



THE POSTAL SERVICE AND THE BREACH OF MAIL CONFIDENTIALITY

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ABSTRACT: This article concerns the way of transferring letters used by the Romans, their ideas on mail confidentiality as well as legal possibilities in case of an infringement of such confidentiality in (classical) Roman law. Today we use the concept of mail confidentiality (by means of a basic right in the constitution) as a mechanism to protect one's privacy. No concept of the privacy of letters as we know it today existed in (classical) Roman law. However, in studying classical Roman law texts as well as texts describing the Roman practice of letter transfers, we can see that other ways to protect correspondence confidentiality existed. There appeared to have been protection against various kinds of damage, namely by destroying, stealing or falsifying letters and/or the unauthorized disclosure of the contents of a (private) letter and/or an official document, not only by the Romans themselves by factual means, but also legally by the possibility of private law actions and actions with a criminal and/or penal character.

KEY WORDS: Mail confidentiality, Postal service, Letters, Roman law, Roman antiquity.

RIASSUNTO: L'articolo riguarda le modalità di trasmissione delle lettere utilizzate dai Romani, il punto di vista degli stessi sulla segretezza della corrispondenza nonché gli strumenti di tutela offerti dal diritto romano (classico) in caso di violazione del segreto epistolare. Oggi utilizziamo il concetto di segretezza della corrispondenza (oggetto di tutela costituzionale in quanto diritto fondamentale) come meccanismo di protezione della privacy. Nel diritto romano (classico) non esisteva alcun concetto di riservatezza della corrispondenza come lo conosciamo oggi. Tuttavia, dallo studio dei testi di diritto romano classico e delle opere che descrivono le prassi romane in materia di trasmissione delle lettere, emerge che esistevano altri strumenti per la tutela della segretezza della corrispondenza. Pare, in particolare, che diversi tipi di danno, quali i casi di distruzione, furto, o falsificazione delle lettere e/o la divulgazione non autorizzata del contenuto della corrispondenza privata e dei documenti ufficiali, fossero tutelati dai Romani non solo nei fatti, ma anche giuridicamente, mediante la possibilità di azioni sia di diritto civile sia di carattere penale.

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Parole chiave: Segretezza della corrispondenza, Servizio postale, Lettere, Diritto romano, Antichità romana.

1. Introduction

According to Article 13 (1) of the Constitution of the Kingdom of the Netherlands (*Grondwet voor het Koninkrijk der Nederlanden*), the privacy of correspondence shall not be violated except in cases provided by statute, by order of a judge.¹ The inviolability of the secrecy of mail correspondence does not only mean that letters may only be opened under certain conditions, but also that their content may not be communicated to others.² The privacy of correspondence concerns the remote communication of an individual, entrusted to the care of a third party for shipping and delivery to the recipient without thereby abandoning the private nature of the message.³ All transportation means for information, so also for mail communication, have in common that whatever the safeguard, they cannot completely protect against people who deliberately want to take note of messages not intended for them. Due to this lack of protection for the privacy of information, legal norms had to be provided.⁴

The historiography of mail traffic shows that in places where governments conceived the postal service as a state task, a process that started in Europe in the mid-15th century, the same governments almost simultaneously started to open letters entrusted to them and investigated their content.⁵ It is, however,

¹ At this moment in time the article contains protection for the confidentiality of letter, telephone and telegram traffic but, after the current procedure for a constitutional amendment will be completed, it will be replaced by a new article, including constitutional protection for all forms of communication, including electronic communication. See *Kamerstukken II*, 2013/2014, 33989.

² The protection provided by Article 13 (1) is further elaborated upon by a number of provisions contained in the Criminal Code (*Wetboek van Strafrecht*); see on this topic and on Article 13 in general, amongst others, Paul A. M. Mevis & Tom Blom, «Artikel 13», in: Alis K. Koekkoek (ed.), *De Grondwet. Een systematisch en artikelsgewijs commentaar*, 3rd ed., Deventer, 2000, esp. p. 192.

³ Lodewijk F. Asscher & Egbert J. Dommering, «Hoofdstuk 4. Artikel 13 Grondwet», in: Egbert Dommering *et al.*, *Informatierecht: fundamentele rechten voor de informatiesamenleving*, Amsterdam, 2000, p. 71.

⁴ Lodewijk Asscher, *Constitutionele convergentie van pers, omroep en telecommunicatie*, Deventer, 1999, p. 65. See also, for protection on a European level, article 8 of the European Convention on Human Rights, where the right to respect for one's (private) correspondence is included.

⁵ See Paulus A. van den Velden, *Academisch proefschrift over het geheim der brieven, aan de geschiedenis en aan de beginselen van staats- en strafrecht getoetst* (diss. Utrecht), The Hague 1859, p. 17; Heim, 'Das Briefgeheimniss', *Archiv für Post und Telegraphie. Beiheft zum Amtsblatte des Reichs-Postamts. Ergänzungsheft*, 24 (1900), p. 966; Marius B. van Meerten, 'Het brief-, telegraaf- en telefoongeheim', *Intermediair* 23 July 1976, p. 23; Johannes A. Hofman, 'Nieuwe uitdagingen voor het briefgeheim', *Tijdschrift voor openbaar bestuur*, 14 (1988), p. 382; Johannes A. Hofman, *Vertrouwelijke communicatie. Een rechtsvergelijkende studie over de geheimhouding van communicatie in grondrechtelijk perspectief naar internationaal, Nederlands en Duits recht*, Zwolle, 1995, p. 24; Asscher, *Constitutionele convergentie van pers, omroep en telecommunicatie*, p. 65. See also, more elaborately, also on the later developments after the 15th century, H. J. Lettink, *De ontwikkelings-geschiedenis der Nederlandsche posterijen*, Breda, 1888, p. 52ff., Jacobus A. Th. Duijnste, *Schending van het brieven- en telegrammengeheim door post- en telegraafbeambten* (diss. Leiden), 's-Gravenhage, 1891, p. 8ff. and Cornelis J. Beelenkamp, 'Over het briefgeheim', in: *Jaarboekje der Posterijen en Telegrafie*, Watersgraafmeer, 1902, p. VIIIff.

unlikely that the concept of mail confidentiality only originated from that period. On the contrary, a certain understanding of mail confidentiality was already present in an earlier period when, next to the oral transfer of information, written communication started to be used.⁶ Furthermore, postal interception and, more in general, infringements of post secrecy is a matter for all times. Although due to the form in which letters were written in Roman Antiquity infringements of mail confidentiality were easily accomplished, various provisions in Roman law show that a violation of correspondence was punished.⁷ Although it has frequently been stated in secondary literature that Roman law – and in later times also canon law – provided protection of correspondence confidentiality,⁸ the exact basis of these claims is unclear.

This article does not depart from the normative legal concept of mail confidentiality as such, but from the perspective of a functional problem. How was the problem of the protection of ‘mail confidentiality’ actually solved in Roman Antiquity, in particular around the turn of the Republic to the Principate? The structure of this article is as follows. Firstly, I will explain how the Roman way of correspondence by means of letters worked. Secondly, I will explain for which reasons the privacy of correspondence was often violated in (Roman) Antiquity, and subsequently, after going into the possible forms of contract to transfer letters and some remarks about the ownership of letters, it will deal with the various ways the Romans tried to solve this problem of violations of the privacy of correspondence. Finally, a conclusion will be presented of the way correspondence confidentiality was protected in Roman law.

2. *Correspondence in Roman Antiquity*

2.1. *The Roman postal service*

All communications have in common a sender, who transmits information, an addressee, who receives information, a particular content of information and the means by which information is transferred and, if this was performed by a carrier, a third person who has carried the information. In the case of the use of letters as a way of transferring information, one has to bear in mind that because of that characteristic the nature of a letter is special. It is different from most other objects in the sense that per definition it is destined to be transferred to another person, namely the addressee. Furthermore, it is also special because normally it is not the writer but someone else who hands over the letter to the receiver (as is still done today). In the following, the Roman interpretation of the elements of means of transport and the person of the carrier will now be looked at more closely.⁹

As regards the means to communicate at a (long) distance, the Romans usually wrote letters on tablets (*tabulae*), which were thin slips of wood or other material, usually of an oblong shape and covered with a coloured wax layer.

⁶ See Heim, ‘Das Briefgeheimniss’, p. 965.

⁷ Beelenkamp, «Over het briefgeheim», p. VII. See also Duijnste, *Schending van het brieven- en telegramgeheim door post- en telegraafbeambten*, p. 6, describing provisions about the privacy of mail correspondence in (later) feudal law and canon law; see the last reference on p. 7. See also Van den Velden, *Academisch proefschrift over het geheim der brieven*, p. 2.

⁸ See e.g. Asscher, *Constitutionele convergentie van pers, omroep en telecommunicatie*, p. 65.

