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RESCRIPTS OF ROMAN EMPERORS PROMULGATED UNTIL THE END OF THE REIGN OF DIOCLETIAN IN 305 A.D.¹

1. 1. This lecture on Roman imperial rescripts from Hadrian (117-138 A.D.) until the end of the reign of the emperors Diocletian and Maximian (284-305 A.D.) is divided into two parts.

In the first part I will give a definition and some characteristics of rescripts (nr.1.2), I will speak of the difficulties of their interpretation and about the causes of these difficulties (nr.1.3), I will make a comparison of the imperial rescripts with the *quaestiones* and the *responsa* of the classical jurists (nr.1.4), I will give an idea of the big number of the rescripts which have been conserved to us mostly by Justinian's *Codex* (nr.1.5) and finally I will present a hypothesis with regard to the jurists who formulated the rescripts (nr.1.6).

The subject of the second part of this lecture is an exegesis of a constitution of the emperor Alexander Severus of 230 A.D. which the compilers of Justinian's Code incorporated in C. 8.19(20).1. We will give a reconstruction of the two cases of sale of a thing mortgaged on different moments to two different creditors examined in the rescript and we will try to establish the role of Athenion, to whom the rescript had been addressed (nrs. 2,1-5).

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1. 2. Rescripts were either directed to magistrates and judges, or to private persons. The first category is a small minority; the second category, which consists of rescripts addressed to private persons, forms by far the majority. I only speak here about the second category. First I give a definition of these rescripts. It are replies to questions asked to the imperial chancery about legal problems which regard the petitioner. Coriat² writes in his book *Le Prince Législateur*: „Les rescripts sont des réponses écrites (d'où leur nom), de l'empereur à des questions écrites, posées le plus souvent à l'occasion d'un procès. Le rescript est une réponse en droit ...“. These answers of the imperial chancery are legal decisions, formally decisions of the emperors. The decisions incorporated in the rescripts are however conditional decisions. They are given under the condition that the petitioner proves the facts alleged by him³. This is often specified explicitly in the text of the rescript, where we read: *si preces veritate nituntur* – „if the petition is based on the truth“ (C. 1.23.7 pr.), or: *si liquido probatur* – „if it is clearly proved“ (C. 6.21.1), or: *si probaveris* – „if you have proved“ (C. 8.25.2). The judge will have to verify the facts alleged by the petitioner. The proof of the facts on which the petitioner bases his petition, is never given to the imperial chancery, which is not equipped for the control of alleged facts. The author of the rescript proposes a solution basing himself on the facts as they were alleged by the petitioner. The *rescripta* differ from the *decreta*, imperial judgments in lawsuits: the rescripts are lacking the effect of *res iudicata* which the *decreta* have. Sometimes the text of the rescript declares that if the facts alleged by the petitioner will be proved, the judge (for example the governor of a province) will decide in conformity with the decision included in the rescript. The judge who will deal with the case examined by the imperial chancery has to decide in conformity with the decision of the rescript, also if its text does not state this explicitly. On the basis of the emperor's *auctoritas* these decisions got also legal effect in other situations which were identical (or analogous) to the case of the rescript. The responses of the emperor to questions of the justiciables soon acquired legal effect according to the Roman lawyers. Gaius, Inst., 1,5 already mentioned all categories of imperial constitutions, to which the rescripts belonged, among what we would call the sources of the law. Half a century later Ulpian states in his Institutes⁴ written under Caracalla (211-217) that it is certain that what the emperor wrote by *subscriptio* (subscription, these are the words of the rescript written under the written petition) is a *lex*

²Jean-Pierre Coriat, *Le Prince Législateur. La technique législative des Sévères et les méthodes de création du droit impérial*, Rome 1997, p. 77.

³Cf. Coriat, *op. cit.*, p. 77: „la solution juridique proposée ne reçoit application que si les conditions indiquées dans la requête se révèlent réalisées, et il incombe au juge de vérifier les faits allégués ...“.

⁴See D. 1.4.1.1.

(statute). For Ulpian the rescripts belong without any doubt to the „sources of the law“.

