



GERHARD THÜR

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gerhard.thuer@oeaw.ac.at

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Fictitious Loans and *Novatio*:
IG VII 3172, UPZ II 190, and C.Pap.Jud. I 24 Reconsidered
Gerhard Thür

I. The most famous example of a fictitious loan comes from outside Egypt. It is preserved on a stone inscription, *IG VII 3172*, from Orchomenos in Boeotia, 223 BC, discussed since Ludwig Mitteis.¹ Nikareta of Thespieae gave a loan of 18,833 drachmae to four representatives of the *polis* Orchomenos. The loan, without interest, was to be repaid only one month later. The loan *sungraphē* is part of a large dossier of eight documents from the same financial transaction, so we definitely know the amount was never paid down; the loan was fictitious. Seven documents of the dossier are written in Boeotian dialect, only the loan *sungraphē* is in Attic *koinē*. Its wording follows exactly the formula used in the papyri and gives a good impression of the widespread standard in this matter all over the Greek world. Better than any evidence from the papyri the dossier reveals the background of a fictitious loan. Here I can give only a short outline of the eight epigraphical documents in their reconstructed chronological order.² My point will be to show the fictitious character of the loan and the juristic consequences of the loan *sungraphē*: did it replace a former loan deed by renewal, technically *novatio*, or not?

¹ Mitteis 1891, 469–475; Text s. Bogaert 1976, 75–83 (n. 43), Migeotte 1984, 43–69 (n. 13) with commentary and rich bibliography: add Rupprecht 1967, 125 sq.

² Documents I–VII (on the stone) in chronological order:

(Not on the stone) *sungraphē* of a loan, amount unknown, given by Nikareta (N.) or her father Thion to the polis Orchomenos (O.).

1) IV ll. 61–75: 5 *huperameriai* (1.55/56 *empraxis* = Att. *eispraxis*), charges filed by N. against the polis O. at Thespieae: 10,055 dr. 2ob. / 2,500 dr. / 4,000 dr. / 1,000 dr. / 5th amount left out; different years, all before 223 BC. Total amount after compromise (*sunchōrēsis*, l. 174) 18,833 dr.

2) VII ll. 123–169: *homologa*, Thespieae(?), 223 BC, 9th month. Agreement between N. and the polis O. (represented by the 3 *polemarkhoi* of the year) about payment of the *huperameriai* in the 12th (13th) month; a *sungraphos* is to be written and deposited; consequences of payment, non-payment, and non-acceptance of the amount. 7 witnesses, depositary included.

3) VI ll. 78–122: *sungraphē* (in Attic *koinē*), place and date as 2/VII. N. gives a loan of 18,833 dr. to 4 Orchomenians (the 3 *polemarkhoi* and the *tamias*), 10 guarantors, due in the 10th month; *praxis* and *kuria* clauses. 7 witnesses, depositary included.

4) III ll. 40–60: decree of the Orchomenians, 11th month, 4th day, in presence of N. Repayment of the 18,833 dr. in the 11th month after a special tax (*enphora* = Att. *eisphora*). The *empraxis* (1/IV) are to be cancelled, the *sungrapha* (3/VI) is to be handed over.

5) VIII ll. 169–178: *diagrapha* at a bank in Thespieae, 13th month, 11th day. According to the *sunchōrēsis* the *tamias* of O. credits the 18,833 dr. to the account of N.

6) II ll. 8–40. Decree of the Orchomenians 13th month, 26th day. Since the case is settled the documents II–VIII are to be published on stone.

7) V ll. 75–77: name of the scribe in Thespieae who cancelled the *huperameriai*.

8) I ll. 1–7: title of the inscription.

Most strikingly, the previous loan given by Nikareta – or perhaps even by her father Thion – to the Orchomenians is not documented on the stone. From l. 45 we know that a previous *daneion* did exist. Now I will follow the chronological order.