⁹ In section 3, the legal qualification and aspects regarding these elements will be dealt with.

Letter marks left by the *stilus* where white.¹⁰ The address on letters was quite simple, it usually just read: 'To A from B'. Nothing more was needed since the person who delivered the letters would go to the house he was instructed to go to.¹¹ Later on parchment and papyrus scrolls came into use, usually tied with straps or cords and locked by seals.

As regards the persons who transferred letters in Roman Antiquity, one must state, first and foremost, that a central institution of postal services¹² was unknown until the end of the Roman Republic;¹³ private networks of messengers performed this function. First and foremost, an official's personal attendant or slave was used, all the more so in problematic times when a trusted letter-carrier was needed to ensure confidentiality.¹⁴ The magistrates in Rome however used *tabellarii* (tablet men), who were freedmen or slaves employed as couriers¹⁵ afterwards free persons might have been part of this class also.¹⁶ There were also *tabellarii* employed by *publicani* or tax collectors, whose letter-carriers also exercised the function of tax collectors.¹⁷ Provincial

¹⁰ William Smith, William Wayte & George E. Marindin (eds.), *A Dictionary of Greek and Roman Antiquities* (1890), s.v. *tabulae*. See also Joachim Marquardt, *Das Privatleben der Römer*, II, Leipzig, 1886 (reprint Darmstadt, 1964), p. 801; Arthur de Rothschild, *Histoire de la poste aux lettres et du timbre-poste depuis leurs origines jusqu'à nos jours*, Genève/Paris, 1984, p. 23. The tablets, of which the inner sides were covered with wax and the outer sides consisted of wood, were subsequently fastened together at the back by means of wires, leaving the waxed sides on the inside. Tablets containing important legal documents were pierced on the outer edges and through these holes a triple thread was passed and upon which a seal was placed on this thread. See Smith, Wayte & Marindin (eds.), *A Dictionary of Greek and Roman Antiquities*, s.v. *tabulae*. Seals of letters were made upon wax or a specially prepared clay (*cretula*). On sealing letters made upon wax, see e.g. Ovidius, *Amores*, II.15. An example of a clay seal can be found in Cicero, *In Verrem*, II.4.258.

¹¹ Lionel Casson, *Travel in the Ancient World*, London, Boston & Sydney, 1974/1979, p. 221.

¹² See for an elaborate discussion of the Roman postal service: Eugen Hartmann, *Entwicklungs-Geschichte der Posten von den ältesten Zeiten bis zur Gegenwart, mit besonderer Beziehung auf Deutschland*, Leipzig, 1868, p. 25-122; Ernst E. Hudemann, *Geschichte des römischen Postwesens während der Kaiserzeit*, Berlin, 1875; Ernst Kornemann, «Postwesen», *RE*, 22 (1953), col. 988-1014, and on the Roman postal service during the Roman Empire also Pascal Stoffel, *Über die Staatspost, die Ochsenespanne und die requirierten Ochsenespanne. Eine Darstellung des römischen Postwesens auf Grund der Gesetze des Codex Theodosianus und des Codex Iustinianus*, Bern, 1994.

¹³ Furthermore, there was no organised intelligence service to obtain information on developments among neighbouring peoples or plans of the enemy. In the early Republican period, the Romans relied on information given to them by their allies when it came to the movements of dangerous neighbouring peoples; see Francis Dvornik, *Origins of Intelligence Services. The Ancient Near East, Persia, Greece, Rome, Byzantium, the Arab Muslim Empires, the Mongol Empire, China, Muscovy*, New Brunswick, New Jersey, 1974, p. 53, and also p. 69, stating that envoys and messengers of the Senate used a system of requisitioning horses and other travelling necessities in cities they passed through which were Roman or belonged to their allies.

¹⁴ Rose M. Sheldon, *Intelligence Activities in Ancient Rome: Trust in the Gods but verify*, London/New York, 2005, p. 77. For letters carried by personal attendants see Cicero, *Ad Atticum*, V.4.1, letter carried by his secretary Tullius. For private letter-carrying by merchants, see Plautus, *Miles Gloriosus*, II.1.

¹⁵ See Livius, *Ab urbe condita*, XLV.1.6 mentioning a story from 168 BC in which a messenger (*tabellarius*) came to Macedonia carrying dispatches wreathed with laurel. On the meaning of *tabellarius* see also Helmut Schroff, «Tabellarius», *RE*, Bd. 4 A (1932), col. 1844-1847; Walter H. Gross, «Tabellarius», in: *Der Kleine Pauly*, ed. DTV, Bd. 5, Munich, 1979, col. 475f.

¹⁶ A. M. Ramsay, «A Roman Service under the Republic», *JRS*, 10 (1920), p. 80.

¹⁷ In Cicero, *Ad Atticum*, V.15.3, Cicero tells Atticus to have his letters forwarded by a tax gatherer's messengers (*tabellarii publicanorum*). See also Cicero, *Ad Atticum*, V.16.1 & V.21.4,

magistrates used special messengers called *statores* for the dispatch of official letters containing information for the Senate and for magistrates in Rome.¹⁸ Perhaps the letter-bearers wore some kind of uniform, with feathers in their hat as an identification with Hermes.¹⁹ A capable messenger could travel with considerable speed: the average distance covered by a private *tabellarius* could be as high as 37-47 miles per day.²⁰ However, there were never enough carriers to fulfil their needs and delays were inevitable. So whenever a courier became available, people had to dash off lines with high speed in order to use that courier.²¹

Only in the Roman Empire did a statutory regulation for postal services, by which the efficiency of the previous postmen was improved in many respects, come into being. It was Emperor Augustus who introduced a public postal service for the whole empire,²² designed specifically for governmental purposes.²³ Although these postal services are commonly known by the name

in which these tax farmers' couriers (*tabellarii publicanorum*) are also mentioned. For examples of private *tabellarii* carrying letters, see e.g. Cicero, *In Verrem*, III.183; Cicero, *Ad familiares*, XII.1; XIV.22; XV.17; Cicero, *Philippica*, II.77. A full list of places where the word *tabellarius* occurs in the letters of Cicero can be found in William A. Oldfather, Howard V. Canter & Kenneth M. Abbot, *Index verborum Ciceronis epistularum*, Urbana, 1938, p. 526f., s.v. *tabellarius*. On the *tabellarii* mentioned in Cicero's letters and used by Cicero to transfer letters, see also Hans-Peter Benöhr, «Der Brief. Korrespondenz, menschlich und rechtlich gesehen. Ciceros Briefe an Atticus und die Rechte an Briefen in Rom», *ZSS RA*, 115 (1998), p. 120f.

¹⁸ See also Bernard Kübler, «Statores», *RE*, III A, 2, 1929, cols. 2228-9; Dvornik, *Origins of Intelligence Services*, p. 72. See e.g. Cicero, *Ad familiares*, II.19.2 and II.17.1. About the Roman *viatores senatorii* and *statores* see Wilhelm H. Matthias, *Über Posten und Post-Regale mit Hinsicht auf Volksgeschichte, Statistik, Archäologie und Erdkunde*, I, Berlin et al., 1832, p. 46f.

¹⁹ Dvornik, *Origins of Intelligence Services*, p. 73. See Cicero, *Ad familiares*, XV.17.1.

²⁰ Sheldon, *Intelligence Activities in Ancient Rome*, p. 78; Dvornik, *Origins of Intelligence Services*, p. 73. According to Barbara Levick, *The Government of the Roman Empire. A Sourcebook*, London & Sydney, Helm 1985, p. 99f., the normal speed of couriers was about 50 Roman miles a day, as opposed to 20 miles per day by the army at marching speed. Travel over the open seas, feasible from 11th March to 10th November, went at a speed rate of 4-6 knots an hour, 2-2 ½ against the wind (3.7-11 km). Casson, *Travel in the Ancient World*, p. 188f., stated that the speed of 50 (Roman) miles per normal travelling day applied to government couriers, but that private voyagers moved more slowly: over normal terrain they walked at a rate of about fifteen to twenty miles a day, in a carriage some twenty-five to thirty miles a day. Forty, even forty-five was possible but that would have meant a long, hard and exhausting travelling day. On the speed of the Roman imperial post service see also A.M. Ramsay, «The Speed of the Roman Imperial Post», *JRS*, 15 (1925), p. 60-74; Hans-Georg Pflaum, «Essai sur le *cursus publicus* dans le Haut-Empire Romain», in: *Mémoires de l'Académie des Inscriptions et Belles-lettres*, XIV (1940), Paris, p. 381ff.

²¹ Casson, *Travel in the Ancient World*, p. 220. See Cicero, *Ad Quintum*, III.1.23, in which he wrote that he had had a letter in his hands for many days past because of the tarrying of the *tabellarii*; Cicero thus apparently had to wait many days for a courier before the letter could be sent.