1.3. Two phenomena have produced the extreme difficulty of interpretation of the rescripts with which we are faced every day. These are: 1) the absence in the imperial reply of the presentation of the case for which the petitioner asks to be informed about the law, and 2) the fact that the rescripts as they are included in Justinian's Code have been abridged, sometimes even extremely abridged. I will explain them one after the other.

1) The biggest problem we experience when we want to give a serious interpretation of the imperial rescripts, is the fact that in the text of the rescripts as we know it by the Code of Justinian the petition is never included. This petition contained an exposition of the facts of which the petitioner gives his version and for which he asks to be informed about his legal position. What we only have, is the subscription by the imperial chancery, in which it gives a legal decision on the condition that the petitioner proves the facts alleged by him before the judge who will deal with the case. We, modern interpreters, have to make a reconstruction of the role of the petitioner, that is the person to whom the rescript was addressed and who was called *tu*.

2) The second phenomenon which is at the basis of our perplexity is the fact that the rescripts have nearly always been abridged, often on a big, sometimes even on an enormous scale. Everyone who is occupying himself with these constitutions can establish it even after a short study. The phenomenon of the abridgement of the constitutions of the period from Hadrian to Diocletian incorporated in the Justinian Code has been proved with a rich production of sources in the among Romanists well known study by Edoardo Volterra, „Il problema del testo delle costituzioni imperiali“, published for the first time in 1971⁵. Every Romanist who made, as I did, a translation of titles of the *Codex* of Justinian is able to establish and Volterra proved by comparing rescripts included in the Code with the same constitution conserved outside of the Code, *e.g.* on an inscription or papyrus, that the rescripts have been abridged in a very large extent. They certainly have been more abridged than the majority of the fragments of the Roman lawyers incorporated in the Digest. The *inscriptiones* (the headings containing the names and titles of the emperor from whom the rescript is originating) and dating have been reduced to the essential data. What is remaining, is often the – mostly abridged – decision of the imperial chancery.

⁵This first publication was in *Atti del II Congresso internazionale della Società Italiana di storia del diritto*, II, Firenze 1971, pp. 821-1097. It was reprinted in E. Volterra, *Scritti Giuridici*, VI, *Le fonti*, Napoli 1994, pp. 1-279.

Often the compilers left only the promulgated norm or a legal principle of which they gave in this way a place in their legislation.

It is obvious that the absence of the petition in the text of the rescripts incorporated in the Justinian Code and the large extent of abridgement of these are at the origin of the enormous problems with which the modern interpreter is faced.

1.4. Two types of works of the classical lawyers can be compared with the imperial rescripts, it are the *quaestiones* and the *responsa*. I have especially in mind these works by Papinian and Paul⁶. The fragments of these works inserted in the Digest are often difficult to interpret, but compared with the rescripts incorporated in the Code they have one big advantage, *viz.* they contain an exposition of the examined case, mostly given by the jurist himself or – as it is done in Paul's *quaestiones*, in which several questions were asked by legal practitioners as Nesennius Apollinaris and Latinus Largus⁷ – by these less talented legal experts.

The rescripts are more similar to the *responsa* than to the *quaestiones*. As the *responsa* the rescripts only give a solution for the presented case, they do not give solutions for other cases. There is one exception: we sometimes find a solution for another (less difficult) related case for which a decision is easier to find or has already been given before. The solution of this similar case is mentioned to help to find a solution for the case submitted to the chancery or to the jurist. In the *quaestiones* on the other hand we find extended dogmatical dissertations and also solutions proposed by the lawyer for other cases which are remote from the submitted case⁸.

1.5. The number of rescripts sent by the imperial chancery from Hadrian to all parts of the empire must have been immense. Wenger writes in his monumental work on the sources of Roman law⁹: „Seit Hadrian haben die Kaiser

⁶See on these works, D. Liebs in *Die Literatur des Umbruchs, Von der römischen zur christlichen Literatur, 117 bis 284 n.Chr.*[Handbuch der lateinischen Literatur der Antike, IV], München 1997, pp. 120-123 (on Papinian) and pp. 172-174 (on Paul).

⁷See J. Schmidt-Otto, *Pauli Quaestiones. Eigenart und Textgeschichte einer spätklassischen Juristenschrift*, Berlin 1993, pp. 148-149.