1) The documentation starts with five *huperameriai* (delays, overdues; document no. 1). I think these are claims for repayment filed by Nikareta against one of the Orchomenian guarantors or magistrates. The claims were registered in Thespieae, Nikareta's domicile. A trial, probably scheduled in a neutral Boeotian *polis*, had not yet taken place. The total of 18,833 drachmae, often mentioned in the dossier, seems to be the result of a compromise made after the last claim was filed in Thespieae. My argument is that the Orchomenians "persuaded" Nikareta to accept the amount (doc. 2/VII l. 135, 4/III ll. 15–16). In doc. 5/VIII (ll. 174–175) the word *sunchōreisthai* is used; the term *sunchōrēsis* for a compromise at court and later for a type of document is very well known from the papyri. Furthermore, Nikareta had to pay a fine when she was not ready to accept the sum she had agreed to (doc. 2/VII). Because of the compromise, I think, the figure in the fifth claim was left out on purpose. When the inscription was engraved, the original amount of the five claims was no more of interest, so it is not correct to restore the figure in l. 75, either in text or in mind.³

All the following documents date from the year 223 BC. In the following I will only mention the numbers of the Boeotian months of this year.

2) No. 2, issued in the 9th month, most probably in Thespieae, is a *homologa* (agreement) between Nikareta and the three *polemarkhoi* of Orchomenos about repayment of the 18,833 drachmae, to take place in the 13th month (a leap month), at the latest. A deed (*sungraphos*) of loan is to be drawn up and to be deposited with a guardian. After payment Nikareta will have to cancel her claims and the guardian will have to hand over the deed to the Orchomenians. If they fail payment, they have to pay the sums both of the *sungraphos* and of the claims, so the sanction is a *duplum*. Surprisingly, a third possibility is foreseen: if Nikareta is not ready to accept the money (the *simplum* of 18,833 drachmae), still the guardian will hand over the deed, and her claims will be invalid (*akuron*). Additionally, she will have to pay an exorbitant fine (*prosapoteisatō*) of 50,000 drachmae to the Orchomenians (l. 164).

This agreement settles the issue in a most perfect way. The first two possibilities do not create any liability based on the *homologa* itself. The agreement simply confirms or cancels documents already existing or soon forthcoming, so that they will have or will not have their validity in a future lawsuit. This is in accordance with the theory that homology by itself never creates liabilities, but rather modifies procedural positions.⁴ Only in the third case the penalty clause inflicting 50,000 drachmae creates a new liability, strangely by not accepting substance, but rather by refusing it. Since no *praxis* clause is added, I think nobody has taken the fine very seriously; canceling the deed and the claims was what the Orchomenian magistrates really wanted. The exorbitant fine could have been a good political argument for the magistrates at the people's assembly in Orchomenos to get the deal ratified.

3) Immediately after the *homologa* and in accordance to it, probably on the same day in the 9th month and at the same place, in Thespieae, the deed of loan, no. 3, was enacted. It has the usual form of a six witnesses *sungraphē* deposited with a guardian, *sungraphophulax*. In protocol style it declares that

³ Discussed by Migeotte 1984, 63.

⁴ Wolff 1957, 63 sq.; Thür 1977, 152–158.

Nikareta has given a loan of 18,833 drachmae to four Orchomenians – their official functions are not mentioned – and to ten guarantors, all of them being liable to repay. Payment is stipulated for the coming 10th month (the *homologa* is worded "the 13th month at the latest"). *Praxis* and *kuria* clauses follow; the *homologa*, document no. 2, already contains the penalty clause.

From the three documents discussed until now it is evident that the plaintiff Nikareta in her situation did not pay down the amount to the defendants. The payment was fictitious. In a lawsuit liability of the Orchomenian debtors was given by the valid loan *sungraphē: edaneisen* (fictitiously) ... *apodotōsan* (in reality), not by a homology, in which the Orchomenians had acknowledged to have received Nikareta's money. Wolff held that in the papyri a homology had such an effect, but Rupprecht's reproach seems to be confirmed by the epigraphic evidence.⁵ One purpose of the transaction was to make responsible the actual magistrates and a new group of guarantors. In addition, the *sungraphē* was necessary for exacting the *duplum* penalty if the Orchomenians would not perform voluntarily. To the question of novation I will come later.

4) Document no. 4: On the 4th day of the 11th month – meanwhile the term set by the *sungraphē* had passed – the people's assembly in Orchomenos decided to repay the amount Nikareta had agreed to. Her claims and the *sungrapha* are to be cancelled, apparently with the consent of Nikareta, who was present at the assembly.

5) Document no. 5: finally, according to the compromise (*sunchōrēsis*) about the claims, payment of the 18,833 drachmae is made to Nikareta's bank account in Thespieae by *diagrapta* on the 11th day of month 13. The date is in accordance with the *homologa*, but not with the *sungraphos*.