²² Suetonius, *Augustus*, XLIX.3. See also Janus H. Cremer, *Disputatio historico-politica inauguralis de cursu publico, tam apud veteres, quam apud recentiores* (diss. Leiden), Amsterdam, 1837, p. 12f. An explanation of Augustus' reason for doing so can be found in Dvornik, *Origins of Intelligence Services*, p. 91f. According to Ramsay, «A Roman Service under the Republic», p. 79, the post had been set up by the Gracchi; it was then allowed to lapse, and was restored by Augustus.

²³ See also Dirk J. Wolterbeek, *Beschouwing over de wet op de brievenposterijen* (diss. Leiden), Amsterdam, 1860, p. 15. On the *cursus publicus*, see also elaborately Matthias, *Über Posten und Post-Regale*, p. 51ff.; Cremer, *Disputatio historico-politica inauguralis de cursu publico*, p. 9-36; Eugen Hartmann, *Entwicklungs-Geschichte der Posten von den ältesten Zeiten bis zur Gegenwart, mit besonderer Beziehung auf Deutschland*, Leipzig, 1868, p. 39-116; Otto

cursus publicus,²⁴ this term was not attested before the fourth century; the earlier term was *vehiculatio*. The original system of long distance messengers (called *iuvenes*) and its first century development is relatively unknown today but its developed form (the so-called *cursus publicus*) was one of the largest-scale administrative initiatives in Antiquity.²⁵ The courier system first used riders and later messengers travelling in carriages (*vehicula*)²⁶ to maintain rapid and accurate communication throughout the Roman Empire. The government communication network functioned through a system of local requisitioning of animals, vehicles, and provisions, called *vehiculatio*.²⁷ A distinction can be made between the *angariae*, the forced provision of vehicles and horses, and the *parangariae*, extra services, which together formed the *cursus publicus*.²⁸ At first the cost for *angariae* and *parangariae* had to be borne by the residents of the provinces but, later on, Emperor Nerva (r. 96-98) relieved Italy by transferring the cost of the *cursus publicus* (*vehiculatio*) to the imperial treasury. For the rest of the empire the costs (and abuses) of the system remained.²⁹

This regulation for the communication network was only applicable to rulers and (some) notable (public) servants.³⁰ Only people in possession of a post warrant (*diploma*),³¹ with an official seal³² granted by the emperor, or his authorized agent, were allowed to use the *cursus publicus*. Therefore, the

Seeck, «Cursus publicus», *RE*, 4 (1901), col. 1846-1863; S. Bellino, «Cursus publicus», *DE*, 2, 2 (1910), p. 1404-1425; Erik J. Holmberg, *Zur Geschichte der Cursus Publicus* (diss. Uppsala), Uppsala, 1933; Pflaum, «Essai sur le *cursus publicus* dans le Haut-Empire Romain», p. 189-390; Gustave Humbert, «Cursus publicus», in: Charles Daremberg & Edmond Saglio, *Dictionnaire des antiquités Grecques et Romaines*, I.2, ed. Graz, 1969 (reprint Paris, 1887), p. 1645-1672; Raymond Chevallier, *Roman Roads*, translated by N. H. Field, Berkeley and Los Angeles, 1976, p. 181ff.; Helmut Blender, *Römischer Reiseverkehr. Cursus publicus und Privatreisen*, Stuttgart, 1978; De Rothschild, *Histoire de la poste aux lettres*, p. 14ff.; Anne Kolb, «Cursus publicus», *Der neue Pauly*, 3, col. 245-246; Lucietta Di Paola, *Viaggi, trasporti e istituzioni. Studi sul cursus publicus*, Messina, 1999.

²⁴ See Stephen Mitchell, «Requisitioned Transport in the Roman Empire: A New Inscription from Pisidia», *JRS*, 1976, p. 112 and also already Arnold H. M. Jones, *The Roman Economy. Studies in Ancient Economic and Administrative History*, ed. Peter A. Brunt, Oxford, 1974, p. 180.

²⁵ Nicholas Purcell, «Postal service», in: Simon Hornblower & Antony Spawforth (eds.), *Oxford Classical Dictionary*, 3rd edn., Oxford, 2003, p. 1233f.

²⁶ Suetonius, *Augustus*, XLIX.3; De Rothschild, *Histoire de la poste aux lettres*, p. 27.

²⁷ Purcell, «Postal service», p. 1234. See also Mitchell, «Requisitioned Transport», p. 106-131.

²⁸ Lettink, *De ontwikkelings-geschiedenis der Nederlandsche posterijen*, p. 5. On the *angariae* see Otto Seeck, «Angaria», *RE*, 1 (1894), 2184-2185; Anne Kolb, «Angaria», *Der neue Pauly*, I, col. 699-700. On the *angariae* and *parangariae*, see also Cremer, *Disputatio historico-politica inauguralis de cursu publico*, Amstelodami, 1837, p. 14ff.; De Rothschild, *Histoire de la poste aux lettres*, p. 28. See title 51 of book 12 of the *Codex Justiniani* (*de cursu publico angariis et parangariis*), title which mainly originates from the *Codex Theodosianus*.

²⁹ Boris Rankov, «Postal service», in: *The Oxford Encyclopedia of Ancient Greece and Rome*, VI, p. 1. See also De Rothschild, *Histoire de la poste aux lettres*, p. 33, who stated that this exemption only concerned the costs for the *parangariae*.

³⁰ See Adriaan F. Bouricius, *De posten*, Arnhem, 1837, p. 14.

³¹ According to Mitchell, «Requisitioned Transport», p. 125, under the Principate, the emperors could issue their own diplomas both for transport and for other purposes – this right was not restricted to them (see Mitchell on p. 125f.). According to Mitchell, Suetonius, *Augustus*, 50 does not refer exclusively to diplomas for the postal or transport service. Cf. Seneca, *De Clementia*, I.10.3; Suetonius, *Gaius*, XXXVIII.1; *Nero*, XII.1.

³² For seals on diplomas see Plutarchus, *Galba*, VIII.4; Suetonius, *Augustus*, L (seals on diplomas, dispatches and private letters); in general see also, elaborately, on stamps, seals and sealing, Leopold Wenger, «Signum», *RE*, 11a, 1923, col. 2361-2448.

largest part of Roman society could not use the (advantages provided by the) *cursus publicus*. Just like everyone else during the Roman Republic for postal services they had to use their slaves, in these instances called *cursores* (couriers), or *tabelarii* (letter-carriers), or as an alternative their friends or acquaintances.³³

Already in the first century AD emperors began to use soldiers to carry official messages, *speculatores* (cavalrymen attached to the Praetorian cohorts who formed the imperial bodyguard).³⁴ Governors also used soldiers to carry messages, including their own bodyguards (*singulares*), staff officers (*beneficarii*) and military couriers (*frumentarii*) from early on in the Principate.³⁵ The *frumentarii* were disbanded by Emperor Diocletian (r. 284-305) due to their unpopularity and replaced by *agentes in rebus*,³⁶ who functioned as couriers (and spies) during the late Roman Empire.³⁷

At the beginning of the third century AD Emperor Septimus Severus (r. 193-211) changed the system by adding the *cursus clabularis*, i.e. a transport service charged with purveying provisions to the army.³⁸ The necessary *diploma* now had two forms: a partial warrant (*evectio*) which authorised transport only and a full warrant (*tractoria*) authorising both transport and subsistence.³⁹ In the second half of the fourth century AD the *cursus publicus* gained its most developed form, after having been used as a transport as well as a dispatch service for a very long time.⁴⁰

2.2. Violation of the confidentiality of correspondence

In the first centuries of the city of Rome letters were only sparsely written and an infringement of mail confidentiality did not frequently occur. Opening letters was a means for the State to ward off immediate danger, but this did not happen very often.⁴¹ Furthermore, during the Roman Republic any abuse was discouraged by the Roman form of government with *comitiae*, annual magistrates and *censores* who had inquisitorial powers.⁴² However, the last century BC, the times of Caesar and Cicero, was totally different from the period

³³ Van den Velden, *Academisch proefschrift over het geheim der brieven*, p. 3.

³⁴ Rankov, «Postal service», p. 2; Boris Rankov, «Les *Frumentarii* et la circulation de l'information entre les empereurs romains et les provinces», in: Laurent Capdetrey & Jocelyne Nelis-Clément (eds.), *La circulation de l'information dans les états antiques*, Paris, 2006, p. 130.

³⁵ See on soldiers who carried messages elaborately Rankov, «Les *Frumentarii*», esp. p. 134ff.

³⁶ Cremer, *Disputatio historico-politica inauguralis de curso publico*, p. 24. See the title on the secret service (*de agentibus in rebus*) in the Theodosian Code, i.e. Title 6.27, and also CTh. 6.35.3.

³⁷ Rankov, «Postal service», p. 2.

³⁸ Casson, *Travel in the Ancient World*, p. 184.