⁸See e.g. Paul D. 44.2.33.1 on which I wrote briefly in *Ex iusta causa traditum, Essays in honour of Eric H. Pool, Fundamina*, Editio specialis, Ed. Rena van den Bergh, Pretoria 2005, pp. 2-9 and more extensively in *Festschrift für Herbert Hausmaninger*, hrsg. von R. Gamauf, Wien 2006.

⁹L. Wenger, *Die Quellen des römischen Rechts*, Wien 1953, p. 431.

ungezählte Reskripte erlassen“. Tony Honoré made a list of dated rescripts from the period 193-305 conserved to us¹⁰, of which we know by far the biggest part (95%) by the Justinian Code. The most numerous are the dated rescripts of Diocletian and Maximian (more than 1100).

The chancery of Alexander Severus (222-235), the emperor of the rescript that we are going to interpret in the second part of this lecture, was rather productive in rescripts. Coriat¹¹ mentions 446 rescripts, Honoré¹² comes to approximately 370 dated rescripts of this emperor.

For these constitutions which are already from the point of view of their quantity, but also as to their contents, very important for the knowledge of Roman private law during the second and the third century A.D., the interest shown by modern Romanists is very limited¹³. The books written by Tony Honoré *Emperors and Lawyers*¹⁴ and by Jean-Pierre Coriat, *Le Prince Législateur. La technique législative des Sévères et les méthodes de création du droit impérial à la fin du principat*¹⁵ are the only works of great importance in this field of the last fifty years. The imperial rescripts from the Principate deserve more attention!

1. 6. To finish the first part of my lecture I would like to say a few words about the authors of the rescripts promulgated in the period from the beginning of Septimius Severus' reign in 193 until the end of the reign of Diocletian and Maximian in 305 A.D. Honoré, who made use of the differences of style of the different redactors, made plausible¹⁶, that at least all rescripts of some importance were drafted by the functionaries called *a libellis* (or *magistri libellorum*), the jurists who were head of the department for petitions of the imperial chancery. Honoré distinguished twenty lawyers who had this function in the period 193-296. During the years 194 to 202 Papinian was secretary for petitions under Septimius Severus and Caracalla. From 203 to 209 Ulpian was *a libellis* under the same emperors and from 293 to 296 Hermogenian was head of the department for petitions under Diocletian and Maximian. We will see that

¹⁰T. Honoré, *Emperors and Lawyers*², Oxford 1994, pp. 187-189.

¹¹J.-P. Coriat, *Le Prince Législateur* (see *supra*, note 1), p. 130.

¹²T. Honoré, *Emperors and Lawyers* (see *supra*, note 10), pp. 188-189.

¹³Coriat wrote in 1997 at the beginning of his impressive book *Le Prince Législateur* mentioned in note 2: „La législation impériale du Principat est un territoire qui est encore à découvrir“ (see p. 2).

¹⁴Second edition, Oxford 1994.

¹⁵Rome 1997.

¹⁶See *Emperors and Lawyers*, pp. 1-32 and *passim*.

the rescript that is the subject of the second part of the lecture was formulated by a jurist whose name we do not know and who received the number 11 in the list of heads of the department for petitions made by Honoré.

2. 1. After this first part containing general observations on the rescripts of the Roman principate I am coming now to the second part of this lecture. In this part we want to give an exegesis of the rescript of the emperor Alexander Severus dated the 11th May 230 A.D., incorporated by the compilers of the Justinian's Code in C.8.19.1. The heading of the title 8.19 is: *Si antiquior creditor pignus vendiderit* („when an older creditor sold the mortgaged thing“). We will see that the case indicated by this heading is the one examined in the *principium* of our text. The studied rescript was formulated – as we saw – by the jurist who got number 11 of Honoré's list of secretaries for petitions. The learned Romanist from Oxford characterized this lawyer as „an accomplished writer who happily combines elegance and legal accuracy¹⁷“. We will see that this positive judgment is fully applicable to the constitution that we will study now.

