae] Puteol(anae) ser(vo) [a]rcario HS [·] per chirograp[hum] hac [d]ìe dedit credidit* [ —- ]
>
> "Gaius Sulpicius Cinnamus has pursuant to a chirograph on this day given and lent Niceros, the treasury slave of the colonists of the Puteolian colony…"

Camodeca considers it likely that the chirograph to which this document (which is only fragmentarily preserved) refers is another document in the archive. This is TPSulp 56, which records a *mutuum cum stipulatione* between the same parties, pursuant to which Niceros borrowed HS 1,000 from Cinnamus. TPSulp 114 then records the actual payment of the borrowed money. In any case, as Camodeca notes, the expression '*per chirographum … dare credere*' is the inversion of '*per chirographum mutuum accipere*'.[130] TPSulp 114 therefore documents a loan from the perspective of the lender.[131] Another document of interest is TPSulp 55, which evidences the creation of a right of pledge. This pledge is created 'for the 5,000 sesterces which I have accepted as a loan from him and which I have written in a chirograph to owe him' ("*ab HS V m.*[*n*(*ummum*)], [*quae*] *ab eo mutua accepì* [*hac?*][*die? pe*]*r* [*c*]*h*[*iro*]*graphum meu*[*m*]"). This chirograph is documented in the same diptych and concerns a *mutuum cum stipulatione* for 5,000 sesterces. A similar document is TPSulp 79, evidencing the creation of a right of pledge 'for the 20,000 sesterces, which I have written in a chirograph to owe him' ("*ob HS vigintì millia nu*[*mmum, quae per* [*chiro*]*graphum scripsi me ei debere* [—-]").[132] This time the secured debt is recorded in a different document preserved in the Sulpicii archive (TPSulp 53), which is a chirograph evidencing a *mutuum cum stipulatione*.

In all these documents, the reference to the indebtedness pursuant to a chirograph is a shorthand or colloquial way for referring to the borrower's liability arising under the contracts of *mutuum* and *stipulatio* as evidenced by a chirograph. As we will see below, the expression '*ex chirographo*' (or related ones) has the same function in several Digest and Codex texts, which all speak in terms of actions or obligations arising out of a document (*ex epistula*, *ex scriptura*, *ex chirographis*, *ex litteris*, *ex cautione*).[133] Apparently the use of chirographs and other documents

129. This time the other document is not preserved in the archive.

130. In TPSulp 71 (partially preserved) a creditor declares to have received 3,000 sesterces *ex epistula*…

131. Camodeca, *o.c.* (n. 10), p. 224–225.

132. In Wolf's edition (TPN 40) it reads: "OB HS V M[ *n quae* AB E*o m*UTUA ACCEPI *ei*[*que debeo per chiro*GRAPHUM M*eu*[*m*."

133. See also section 6 below and the Digest texts mentioned in n. 188.

had become so familiar that — in this respect — debts were identified with the documents evidencing them.[134]

## 4.5. Blurring the limits of the notion of chirographs?

Jakab observes that under the prevailing understanding of chirographs also a *stipulatio* documented in writing would constitute a chirograph. Jakab holds that such an expanded definition of chirographs would completely blur the limits of this type of document.[135] The notion of chirographs should therefore be restricted to constitutive chirographs. Jakab apparently fails to recognize that *stipulatio* and *chirographum* are not mutually exclusive categories. They have an entirely different legal nature and function. *Stipulatio* is a contract, *chirographum* a style of document evidencing a contract. It is the same as with notarial deeds in modern civilian legal systems. The obligations created within the framework of these documents have their source in the loan agreements, contracts of sale et cetera recorded in the notarial deed. The notarial deed is often used because this may have certain advantages for purposes of reliability (e.g. immovable property), evidence or enforceability (execution without court order). By no means does this blur the limits of this type of document. Therefore, with the Roman jurists I can see no objection at all to call documents recording stipulations 'chirographs', where these documents have been executed by (or on behalf of) the promissor.

## 4.6. Conclusion

In Roman legal practice chirographs had a purely evidentiary function. Not only TPSulp 51, but also all the other chirographs of the Sulpicii archive evidencing the conclusion of contracts expressly mention the contract on which the debtor's liability is based. With respect to chirographs expressly mentioning the underlying contracts *mutuum* and *stipulatio,* such as TPSulp 51, Jakab claims that not only the payment (*numeratio*) by way of *mutuum* and the stipulation, but also the chirograph itself constituted a separate cause of action. When the creditor instituted the *condictio* on the basis of *mutuum* or *stipulatio* he would have to prove the *numeratio* or the oral formalities of the *stipulatio,* while in case of an action directly based on the chirograph itself only the document would have to be produced in court.[136] The latter may often have been true in practice, but only as a consequence of principles of evidence. But the action brought by the creditor against the debtor, for which a chirograph like that of TPSulp 51 would be produced in court, would

134. Platschek regards this as a manifestation of how deeply rooted in the Hellenistic world the use of chirographs was. Platschek even holds that for the users of chirographs the characteristic act was not the stipulation, but rather the execution of the chirograph. Platschek, *o.c.* (n. 3), p. 260. For the classical jurists, however, the stipulation always remained the source of obligation.

135. Jakab, *l.c.* (n. 2), p. 279.

136. Jakab, *l.c.* (n. 2), p. 286.

be the *condictio*, either pursuant to the *mutuum* or the *stipulatio* evidenced by this document. The chirograph itself was not a cause of action.

## 5. The elements of Roman chirographs

### 5.1. Hellenistic origin of Roman chirographs

The Latin loan word *chirographum* (χειρόγραφον) already suggests that Roman chirographs have originated in Greek-Hellenistic transactional practices.[137] Not only the name and style of the Roman chirograph, but also its substance may have been a 'legal transplant' from the Greek-Hellenistic world.[138] The way in which contractual liability arising under loan agreements is documented in Roman chirographs is very similar to that in Hellenistic documents.[139] In most loan documents in and outside the Sulpicii archive three elements can be distinguished, two of which are of Hellenistic origin. A peculiarity of TPSulp 51 and some other documents is that it contains a fourth element: the author of the chirograph declares that he will return the borrowed money at the creditor's first demand: *quae eì reddam cum petìerit*. For the question whether or not chirographs were constitutive as a matter of Roman law, this so-called repayment clause, which also has Hellenistic origins, is the most interesting one. Can it be regarded as a promise generating obligations outside the closed system of classical contract law?

### 5.2. Three standard elements

The elements of a typical Roman loan chirograph, which is executed by the debtor (borrower), are:

1. *Confirmation of receipt of (borrowed) money*. The debtor declares that he has received a certain amount of money from his creditor, often by way of *mutuum*: *scripsi me accepisse (mutua)*.[140]
2. *Confirmation of indebtedness*. The debtor acknowledges that he is indebted towards his creditor: *scripsi me debere*.

137. Wenger, *o.c.* (n. 2), p. 736; Jakab, *l.c.* (n. 2), p. 279. In Egypt chirographs were introduced in the middle Hellenistic period, but when and where exactly its origins lie in the pan-Greek-Hellenistic world is unclear. Wolff, *o.c.* (n. 38), p. 109–110.

138. In the Hellenistic papyri from Egypt the date is always inserted at the end, while the place of execution is never mentioned. Wolf, *l.c.* (n. 12), p. 160. In Roman chirographs the date is inserted at the beginning and the place of execution (e.g. *Actum Puteolis*) is recorded at the end of the document. Wolf, *l.c.* (n. 12), p. 159. Another typical Roman element of chirographs is the use of *scripsi*. Wolf, *l.c.* (n. 12), p. 164.

139. Platschek, *o.c.* (n. 3), p. 4, 242–262.

140. TPSulp 51. See also TPSulp 50, 52, 53, 54 55, 56, 57 and 59.

3. *Stipulatio.* The debtor expressly promises — in the form of a *stipulatio* — to pay or give something: *dari stipulatus est … spopondi.*[141]

The practice of using receipts (element 1) (*apochae*) has been taken over from the Hellenistic world.[142] In Rome this element functions as evidence of the *numeratio,* which is essential for the existence of *mutuum*. The declaration that the debtor is indebted for the received money (element 2) is also of Hellenistic origin.[143] As Gaius observes in Gai. *Inst.* 3.134, the obligation created by the declaration that one owes a debt ('*si quis debere se … scribat*') is 'peculiar to peregrines'. From a purely Roman legal perspective this does not appear to add anything. It only served as a further assurance by the borrower that he considered himself to be liable pursuant to *mutuum.*[144] In the *mutua cum stipulatione* of the Sulpicii archive the first two elements are always combined: *scripsi me accepisse (mutua) et debere.*[145] The only original Roman substantive element in the Roman loan documents is the stipulation clause (element 3). In the Roman chirograph templates the stipulation was a *Fremdkörper*, which originally had been added to Hellenistic standard forms, in order to make the document enforceable as a matter of Roman law.[146] Something similar occurred a few centuries later, when, not long after the enactment of the *Constitutio Antoniniana*, it became standard practice to add stipulatory clauses to Hellenistic documents, in order to make them enforceable as a matter of Roman law.[147]

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141. In TPSulp 51 the contract of *mutuum* is entered into directly with the (absent) lender, by the lender's slave handing over the money to the borrower. Accordingly, the third person is used to refer to the creditor in the borrower's acknowledgement of debt ('I owe him') and in the repayment-clause ('which I will return to him when he demands it'). This is different, however, with the stipulation. The absence of the lender prevents such a stipulation being entered into with this party. For this reason, the stipulation for the repayment of the HS 10,000 is entered into with Hesychus rather than with his master Gaius Evenus: 'has been stipulated by Hesychus' (*stipulatus est Hessucus*).

142. For instance, P. Fouad I 45 (*fateor me accepisse*). See also the examples (in Greek) reproduced by Platschek, *o.c.* (n. 3), p. 263.

143. For instance, P. Fouad I 45 ('*fateor me … debere*'); P. Vindob. L 135 ('*fateor me tibei debere*'). See also the examples (in Greek) reproduced by Platschek, *o.c.* (n. 3), p. 263.

144. In TPSulp 79 a borrower refers to an earlier debt as 'the 20,000 sesterces, which I have written in a chirograph to owe him' ("*ob HS vigintì millia nu*[*mmum, quae per* [*chiro*]*graphum scripsi me ei debere* [—-]"). This other chirograph is TPSulp 53 evidencing a *mutuum cum stipulatione*.

145. In most of these chirographs *accepisse* is immediately followed by *debere* (e.g. TPSulp 53: '*scripsi me accepisse et debere*') or with only a reference to *mutuum* in between these two verbs (e.g. TPSulp 54: '*scripsi me accepisse mutua et debere*'). However, there are also documents in which these verbs are used separately. In the 'receipts' preserved in the archive the author of the chirograph declares to have accepted a certain amount of money: *scripsi me accepisse*. TPSulp 70–74. See also TPSulp 77: '*scripsi me habere*'. The archive also contains separate acknowledgements of indebtedness: *scripsi me debere*. TPSulp 68 and 69.