³⁹ Ibid.

⁴⁰ See more elaborately on this topic, Casson, *Travel in the Ancient World*, p. 184ff.

⁴¹ See also Van den Velden, *Academisch proefschrift over het geheim der brieven*, p. 6. See e.g. Livius, *Ab urbe condita*, II. 4 (sequestration letters).

⁴² In general it can be said that violations of the confidentiality of correspondence occurred more frequently at certain times, for example in times of war, revolt, suppression, etc., rather than in periods of peace. Apart from the societal state of affairs, also the organisation of the government had an impact on the moral behaviour of the people. In the Republic public assemblies watched over the acts of those in authority, who were answerable to them. All citizens could appeal to this. See Van den Velden, *Academisch proefschrift over het geheim der brieven*, p. 4f.

of the early Republic; the *mores* slowly disappeared and the need to protect private correspondence from outsiders grew⁴³.

With regard to the quality of the carriers, the organisation, speed, frequency and the quality of the persons entrusted with the transfer of letters in the Roman Republic, part of the private networks of messengers, provided some safeguards against the violation of the confidentiality of correspondence. Also, as long as slaves could not read, the privacy of correspondence was not in significant danger. However, by the time they had mastered reading and writing and when freedmen (*liberti*) were often used to transfer letters, the inviolability of the secrecy of correspondence was likely to become subject to infringement. This is not unlikely considering the fact that, as described above, the form in which letters were written on open tablets (*tabulae*) contained the writing. The seal of the later parchment or papyrus scrolls were – as was generally the custom – handed over by the person who transferred the letter (*epistola*) to the receiver to (clearly) show him that the seal was intact, before the latter proceeded to open the letter or scroll.⁴⁴

Important is the way Cicero dealt with correspondence confidentiality in a trial against Catalina. He did not want to open (the seals of) letters (*i.e.* on the knot on the tie that normally bound two wax tablets together), before these were handed over to the Senate since he only wanted to open them in the presence of the Senate.⁴⁵ Furthermore, from a passage in Cicero's Philippics, his non-spoken view (but submitted to the Senate on paper) regarding the privacy of correspondence can be understood.⁴⁶ Cicero is considered a rather good representative of his time and of the way his contemporaries thought about societal issues, so from this statement we may deduce how the Romans of his time thought about this matter. He denied Marcus Antonius (82-30) every sense of honour and decency, because Antonius had (openly) read letters, written to him by Cicero, aloud in a public assembly. "How many jokes", wrote Cicero, "are commonly found in letters which, if published, seem jejune! How many serious thoughts which nevertheless should in no way be divulged."⁴⁷

⁴³ See Van den Velden, *cit. supra*.

⁴⁴ Abrahamus de Vries, *Spec. jur. de commercio epistolarum ex juris principiis aestimato* (diss. Leiden), Amsterdam, 1841, p. 13. Most letters were not meant for publication but only for the person to whom they were written. In Antiquity a literary form was developed, meant for publication. The non-literary letters remaining today are those written by Cicero to his friends and the correspondence of Plinius (Minor) with Emperor Trajanus. Furthermore, in the period of the Empire emperors answered questions by means of rescripts (*rescripta*). A distinction has to be made: in case of letters sent by an official (called *epistulae*), the bureau *ab epistulis* drafted a rescript that was formally signed by the emperor with salutation (*vale*). Letters/petitions from other (private) persons called *libellus*, *prex*, *supplicatio*, received a reply appended to a redrafted copy of the petition as a subscription (*subscriptio*), prepared by the bureau *a libellis* and signed by the emperor with (*re*)*scripsi*. See Max Kaser, *Römische Rechtsgeschichte*, 2nd ed., Göttingen, 1967, p. 152; A. Arthur Schiller, *Roman Law. Mechanisms of Development*, 1978, p. 488-489, 492-493. See also elaborately already Ulrich Wilcken, «Zu den Kaiserreskripten», *Hermes*, 55 (1920), p. 1-42, esp. p. 2ff., 9ff. On letters (*epistulae*) see also Theo Mayer-Maly, «Epistula», in: *Der Kleine Pauly*, ed. DTV, Bd. 2, Munich, 1979, col. 327.

⁴⁵ See Cicero, *In Catilinam*, III (.7).

⁴⁶ See also Heim, «Das Briefgeheimniss», p. 965-966.

⁴⁷ Cicero, *Philippica*, II.4: *Quam multa ioca solent esse in epistulis, quae prolata si sint, inepta videantur, quam multa seria neque tamen ullo modo divulganda!* [transl. taken from Walter C. A. Ker, in: Loeb Classical Library, *Cicero. Vol. XV: Philippics*, London-Cambridge (Mass.), 1969, p. 70-73]. Also Pompeius apparently attached importance to the inviolability of the confidentiality of correspondence as appears from Plutarchus, *Pompeius*, XX.4, in which it can be read that

Cicero was aware of the fact that letters were regularly checked for their content. He excused himself to Atticus for his late reply, due to the lack of a safe letter-carrier. There are, according to Cicero, very few who can carry a letter of weight without lightening it by a perusal, because he could not find a reliable messenger – and because he did not hear of every traveller to Epirus.⁴⁸ In 51 BC he wrote that he ended his correspondence until he would have trustworthy messengers at his disposal⁴⁹ and he commanded his wife, in a letter written in the year 49 BC, to establish a regular succession of letter-carriers to send him news by letter every day.⁵⁰ In 61 BC, Cicero wrote a letter to Atticus that he did not dare commit all things worth writing that happened to the risk of letters being either lost, opened or intercepted. Furthermore, he did not trust an important letter to a man in the street, as he described the messenger in question.⁵¹

The fact that seals came into use by the Romans can be considered as proof that people were fearful of an unauthorised/illegal inspection of letter content already at a very early stage.⁵² Confirmation of this can also be found in the mentioning of the secrecy of covered correspondence. Known to us are the Laconian letters, secret orders written on a leather belt that was wound around a stick,⁵³ and other ingenious ways of secret correspondence.⁵⁴ Around the time of Caesar (100-44) secret correspondence was in use and even Caesar himself used a secret code.⁵⁵ This becomes evident from a letter from Cicero to Atticus in which he wrote that it did not surprise him that his friend did not understand one of his previous letters, due to the abbreviations he had used.⁵⁶ From the frequent secret exchange of letters at the end of the Republic, an increase in the opening of letters can be presumed.⁵⁷ Furthermore, one has to bear in mind that letters transported by carriers did not always arrive at the receiver, as they sometimes became lost during transport, or disappeared due to a robbery, or

Pompeius, fearing that showing the letters of Sertorius, including letters by old consuls and important men of Rome in which they asked Sertorius to come to Rome, might stir up greater wars than those which had just ended, put Perpenna to death and burned the letters without reading their content. Also Cicero, *Ad Atticum*, VIII.2.4, in which he writes that he burned Atticus' letter with his lamp, is interesting in this respect.

⁴⁸ Cicero, *Ad Atticum*, I.13.

⁴⁹ Cicero, *Ad Atticum*, V.17.

⁵⁰ Cicero, *Ad Familiares*, XIV.18. See also Eugène Vaillé, *Le Cabinet Noir*, Paris, 1950, p. 8-9.

⁵¹ Cicero, *Ad Atticum*, I.13.

⁵² See Van den Velden, *Academisch proefschrift over het geheim der brieven*, p. 3, who wrote that it is not assumed that the seals were only used as jewels.

⁵³ An example can be found in, e.g., Plutarchus, *Lysander*, XIX.5-7.

⁵⁴ See Aulus Gellius, *Noctes Atticae*, XVII.9, amongst others, mentioning the covering of the writing on a wooden tablet with wax to disguise the content, and also Plinius, *Historiae Naturalis*, XXVI.89 (trace letters on body with milk, allow it to dry and then on being sprinkled with ash, the letters become visible); Herodotus, V.35 [shave and pricked marks on head of slave and wait until hair grew again; sending the slave to the recipient who shaved his hair and examined his head (and the writing)]; see also Vaillé, *Le Cabinet Noir*, p. 10ff. On mail confidentiality, the promotion of secrecy and the use of secret codes in Roman antiquity, see also elaborately Wolfgang Riepl, *Das Nachrichtenwesen des Altertums*, Leipzig/Berlin, 1913 (reprint Hildesheim, 1972 et al.), p. 295-322.

⁵⁵ See Aulus Gellius, *Noctes Atticae*, XVII.9 and Suetonius, *Julius*, LVI.6. On Caesar's secret code see Wilhelm S. Teuffel et al., *Geschichte der römischen Literatur. I. Die Literatur der Republik*, Berlin/Leipzig, 1916, p. 446.

⁵⁶ Cicero, *Ad Atticum*, XIII.32 (*quia διά σημείων scripseram*).