6–8) The rest is pure bureaucracy: on the 26th day of month 13 (no. 6) the people's assembly of Orchomenos decided all transactions were executed properly. No. 7 certifies that the claims in Thespieae are cancelled, no. 8 is the title of the whole dossier on top of the inscription.

In sum, the fictitious character of the loan is evident. The second question was: did the loan documented in the inscription renew the former loan that gave reason for Nikareta's five claims against the Orchomenians? The answer is no. The fictitious loan did not replace the former real one, but rather the *sunchōrēsis*, the compromise between Nikareta and the Orchomenians did this. The argument is the penalty clause in the *homologa* (doc. 2). If the Orchomenians had failed to pay in time, Nikareta would have been able to use the still valid *hyperameriai*, but only up to the amount of the compromise (ll. 155–156, 158–159). More exactly, the compromise did not renew the former, real loan, but rather modified it. Now, the original document was valid only up to 18,833 drachmae. Herewith the penalty clause in the original loan was invalid. To secure the compromise a new document was necessary. That was the reason for drawing up the fictitious loan deed. With this Nikareta could enforce exactly the *duplum* of the 18,833 drachmae as penalty.

Technically in the Nikareta case one cannot speak of novation. In classical Roman law the new obligation out of a novation *stipulatio* completely substitutes for the former one.⁶ In spite of the agreements between Nikareta and the Orchomenians all former documents kept their validity. Only when the debtors really had performed their duties were the former documents cancelled or handed over to them. Going on

⁵ Rupprecht 1967, 134 against Wolff 1957, 37.

⁶ Zimmermann 1990, 634 sq.

to the papyri now, we have to keep in mind how carefully in settling financial affairs the balance between debtors and creditor was observed by drawing up several documents.

II. It is not easy to find fictitious loans in papyrus documents. Many simple loans might be fictitious ones. Instead of paying the price in cash – to become owners of the goods – some buyers declare they have accepted a loan from the vendors. In these – fictitious – loan documents there is no need to mention the sales; nevertheless, sometimes they were mentioned. Indirectly we can find some more fictitious loans in petitions when debtors complain about fraud or about usury by capitalizing unlawful interest.⁷

From a legal point of view direct references to previous valid documents to be renewed by present loan deeds are of utmost interest. For that papyri use the clause *touto d' estin* dealt with by Rupprecht in a whole chapter of his book on loans.⁸ Generally I agree with him, but some doubts remain. Correctly he holds that on trial a valid loan document, or one of a fictitious loan, constituted irrefutable proof. But what happened when the creditor had two valid documents, one of a real loan and one fictitious, for the same claim? Did the *touto d' estin* clause alone really save the debtor from getting condemned twice, as Rupprecht thinks?⁹ Again we are confronted with the problem of novation.

1) The *touto* clause is double-faced. Depending on context it can mean "notwithstanding" other debts on the one side or it can have a "privative" sense on the other: the present amount is replacing the former one. From this uncertainty, I think, the clause alone is no relief to the debtor. As in the Nikareta case an additional agreement seems to be necessary. I see a third document, again a homology, in *UPZ II 190* (Thebais, 98 BC): Date. Harsiesis, son of Horus, gives a loan of 22½ artabae of grain to Asklepias, daughter of Panas, without interest, to be repaid in the next month. Penalty clause: the *hēmiolion* of the market price; *praxis* clause; detailed *touto* clause (ll. 16–20): "This is the loan that she had agreed again (*anōmologēsato*, l. 17) to have gotten from him instead of the 14 artabae of grain that her above mentioned father Panas had owed to Harsiesis' father Horus according to an Egyptian *sumbolaion*."¹⁰

Rupprecht does not make up his mind whether *anōmologēsato* refers to the present loan deed or to an additional document.¹¹ I think the case is very similar to Nikareta's. A grant of a short delay and, probably, a compromise is secured by a fictitious loan deed. The amount seems to have been fixed in an additional homology, because we do not know how the parties came to the odd figure of 22½ artabae (the *hēmiolion* from 14 artabae makes only 21). In this homology there must also have been an agreement how both the Egyptian *sumbolaion* and the new *sungraphē* are to be handled. Only with such a document in her hands can Asklepias be sure that the creditor will not sue her from the old document, probably with much higher penalty. Evidently, the *touto* clause is useless for Asklepias because the new document is in the hands of her creditor. Only after performing her duties from the new document will

⁷ Pringsheim 1950, 253 sq., 265; Wolff 1957, 30; Kühnert 1965, 28–30.