146. Platschek, *o.c.* (n. 3), p. 263.

147. Simon, *o.c.* (n. 3), p. 41–90; Kaser, *o.c.* (n. 69), p. 375–376.

## 5.3. Purpose of the repayment-clause

There is one element which has not yet been characterised from the perspective of Roman law. In TPSulp 51 the debtor's chirograph declares that he will return the borrowed money at the creditor's first demand (*quae eì reddam cum petìerit*). What is the *purpose* of this repayment-clause? In TPSulp 51 it serves to indicate the *time of performance*: it indicates when the loan is due and payable.[148] In the other document of the Sulpicii archive containing a repayment-clause, TPSulp 67, the repayment-clause is used in order to provide that the debtor (C. Novius Eunus) shall pay the outstanding debt of 1,130 sesterces to either Hesychus *or* C. Sulpicius Faustus, at their first demand.[149] In a writing tablet from Vidonissa (AD 90) a stipulation to pay principal and interest is followed by the clause: '*Aes reddam ti*[*b*]*i aut proc*(*uratori*) *aut heredi tuo*'.[150] The purpose of the repayment-clause, therefore, is the specification of the modalities of performance: to indicate *when* and *to whom* the promised amount must be (re)paid. But what exactly is its *legal nature*?

## 5.4. Part of stipulation?

The debtor's declaration that he shall return the money (*quae eì reddam*), unlike his statement that he has received the money (*scripsi me accepisse*) and is indebted (*scripsi me … debere*), does not appear to be merely a confirmation for evidentiary purposes. This element is a 'written declaration of intent'.[151]

Is it possible to regard this declaration of intent as part of the stipulation itself? There is epigraphic evidence of clauses indicating at what time and to whom the borrowed amount must be repaid which are integrated into the stipulation. From the first century AD several such clauses have been preserved, both inside and outside the Sulpicii archive. Thus the text of one of the writing tablets of the Bloomberg documents from Roman London reads as follows.

> Tab. Lond. Bloomberg 55: *[et] sor[tem et eorum u]s{s}uras qua[s] debuerit probos recte curari qua(n)documque peti[eri]t … […]runt*

148. In TPSulp 50 we do not find the '*reddam*-clause'. The debtor's declaration that he has received (element 1) and owes (element 2) the borrowed money is not followed by a promise to return the money, but is immediately followed by the stipulation. At the end of the document, however, there are traces of what may have been the date of repayment: "*quam summa*[*m*-- -] +++ *pr*(*idie*) *ìd*[*us*-- -][------*?*]." Camodeca, *o.c.* (n. 10), p. 135, who, however, notes that it could also have concerned a guarantee by way of *fideiussio* (as in TPSulp 109). This may explain why in TPSulp 50 the stipulation was not preceded by the '*reddam*-clause'.

149. Element 1 is lacking in TPSulp 67, but that is because this chirograph is concerned with the settlement of the remaining amount which was due under loans already entered into in the past. One of these loans may have been TPSulp 51.

150. 'I shall return the money to you, your agent or your heir.' Speidel *o.c.* (n. 121), p. 98.

151. Platschek, *o.c.* (n. 3), p. 255.

*Nar[cisso] Rogati Lingonis [rec]te [p]robe dari fide promis{s}it Atticus … [I]ng[e]nuo … illis eiue ad quem ea res pertinebit eosque [m]anu q(ui) s(upra) s(cripti) s(unt) coram dix{s}it se debere et <h>abere et accepisse ante hanc diem Atticus*

"… and the principal and the interest on them which he shall have owed … to procure that it will be properly given in good (coin) whenever he shall have requested…
To Narcissus (the slave of) Rogatus the Lingonian, Atticus … has properly, truly, faithfully promised (it is) to be given, to Ingenuus … or to him to whom the matter will pertain. And in the presence of those who have been written in (their own) hand above, Atticus has said that he owes and holds and has received before this day…"[152]

Tab. Lond. Bloomberg 55 is a wooden waxed tablet which may have formed part of a triptych.[153] It is not a chirograph, but written in the style of a *testatio*.[154] What is interesting for our purposes is that both functions of the repayment-clause are represented by this document. It indicates both *when* (*qua*[*n*]*documque peti*[*eri*]*t*) and *to whom* ([*I*]*ng*[*e*]*nuo… illis eiue ad quem ea res pertinebit*) the promised amount must be paid.[155] The second function (to whom) is certainly carried out by a stipulatory clause. For the first function (when) we do not know this for certain, because the text is incomplete. One would expect, however, that this would also be covered by a stipulatory clause. A complete specimen of a chirograph recording a stipulation which provides for the time of repayment is part of the Sulpicii archive itself.

TPSulp 56: *Fausto Cornelio Sulla Felice L(ucio) Salvio Othone Titiano co(n)s(ulibus), nonis Martìs. Niceros colonorum coloniae Puteolanae servus arcarius scripsi me accep[i]sse mutu«o»s et debere C(aio) Sulpicio [Ci]nnamo HS [∞] nummos eosque HS mille nummos, qui s(upra) s(cripta) s(unt), p(robos) r(ecte) d(ari) k(alendis) Ìulis prìmis {p(robos) r(ecte) d(ari)} fide rogavit C(aius) Sulpicius Cinnamus, fide promisì Niceros col(onarum) col(oniae) servus arcarius. Actum Puteolis.*

"Under the consuls Cornelius Sulla Felix and Lucius Slavius Otho Titianus on the Nones of March (7 March 52), I, Niceros, treasury slave of the colonists of the Puteolan colony, have written that I have accepted as a loan from Gaius Sulpicius Cinnamus, and that I owe him, HS 1,000 in cash. Gaius Sulpicius Cinnamus asked faithfully to be duly paid in good coin the HS 1,000 in cash, which are

152. The word *curari* in Tab. Lond. Bloomberg 55 is paralleled in Justinian's Digest. Celsus D. 12.1.42.1 and Ulp. D. 45.1.67.1, both restate an opinion (the same one) by Labeo (who is more or less contemporary to Tab. Lond. Bloomberg 55). D. 12.1.42.1 (Celsus libro sexto digestorum) reads: '*Labeo ait, cum decem dari curari stipulatus sis…*' ("Labeo holds that where you have taken a stipulation from one that he shall procure the giving of ten…"). In D. 45.1.67.1 Ulpian refers to both Labeo and Celsus (with reference to the sixth book of his Digest). This part of the document seems to be a reference to what we would now call a credit facility, pursuant to which the borrower has the right to demand a loan in the future.

153. Tomlin, *o.c.* (n. 15), p. 181.

154. Tomlin, *o.c.* (n. 15), p. 180.

155. Also interesting is that the *stipulator* (Narcissus) is the slave of Rogatus, while the money is to be repaid to Ingenuus (or his assignee or heir).

written above, on the next Kalends of July (1 July 52); I, Niceros, treasury slave of the colonists of the colony, promised faithfully {to duly pay in good coin}. Done at Puteoli."

This chirograph does not have a 'reddam-clause', presumably because the time of repayment has been made part of the stipulation itself.[156]

It would, however, require a rather liberal interpretation of stipulations to reach the conclusion that also in chirographs like TPSulp 51 and 67 the parties must have intended to integrate the repayment-clause into the stipulation itself. It is by no means certain that Roman jurists at the time of the Sulpicii would already endorse such a liberal interpretation.[157] It is, therefore, still a relevant question to ask what the legal nature of the repayment-clause in TPSulp 51 and 67 is.

## 5.5. Menelaos's chirograph

According to Wolf the repayment-clause is typical for Hellenistic chirographs and is not part of Roman templates for loan documentation.[158] The obligation arising from the promise to return the borrowed money is indeed mentioned by Gaius as 'peculiar to peregrines'.[159] It is a variant of the chirographs and syngraphs, mentioned by Gaius, stating 'that he will give something ('*si quis … daturum se scribat*'). There are, however, examples of repayment-clauses in Roman/Latin chirographs. These examples are, as we have seen, rare: TPSulp 51 and 67 and the tablet from Vindonissa (Speidel, nr. 3). In the Sulpicii archive there is also a chirograph written in Greek containing a repayment-clause.

TPSulp 78: (…) Μενέλαος Εἰρηναίου Κεραμιήτης ἔγραψα ἀπέχιν μαι παρὰ Πρίμου Ποπλίου Ἀττίου Σεβήρου δούλου{λου} δηνάρια χίλια ἐκ ναυλωτικῆς ἐκσφραγισμένης, ἃ καὶ ἀποδώσω ἀκ{ου}λούθως τῆ ναυλωτικῆ, ἣ<ν> πεποίημαι πρὸς αὐτόν. (…)

"I Menelaos, son of Eirenaios from Keramos, have written that I have received from Primus, slave of Publius Attius Severus, one thousand denarii pursuant to a sealed *naulotike* and these denarii I will repay in accordance with the *naulotike* which I have concluded with him."

156. From second century (AD) Dacia we have a testatio reading: '(*denarios*)*LX q*(*ua*) *d*(*ie*) *p*(*etierit*) *p*(*robos*) *r*(*ecte*) *d*(*ari*) *f*(*ide*) *rogavit Iul*(*ius*) *Alexander dari f*(*ide*) *p*(*romisit*) *Alexander Cari*'. *FIRA* III, nr. 122, p. 394. An interesting variant is another document from Dacia (AD 161): *FIRA* III, nr. 123. See also the chirograph cited in Paulus D. 12.1.40: '*…haec quindecim proba recte dari kalendis futuris stipulatus est Publius Maevius, spopondi ego Lucius Titius.* (…)'("that these fifteen are to be given in good coin on the first of next month has been stipulated by Publius Maevius and I Lucius Titius have promised").

157. Kaser – Knütel – Lohsse, *o.c.* (n. 5), § 40.3.

158. Wolf, *l.c.* (n. 12), p. 165 (n. 61).

159. See for instance P. Fouad I 45 (*quos tib*[*i re*]*ddam*); P. Vindob. L 135 (*quas tibi solvam*).

In this document the shipper Menelaos has written that he has received 1,000 denarii from the slave of Publius Attius Severus pursuant to a sealed 'naulotike' (ναυλωτικῆ) and declares that he shall return the denarii in accordance with this contract. This is a much debated document in the Romanist literature of the last decades. In particular in respect of the legal nature of the 'naulotike' different views have been expressed. Is it a maritime loan (*fenus nauticum*), a contract for the carriage of goods (here: transport of money) or a maritime insurance?[160] In this contribution I will not take sides in this debate. What is relevant for the purposes of this contribution is how the promise by Menelaos to pay 1,000 denarii must be characterised.

The triptych of TPSulp 78 also records a chirograph executed on behalf of the (illiterate) Marcus Barbatius Celer, in which the latter is declared to be a surety for the benefit of Menelaos's creditor Publius Attius Severus. This part of the document is evidence of a stipulation (*fideiussio*).[161] However, the promise by Menelaos to repay 1,000 denarii is certainly *not* cast in the form of a stipulation. Like Roman chirographs, Menelaos's chirograph starts with 'I Menelaos… have written'.[162] This is, however, the only part of the document which corresponds to Roman templates for loans and receipts.[163] In all other respects, Menelaos's chirograph is in form and substance a Hellenistic chirograph.[164] In Roman chirographs the date is inserted at the beginning and the place of execution (e.g. *Actum Puteolis*) is recorded at the end of the document.[165] In the Hellenistic papyri from Egypt the date is always inserted at the end, while the place of execution is never mentioned.[166] On this basis Wolf concludes that Menelaos's chirograph (TPSulp 78) has been deliberately

160. See H. Ankum, «Noch einmal: die naulootike des Menelaos in TP 13 (= TPSulp. 78) — ein Seedarlehen oder ein Seefrachtvertrag?», in *Extravagantes. Scritti sparsi sul diritto romano*, Naples, 2003 (*Antiqua*, 93), p. 447–455 (with further references).