⁵⁷ Van den Velden, *Academisch proefschrift over het geheim der brieven*, p. 6.

were intercepted by others or – if transported by sea – were hijacked, lost in a shipwreck or halted by a storm.⁵⁸

As a consequence of the moral decline that would have taken place after the collapse of the Republic, one could presume that the rules for correspondence confidentiality were not strictly complied with in that period.⁵⁹ The continuous quarrels and internecine struggles among throne pretenders may also have led to the interception of letters.⁶⁰ Some disapproved of this.⁶¹ From the sources it becomes clear that ways to avoid the interception of letters were looked for. An example is included in Frontinus (1st cent. AD), who described that the Romans, when keeping guard against the inhabitants of Capua whom they were besieging, found ways to dispatch correspondence in such a way that the enemy could not intercept it (in 211 BC).⁶²

3. Legal aspects regarding the breach of mail confidentiality

3.1. Introduction

What were the legal possibilities provided by Roman law to protect the confidentiality of correspondence? Although legally no breach of confidentiality existed as such, and neither did it exist as an action, along various ways one possibly reached a similar result. These ways/instruments will now be discussed successively: legal protection for the delivery of letters and/or the ownership of letters, the contract with the carrier, delict (theft or unlawfully caused damage) and, finally, the intentional breach of mail confidentiality.

3.2. Contracts including the transport of letters

If *tabellarii* were used for transport, slaves or freedmen were meant, as mentioned above. If slaves were used, probably the slaves of the sender or the receiver of the letter were meant.⁶³ The legal basis of the free transport of letters, like any other object which was transported for free, was the contract of mandate (*mandatum*)⁶⁴ – as already appears from a passage in Plautus'

⁵⁸ Benöhr, «Der Brief», p. 122f., with references to Cicero's letters.

⁵⁹ See on this matter, Van den Velden, *Academisch proefschrift over het geheim der brieven*, p. 7.

⁶⁰ See also Julianus, *Epistulae, Ad Philippum*, 30, for his carefulness and distrust in sending letters. See also Vaillé, *Le Cabinet Noir*, p. 10.

⁶¹ Ammianus Marcellinus, *Historia*, XXI.16.11, mentions the decision of Emperor Marcus Aurelius who, when Cassius had risen to imperial heights in Syria, and a packet of letters sent by him to his accomplices had fallen into the emperor's hands through the capture of their bearer, ordered it to be burned unopened, in order that he would not learn who were plotting against him.

⁶² Frontinus, *Stratagemata*, III.13. At a certain (later) moment the *tabellarii* also started to take cognizance of the content of letters that were entrusted to them, see Vaillé, *Le Cabinet Noir*, p. 12, and also already Denys Gorce, *Les voyages l'hospitalité et le port des lettres dans le monde chrétien des IV^e et V^e siècles*, Paris, 1925, p. 234ff. Similar indiscretions can be found in Basilus, *Epistulae*, CLXXIII – a letter to Theodora the Conenness, in which he wrote that he should be more diligent in writing to her because his letters did not always reach her. He thought that this was due to the 'naughtiness' of those on whose service he depended.

⁶³ See Benöhr, «Der Brief», p. 128 with references. See also Barnabas Brissonius, *De verborum quae ad ius pertinent significatione*, Paris, 1596, fo. 622r., s.v. *tabellarius servus*, with a reference to D. 41.1.65pr.

⁶⁴ See Pomp.-Ulp. D. 47.2.14.9; Ulp. D. 16.3.1.11; Jacques Michel, *Gratuité en droit romain*, Brussels, 1962, p. 179; René Robaye, *L'obligation de garde. Essai sur la responsabilité contractuelle en droit romain*, Brussels, 1987, p. 200; Benöhr, «Der Brief», p. 128.

Curculio.⁶⁵ If a letter was sent in order for the receiver to keep it, the sender had an *actio mandati* against the carrier and an *actio depositi* against the receiver.⁶⁶ Although a contract of mandate was performed without doing something in return from the sender (a payment), an expenses allowance or a honorarium was not excluded.⁶⁷ The liability of the carrier was limited to *dolus* but could be extended to *custodia* if agreed upon.⁶⁸

If a letter carrier was a free man, could he be considered to be a *procurator*? A *procurator* was a person who looked after the affairs of someone else, on the legal basis of a mandate.⁶⁹ There seems to have been a difference of opinion among classical Roman jurists in the Principate. Some, amongst which were the jurist Sextus Pomponius, argued that a person taking a mandate for only one item was not a *procurator* just like the person who undertook to convey an object, letter or message could be properly called a *procurator*. On the contrary, the late-classical jurist Domitius Ulpianus was of the opinion that the person appointed for only one piece of business was a procurator and called him a *procurator unius rei*.⁷⁰

Apart from liability originating from a breach of the obligation arising from a mandate contract (*mandatum*), there could be similar obligations but from a different contract, namely from a deposit contract (*depositum*) or even a quasi-contract, namely to conduct affairs for another person, *i.e.* without their authorisation (*negotiorum gestio*). In the latter case, the mail carrier was regarded as the *negotiorum gestor* of the addressee.⁷¹ If someone took on the task of conveying an object to someone else, that other person had an *actio negotiorum gestorum* against the person who conveyed the object.⁷²

⁶⁵ Plautus, *Curculio*, Actus III.1, l. 411-412 (*mandatum si mihi ut has tabellas ad eum ferrem*); see also Alan Watson, *Contract of Mandate in Roman Law*, Oxford, 1961, p. 15.

⁶⁶ Ulp. D. 16.3.1.11.

⁶⁷ Benöhr, «Der Brief», p. 129. See Alfons Bürge, «Salarium und ähnliche Leistungsentgelte beim mandatum», in: Dieter Nörr & Shigeo Nishimura (eds.), *Mandatum und Verwandtes. Beiträge zum römischen und modernen Recht*, Berlin et al., 1993, p. 319-338.

⁶⁸ See also Michel, *Gratuité en droit romain*, p. 179.

⁶⁹ Ulp. D. 3.3.1pr. On this text, see Vincenzo Arangio-Ruiz, *Il mandato in diritto Romano*, Napoli, 1949, p. 58, with references.

⁷⁰ Ulp. D. 3.3.1.1. On this text, see also Benöhr, «Der Brief», p. 129 – who stated that the text is heavily reduced in size – and the references mentioned there. On this text also Luigi de Sarlo, *Il documento oggetto di rapporti giuridici privati*, Florence, 1935, p. 189-191, who states, amongst other things, that the concept of *procurator unius rei* was not present in classical Roman law (outside the procedural representation). See also Arangio-Ruiz, *Il mandato in diritto Romano*, p. 13 n. 3, 17. See also Max Kaser, review of 'A. Watson, *Contract of Mandate in Roman Law*. Clarendon Press, Oxford 1961. 223 p. 42 S. net.', *TvR*, 30 (1962), p. 265, who states that the origin of the *procurator unius rei* is doubtful but that this topic is not yet clarified conclusively; possibly this emergence of this intermediate type between *procurator omnium bonorum* and the *procurator ad litem* had to be interpreted in connection with the gradual recognition of the *actio mandati* in these relationships. Differently, holding the classical character of the term *procurator unius rei*, see Watson, *Contract of Mandate in Roman Law*, p. 60 and Jacques-Henri Michel, 'Quelques observations sur l'évolution du *procurator* en droit romain', in: *Études offertes à Jean Macqueron*, Aix-en-Provence, 1970, p. 524.

⁷¹ Based on Ulp. D. 3.5.5.4(2); see also Eduard S. Hollander, *Het brievenvervoer uit een privaatrechtelijk oogpunt beschouwd* (diss. Leiden), Leiden, 1893, p. 152ff., with references.

⁷² Ulp. 3.5.5.4(2). According to Benöhr, «Der Brief», p. 130, it is, however, difficult to imagine how someone would agree to transfer an object without a contract, be it with the sender or with the receiver(s).

If, on the contrary, a compensation was agreed upon for the transfer of the letter, then the contract was qualified (by Romans) as one of *locatio conductio*⁷³ (*operis* – a later term/addition, not found in the Roman sources). It has been argued that, also based on D. 47.2.14.17 (this text will be dealt with below), the letter carrier was liable for *custodia*⁷⁴ but also that he was (only) liable for *culpa*.⁷⁵

Another possibility is that liability arose from taking on a particular expressed guarantee to achieve a certain result. More specifically the undertaking by a seaman, innkeeper or stable keeper for the safety of customers' goods entrusted to them could be applicable (the *receptum nautarum, cauponum, stabulariorum*).⁷⁶ These persons were, irrespective of the *locatio conductio*, liable for property that people who made use of their services brought on board of their ship or left behind in their inn or stable.⁷⁷ The praetor could grant an *actio de recepto* if requested.⁷⁸ Liability existed even if the property received was lost or damaged without his fault, unless this occurred through an unavoidable accident.⁷⁹ The seaman, innkeeper or stable keeper was liable on account of safekeeping (*custodia*).⁸⁰

3.3. The (transfer of) ownership of letters

As long as the writer did not take action to transfer the letter to the addressee, it remained under the ownership of the writer. The Romans recognised this ownership of letters,⁸¹ as they allowed the remedy for asserting it with a *rei vindicatio*.⁸² First of all, it was required to establish the owner of the letter in question, *i.e.* of the totality of material with written information. With regard to the acquisition of ownership of the writing on a piece of paper (or

⁷³ See Paul. D. 17.1.1.4; Gai. D. 19.2.2pr.; Ulp. D. 47.2.14.17; Robaye, *L'obligation de garde*, p. 201ff.; De Sarlo, *Il documento*, p. 193; Benöhr, «Der Brief», p. 131.