C. 8.19(20). Imperator Alexander A. Athenioni¹⁸

Si vendidit is qui ante pignus accepit, persecutio tibi hypothecaria superesse non potest.

1. Cum autem debitor ipsi priori creditori eadem pignora in solutum dederit vel vendiderit, non magis tibi persecutio adempta est, quam si aliis easdem res debitor venum dedisset: sed ita persequens res obligatas audieris si, quod eidem possessori propter praecedentis contractus auctoritatem debitum est, obtuleris.

Pp. V id. Mai. Agricola et Clemente cons.

The emperor Alexander [Severus] Augustus to Athenion

¹⁷ Honoré, *Emperors and Lawyers*, p. 111.

¹⁸ See on this text: H. Siber, *Römisches Recht*, II, Berlin 1928 (hereafter: Siber, *Röm. Recht*, II), pp. 127-128, P. Frezza, *Le Garanzie delle Obbligazioni, Corso di diritto Romano*, II, *Le Garanzie reali*, II, Padova 1963, pp. 296-207, M. Kaser, *Das römische Privatrecht*, I², München 1971 (hereafter, Kaser, *RPR*, I), p. 469, F. Peters, Der Erwerb des Pfandes durch den Pfandgläubiger im klassischen und im nachklassischen Recht, in *Studien im römischen Recht Max Kaser gewidmet*, hrsg. von D. Medicus und H.H.Seiler, Berlin 1973, pp. 150-153 and M. Zimmermann, *Der Rechtserwerb hinsichtlich eigener Sachen. Rei suae sive de re sua contractum consistere non potest*, Berlin 2001 (hereafter: M. Zimmermann, 2001), pp. 32-34, my study, Consequences of a Pledge Extinguished by Merger in Classical Roman Law. in *Ex Iusta Causa Traditum, Essays in honour of Eric H. Pool*, mentioned above in note 8, pp. 14-17 and my contribution, C. 8.19.1, un beau rescrit d'Alexandre Sévère, in *Studi in memoria di Gennaro Franciosi*, Napoli 2006. nrs. 2.1-2.5.

When someone who received a mortgage [on the same things] before you, sold the mortgaged things, the right to claim it [with the actio Serviana] does not remain for you.

1. When the debtor gave the same mortgaged things as a substituted performance or sold them to the first creditor, you are no more deprived of the right to claim them than if the debtor would have sold the said things to third persons. If you claim however the mortgaged things [from the person who was the first mortgage creditor], you will [only] be heard [by the judge], if you offer to the mentioned possessor what is due to him on the basis of the force of the preceding contract.

Promulgated on the 11th of May [230] under the consulate of Agricola and Clemens.

2. 2. As is always necessary when one starts the interpretation of a rescript, one has to reconstruct the legal situation as presented by the petitioner, the person to whom the author of the rescript addresses himself, and the role of the addressee.

We start with the second problem. Who was this Athenion, the person for whom our rescript was intended? From the beginning of the text it is clear that he, the person who was called *tu* in the rescript, is the second mortgage creditor. This was seen already by Accursius who wrote in his gloss to the word *tibi* in § 1: *secundo creditori*.

In most rescripts only one case is examined by the imperial chancery. A complication of the studied rescript is that two cases are discussed, *viz*, two cases of sale of mortgaged things. The case dealt with in the *principium* of C.8.19.1 is that in which the first mortgage creditor sold the mortgaged things to someone, the buyer B. The case discussed in § 1 is that in which the debtor (D) sold these things to the first mortgage creditor (C1). For the two cases a reply is given to the question: what were the legal consequences of these sales for the second mortgage creditor Athenion (C2). This double reply was necessary, either because the petitioner Athenion had not worded his petition in a clear way, or because he only knew that the mortgaged things had been sold, but he did not know by whom. If such was the case, it is understandable that Athenion wanted to be informed about his legal position in the two mentioned situations.