161. According to Wolf this suretyship is also governed by Hellenistic law, because it would be invalid as a matter of Roman law: the guarantor's (M. Barbatius Celer) chirograph fails to mention the creditor's question as required for a guarantee by way of stipulation. Wolf, *l.c.* (n. 12), p. 182. Ankum, however, observes that the chirograph was actually written by Q. Aelius Romanus on behalf of Barbatius Celer, because the latter was illiterate. Where one Roman citizen writes that another Roman citizen has accepted liability as *fideiussor* towards (the slave of) yet another Roman citizen, one may assume that all participants were well aware that the question-and-answer procedure had to be followed. In other words, it is plausible that Barbatius Celer's suretyship was governed by, and valid under, Roman law. Ankum, *l.c.* (n. 160), p. 455 (23).

162. Wolf, *l.c.* (n. 12), p. 164 (n. 61).

163. Wolf, *l.c.* (n. 12), p. 165 (n. 61).

164. However, as Thür, *l.c.* (n. 77), p. 1278, rightly observes, Menelaos' chirograph must have been enforceable also before Roman courts.

165. Wolf, *l.c.* (n. 12), p. 159. The combination of the place and date of execution at the beginning of the chirograph is a characteristic of Hellenistic chirographs.

166. Wolf, *l.c.* (n. 12), p. 160.

drafted according to a Hellenistic template.[167] Menelaos was a citizen of Keramos in Asia Minor and must have followed a custom in Asia Minor to insert the date and place of execution at the beginning of the chirograph.[168] The Hellenistic origin of Menelaos's chirograph also explains the presence of the repayment-clause. This promise to repay 1,000 denarii is not governed by Roman law. What its function was under Hellenistic law is not entirely clear. Wolf suspects that only the promise to return the 1,000 denarii in accordance with the 'naulotike' would make Menelaos liable if he would not return the money, or not in accordance with the terms of the contract.[169] I am no expert in Hellenistic law, so I am very reluctant to say that I do not find this very plausible. What would be the sense of entering into a sealed contract of 'naulotike' if that contract itself did not vest liability in the debtor and would require an additional promise? In any case, what matters for our purposes is that Menelaos's chirograph cannot be used as positive evidence for the constitutive nature of chirographs as a matter of Roman law.

### 5.6. *Constitutum debiti*

The repayment-clause could be regarded as a typical Hellenistic clause, which was simply inserted in imitation of Hellenistic templates and which did not have any specific legal consequences in a chirograph governed by Roman law. However, if one would be looking for a legal basis for the repayment-clause in Roman law, the most suitable candidate would be the *constitutum debiti*.

The Praetor's Edict contained a special action — *actio de pecunia constituta* — which a creditor could bring against 'whoever has established money owed' ("*qui pecuniam debitam constituit*").[170] The *constitutum debiti* presupposed an already existing debt arising under a *ius civile* contract (in particular: *mutuum*), whose modalities (in particular: time of payment) it specified. In contrast with the *promisor*'s liability under a stipulation, which required the compliance with certain oral formalities, the debtor's liability pursuant to a *constitutum debitum* is exclusively based on the (informal) agreement (*constituta ex consensu facta*) of the parties.[171] The consensual nature of the *constitutum debiti* entailed that writing was not required. Nevertheless, for evidentiary reasons *constituta debiti* were often recorded in writing. Precisely because it relates to already existing debts, the repayment-clause could perhaps be characterized as a *constitutum debiti*.[172] This purely consensual agreement particulary served to set the modalities (e.g. time

167. Wolf, *l.c.* (n. 12), p. 166, 167.

168. Wolf, *l.c.* (n. 12), p. 161. We are dealing with a Hellenistic Homology-document stemming from the Greek east.

169. Wolf, *l.c.* (n. 13), p. 180.

170. Ulp. D. 13.5.1.1. For a succinct discussion, see Platschek, *o.c.* (n. 3), p. 5–7.

171. Ulp. D. 13.5.1 pr.

172. Platschek, *o.c.* (n. 3), p. 255.

of payment, conditions) of obligations arising under a contract of *mutuum*. In TPSulp 51 and 67 and Speidel, nr. 3 (Vindonissa) (and other Roman documents) the repayment-clause could be a *constitutum debiti* specifying the modalities of the borrower's repayment obligations arising pursuant to *mutuum*.[173]

Where the debtor failed to honour the *constitutum debiti*, he would be liable to pay damages (e.g. for late payment).[174] The Roman perception was that *pecuniam constituere* did not constitute an obligation (*dare opportere*) arising under a formal contract sanctioned by the *ius civile*, but rather was an informal contract sanctioned by the praetor.[175] Gaius's negation of the creation of an obligation by way of '*scribere se daturum esse*' is, therefore, not inconsistent with the praetor granting action for damages caused by breach of a *pecuniam constituere*.[176] Not only Gai. *Inst.* 3.134, but Gaius's whole discussion of the law of obligations is confined to the *ius civile*, without integrating obligations arising under the *ius honorarium*.[177] However, as Platschek observes, the writings of other classical jurists demonstrate that with the *actio de pecunia constituta* the praetor sanctioned declarations which are similar to those mentioned by Gaius ("*si quis debere se aut daturum se scribat*").[178] Thus, the repayment-clause does not support the proposition that chirographs were constitutive as a matter of Roman law.[179] Where any obligations (arising pursunt to *mutuum*) are modified or supplemented, this is a legal consequence of the *constitutum debiti* and not of the document in which it was recorded.

## 6. Chirographs in Roman jurisprudence

### 6.1. Introduction

In the Digest there is an abundance of texts from which it appears that chirographs, *epistulae* and other documents only served evidentiary purposes. At the end of this section I will briefly discuss some of these texts, dealing with chirographs and *epistulae*, which are representative for a larger group. The opinions

173. Platschek, *o.c.* (n. 3), p. 253–262.

174. Platschek, *o.c.* (n. 3), p. 5. In the form of a *constitutum debitum alienum* it could also be employed for assuming liability for someone else's debts. Julian in Ulp. D. 13.5.5.3, discussed by Platschek, *o.c.* (n. 3), p. 7, 155–161. As Platschek observes, the edict is formulated objectively: *Qui pecuniam debitam constituit.* Also someone else's pre-existing debt could be the basis of praetorian liability, so that the *constitutum debiti* would function as a guarantee. Platschek, *o.c.* (n. 3), p. 7.

175. Platschek, *o.c.* (n. 3), p. 6.

176. Platschek, *o.c.* (n. 3), p. 6.

177. Platschek, *o.c.* (n. 3), p. 6.

178. Platschek, *o.c.* (n. 3), p. 6–7. For extremely interesting observations on the 'competition' between the formal *stipulatio* and the informal *constitutum debiti*, see Platschek, *o.c.* (n. 3), p. 7.

179. Platschek, *o.c.* (n. 3), p. 4–5.

of some some jurists will be reviewed more extensively, some of which do accept promissory liability without stipulation. We will start with two interesting opinions by Quintus Cervidius Scaevola. The opinions of this late 2nd century jurist and counsel to emperor Marcus Aurelius are of particular interest for examining Roman legal transaction practices. There is no other jurist who so often quotes the content of transaction documents, enabling us to gain valuable insights in the Roman 'law in action'.

## 6.2. Scaevola D. 44.4.17 pr.: *actio ex chirographo?*

There is a difficult opinion by Scaevola, which according to Sirks must be regarded as evidencing the constitutive effect of chirographs. The facts were that a father had made a promise to give a dowry and also had made a pact with his son-in-law to support his daughter and members of her household. Later he also executed a document, probably a letter (*epistula*), concerning the interest over the amount of the dowry.

> D. 44.4.17 pr. (*Scaevola libro 27 digestorum*): *Pater pro filia dotem promiserat et pactus erat, ut ipse aleret filiam suam eiusque omnes: idem homo rusticanus genero scripsit quasi usuras praeteritas ex dotis promissione: quaesitum est, cum ipse filiam suam exhibuerit et maritus nullam impensam fecerit, an ex chirographo ex stipulatu agenti genero exceptio obstare debeat. Respondit, si, ut proponatur, pater, cum exhiberet, per errorem promisisset, locum fore doli mali exceptioni.*
>
> "A father had promised a dowry for his daughter and had agreed that he himself would support his daughter and all her members of her household; the said man, a peasant, wrote to his son-in-law concerning past interest accrued on the promise of dowry; since the former has supported his daughter and her husband has incurred no expenses, it was asked whether the defense ought to avail against the son-in-law if he brings an action on stipulation on the chirograph. The reply was that if, as previously stated, the father, since he provided support, had made the promise in error, the defense of fraud will be of application."[180]

The phrase '*ex chirographo ex stipulatu agenti*' is according to Riccobono 'literally unintelligible'.[181] In its current reading it means that the son-in-law institutes two actions: an *actio ex stipulatu* for the dowry promised by way of stipulation and an *actio ex chirographo* for the interest informally promised in the letter.[182] As such the text would demonstrate that 'a promise made by *chirographum* is the constitutive cause of a legal right'.[183] According to Riccobono, however, the text is heavily

180. Translations of Digests texts are taken from A. Watson (ed.), *The Digest of Justinian*, 4 vols., Philadelphia, 1998, and adapted where I preferred a different translation.

181. S. Riccobono, *Stipulation and the Theory of Contract*, transl. J. Kerr Wylie, rev. and ed. B. Beinart, Amsterdam/Cape Town, 1957, p. 152.

182. See also Paul D. 24.3.45.

183. Riccobono – Beinart, *o.c.* (n. 181), p. 152.

interpolated and the *actio ex chirographo* must have been a Byzantine insertion. If D. 44.4.17 pr. indeed is interpolated and Riccobono's interpretation is correct, it would confirm what we already know, namely that at the time of Justinian (but not yet in classical law) promises recorded in written instruments were as such legally enforceable. According to Sirks, however, D. 44.4.17 pr. reflects classical law and confirms that the chirograph as such was sufficient to make a promise binding. Sirks holds that the promise to pay interest by the father to his son-in-law is unlikely to have been cast in the form of a *stipulatio*. If this would have been the case, the text would have said so, argues Sirks, as the father is described as a *rusticanus*. The father must rather have written a "simple acknowledgement of debt ('I owe you so much money')". Nevertheless, the father's chirograph is, according to Sirks, treated in the same way as a *stipulatio,* because it can be enforced with an *actio ex stipulatu*.[184] Thus according to Sirks the chirograph can be regarded as a *contractus litteris*.[185]

### 6.2.1. Analysis

The action '*ex chirographo ex stipulatu*' instituted by the son-in-law is *not* an '*actio ex chirographo*'. The Roman legal sources often use phrases like *ex epistula petere*, *ex cautione conveniri*, *ex chirographo debere*.[186] They do so, although the legal basis is clearly not the document itself but the contract (usually: *stipulatio*) evidenced by it. It's the same here. The phrase '*ex chirographo ex stipulatu agenti*' means that we are dealing with an action which is based on a stipulation recorded in a chirograph. When one then applies Ockham's razor to Scaevola's opinion an entirely different interpretation emerges than that of Sirks. It is as simple as this: from the award of an action based on stipulation it can be deduced that the father must have cast the promise to pay interest in the form of a stipulation. It is true that the Roman jurists sometimes recommended analogous application of certain actions, but one would then expect that Scaevola would have granted an

184. The text itself is interpreted by Sirks as referring to the *actio ex stipulatu*. Sirks, *l.c.* (n. 4), p. 272. Where interest is claimed wouldn't one rather expect a *condictio*? The phrase '*ex stipulatu agenti*' simply refers to bringing an action pursuant to stipulation, which could either be way of *condictio* (*certum*) or *actio ex stipulatu* (*incertum*). See, for instance, Ulp. D. 2.14.7.12, where '*ex stipulatu nascitur actio*' also has this general meaning.