⁷⁴ Benöhr, «Der Brief», p. 131.

⁷⁵ Robaye, *L'obligation de garde*, p. 203ff.

⁷⁶ On the *receptum nautarum*, see, *e.g.*, Francesco M. de Robertis, *Receptum nautarum. Studio sulla responsabilità in diritto romano, con riferimento alla disciplina particolare concernente il caupo e lo stabularius*, Bari, 1952. On carriage by sea, see also Joseph A. C. Thomas, 'Carriage by sea', *RIDA*, 7 (1960), p. 489-505 and Joseph A. C. Thomas, 'Juridical Aspects of Carriage by Sea and Warehousing in Roman Law', *Recueils de la Société Jean Bodin*, XXXII, Brussels, 1974, p. 117-159.

⁷⁷ Ulp. D. 4.9.1; Ulp. D. 4.9.3.1.

⁷⁸ Ulp. D. 4.9.1pr.; Ulp. D. 4.9.3.5.

⁷⁹ Ulp. D. 4.9.3.1 [who mentioned Labeo who was willing to grant an exception (the so-called *exceptio Labeoniana*) if the damage was caused by shipwreck or by an attack by pirates or if *vis maior* occurred in a stable or inn].

⁸⁰ Gai. D. 4.9.5pr.

⁸¹ Lab. D. 41.1.65 and Ulp. D. 47.2.14.17. See also elaborately on the (Roman) ownership of letters Gustavus A. Siebdrat, *Diss. de dominio epistolarum*, Leipzig, 1829, esp. p. 7ff.

⁸² See also Otto Lenel in his *Palingenesia iuris civilis*, Leipzig, 1889, I, col. 533, pal. nr. 220, who placed D. 41.1.65 in the sixth book of Labeo's *Pithanon a Paulo Epitomarum libri VIII*, under the title 'De acquirendo rerum dominio et rei vindicatione'. D. 47.2.14.17 is placed by Lenel in the twenty-ninth book ad Sabinum under the title 'De emptione et venditione 2' and more specifically under the title 'De custodia a venditore prestanda', see Otto Lenel, *Palingenesia iuris civilis*, Leipzig, 1889, II, col. 1127, pal. nr. 2734. That the title is about *emptio-venditio* is also clear from D. 47.2.14pr.-1, which concerns the question of who can bring an *actio furti* in a *emptio-venditio* case; although D. 47.2.14.17 does not concern an *emptio-venditio*, it is associatively linked to the previous parts of D. 47.2.14, namely by the common element of *furtum*.

parchment), accession took place; however, a distinction has to be made between the situation in which the paper was the ownership of the writer and that in which this was not the case. According to the classical Roman jurists, letters accede to paper or parchment and thus the owner of the material becomes the owner of the total object.⁸³ What is written on a papyrus or parchment⁸⁴ thus belongs to the ownership of the owner of the paper.⁸⁵ If someone wrote a letter on his own paper, the written paper (or tablet) remained his, but if he wrote on a previously received letter from the receiver or if he used a wax tablet of the receiver which he previously obtained, and smoothed it and prepared it for new use, then the object on which the writer wrote became the property of the receiver.⁸⁶

The *traditio* of objects as a form of transfer of ownership led to such a transfer only if the factual transfer of possession on the object was taken by the owner with a valid legal basis (*causa*). A transfer of possession led to a transfer of ownership (of *res nec Mancipi*) if this occurred *ex iusta causa*.⁸⁷ The transfer of ownership had to be (legally) justified. Therefore, the *causa traditionis* was needed to acquire both possession and ownership. The transfer of the ownership of a letter, which was a *res nec Mancipi*, took place by means of *traditio*, as a result of consensus between two parties, provided the delivery was pursuant to a *iusta causa* and actually led to the transfer in the hands of the receiver.⁸⁸ An exception applied if the sender did not have the will to make the addressee the owner, for example when the writer sent a letter that should have been returned to him (and thus the letter was only sent for reading purposes). In such a case the writer remained the owner of his letter.⁸⁹

At which moment was the ownership (*dominium*) of the letter transferred? In that respect D. 41.1.65pr. is in particular relevant, which reads as follows.

D. 41.1.65pr. (*Labeo libro sexto pithanon a Paulo epitomatorum*)

Si epistulam tibi misero, non erit ea tua, antequam tibi reddita fuerit. Paulus: immo contra: nam si miseris ad me tabellarium tuum et ego rescribendi causa litteras tibi misero, simul atque tabellario tuo tradidero, tuae fient. Idem accidet in his litteris, quas tuae dumtaxat rei gratia misero, veluti si petieris a me, uti te alicui commendarem, et eas commendaticias tibi misero litteras.

⁸³ See Gai. D. 41.1.9.1; Gaius, *Inst.* 2.77, and also later *Inst.* 2.1.33. Similarly also Adolf H. Walkate, *Eigendom van brieven* (diss. Amsterdam), Kampen, 1893, p. 2.

⁸⁴ Or painted on a panel, according to Paul. D. 6.1.23.3, in which case the same applied (there was controversy on this point, as Paul already referred to others who had a contrary opinion). According to Gaius, the question was answered differently if a painting was painted on a panel, see Gai. *Inst.* 2.78 (and Gai. D. 41.1.9.2). A discussion of these texts can be found in Tessa Leesen, «Romeinse schilderskunst op andermans paneel: Wie wordt eigenaar van de *tabula picta*?», *GROM*, XXIII (2006), 113-130, and from the same author 'Topical argumentations in legal texts: the *tabula picta*', *Quaderni Lupiensi di Storia e Diritto*, 2 (2012), p. 125-139, with reference to various other literature on this topic. The controversy is also mentioned in Justinian's *Inst.* 2.1.34 and decided in favour of the painter, who thus became the owner of the totality of the object. See also Max Kaser, *Das römische Privatrecht*, I, 2nd ed., Munich, 1971, p. 429 (n. 38) and Benöhr, «Der Brief», p. 126f.

⁸⁵ See Gaius, *Inst.* 2.77; Gai. D. 41.1.9.1; Paul. D. 6.1.23.3; Iul.-Ulp. D. 10.4.3.14. See also Kaser, *Das römische Privatrecht*, I, p. 429 (n. 37); De Sarlo, *Il documento*, p. 121ff.

⁸⁶ Benöhr, «Der Brief», p. 127.

⁸⁷ See e.g. Kaser, *Das römische Privatrecht I*, p. 616f.

⁸⁸ See also De Sarlo, *Il documento*, p. 129.

⁸⁹ Walkate, *Eigendom van brieven*, p. 3f.; see Ulp. D. 47.2.14.17.

Labeo, *Plausible Views, Epitomized by Paul, book 6*

If I send you a letter, it will not be yours until it has been delivered to you. Paul: Quite the contrary, for if you send your letter-carrier to me and I send you a letter in reply, it will become yours as soon as I hand it to the carrier. The same is true of any letter which I send you exclusively for your own purposes, say, if you have asked me to give you a testimonial and I send you the testimonial.⁹⁰

According to the Roman jurist M. Antistius Labeo (50 BC – 10/11 AD) in principle a letter only became the property of the receiver at the moment it reached the addressee. This was certainly the case when the person delivering the letter was the writer's *tabellarius*, his slave or freedman who, to some extent, were his instruments.⁹¹ The *traditio* could be regarded as based on a *causa donandi*,⁹² unless one would have to consider it given for any other reason (*quavis alia ex causa*; see Gaius, *Inst.* 2.20).⁹³ However, the jurist Julius Paulus (3rd cent. AD) stated that if the addressee used his *tabellarius* and sent him to the writer, who subsequently returned a letter in reply, the ownership would be transferred to him at an earlier moment, namely at the moment his *tabellarius* received the letter. When the *tabellarius* of the receiver was a slave or *filius familias*, the ownership of the letter would be transferred immediately.⁹⁴ The common use of receiving a letter from a *tabellarius* (of the other party) and handing back a reply⁹⁵ must have occurred frequently already in the Republic, see for example Cicero.⁹⁶ Especially for the case in which a *tabellarius* was a freedman, the view of the jurist Paulus is important, in that the addressee, immediately upon handing it over to the *tabellarius*, acquired ownership of the letter sent in reply; in Cicero's correspondence also *liberti* transferred letters and therefore it is relevant what the status of the carrier was: a slave or a free person. In the latter case it would mean that ownership was gained through another free (third) person (*per liberam personam*).⁹⁷ Possession, the factual power over an object, in which possession (in this case of a letter) was protected by interdicts, in the high classical period could only be gained through a third person in exceptional cases (the *procurator* and apparently also the *tutor*). The late classical jurists might have generalised this idea.⁹⁸ Such a case might be applicable here. If the acquisition of possession through a third person was possible, then the acquisition of ownership through *traditio* was also

⁹⁰ The Latin texts of the Digest in this article are taken from the *editio maior* of Theodor Mommsen and the English translation from that of the English translation in the edition of Alan Watson, see Alan Watson, *The Digest of Justinian*, Latin text ed. by Theodor Mommsen with the aid of Paul Krueger, English translation edited by Alan Watson, I-IV, Philadelphia, 1985. The fragment of D. 41.1.65pr is part of the English translation made by Joseph A. C. Thomas.