⁸ Rupprecht 1967, 118–147.

⁹ Rupprecht 1967, 145.

¹⁰ *UPZ II 190.16–20*: ... Τοῦτο δ' ἐστὶν | τὸ δάνειον ὃ ἀνωμολογήσατο ἔχειν παρ' αὐτοῦ | ἀνθ' ὧν
προ<σ>ώφειλεν ὁ προγεγραμμένος αὐτῆι | πατὴρ Πανᾶς τῶι τοῦ Ἀρσιήσιος πατρὶ ὤρος (sic) κατὰ | συμβόλαιον
Αἰγύπτιον (πυροῦ) (άρταβῶν) ἰδ.

¹¹ Rupprecht 1967, 123.

her situation become better: when the creditor, Harsiesis, has handed over the document to her she will be protected also by the *touto* clause. For Harsiesis will give his receipt only for the second loan deed of 22½ artabae, not for the Egyptian one of 14. With the receipt and either deed, at least with that of 22½, in her hands Asklepias will be absolutely safe. Then, the homology had become unnecessary and the *touto* clause alone will connect the sole receipt with the two loan deeds written out for one and the same business.

2) Similar to the Asklepias case is *C.Pap.Jud.* I 24 (*P.Tebt.* III 818; Trikomia, Fayum, 174 BC). The fictitious loan of 2 talents 500 drachmae runs over seven months; the *touto* clause is worded (ll. 15–20): "This is the *daneion* which Agathokles still owed to Judas out of the five talents which he had received from Judas as an advance towards a retail(?) trade business in partnership according to a *sungraphē homologias*, of which Ananias ... is guardian."¹² Agathokles received capital of five talents from Judas for a business in partnership. Most probably a deed of partnership was drawn up, which Rupprecht incorrectly equates with the homology.¹³ In fact they drew up the *homologia* in the form of a *syngraphē* only after they had settled accounts fixing a debit of 2 talents 500 drachmae for Agathokles. According to that homology the fictitious loan document was issued. Again we have three, not only two steps: a deed of partnership, a homology (this time not for compromise, rather from a balance), and a fictitious loan securing the debit. After paying his debt of 2 talents 500 drachmae Agathokles will get a receipt for this amount and the loan document will be returned to him. By the *touto* clause within this document he will be protected against any claim out of the five talents' advance, too.

In my preliminary research – I must confess – I did not find any more *touto d' estin* clauses referring to third documents, especially to *homologiai*. I also did not find an example of such a *homologia* as in the Nikareta inscription. No wonder, a homology about the terms of settling the case was of only temporary value and for the debtor it may not have been preserved. For the creditor it was of no value at all, so there is no need for it to be mentioned in the loan deed, the instrument in his hands. When the debtor duly had performed his safeguard the receipt and the loan deed were returned to him. When not, the creditor might have the choice out of which title he would enforce either out of the original or of the new one.

So I come to the conclusion that there was no *novatio* in a technical sense in the papyri. By means of drafting fictitious loan deeds debts were not renewed by agreement, rather by performance under new terms.

III. In discussing *novatio*, it would be out of place here to discuss Latin documents and Roman juristic literature. I can only mention a fictitious loan in the *tabulae Pompeianae Sulpiciorum* (no. 78, the Menelaos case) and two texts in Justinian's digests with *pro mutuo* (Ulp. 32 ed. D. 19, 2, 15, 6 and Scaev. 16 dig. D. 32, 34, 3).¹⁴ Instead of using *stipulatio* deeds Roman practice sometimes also drew up documents about loans never paid down.

¹² *C.Pap.Jud.* I 24.15–20: ... Τοῦτο δ' ἐστὶ τὸ δάνειον ὃ προσωφείλησεν Ἀγαθοκλῆς Ἰούδα<ι> | ἀπὸ τῶν πέντε τάλαντων ὧν εἰλήφη παρὰ τοῦ Ἰούδου εἰς προβολὴν κοινῆς ἐργασίας μεταβολικῆς κατὰ συγγραφὴν ὁμο|λογίας ἐφ' ἧς συγγραφοφύλαξ Ἀνανίας Ἰωνάθου Ἰουδαῖος | τῆς ἐπιγονῆς.

¹³ Rupprecht 1967, 121.

¹⁴ Jakab 2000; see also Thür 1994.

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