185. Sirks, *l.c.* (n. 4), p. 271.

186. Other texts by Scaevola are: D. 16.3.28 (*an ex ea epistula etiam usurae peti possint*); D. 13.5.31 (*an ex scriptura proposita de constituta pecunia conveniri possit*); D. 46.3.89 pr. (*actio ex reliquis chirographis per ipsum debitorem cautis*); D. 17.1.62 pr. (*an ex litteris suis possit … conveniri*). Other texts are Paul D. 16.3.26.2 (*an ex huiuscemodi scriptura aliqua obligatio nata sit and ex epistula, de qua quaeritur, obligationem quidem nullam natam videri*); Dio. C. 8.38.4 (*Ex [eo instrumento] nullam vos habere actionem*). See also Alex C. 2.19.2 (*querella de chirographis*); Dio./Max. C. 8.41.7 (*chirographario debitore*); Ant. C. 4.7.1 and Sev./Ant. C. 4.30.3 (*ex cautione conveniri*). We have also encountered similar expressions in TPSulp 52, 55, 57, 79 and 114: see section 4.4 above.

*actio in factum* (as in D. 44.7.61.1 discussed below) or an *actio utilis*.[187] The real difficulty with the promise to pay interest in D. 44.4.17 pr. rather is to determine when exactly it was made: in the original stipulation granting the dowry, at the time of the letter or sometime in between? On the basis of the sequence of events set out below two different reconstructions are plausible, one in which the promise to pay interest was made in the original dowry stipulation and the other in which it was the object of a separate stipulation. However, irrespective of whether the promise to pay interest was made in the original dowry stipulation or afterwards in a separate stipulation evidenced by the letter, the fact that it gave rise to an action based on stipulation demonstrates that the cause of action was stipulation and *not* a constitutive chirograph.

### 6.2.2. Sequence of events

In order to answer the question whether the promise to pay interest was made in the original dowry stipulation or afterwards we must carefully reconstruct — step by step — the acts of the parties and their sequence in time ($t_1$, $t_2$, $t_3$). This sequence was as follows:

- *Stipulation for dowry* ($t_1$). The father promised a dowry (*dotem promiserat*) to his son-in-law by way of stipulation.
- *Pactum for support* ($t_1$). The stipulation was accompanied by an informal agreement (*pactum erat*) between the father and the son-in-law, pursuant to which the father agreed that he would support his daughter and her household.
- *Letter on accrued interest* ($t_2$). Sometime after the dowry stipulation and the *pactum* had been entered into, the father issued a document to his son-in-law about the interest accrued under the dowry promise (*scripsit quasi usuras praeteritas ex dotis promissione*).
- *Litigation* ($t_3$). The father was unwilling to pay the promised interest, whereupon the son-in-law brought an action against him which was based on a stipulation recorded in a chirograph (*ex chirographo ex stipulatu agenti*).

### 6.2.3. Reconstruction 1: Interest promise in dowry stipulation

Where Scaevola writes that the father had promised a dowry for his daughter (*pro filia dotem promiserat*), the verb *promittere* referred, as it almost always does, to a promise by way of *stipulatio*.[188] Moreover, this dowry stipulation included a formal promise to pay interest. This is why Scaevola refers to *usuras praeteritas*

187. In D. 15.3.21, which is also on a dowry stipulation combined with an informal maintenance agreement, Scaevola holds that an *actio de in rem verso* ***utilis*** should be awarded.

188. A dowry would be promised either in the form of a stipulation (*dotis promissio*), or by way of legacy (*per damnationem*) or the special unilateral act of *dotis dictio*. Kaser – Knütel – Lohsse, *o.c.* (n. 5), § 59.13. In Scaev. D. 44.4.17 pr. the agreement to support the daughter was not part of the dowry stipulation, but based on an informal *pactum*. It is possible, however, that this *pactum* would nevertheless be regarded as part of the dowry stipulation. Paul D. 12.1.40

*ex dotis promissione*: past interest accrued under the dowry promise. The promise which was made 'in error' was this promise to pay interest included in the dowry stipulation. In the first part of the opinion Scaevola uses the words *promittere* and *promissio* in order to indicate the dowry stipulation (while referring to the letter only as '*scripsit*'). Where at the end of the opinion our jurist again uses the word *promittere* (*per errorem promisisset*) this relates to the same promise: the interest promise in the dowry stipulation. Why was this promise, which was part of the dowry stipulation, made 'in error'? Mayer-Maly suggests that a standard form template was used for the dowry stipulation, which included a provision on interest payable until the dowry was actually given.[189] We know from another opinion of Scaevola that interest on a dowry was promised in order to support wives (D. 29.2.98).[190] However, because — at the time when the dowry stipulation was negotiated — the father already intended to support his daughter and her household, the interest clause in the dowry stipulation should have been deleted. The father — a 'peasant' — failed to do so and accordingly the promise to pay interest was made erroneously. This is why Scaevola holds that the father can raise the *exceptio doli* against the action '*ex chirographo ex stipulatu*' instituted by his son-in-law. In this interpretation, the father's letter is likely to have been a written acknowledgement of his liability to pay interest under the dowry stipulation. We have seen that chirographs were used by debtors to confirm that they were indebted towards their creditors: *scripsi me… debere*. This may have provided further assurance that the existing indebtedness would be honoured.[191] Scaevola may have mentioned the letter, because it corroborated the erroneous belief of the father that he was under an obligation to pay interest to his son-in-law.

### 6.2.4. Reconstruction 2: Interest promise evidenced by letter

Alternatively, one could assume that '*quasi*' in '*quasi usuras praeteritas ex dotis promissione*' implies that the interest in reality was not due because of a stipulatory promise to pay interest which was part of the dowry stipulation: interest which '*as it were*' had accrued in the past.[192] The promise to pay interest could then have been laid down in the letter. If the son-in-law's action against the father was based

says that agreements (*pacta*) which are made immediately after a stipulation must be deemed to be part of the stipulation.

189. Th. Mayer-Maly, «Rusticitas», in *Studi in onore di Cesare Sanfilippo I*, Milan, 1982 (*Università degli studi di Cagliari. Pubblicazioni della Facultà di giurisprudenza*, 96), p. 307–347, 337–338.

190. In D. 29.2.98 Scaevola discusses a case in which a grandmother had promised a dowry by way of stipulation and in order to provide support periodically paid a certain amount by way of interest.

191. The letter cannot have been a *constitutum debiti* (see sections 5.6 and 6.4), because then Scaevola should have referred to the *actio de pecunia constituta*.

192. In this sense, L. ter Beek, *Dolus. Een semantisch-juridische studie*, Nijmegen, 1999 (*Rechtshistorische reeks van het Gerard Noodt Instituut*, 44), vol. II, p. 993 (n. 2).

on a separate promise made in the letter, there is no reason why this letter could not have been a chirograph evidencing a stipulation.[193] There must have been a stipulation, otherwise the son-in-law could not have instituted an action based on stipulation. If the letter would have been written by the father and then sent to the son-in-law, there could not have been a stipulation, as this would require the presence of both parties.[194] However, this letter could have been an *epistula* which had been executed by the father in the presence of his son-in-law. If this 'peasant' was capable of promising a dowry by way of *stipulatio,* there is (contrary to what Sirks believes) no good reason why the promise to pay interest over the dowry could not have been made in the same manner, certainly if the letter was written at the request (and in the presence) of a shrewd son-in-law. In that case, the promise would have been made mistakenly if the father believed that he was obliged to pay interest to his son-in-law for the maintenance of his daughter, while in fact he (the father) had already agreed that he would support his daughter himself. Alternatively, rather than having directly recorded the stipulation, the letter could simply have included a reference to its existence. The son-in-law would institute against the father an action based on stipulation, substantiated with the father's chirograph (= letter) as evidence. The father then raised as a defense that his son-in-law acted in bad faith by claiming interest (as replacement for the income generated by the dowry capital), while at the same time leaving the maintenance of the daughter (for whom the income was destined) to the father.

### 6.3. Scaev. D. 44.7.61.1: A Roman case of 'promissory estoppel'?

Another remarkable opinion from Scaevola is D. 44.7.61.1. In this text promissory liability may have been assumed outside the *numerus clausus* of Roman contracts.[195]

> D. 44.7.61.1 (*Scaevola libro 28 digestorum*): *Seia, cum salarium constituere vellet, ita epistulam emisit: 'Lucio Titio salutem. Si in eodem animo et eadem affectione circa me es, quo semper fuisti, ex continenti acceptis litteris meis distracta re tua veni hoc: tibi quamdiu vivam praestabo annuos decem. Scio enim quia valde me bene ames'. Quaero, cum et rem suam distraxerit Lucius Titius et ad eam profectus sit et ex eo cum ea sit, an ei ex his epistulis salarium annuum debeatur. Respondit ex personis causisque eum cuius notio sit aestimaturum, an actio danda sit.*

193. *Epistulae* were used as chirographs evidencing contractual liability. See Pap. D. 16.3.24, Scaev. D. 17.1.62 and D. 39.5.35 pr., all referring to the standard clause 'written in my own hand' ("*hac epistula manu mea scripta*").

194. In Paul D. 24.1.57 a wife had sent a letter to her husband ("*litteras ad eum misit*"), in which she promised to repay money she had received from him as a gift. The promise was regarded by Paul as a stipulation.

195. V.T. Halbwachs, «'*…quia valde me bene ames.*' — Verpflichtung aus Liebe?», in R. Gamauf (ed.), *Festschrift für Herbert Hausmaninger*, Vienna, 2006, p. 109–118.

> "Seia, wishing to fix a salary, sent a letter as follows: 'To Lucius Titus. Greeting. If you are of the same mind and of the same regard to me as you have always been, then, on the receipt of my letter, forthwith dispose of your estate, and come here; I shall provide you with ten yearly for as long as I live. For I know that you love me very well.' My question is whether, if Lucius Titius did sell his estate and went to her and since that time has been with her, the annual salary is due in terms of this letter. The answer was that the person having cognizance of the case shall have to decide from the persons and the circumstances whether an action ought to be granted."

Although the preceding fragment (D. 44.7.61 pr.) is, also in Lenel's Palingenesia, about stipulation, the present text clearly is not. Promises of an annuity could be cast in the form of a stipulation, but this is apparently not what happened here. The reason for this may have been that stipulations required the presence of both parties at the same location, while at the time Seia put her promise into writing her lover Lucius Titius was at another place. It is clear also that according to Scaevola the mere informal promise to pay an annuity, even if recorded in writing, was not sufficient to make the promissor liable. There have to be special circumstances, according to Scaevola, which justify that the intended beneficiary of the annuity does have an action against the promissor. One would think that such action would be an *actio in factum*.[196] The situation is very similar to cases envisaged by the modern American doctrine of promissory estoppel, pursuant to which the person who changed his position in reliance on someone else's promise may have a remedy for damages against the *promisor*.[197] There is also a structural similarity with the innominate contracts of classical and Justinianic Roman law: '*feci ut facias*' (etc.) is here '*distraxi et veni, ut praestes*'.