⁹¹ Axel Claus, *Gewillkürte Stellvertretung im römischen Privatrecht*, Berlin, 1973, p. 116; also Benöhr, «Der Brief», p. 132.

⁹² Claus, *Gewillkürte Stellvertretung im römischen Privatrecht*, p. 116.

⁹³ Benöhr, «Der Brief», p. 132f.

⁹⁴ Benöhr, «Der Brief», p. 133.

⁹⁵ See also Claus, *Gewillkürte Stellvertretung im römischen Privatrecht*, p. 203.

⁹⁶ Cicero, *Ad Atticum*, XII.42.1; *Ad familiares*, XV.17.1.

⁹⁷ See also D. 47.2.14.17 (discussed in section 3.4).

⁹⁸ Kaser, *Das römische Privatrecht*, I, p. 393; Benöhr, «Der Brief», p. 133f.

possible.⁹⁹ As is well known, a free person outside the power of someone could not acquire something for another person, unless he was a *procurator* (this was an exception), because he could acquire possession for his principal. The actual acquisition only took place after ratification.¹⁰⁰ The buyer of an object could ratify after the acquisition or give an order in advance.¹⁰¹

Was it a problem that a third party could not establish a more favourable legal position for someone else? Probably one does not have to expand the maxim that no one can stipulate for another (*alteri stipulari nemo potest*) to that.¹⁰² Important is that in case of (the ownership of) letters it obviously concerned the possibility to take cognizance of the contents of the letter. The *tabellarius* apparently acted based on a general (presumed) instruction of the addressee¹⁰³ and at the moment the master (*dominus*) acquired possession from the *procurator* he also acquire ownership, as the sale or donation in the name of the *dominus* (*in nomine domini*) was considered to be the *iusta causa* of the *traditio* of the *procurator nomine domini*.¹⁰⁴

3.4. Theft of letters

One of the first possibilities for an infringement on mail confidentiality is when a letter is stolen (during the transfer). Let us take a look at the famous text by

⁹⁹ Kaser, *Das römische Privatrecht*, I, p. 393; Benöhr, «Der Brief», p. 134.

¹⁰⁰ PS. 5.2.2.

¹⁰¹ Paul. D. 3.5.23(24); Lab.-Paul. D. 12.6.6.1; Ulp. D. 41.2.42.1; Benöhr, «Der Brief», p. 134. Apparently the you-person, who sent his *tabellarius* (with a letter presumably) to the I-person, who sent a letter back to the you-person, did not count on such a quick reply and did not give instructions regarding the response letter, see Claus, *Gewillkürte Stellvertretung im römischen Privatrecht*, p. 203; according to Alan Watson, «Acquisition of Ownership by Traditio to an Extraneus», *SDHI*, 1967, p. 189-209, reprinted in: *Studies in Roman Private Law*, London/Rio Grande, 1991, p. 109-129, on p. 121, there is no reason to suggest that the decision by Paul should be restricted to cases where the *tabellarius* (usually a slave or a freedman) was told by his principal to bring back a reply.

¹⁰² Benöhr, «Der Brief», p. 134f. Differently, for a quite comprehensive validity of the rule that one cannot acquire something through a third person (*per extraneam personam nobis adquiri non posse*), see Werner Flume, *Rechtsakt und Rechtsverhältnis. Römische Jurisprudenz und modernrechtliches Denken*, Paderborn et al., 1990, p. 85f.

¹⁰³ Benöhr, «Der Brief», p. 135. According to Watson, «Acquisition of Ownership by Traditio to an Extraneus», p. 121, Paul allowed the principal to acquire ownership through a free *tabellarius* when the latter took a letter on his behalf without his knowledge and without his instructions.

¹⁰⁴ Flume, *Rechtsakt und Rechtsverhältnis*, p. 86ff. (not writing in particular about letters); Benöhr, «Der Brief», p. 135. The final situation mentioned in D. 41.1.65pr. is that in which a letter was sent to the addressee exclusively for the latter's purposes, e.g. a testimonial/letter of recommendation. With certain letters, only containing a recommendation, with only a political or economic value to the recipient, the ownership changed directly; in this sense see Benöhr, «Der Brief», p. 136. The courier mentioned in the final part of D. 41.1.65pr. was an outsider, a third party; see Claus, *Gewillkürte Stellvertretung im römischen Privatrecht*, p. 204; possibly it was a free person who stood in a socially subordinate relation in the agreement of *locatio conductio*, or possibly an *amicus* of the sender. In both cases there could be a delivery *constitutum possessorium* by the carrier on behalf of the addressee. The same would apply if the carrier would be a slave of a third party. In this sense Benöhr, «Der Brief», p. 136. This final part of D. 41.1.65pr. has been regarded as interpolated, see Vincenzo Arangio-Ruiz, *Responsabilità contrattuale in diritto Romano*, 2nd ed., Naples, 1958, 129 n.1; De Sarlo, *Il documento oggetto di rapporti giuridici privati*, p. 133. According to Francis de Zulueta, *Digest 41.1 & 2 with Translation and Commentary*, Oxford, 1950, (reprint Aalen, 1979), p. 82, perhaps Paul's real point was more limited, namely that it only applied if the person recommended had an interest for the purpose of an *actio furti* (with reference to Ulp. 47.2.14.17).

Ulpian in D. 47.2.14.17 which is of crucial importance for the issue of the theft of letters.

D. 47.2.14.17 (Ulpianus *libro vicensimo nono ad Sabinum*)

Si epistula, quam ego tibi misi, intercepta sit, quis furti actionem habeat? Et primum quaerendum est, cuius sit epistula, utrum eius qui misit, an eius ad quem missa est? Et si quidem dedi servo eius, statim ipsi quaesita est, cui misi: si vero procuratori, aequae (quia per liberam personam possessio quaeri potest) ipsius facta est, maxime si eius interfuit eam habere. Quod si ita misi epistulam, ut mihi remittatur, dominium meum manet, quia eius nolui amittere vel transferre dominium. Quis ergo furti agat? Is cuius interfuit eam non subripi, id est ad cuius utilitatem pertinebant ea quae scripta sunt. Et ideo quaeri potest, an etiam is, cui data est perferenda, furti agere possit. Et si custodia eius ad eum pertineat, potest: sed et si interfuit eius epistulam reddere, furti habebit actionem. Finge eam epistulam fuisse, quae continebat, ut ei quid redderetur fieretve: potest habere furti actionem: vel si custodiam eius rei recepit vel mercedem perferendae accipit. Et erit in hunc casum similis causa eius et cauponis aut magistri navis: nam his damus furti actionem, si sint solvendo, quoniam periculum rerum ad eos pertinet.

Ulpian, *Sabinus*, book 29

If a letter which I sent you should be intercepted, who has an action for theft? The first question is: Whose is the letter, the writer or the addressee? If, indeed, I gave it to the addressee's slave, it immediately becomes his; so also if I gave it to his genuine procurator (for possession can be acquired through a free person); certainly is this so if he has an interest in having it. But if I so sent the letter that it should be returned to me, I remain owner because I did not wish to lose or transfer ownership of it. Who then sues for theft? He who has an interest in the letter's not being stolen, that is, the one to whose advantage the writing pertains, can bring the action for theft. If he be liable for safekeeping the letter, he can sue, as also if he has an interest in returning the letter. Suppose the letter to have been such that something was to be returned to him or become his; he can have the action for theft, as also if he undertakes safekeeping of it or receives a reward for the delivery. In such a case, he will be like an innkeeper or ship's master; for we give them the action for theft, assuming their insolvency, since goods are at their risk.¹⁰⁵

This fragment concerns the question of who was actively legitimised to bring an *actio furti* in the event of the interception of a letter.¹⁰⁶ The Roman delict of *furtum* (theft) meant the fraudulent appropriation of an object for the purpose of gain, whether by the object itself or by the use or possession of it.¹⁰⁷ The plaintiff could claim damages and the damage amount awarded depended on

¹⁰⁵ The fragment of D. 47.2.14.17 is part of the English translation made by Joseph A. C. Thomas.