2. 3. In the *principium* of the text the secretary for petitions writes briefly that in the case in which C1 *vendidit*, that means here as often „sold and delivered“¹⁹ the mortgaged things, these are (I add: consequently) freed from

¹⁹ E. Levy, *Verkauf und Übereignung*, in *Iura* 14 (1963), pp. 1-28 showed convincingly that the word *vendere* often includes in the legal sources the real element and means „to sell and to

the right of *pignus* and the second creditor is no more entitled to institute the *actio Serviana* against the buyer²⁰. This decision is conform to Marcian D.20.4.12.7 and to several later imperial constitutions from the third century A.D.²¹. The only thing (not mentioned by the rescript) that Athenion (C2) could do was to start a lawsuit against C1 and to claim from him²² a possible *superfluum* with a personal *actio Serviana* adapted to this case²³.

2. 4. The most difficult case for which the *a libellis* had to give to Athenion (C2) information about his legal position is discussed in § 1 of our rescript. It is the following: the debtor D gives the mortgaged things *in solutum*, as a substituted performance, or he sells them and transfers their ownership²⁴ to C1. In late classical law the consequence of a *datio in solutum* to the creditor was the extinction of the debt *ipso iure*²⁵. In the case of a sale by D followed by the transfer of ownership of the mortgaged things to C1, the latter did not pay, but the parties agreed on the compensation of the price due by C1 with D's debt to him. This produced too the extinction of this debt. In these two cases the acquisition of ownership of the mortgaged things by the creditor has the consequence of the extinction of the latter's right of *pignus* by merger (*confusio*)²⁶. The rule that one cannot have a right of pledge (*pignus*) on his own thing (*pignus rei suae consistere non potest*) and that a pledge creditor who acquires ownership of the pledged thing loses his pledge as a result of merger (*confusio*) is clearly formulated in texts by Julian (D. 13.7.29), Paul (D.

transfer ownership". In our text the objects of the sale were probably pieces of provincial land; C1 had transferred the provincial ownership of these *fundi* by the transmission of the possession.

²⁰ After the sale and the transfer of the ownership of the mortgaged things by C1 the second creditor also lost the *ius offerendi* that he had before vis-à-vis C1; see M. Kaser, *Über mehrfache Verpfändung im römischen Recht*, in *Studi Grosso*, I, Torino 1968 = Kaser, *Ausgewählte Schriften*, II, Napoli 1976 (hereafter: *Über mehrfache Verpfändung*), p. 54 = p. 186, n. 88 with texts.

²¹ See Valerianus and Gallienus C. 8.17.6 (of 260) and Diocletianus and Maximianus C. 4.10.6 and C. 4.10.7.1 (both of 293) and C. 8.29.5 (of 294).

²² It is interesting to note that in this case the mortgage creditor (C2) brings an action based on an already extinguished right of pledge. See for another case Paul. D. 44.2.30.1. We will see that in our rescript an exception is given to C1 based on a pledge extinguished by merger.

²³ Kaser, *Über mehrfache Verpfändung*, pp. 71-76 = pp. 214-218 made plausible that such an action was at the disposal of the second mortgage creditor.

²⁴ See on this frequent meaning of *vendere*, *supra*, note 19.

²⁵ This was the opinion of the Sabinians that was at the end of the classical period generally accepted; cf. Kaser, *RPR*, I, p. 638.

²⁶ This extinction could also be based on the extinction of the debt for which the mortgage had been created and to which it was accessory.

44.2.30,1) and Ulpian (D. 50.17.45 pr.). The same holds true in actual European legal systems²⁷.

To make the effect on Athenion's (C2's) right of the sale of the mortgaged things by the debtor to the first mortgage creditor²⁸ more understandable, the author of the rescript compares this more complicated case with the easier case of the sale and transfer of the ownership of the mortgaged things by D to a third person (B). In this case, as in that of the sale to C1, the second creditor Athenion conserves the *actio Serviana*; in both cases he can claim by means of this action the sold mortgaged things.