## 6.4. Modestinus D. 22.1.41.2: Hellenistic or *constitutum debiti*?

The jurists did render opinions on the *constitutum debiti* evidenced by *epistulae* and other documents which closely resembled the consititutive chirographs mentioned by Gaius.[198] These opinions, however, do not support the hypothesis that chirographs were dispositive as a matter of Roman law. Platschek has convincingly demonstrated that several texts which at first sight seem to be endorsing that informal promises, whether or not recorded in writing, give rise to enforceable

196. Compare Pap. D. 23.4.26.3.

197. § 90 *Restatement (Second) of Contracts*: 'A promise which the *promisor* should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.' See (among many others) G.S. Geis, «Gift Promises and the Edge of Contract Law», *University of Illinois Law Review* (2014), p. 663–688.

198. Platschek, *o.c.* (n. 3), p. 6–7.

obligations, are on closer inspection cases of *constitutum debiti*.[199] There is no need to do his research all over again.[200] In this section I will only review one — problematic — opinion.

### 6.4.1. Modestinus D. 22.1.41.2

From the late classical period there is an opinion by Modestinus, concerning an informal promise to pay interest which was recorded in a chirograph.[201]

> D. 22.1.41.2 (*Modestinus libro tertio responsorum*): *Ab Aulo Agerio Gaius Seius mutuam quandam quantitatem accepit hoc chirographo: 'ille scripsi me accepisse et accepi ab illo mutuos et numeratos decem, quos ei reddam kalendis illis proximis cum suis usuris placitis inter nos': quaero, an ex eo instrumento usurae peti possint et quae. Modestinus respondit, si non appareat de quibus usuris conventio facta sit, peti eas non posse.*
>
> "Gaius Seius accepted a certain amount as a loan from Aulus Agerius with the following chirograph: 'I have written that I have received and actually have received from so-and-so ten (thousand) as a loan and in cash, which I will repay on the first of such-an-such a month with the agreed interest.' What interest, if any, can be claimed on such a document? Modestinus replied that if the agreed rate of interest could not be proved, no interest could be claimed."

It is unlikely that the promise in the chirograph cited by Modestinus was cast in the form of a *stipulatio*. In the latter case the chirograph would have contained a phrase like: *usuras probas recte dari stipulatus est Aulus Agerius et spopondi Gaius Seius*. There is therefore every reason to assume that the body of the chirograph has been completely cited in D. 22.1.41.2.[202]

### 6.4.2. Interpolated (Pringsheim)

Pringsheim suggests that D. 22.1.41.2 has been interpolated already before Justinian. It is clear that changes have been made to the text : the use of standard names rather than the name of the parties originally named in the cited chirograph, the references to *ille*, *illo* ('so-and-so') and *kalendis illis* ('such-an-such a month'). Pringsheim suggests that the changes were also of a more substantial nature and that the question put before Modestinus orginally was: 'Can interest be claimed

199. See, for instance, D. 2.14.47.1 Marcel. D. 13.5.24; Scaev. D. 14.3.20, D. 15.5.31, D. 16.3.24 and D. 44.7.61 pr.

200. See Platschek, *o.c.* (n. 3), p. 111–212.

201. Platschek, *o.c.* (n. 3), p. 136–137.

202. Platschek holds that the answer cannot be found by assuming that stipulations for interest were standard practice and were, as such, so self-evident that Modestinus did not regard it necessary to disclose its text. Platschek, *o.c.* (n. 3), p. 136–137.

on such a document? Modestinus replied that it could not be claimed.'[203] This reconstruction would bring D. 22.1.41.2 in line with classical doctrine: interest which is not promised by way of stipulation or in an ancillary agreement to a contract governed by good faith cannot be claimed. Kaser, Platschek and others have expressed skepticism on Pringsheim's attempt to reconcile D. 22.1.41.2 with classical doctrine. Let us therefore assume that this opinion does recognise the possibility of a contractual obligation arising under a promise recorded in a chirograph which is not based on a stipulation. How can this be reconciled with what we know about classical Roman contract law? It is true that the claim for the payment of interest was rejected by Modestinus. The reason for this is not, however, the absence of a stipulation, but rather the fact that the parties have failed to determine the rate of interest. The *a contrario* conclusion appears justified that a non-stipulatory promise to pay an agreed interest rate would have been enforceable according to Modestinus.[204]

### 6.4.3. Hellenistic context (Kaser)

Kaser attempts to explain D. 22.1.41.2 by placing it in a Hellenistic context. The text must have been changed by a 'post-classical hand', as the 'dissonant' *ille/ab illo* betrays. It is also striking that the text uses standard names: the original names might have disclosed that the chirograph was issued between non-Romans. After all, as Gai. *Inst.* 3.134 states, a peregrine can create obligations by stating 'in writing that he owes a debt, or will make payment'.[205] Platschek is not convinced by this interpretation. He points out that Modestinus gave his opinion decades after the *Constitutio Antoniniana* had granted Roman citizenship to virtually all inhabitants of the empire. Kaser's argument would only be plausible if it could be maintained that the person issuing the chirograph would belong to a group of persons who had been excepted from this (*dediticii*). It is very likely that Modestinus would have mentioned this, unless the 'post-classical hand' also deleted this.[206]

### 6.4.4. *Constitutum debiti* (Platschek)

Platschek holds that there is nothing which points at a 'peregrine scenario' and that a different explanation has to be sought.[207] According to Platschek this explanation can be found in the *constitutum debiti*.[208] It is true that the *constitutum debiti*

203. This is Pringsheim's reconconstruction: "*quaero, an ex eo instrumento usurae peti possunt. Modestinus respondit peti eas non posse*." Pringsheim, *l.c.* (n. 69), p. 255–256.

204. Kaser, *l.c.* (n. 125), p. 281 (163); Platschek, *o.c.* (n. 3), p. 134.

205. Kaser, *l.c.* (n. 125), p. 283 (165).

206. Platschek, *o.c.* (n. 3), p. 135–136.

207. Platschek, o.c. (n. 3), p. 141. On the *constitutum debiti* see section 5.6 above.

208. One should not give too much weight to the phrase *ex eo instrumento usurae peti*. The Roman legal sources often use phrases like this, also when the legal basis is clearly not the document

presupposed an already existing debt, while the interest promised in D. 22.1.41.2 was not already owed by Gaius Seius. However, where Ulpian D. 13.5.1.6 holds that debts arising pursuant to any legal basis (*ex quacumque causa*) can be 'constituted', Ulpian D. 13.5.1.7 adds that that which is 'naturally indebted' is also sufficient ("[*d*] *ebitum autem vel natura sufficit*") for a *constitutum debiti*. Modestinus's opinion indicates that also interest for loans which has not been stipulated can be regarded as *natura debitum*.[209] This is supported by the fact that interest that has been paid pursuant to an informal pact cannot be claimed back (Ulp. D. 46.3.5.2; Sev./Ant. C. 4.32.3) and that the 'natural' obligation to pay interest can be secured with a right of pledge (Ulp. D. 13.7.11.3).[210] In other words, informal interest agreements were not completely without legal effect. That we do not have much evidence of such informal promises to pay interest can be explained by the omni-presence of stipulations in credit transactions.[211]

### 6.4.5. Conclusion

Modestinus D. 22.1.41.2 is a remarkable text, whose noteable features may have been derived from its Hellenistic background. Platschek argues that phrases like "*scripsi me accepisse et accepi ab illo mutuos et numeratos decem, quos ei reddam*" find their parallel in chirographs from the Sulpicii archive and elswhere.[212] We have seen above, however, that the 'reddam-clause' is only very rarely used in Roman chirographs, while it is a standard phrase in Hellenistic loan documents. For that reason, one cannot rule out the possibility that Modestinus's opinion was originally on a chirograph in which the debtor wrote 'that he will give something' as contemplated in Gai. *Inst.* 3.134. But that still leaves us with the problem that Modestinus's opinion dates from after the enactment of the *Constitutio Antoniniana*, so that our jurist should have held that also between provincials a stipulation would have been necessary for interest.[213] Interpreting D. 22.1.41.2 as a case of the *constitutum debiti* would explain this.

## 6.5. Callistratus D. 49.14.3: Chirographs as 'secret trusts'

Prior to Augustus *fideicommissa* ('testamentary trusts') were not actionable and only created a moral duty for the trustee to meet the testator's request. Augustus charged the consuls with enforcing *fideicommissa* in the more flexible

itself but the contract (usually: stipulatio) evidenced by it. See the Digest texts mentioned in n. 186.

209. Platschek, *o.c.* (n. 3), p. 141.

210. Platschek, *o.c.* (n. 3), p. 141.

211. Platschek, *o.c.* (n. 3), p. 141.

212. Platschek, *o.c.* (n. 3), p. 136.

213. Platschek, *o.c.* (n. 3), p. 255.

*cognitio extra ordinem* procedure.[214] After Augustus, successive emperors enacted 'anti-trust' legislation, purporting to invalidate evasions of mandatory inheritance laws. The sanction could be that the property subject to the trust would be forfeited to the Roman state, which would happen where peregrines were beneficiaries of a trust.[215] This in its turn encouraged the use of *inter vivos* arrangements which relied on other legal institutions and which were — as such — formally not subject to inheritance laws. These were called 'secret trusts' (*tacita fideicommissa*).[216] Emperor Trajan encouraged beneficiaries of secret trusts to come forward. If they would voluntarily report the acquisition of property to the fisc, beneficiaries of a secret trust would only have to give half the value of the property to the fisc (the so-called *beneficium Traiani*).[217]

### 6.5.1. Callistratus D. 49.14.3.3

One type of evasions relied on the use of documents, such as chirographs, produced as evidence of an obligation to transfer assets to a beneficiary. An opinion by the jurist Callistratus implies that whenever a secret trust can be proven — by a chirograph or otherwise — the sanction of forfeiture (as well as the *beneficium Traiani*) applies.

> D. 49.14.3.3 (*Callistratus libro tertio de iure fisci*): *Tacita autem fideicommissa frequenter sic deteguntur, si proferatur chirographum, quo se cavisset cuius fides eligitur, quod ad eum ex bonis defuncti pervenerit, restituturum. Sed et ex aliis probationibus manifestissimis idem fit.*
>
> "Secret trusts are frequently detected if a chirograph is produced in which the trustee had guaranteed that he would make over the property that came to him from the estate of the deceased. But the same also occurs in the case of absolutely plain proof."[218]

The wording of this chirograph must have been something like: 'I promise to make over to you the property I have received from X's estate'.[219] According to Riccobono this fragment must have been interpolated, as it seems to regard the chirograph as constitutive rather than probative.[220] Against this Johnston argues

214. D. Johnston, «Succession», in D. Johnston (ed.), *The Cambridge Companion to Roman Law*, Cambridge, 2015, p. 199–212, 206–209. Under Claudius two (later one) praetors became also responsible for dealing with trusts, with (probably) the consuls remaining charged for trusts set up by wealthy Romans.

215. D. Johnston, *The Roman Law of Trusts*, Oxford, 1988, p. 35–40.

216. Johnston, *o.c.* (n. 215), p. 42–75.

217. Johnston, *o.c.* (n. 215), p., 55–58.

218. Translation taken from Johnston, *o.c.* (n. 215), p. 62.

219. Johnston, *o.c.* (n. 215), p. 62.

220. Riccobono – Beinart, *o.c.* (n. 181), p. 159: 'The *chirographum* is here shown to us as endowed with dispositive force.'

that this depends on how one translates '*chirographum, quo se cavisset*': as '*by* which' or '*in* which'.[221] A chirograph *in* which the promise to transfer is made could easily have been recording a *stipulatio*. But suppose we would translate '*quo*' with '*by* which', what would then be its meaning? Even then it could still be read as referring to a chirograph recording a stipulation. As we have seen, expressions like *ex epistula petere*, *ex cautione convenire*, *ex* (or *per*) *chirographo debere* were often used in order to refer to obligations or actions arising under the contract evidenced by these documents.[222]

The problem discussed by Callistratus is the evasion of inheritance laws by making written promises like this. This seems to imply that these promises are intrinsically valid, perhaps even also when these promises are not made as a stipulation. Does this mean that it must be concluded that where these promises were recorded in chirographs, these chirographs were sources of obligation? It does not. It is true that the fragments on secret trusts leave open the possibility that — within the framework of the (more flexible) extraordinary cognition procedure for *fideicommissa* — informal undertakings by the trustee were enforceable by the beneficiary of the trust. This promissory remedy is, however, not specifically tied up with the use of chirographs. As the last part of Call. D. 49.14.3.3 indicates, secret trusts could also be proven by other means (although this may have been difficult in practice).[223] Also in other Digest fragments, it was not the chirograph itself which was a source of obligation, but rather the promise made by the trustee to the beneficiary, whether cast in the form of a chirograph or in that of another document or given orally.[224] The opinions on *fideicommissa* do not support the proposition of the constitutive nature of chirographs.

## 6.6. Other opinions by Scaevola and other classical jurists

Besides the opinions by Scaevola which have already been reviewed in this section, there are other texts from this jurist on contractual undertakings recorded in chirographs. In addition, there are opinions by Julian and Paul which nicely illustrate that chirographs were not constitutive as a matter of Roman law.

### 6.6.1. Scaevola's opinions

D. 34.3.31.4 cites a clause of a legacy (with *fideicommissum*) in which the testator provides that his debtor is to be discharged from liability for 'everything for which according to chirographs and accounts he is debtor, or for what he has

221. Johnston, *o.c.* (n. 215), p. 62 note 54.

222. See sections 4.4 and 6.2.

223. *Ps.-Quint.*, decl. 325: "*difficile est quidem natura probare tacitum fidei commissum. Quomodo enim probamus?*" Quotation from Johnston, *o.c.* (n. 215), p. 63.

224. Jul. D. 30.103; Gai. D. 34.9.10 pr..

accepted as a loan from me or for what I have guaranteed on his behalf'.[225] Could it be argued that by juxtaposing liability recorded in chirographs (and accounts) and liability arising under *mutuum*, Scaevola's opinion implies that chirographs are an independent source of obligation? Apparently, the chirographs did not record contracts of *mutuum*. However, they may still have been chirographs evidencing stipulations. As the epigraphic evidence shows, chirographs and stipulations were a preferred combination for the Romans. Likewise, where Scaevola speaks of someone who was 'a creditor on several bases and chirographs' (D. 46.3.89 pr.), these chirographs may very well have been evidencing stipulations, acknowledgments of debt et cetera. Accordingly, the 'action on these other chirographs executed by the debtor himself' ("*actio ex reliquis chirographis per ipsum debitorem cautis*") is likely to be a reference to the *condictio* (*mutuum*, *stipulatio*) or other traditional contractual actions.

In D. 44.7.61 pr. a general manager (*procurator*) had issued a document to the creditor settling the accounts of a business relationship between his principal and a silversmith. In this document the general manager acknowledged that his principal still owed an amount to the silversmith. Would this document, if it had been written by the principal himself, as such have created an obligation to pay?[226] This question appears to be answered negatively by Scaevola. The banker would only be liable to pay the amount stated to be due in the document, if a debt already existed. The document itself does not create a new obligation to pay for the person on whose behalf it was executed.[227]

In another opinion by Scaevola (D. 14.3.20) a bank manager had executed a letter to one of the customers of his patron's bank, writing that the customer had a credit balance of 10,000 denaries which was payable at a certain date.[228] The question was asked to Scaevola whether the bank manager could be sued in court on the basis of this letter (*ex epistula iure conveniri*). Scaevola answered that the manager was not legally bound by these words nor liable on the basis of equity, because he had written the letter in his capacity as manager (*institor*) in order to confirm the bank's creditworthiness. In modern terms, we are dealing with a 'letter of comfort' which was not intended to have legally binding effect.

In D. 16.3.28 the question was addressed to Scaevola whether an *epistula* was the cause of action for a banker's liability to pay interest ("*an ex ea epistula etiam*

225. "*… quidquid mihi aut chirographis aut rationibus debitor est vel quidquid a me mutuum accepit vel fidem meam pro eo obligavi.*"

226. Platschek, *o.c.* (n. 3), p. 222.

227. Platschek, *o.c.* (n. 3), p. 223, who notices that Scaevola expressly rejects the Greek perception that such a document effectively did have a dipositive nature on the basis of its strong evidentiary force.

228. In D. 14.3.20 the letter is reproduced verbatim: "*Octavius Terminalis rem agens Octavii Felicis Domitio Felici salutem. Habes penes mensam patroni mei denarios mille, quos denarios vobis numerare debebo pridie kalendas Maias.*"

*usurae peti possint*"). The banker Quintus Caecilius Candidus had confirmed in a letter that money had been deposited, that it would be entered into his ledgers (*ratiuncula*) and that it would generate interest.[229] This contractual arrangement, which probably is a contract of *depositum*, gives rise to a *bonae fidei iudicium*.[230] This is according to Scaevola the reason why the banker must pay interest. Again, the *epistula* itself does not generate obligations.

### 6.6.2. Julian D. 17.1.34 pr.

In Julian D. 17.1.34 pr. a procurator had collected money from his principal's debtors and then wrote to the principal that he held this sum resulting from his management and that it would be owed by him as a loan with interest. According to Julian this did not constitute a loan ("*non esse creditam*"), because holding otherwise would entail that out of each transaction a loan of money could be created by bare agreement. We can see that the fact that the intended debtor himself wrote that he would be liable as a borrower (for principal and interest) was not sufficient to generate liability.

### 6.6.3. Paul D. 16.3.26.2

Paul D. 16.3.26.2 concerns an *epistula* which is reproduced verbatim in the opinion.[231] In this letter a banker (Titius) confirms to the Sempronius brothers that they have deposited gold and plates with him. The banker also writes that the brothers owe him a certain amount of money. The question was asked to Paul 'whether any obligation has arisen from a document of this kind, that is, as concerns the case of the money and that alone'[232]. Paul answered:

> Paul D. 16.3.26.2 (*Paulus libro quarto responsorum*): (…) *Respondit ex epistula, de qua quaeritur, obligationem quidem nullam natam videri, sed probationem depositarum rerum impleri posse: an autem is quoque, qui deberi sibi cavit in eadem epistula decem, probare possit hoc quod scripsit, iudicem aestimaturum.*
>
> "He replied that no obligation appears to have arisen from the letter about which the question is put, but that it can serve as proof of the deposits of the property. But whether also he who made a declaration in the same letter to the effect that ten were owing to him can prove what he wrote, a judge would have to investigate."

The letter itself does not create obligations,[233] but can only serve as proof of the existence of a contract of *depositum*. As far as the obligation to pay money

229. Also according to Gröschler, *o.c.* (n. 36), p. 129 n. 212, Caecilius was a banker.

230. This is also how Gröschler (p. 48) interprets this text. So also Platschek, *o.c.* (n. 3), p. 172.

231. According to Platschek, *o.c.* (n. 3), p. 213, the text of this letter 'borders the incomprehensible'. For an elaborate exegesis of D. 16.3.26.2, see Platschek, *o.c.* (n. 3), p. 230–235.

232. "*An ex huiuscemodi scriptura aliqua obligatio nata sit, scilicet quod ad solam pecuniae causam attinet.*"

233. In the same sense, Platschek, *o.c.* (n. 3), p. 232.

is concerned, the letter itself does not even provide evidence. The reason for this must have been that it had been written by the creditor rather than the debtor. That is why Paul says that this needs to be further examined by a judge.

#### 6.6.4. Conclusion

In the Digest there is an abundance of texts from which it appears that chirographs, *epistulae* and other documents only served evidentiary purposes. Even the most difficult jurists' opinions all turn out to be in conformity with the classical doctrine of contracts. Scaevola D. 44.4.17 pr. demonstrates that in case of a *stipulatio* evidenced by a chirograph, the creditor did not have an *'actio ex chirographo'* but rather an action based on a *stipulatio* which is evidenced by a chirograph. Scaevola D. 44.7.61.1 is a special case, indicating that someone who acted in reliance on an informal promise may under certain circumstances (e.g. change of position) be granted an *actio in factum*. The most controversial text, Modestinus D. 22.1.41.2 may have been interpolated, but can also be explained as concerning a *constitutum debiti*. None of the Digest texts lead to the conclusion that chirographs were constitutive according to the classical jurists.

## 7. Imperial constitutions

### 7.1. Introduction

The imperial chancery has produced many constitutions in which the chirograph and the underlying contract are neatly separated. For instance, a rescript by Diocletian deals with a 'chirograph of accepted borrowed money' ("*chirographum acceptae mutuae pecuniae*"), thereby referring to the contract of *mutuum* (Dio./Max. C. 8.42.14 [a. 293]). Another rescript by the same emperor (Dio./Max. C. 3.42.9 [a. 294]) provides that when a debtor has proven before the provincial governor that he has paid what was due under 'whichever contract' (*quocumque contractu*), the chirographs — pursuant to which nothing can be claimed anymore — must be returned to the debtor. Again, chirographs were used to record recognized types of contract.

### 7.2. *Exceptio non numeratae pecuniae*

Of particular interest are imperial rescripts concerning the *exceptio non numeratae pecuniae*, because the availability of the defense against promises recorded in writing might imply that the writing is constitutive. The *exceptio non numeratae pecuniae* originated in the *ius honorarium* of the second century AD. It applied

when someone had promised to repay borrowed money (*credita pecunia*),[234] while as a matter of fact the money had never been paid out.[235]

Originally the debtor would in theory be able to raise the *exceptio doli* against the creditor's action on the basis of the promise.[236] Against certain persons (parents, patrons), however, it could not be raised as a matter of principle, while against other persons (e.g. heirs, assignees) it could fail because they were unaware of the facts.[237] The *exceptio non numeratae pecuniae*, by way of contrast, could be raised independent of the creditor's *dolus*. The earliest sources say nothing about the burden of proof. In accordance with the general rule the debtor invoking the defense would have to prove the facts on which it was based, in other words, that the money had not been paid.[238] It is only in a rescript by Caracalla (C. 4.30.3) from AD 215 that, when the debtor would raise the *exceptio non numeratae pecuniae*, the burden of proof that the money had been paid out came to rest on the creditor.