The most complicated of these two cases is the one presented to the imperial chancery by Athenion, in which C1's right of *pignus* was extinguished by merger at the moment on which he acquired ownership of the *res pignorate*. The jurist who formulated the rescript stresses that as to C2's right to bring the *actio Serviana* there is no difference between the case of sale by D to a buyer B and that of sale by D to C1. In both cases he can institute this action. This is not surprising in view of the real character of the *actio Serviana*. What is the striking element in the rescript's legal decision is the fact that the judge will only have to condemn C1 with the effect of the surrender of the mortgaged things, if Athenion (C2) pays to him the sum of his (C1's) claim against D. According to a strict dogmatically reasoning Athenion (C2) acquired, as a result of the extinction of the right of *pignus* of C1, the position of first mortgage creditor. That would have had the result that he (Athenion) could claim without paying him anything the mortgaged things from the owner who lost his right of pledge by merger. This effect would have been absurd, because in this way C1 who acquired the most englobing private right, *viz.* ownership, would now be in a worse position towards Athenion than he was before²⁹. As long as he was first mortgage creditor, he could claim from the second mortgage creditor Athenion payment of D's debt before he had to give up to him the mortgaged things. According to strict law he had lost this right as a result of the *confusio*. The jurist who formulated the rescript prefers a solution that is more in conformity with justice. He gives to the defendant C1 an exception, the *exceptio rei sibi*

²⁷ I quote as an example § 1256, Abschnitt 1 of the German BGB: „Das Pfandrecht erlischt wenn es mit dem Eigentum in derselben Person zusammentrifft“. See also Art.3:81, para 2 under *e* of the Dutch Burgerlijk Wetboek according to which „limited rights“, to which pledge and mortgage belong, extinguish by merger.

²⁸ For reasons of clarity I concentrate my exposé on the case of the sale of the mortgaged things by D to C1 and I leave that of the *datio in solutum* aside.

²⁹ This is clearly exposed by M. Zimmermann, 2001, p. 34.

*ante pignoratæ*³⁰, or the *exceptio doli*, that he can oppose to Athenion's *actio Serviana*. As a result of one of these exceptions the judge cannot condemn C1, if Athenion did not pay to him the sum owed to him by D. In this way C1 is not towards Athenion in a worse position after having become owner of the things of which he had been first mortgage creditor. And for Athenion (C2) there was not much difference between the case in which he brings the *actio Serviana* against B and that in which he institutes this action against C1: in the first case he can be forced by the first mortgage creditor (C1) to pay to him (C1) the sum owed to C1 by D; in the second case he will only have success, if he pays to C1 the amount of the latter's claim.

We consequently can agree with Honoré's positive judgment about the legal qualities of the redactor of C. 8.19.1³¹. In a text of his *quaestiones* written some years earlier by Paul³² this jurist gave an *actio Serviana* to the first mortgage creditor, whose right of pledge was extinguished by merger, against the second mortgage creditor who was in possession of the mortgaged thing³³. The redactor of our rescript comes in C. 8.19.1.1 to a comparable result giving to the first *creditor pignericus* an exception based on a right of *pignus* extinguished by merger. Both jurists gave consequences to a right of pledge extinguished by *confusio*. Kaser and M.Zimmermann speak here with a well chosen term of „Nachwirkungen“ of the right of pledge³⁴.

The mentioned text of Paul and § 1 of our rescript are at the origin of the second „Absatz“ of § 1256 of the German Civil code (BGB). Contrary to the normal rule of the first „Absatz“ of this § according to which the acquisition of ownership by the pledge creditor produces the extinction of his right of pledge by confusion, the second „Absatz“ lays down: „Das Pfandrecht gilt als nicht erloschen, soweit der Eigentümer ein rechtliches Interesse an dem Fortleben des Pfandrechts hat“ (The right of pledge is considered as not to be extinguished, in so far as the owner has a legal interest in the continuation of the right of pledge).

The interpretation of the rescript of C. 8.19.1 was an intellectual pleasure. As often, it turns out to be also useful for a better understanding of a modern legal provision.

³⁰ H. Siber, *Röm. Recht*, II, p. 128 and M. Zimmermann, 2001, p. 12 suppose also that C1 could oppose this exception.

³¹ See *supra*, note 17.

³² See on the dating of Paul's *quaestiones*, J. Schmidt-Otto, *Pauli Quaestiones*, p. 15.

³³ See D. 44.2.30.1 studied by me in contributions to two recent „Festschriften“; see *supra*, note 8.

³⁴ Kaser, *RPR*, I, p. 469 and M. Zimmermann, 2001, p. 32, note 63.