In the formulary procedure both the *exceptio doli* and the *exceptio non numeratae pecuniae* would normally be directed against an action based on a stipulation, whether or not recorded in writing. When later the *exceptio non numeratae pecuniae* was taken over in *cognitio* proceedings, it could also be directed against simple deeds (not mentioning a stipulation).[239] According to Litewski, however, all jurists' opinions and rescripts on the *exceptio non numeratae pecuniae* concern debts arising out of stipulation.[240] Litewski takes the view that when the *exceptio* was granted, this presupposes that the promise to pay was actionable. This in its turn presupposes that the promise must have been made by way of stipulation. If it would have been a bare promise, which was not made as a stipulation, the claimant's action could simply have been denied, without the need to raise an exception. Litewski's position is based on the assumption that chirographs were not constitutive. In many of the texts mentioned by Litweski this assumption *is*

234. Persons standing surety for the borrower's repayment of the loan were also entitled to invoke the defense: Dio./Max. C. 4.30.12. See Litewski, *l.c.* (n. 3), p. 439–440. The defense was, however, not available to someone who had promised to repay an amount allegedly due under a settlement (*transactio*): Dio./Max. C. 4.30.11. Litewski, *l.c.* (n. 3), p. 438–439.

235. Litewski, *l.c.* (n. 3), p. 448, derives from '*placet*' in Gai. *Inst.* 4.116a that granting the *exceptio doli* in *non numeratae pecuniae* cases was already settled practice at the time of Gaius, so that its origins lie before Gaius. Litewski denies both that the *exceptio* was invented by the imperial chancery and that its coming into existence was influenced by Greek law. Litewski, *l.c.* (n. 3), p. 450–451 (with further references).

236. Gai. *Inst.* 4.116a and 119. The last time it was mentioned in this context is in a rescript by Caracalla: Ant. C. 4.30.3 (a. 215). See also Ulp. D. 17.1.29 pr. and Ant. C. 4.30.3 (a. 215). The rescript by Caracalla mentions both the *exceptio doli* and the *exceptio non numeratae pecuniae*. See also the other rescripts mentioned in Litewski, *l.c.* (n. 3), p. 449, n. 384.

237. Zimmermann, *o.c.* (n. 51), p. 94.

238. Litewski, *l.c.* (n. 3), p. 452.

239. Litewski, *l.c.* (n. 3), p. 450.

240. Gai. *Inst.* 4.116a and 119; Ulp. D. 17.1.29 pr.; Ulp. D. 44.4.4.16. Litewski, *l.c.* (n. 3), p. 411.

supported by the facts. In Gai. *Inst.* 4.116a Gaius expressly states that the promise was made by stipulation (without indicating whether it was recorded in writing).[241] In Gai. *Inst.* 4.119 it is not indicated whether the promise to repay the loan was made by way of (verbal) stipulation or written instrument, but it is likely that this text builds on Gai. *Inst.* 4.116a.[242] Besides, in Gai. *Inst.* 3.134 Gaius had already made it clear that Roman chirographs were not constitutive.

But not from all texts it can be derived that they were concerned with stipulations. In two opinions by Ulpian (D. 17.1.29 pr. and D. 44.4.4.16) the *exceptio non numeratae pecuniae* was raised against an action for the payment of money, but neither the legal basis of this action is mentioned nor whether the promise to pay was cast in writing.[243] These opinions by Ulpian therefore neither confirm nor deny the constitutive character of chirographs. Likewise, from several rescripts on *cautiones* and other written instruments it cannot be deduced whether they were 'simple deeds', recording 'bare' promises which were not made as part of a stipulation, or whether they were 'stipulation deeds'. In particular rescripts which state that a claimant acted on the basis of a *cautio* (e.g. Ant. C. 4.7.1 and Sev./Ant. C. 4.30.3 [a. 197]: *ex cautione convenire*) leave as an open question whether or not the *cautio* as such was the cause of action. For that reason we do have to regard these texts as neither confirming nor denying the constitutive effect of chirographs. In the remainder of this section we will focus on those rescripts which are called upon by Sirks in order to demonstrate that chirographs were constitutive.

### 7.3. Sev./Ant. C. 4.30.1 and Alex. C. 4.30.5

A rescript by Septimius Severus (C. 4.30.1 [a. 197])[244] is dealing with the enforceability of a right of pledge which purported to secure a debt evidenced by a *cautio*. The debtor had granted a possessory pledge and had issued a *cautio* despite the fact that the borrowed money had not been actually paid (*non esse numeratam*) to him. The emperor ruled that the debtor can recover the pledged object if the secured debt did not actually exist. Likewise, as the rescript declares in the last sentence, when the pledge was created as a non-possessory pledge, the debtor can raise a defense against the creditor's *actio Serviana*. According to Sirks C. 4.30.1 and Scaevola's writings (see section 6) 'suggest, if not demonstrate, that such a constitutive effect of the chirograph was already a reality under Marcus Aurelius'.[245] I cannot see how C. 4.30.1 could support this proposition. In contrast

241. Litewski, *l.c.* (n. 3), p. 407.

242. Litewski, *l.c.* (n. 3), p. 408.

243. Litewski, *l.c.* (n. 3), p. 411 (D. 44.4.16), 413 (D. 17.1.29 pr.).

244. The same constitution is recorded in C. 8.32.1. There are two differences with C. 4.30.1: after *emissam* the word *adseris* has been left out and instead of *numeratae* it reads *redditae*. According to Litewski these differences do not have much significance. Litewski, *l.c.* (n. 3), p. 414.

245. Sirks, *l.c.* (n. 4), p. 273.

to what Sirks seems to assume, it is not the *cautio* which was recovered in the proceedings for which this rescript was issued but rather the pledged object. The central element of this text is 'the claim on a pledge given' (*intentio dati pignoris*) and not (as Sirks seems to hold) the *cautio* as a negotiable instrument embodying the debt.[246] Besides, the text does not clarify whether the debt for which the *cautio* was issued arose pursuant to *stipulatio* or *mutuum* or pursuant to a bare promise to repay.[247]

A rescript by Alexander Severus (C. 4.30.5) confirms — first and foremost — that the *exceptio non numeratae pecuniae* only applies when money is reclaimed as having been 'credited' (*quasi credita pecunia*), which (at least) suggests that we are dealing with a debt arising pursuant to *mutuum* and/or *stipulatio*.

> Alex. C. 4.30.5: *Adversus petitiones adversarii si quid iuris habes, uti eo potes. Ignorare autem non debes non numeratae pecuniae exceptionem ibi locum habere, ubi quasi credita pecunia petitur, cum autem ex praecedenti causa debiti in chirographum quantitas redigitur, non requiri, an tunc cum cavebatur numerata sit, sed an iusta causa debiti praecesserit.*
>
> "If you have any basis in law against the claims of your adversary, you can use it. However, you should not ignore that the defense of money not paid is applicable when money is claimed as if for a loan; but when the amount is entered onto a chirograph from a preceding cause of debt, it is not asked whether it was paid at the time it was being promised, but (rather) whether a proper cause for the debt had preceded."[248]

When a chirograph has been issued in order to acknowledge the amount which is due under a pre-existing contract (or other source of obligation), it is not relevant whether the amount had actually been paid out at the time of execution of the chirograph. The rescript rules that decisive is whether the preceding contract (or other cause of debt) was a valid source of obligation (*iusta causa debiti*). Sirks holds that 'the obligation enclosed in the chirograph is treated as if created by a stipulation'. But that is precisely what C. 4.30.5 does *not* do. The chirograph is neatly distinguished from the underlying contract: it is only the validity of this contract which matters for the debtor's liability, not the chirograph. Therefore, the chirograph of a money debt was, contrary to what Sirks holds, *not* 'considered as an obligation of strict law, even if not formulated in a stipulation, and therefore considered a *contractus litteris*'.[249] If anything, this rescript demonstrates that not

246. Sirks, *l.c.* (n. 4), p. 273–274. The Frier translation (see n. 249) adds between brackets after in rem: 'to recover the pledge'. In the same sense also Litewski, *l.c.* (n. 3), p. 414–416.

247. Litewski, *l.c.* (n. 3), p. 417.

248. English translations of Codex texts in this contribution are taken from B.W. Frier (ed.), *The Codex of Justinian*, 3 vols, Cambridge, 2016 and have occasionally been slightly amended.

249. Sirks, *l.c.* (n. 4), p. 272.

the chirograph itself constitutes the source of the debtor's obligation, but rather the contract in connection with which the chirograph was executed.[250]

## 7.4. Chirographs as irrefutable claims?

Originally the *exceptio non numeratae pecuniae* may not have been limited in time. The first rescript which mentions that the *exceptio* was subject to a limitation period is a rescript from Alexander Severus from 228 AD (C. 4.30.8). The actual term of the limitation period is not mentioned in this rescript, but it was probably one year.[251] Sirks holds (with reference to C. 4.30.4, 4.30.8 and 4.30.10) that after the term of one year had expired, the claim would be 'irrefutable'. This indicates, according to Sirks, 'that the chirograph was considered to be strict law, which suggests, as said before, it was considered a *contractus litteris*'.[252] It is, however, not at all certain that the expiry of the one-year-term would make a claim based on a chirograph irrefutable.[253] It would seem odd that after the expiry of the one-year-period chirographs would suddenly be completely immune against any evidence that the borrowed money had not actually been paid out. With the majority of the Byzantine commentators — who felt that the introduction of a defense for the benefit of these debtors should not work against them — one is inclined to think that the debtor who had executed a chirograph could still try to prove that the money had not been paid.[254]

### 7.4.1. Ant. C. 4.30.4: *querella non numeratae pecuniae*

More or less at the same time at which the *exceptio non numeratae pecuniae* originated, an additional remedy was created by the imperial chancery: the *querella non numeratae pecuniae*. It first appears around AD 215–217 in a rescript by Caracalla: C. 4.30.4, whose wording implies that it already existed.[255] The purpose of the *querella* was to prevent that the defense that the money had not been paid could no longer be raised, because the creditor would claim payment after the limitation period had expired.[256] The debtor could himself take the initiative by bringing the *querella* against the creditor, in order to be released from liability under the stipulation. C. 4.30.4 rules that the *querella non numeratae pecuniae* can still be instituted after the debtor has confirmed the correctness of the *cautio* and has paid part of the principal or interest evidenced herein. This rescript merely

250. In the same sense, Litewski, *l.c.* (n. 3), p. 425.

251. Litewski, *l.c.* (n. 3), p. 451. Later it was extended to five years by Diocletian.

252. Sirks, *l.c.* (n. 4), p. 273.

253. So also Zimmermann, *o.c.* (n. 51), p. 94.

254. Sch. 4 and 5 ad *Bas.* 23.1.72 (= *Scheltema*, B IV 1606). Based on Litewski, *l.c.* (n. 3), p. 438.

255. Litewski, *l.c.* (n. 3), p. 454.

256. Litewski, *l.c.* (n. 3), p. 454, referring to the perpetuation of both the *exceptio* and the *condictio*.

underlines the probative value of (presumably) chirographs, but says nothing about their constitutive effect.

### 7.4.2. Ant. C. 4.30.8; Dio./Max. C. 4.2.5 and C. 4.30.10

C. 4.30.8 (a. 228) is concerned with the term for the *exceptio non numeratae pecuniae* in certain situations after the debtor who issued a *cautio* had died. The *cautio* must have evidenced a debt to repay a loan, but it cannot be established whether this document recorded a *stipulatio* to do so or an informal promise.[257] Accordingly, C. 4.30.8 cannot be used as evidence for or against the constitutive effect of chirographs. A rescript from Diocletian issued in AD 293 (C. 4.30.10) deals with the question whether or not a debt has been paid in general, without mentioning the source of the debt and whether or not it was recorded in a chirograph or other written instrument. Accordingly, there is no way by which this rescript can be used as an argument in favour of the constitutive effect of chirographs. Another rescript by Diocletian from AD 293 (Dio./Max. C. 4.2.5) is on a case in which, after money had been paid out by way of loan, a deed (*instrumentum*) had been produced stating (untruthfully) that oil had been received. The rescript rules that, where no stipulation for the return of the oil has been recorded in the deed, the true state of affairs remains decisive. The rescript concludes with stating that it is evident that on the basis of the deed recording the receipt of the oil nothing is owed (*ex olei accepti scriptura nihil deberi manifestum est*). Again, the document by itself is incapable of creating obligations: only when it records a stipulation for a certain performance (e.g. deliver oil) will its author be liable to render that performance.

## 7.5. *Condictio liberationis*

Those who have assumed liability without a cause ([*q*]*ui sine causa obligantur*) have a *condictio* with which they can claim that they are released from their liablity. This *condictio liberationis* can according to Julian either be used in order to reduce liability or to extinguish it altogether.[258] In some of the rescripts dealing with *non numeratae pecuniae* cases this *condictio liberationis* is granted to the debtor who had written an acknowledgment of debt. If the disputed debt instruments recorded bare promises (i.e. not based on stipulation or other recognized contracts), these rescripts would support the constitutive effect of chirographs. The rescripts on the *condictio liberationis*, however, do not shed light on whether or not chirographs had constitutive effect in classical law. Alex. C. 4.30.7 (a. 223) is concerned with a case in which several borrowers had, in anticipation of loans by way of *mutuum*, issued debt instruments in favour of the lender. The rescript says that when the borrowed amount was not actually paid out, the authors of the instruments could use either the *condictio liberationis* or the *exceptio non numeratae pecuniae*.

257. Litewski, *l.c.* (n. 3), p. 428.

258. Jul. D. 12.7.3.

Litewski takes the view that the debt instrument recorded a stipulation, but this is based on his assumption that every actionable debt instrument must have involved a stipulation. Although this is a distinct possibility, we cannot know for certain whether the promise to repay the borrowed amount was a 'bare' promise. For this reason Alex. C. 4.30.7 can neither be used against nor in favour of the proposition that chirographs had constitutive effect. The other rescript on the *condictio liberationis* (Dio./Max. C. 8.39.3 [294]), on the other hand, unequivocally concerns the assumption of joint and several liability pursuant to stipulation, without indicating whether or not the stipulations were recorded in writing.

## 7.6. 'Degeneration' of the stipulation

Did the widespread practice of recording stipulations in writing lead to a 'degeneration' of the stipulation in late classical law, from a formal oral contract into a contract whose only formality was writing?[259] We have seen above that in the Principate a practice existed of using stipulations recorded in writing, in relation to other types of contract (e.g. *mutuum*, *emptio venditio*, *societas*) which, also without a stipulation, would have been valid and enforceable contracts.[260] The stipulation became a fixed component of transaction documents, which must have contributed to the perception in practice that it was a written rather than a oral contract.[261] In the second and third century AD the growing importance of writing may thus have created a tendency among practioners to regard writing as constitutive.[262] The imperial chancery, however, was not prepared to go along with this and held on to classical doctrine. It is true, where a document only recorded the *promisor*'s promise, the *stipulator*'s *interrogatio* was presumed to have preceded it.[263] Moreover, a rescript by Alexander Severus provides that where written evidence implied that a *stipulatio* had been entered into, it could be presumed that the oral formalities had taken place. Where, however, the alleged debtor could prove that at the time the document was executed he was not physically present at the place of execution, the evidence of the stipulation was rebutted (C. 8.37.1)[264]. This demonstrates that at the end of the classical period, the model of the stipulation as an oral contract was still intact. The stipulation had not become a *contractus litteris*: writing continued to serve as — rebuttable — evidence of a stipulation entered into by the exchange

259. For a succinct discussion (with many references), see Zimmermann, *o.c.* (n. 51), p. 80–81. See also Riccobono – Beinart, *o.c.* (n. 181), p. 145–214; G. Sacconi, *Ricerche sulla* stipulatio, Naples, 1989 (*Pubblicazioni della Facoltà di Giurisprudenza della Università di Camerino*, 33), p. 151–173.

260. See section 4 above.

261. Simon, *o.c.* (n. 3), p. 28–29.

262. Simon, *o.c.* (n. 3), p. 28–29.

263. Paul D. 45.1.134.2.

264. Papinian was *procurator a libellis* at the time this rescript was issued (AD 200). See T. Honoré, *Emperors and Lawyers*, 2nd ed., Oxford 1994, p. 190 (Table 2, no. 1). See also Paul D. 45.1.134.2.

of words. The legal concept of a constitutive chirograph, which would entail that a *condictio/actio certae pecuniae* could be based on the execution of a document alone, would have made this classical doctrine fully redundant.[265] In contrast with Greek-Hellenistic law(s), in Roman law documents never even attained the status of non-rebuttable proof, as this constitution of Alexander Severus shows.[266]

> Alex. C. 8.32.2: *Si, ut nunc adseveras, nihil creditor numeravit uxori tuae quae pignus dedit, sed inanem extorsit cautionem, mendaci scriptura contra fidem veritatis obligari eius res non potest.*
>
> "If, as you now allege, a creditor paid nothing to your wife after she gave him a pledge, but extracted a *cautio* without legal foundation, her property cannot be obligated by a deceitful writing that is contrary to the truth."

In the eastern part of the Roman Empire the chirograph may have been an alternative to the stipulation, as the latter type of contract originally was not available to non-Romans and later may have been less familiar to them. Significantly, where — as a consequence of the *Constitutio Antoniniana* — the applicability of Roman law was extended to former peregrines and their descendants, the widespread practice of the stipulatory clause indicates that even in the eastern part of the empire the parties took care to make their written promises enforceable as a matter of Roman law. The fact that in the first half of the third century AD in Roman Egypt stipulatory clauses were added to chirographs and other documents demonstrates that one was still a long way from fundamentally recognizing written agreements.[267]

## 8. Concluding observations

In several respects Jakab's analysis of chirographs can easily be followed. Chirographs did not need to be written by the author's own hand, but could be written by slaves, sons *in potestate* and even by free persons acting on the author's behalf. We can see this already in Ptolemaic Egypt (e.g. Zois's chirograph), in Roman Egypt (P. Vindob. L 135) and later in the Sulpicii documents (TPSulp 46, 78 and 98) and it has always been clear that this was not a problem from a Roman legal perspective (e.g. Mod. D. 20.1.26.1). Ruling otherwise would have meant that a large (illiterate) part of the Roman population would not have been able to provide proof of their commitment by using this style of document, which would

265. 'There is no cause for the presumption that at the time of its introduction in Egypt the stipulation had already undergone a change in its classical substance.' Simon, *o.c.* (n. 3), p. 32 (my own translation from the original German).

266. See also Alex. C. 4.31.6 (a. 229), also referring to binding oneself *contra fidem veritatis*.

267. Simon, *o.c.* (n. 3), p. 32. It took about eight years after the enactment of the *Constitutio Antoniniana* (212 AD) before stipulatory clauses were systematically added to Hellenistic templates. Even after 220 AD documents were sometimes still executed without a stipulatory clause.

have been extremely impracticable. Also the form of a letter was not obligatory, although particularly in the Digest we do encounter *epistulae* which begin with extending greetings to the addressee (e.g. Pap. D. 16.3.24). One can also easily agree with Jakab where she claims that it cannot be derived from Gaius that as a 'type of document' (*Urkundentyp*) the chirograph was restricted to peregrini. From the Sulpicii archive, the Herculaneum tablets and the Iucundus archive and other sources (including the Digest) it can be concluded that the use of chirographs by Romans was widespread. One can again agree with Jakab that is difficult to imagine that all chirographs, whether recorded in the epigraphic sources or reported by the jurists, were made *contra legem*.[268] There is no reason to assume that chirographs were against the law. Why should it be? There are more than 50 fragments in the Code and the Digest confirming that chirographs were legally valid instruments for documenting transactions.

One cannot, however, conclude from the widespread use of chirographs that as a matter of Roman law the chirograph was an independent source of obligation (cause of action). The actions which the addressees of the chirograph could institute were based on the contracts evidenced by the chirograph, such as *mutuum*, *stipulatio* or *constitutum debiti* and not on the chirograph itself. During the entire classical period the use of chirographs was legally relevant for Romans, but their *legal* significance did lie exclusively in their probative value. The rescripts on the *exceptio non numeratae pecuniae*, the *querella non numeratae pecuniae* and the *condictio liberationis* included in Justinian's Code do not give any positive indication that — in the classical period (including Diocletian) — the range of these remedies was extended to 'bare' promises recorded in writing. In many rescripts it is clear that this *exceptio* continued to serve as a defense against claims based on stipulation. From other rescripts on written instruments, including those rescripts where a claimant acted *ex cautione, chirographo* or *epistula* (e.g. C. 4.7.1 and C. 4.30.3) it cannot be derived whether the document as such was the cause of action. For that reason we do have to regard these texts as neither confirming nor denying the constitutive effect of chirographs.

Meyer calls it a 'modern verdict that legal documents, even Roman ones, almost always served as proof'.[269] Modern it is, but it is not untrue. In classical Roman law writing did almost always exclusively serve as proof: *verba volant, scripta manent*. Jakab's view, as further substantiated by Sirks, that chirographs had constitutive effect, cannot withstand the test of the normative sources.

268. Jakab, *l.c.* (n. 2), p. 277.

269. Meyer, *l.c.* (n. 51), p. 85.

## Table of Conversion TPSulp → TPN

| | | | |
|---|---|---|---|
| TPSulp 13 | TPN 13 | TPSulp 59 | TPN 47 |
| TPSulp 14 | TPN 14 | TPSulp 60 | TPN 49 |
| TPSulp 15 | TPN 15 | TPSulp 62 | TPN 50 |
| TPSulp 42 | TPN 83 | TPSulp 64 | TPN 53 |
| TPSulp 43 | TPN 84 | TPSulp 67 | TPN 58 |
| TPSulp 44 | TPN 85 | TPSulp 68 | TPN 59 |
| TPSulp 45 | TPN 86 | TPSulp 69 | TPN 60 |
| TPSulp 46 | TPN 87 | TPSulp 70 | TPN 61 |
| TPSulp 47 | TPN 87 | TPSulp 71 | TPN 63 |
| TPSulp 48 | TPN 88 | TPSulp 72 | TPN 62 |
| TPSulp 49 | TPN 101 | TPSulp 73 | TPN 64 |
| TPSulp 50 | TPN 46 | TPSulp 74 | TPN 112 |
| TPSulp 51 | TPN 43 | TPSulp 77 | TPN 67 |
| TPSulp 52 | TPN 44 | TPSulp 78 | TPN 68 |
| TPSulp 53 | TPN 45 | TPSulp 79 | TPN 69 |
| TPSulp 54 | TPN 39 | TPSulp 80 | TPN 89 |
| TPSulp 55 | TPN 40 | TPSulp 82 | TPN 82 |
| TPSulp 56 | TPN 41 | TPSulp 98 | — |
| TPSulp 57 | TPN 42 | TPSulp 109 | — |
| TPSulp 58 | TPN 48 | TPSulp 114 | TPN 105 |

# RIDA

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## Sommaire




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