¹⁰⁶ See also De Sarlo, *Il documento*, p. 128ff., 292f. See also already Lab. D. 41.1.65pr. (discussed in section 3.3).

¹⁰⁷ Paul. D. 47.2.1.3. On the theft of documents, *tabulae*, letters *et al.*, and on the delimitation of the *actio furti* with the *actio legis Aquiliae*, see De Sarlo, *Il documento*, p. 277-294. On *furtum* in general, see, e.g., Paul Huvelin, *Études sur le furtum dans le très ancien droit Romain*, I, Lyon/Paris, 1915; Kaser, *Das römische Privatrecht*, I, p. 157-160, 614-619.

the question whether the thief was caught in the act or not. If he was, the plaintiff could recover four times the value of the stolen object (*furtum manifestum*), but if he was not caught in the act, only two times the value (*furtum nec manifestum*).¹⁰⁸

In the first place it was the owner of an object who could bring an *actio furti (nec) manifesti*, – this ownership had to be determined, in the case of letters, based on the criteria mentioned in section 3.2. In the late republican period this rule was modified in the sense that the claim could be brought by whoever had an interest in keeping the property untouched. Therefore, the solvent non-owner was liable towards the owner based on *custodia*, such as e.g. the contractor like the postmen in Ulp. D. 47.2.14.17.¹⁰⁹ With an *actio furti* the owner and those who transferred the letter and who were liable to him based on *custodia* and the innkeeper or the captain of a ship upon whom the risk for the goods rested¹¹⁰ (this also applied to letters) were protected.

Depending on the ownership of the letter, the writer or the receiver should be actively legitimised to bring an *actio furti*.¹¹¹ As mentioned before, the possession and the ownership changed hands after the writer gave it to the slave of the addressee. Furthermore, and this possibility is not mentioned in D. 41.1.65pr. (see above), if the letter would have been handed over to the *procurator* of the addressee, it also came into the possession (and ownership) of the addressee,¹¹² certainly if he had an interest in having it.¹¹³ A *procurator* acting based on a *mandatum* could acquire ownership of an *res nec mancipi* for

¹⁰⁸ Gaius, *Inst.* 3.189-190. Next to this penal action, the *actio furti (nec) manifesti*, it was possible to bring reipersecutory action, the *condictio ex causa furtiva*, though only by the owner claiming (only) once the value of the object. See D. 13.1; Ulp. D. 47.2.14.16/17. Possibly the *actio furti adversus nautas, caupones et stabularios* (D. 47.5.1) was also applicable (to the *exercitor vehiculorum*), although some authors disagree. See on this topic e.g. Christian Ranisch, *De rhedis meritoriis*, Leipzig, 1685, c. 4 § 4. On the *actio furti adversus nautas, caupones et stabularios*, see, e.g., Haiyang Dou, *Responsabilità per fatto altrui. Osservazione dal sistema della responsabilità extracontrattuale* (diss. Roma Tor Vergata), 2009/2010, p. 22ff. Furthermore, the *actio de recepto* (D. 4.9) may have been applicable (see above, section 3.1).

¹⁰⁹ Kaser, *Das römische Privatrecht*, I, p. 508, 616f.

¹¹⁰ Ulp. D. 47.2.14.17.

¹¹¹ Critical comments and suspicions of interpolation on various parts of D. 47.2.14.17 can be found in the references mentioned in De Sarlo, *Il documento*, p. 292f., Elisabeth Berneisen, «Per Liberam Personam», *RIDA*, 6 (1959), p. 287ff. and Benöhr, «Der Brief», p. 137ff. See also Ferdinand Kniep, *Vacua possessio*, I, Jena, 1886, p. 220f.; Fritz Schulz, «Die Aktivlegitimation zur *actio furti* im klassischen römischen Recht», *ZSS RA*, 32 (1911), p. 62ff.; Arangio-Ruiz, *Responsabilità contrattuale*, p. 128-130; Gerhard Beseler, *Beiträge zur Kritik der römischen Rechtsquellen*, III, Tübingen, 1913, p. 22; Jan Vâžný, «Custodia», *Annali del seminario giuridico dell'Università di Palermo*, XII (1929), p. 122f.

¹¹² Although not explicitly stated, from D. 47.2.14.17 by means of an *a contrario* reasoning it can be deduced that if the writer used his slave or his *procurator* and the letter became lost or stolen during transfer, it had to be considered to have remained under the ownership of the writer. See also Walkate, *Eigendom van brieven*, p. 7; Arangio-Ruiz, *Responsabilità contrattuale*, p. 128f.

¹¹³ The question remains how this relates to Gaius, *Inst.* 2.95, in which it is shown that possession and ownership could not be gained by a *procurator* for a third party. Nevertheless, Gaius stated that the question whether or not possession can be gained by a free person (*libera persona*) for someone else arises. On this topic see Benöhr, «Der Brief», p. 138f. On the question whether or not a *causa* for the transfer of ownership is present in the event of a transfer of letters, see the discussion in Benöhr, «Der Brief», p. 139f. On the latter phrase (interest of the addressee), see Benöhr, «Der Brief», p. 140f.

his principal as well as *usucapio* possession of a *res Mancipi*.¹¹⁴ One phrase in D. 47.2.14.17, namely that possession can be acquired through a free person (*quia per liberam personam possessio quaeri potest*) leads to a suspicion with regard to the authenticity of (this part of) the text.¹¹⁵ Probably the free person mentioned was someone to whom the addressee stood in a close (legal) relationship.¹¹⁶ But, according to Ulpian, in the case of a letter sent in order to be returned to the sender, no transfer of ownership (and possession) took place because no will to lose or transfer (*traditio*) – no transfer of possession – the ownership was present.¹¹⁷ An example of such letters may be an instruction by a principal to his subordinate, safety concerns, the intended transmission of the letter by the writer to a third person, the receiving of the sender of a signature of the addressee which had to go back to the sender or the well-known letter tablets.¹¹⁸

Furthermore, according to D. 47.2.14.17 an *actio furti* could be brought by a person interested in not having the letter stolen, *i.e.* the individual who would benefit from the contents. Based on Gaius, *Inst.* 3.203, a person who, although not the owner, had such an interest in the property being preserved, could bring an *actio furti*.¹¹⁹ Examples are the addressee when he was not yet the owner of the letter because it was in transfer by one of the people from the sender, or a third party who would be favoured by the letter. For them this could be something similar to a debt instrument and therefore it deserved the same protection by the *actio furti*.¹²⁰ The carrier of the letter could also be someone with an interest to the letter. Could he, if he was a free person, or his *pater familias*, in case he was *alieni iuris*, bring an *actio furti*? Apart from the case in which he was liable for the safekeeping of the letter (*custodia*), *i.e.* when he

¹¹⁴ Neratius in D. 41.1.13pr. and see Okko Behrends, «Die Prokurator des klassischen römischen Zivilrechts», *ZSS RA*, 88 (1971), p. 294.

¹¹⁵ See the references mentioned in Benöhr, «Der Brief», p. 140, n. 165. For further suspicions of interpolations see the references mentioned in Ernst Levy & Ernst Rabel (eds.), *Index interpolationum quae in Iustiniani Digestis inesse dicuntur, Tomus III. Ad Libros XXXVI-L pertinens*, Weimar, 1935, col. 484f. Differently Watson, «Acquisition of Ownership by Traditio to an Extraneus», p. 124f.

¹¹⁶ See Alan Watson, «Acquisition of Possession per Extraneam Personam», *TvR*, 1961, p. 1-21, reprinted in: *Studies of Private Law*, London/Rio Grande, 1991, p. 63-83, esp. p. 75.

¹¹⁷ See also De Sarlo, *Il documento*, p. 131. Katharina Schickert, *Der Schutz literarischer Urheberschaft im Rom der klassischen Antike*, Tübingen, 2005, p. 61 and Katharina de la Durantaye, «The Origins of the Protection of Literary Authorship in Ancient Rome», *Boston University International Law Journal*, 25 (2007), p. 67, contest(s) the view that in Roman law the author's rights began and ended with the mere physical possession of a manuscript. She (both works are written by the same author although the last names differ) mentions the exception of Ulpian, namely the reservation of the right. She states that what is delivered in that case is only a form of rightful possession (and not the proprietary right). On the concept of intellectual property and on authorial rights on letters, see Karl Dziatzko, «Autor- und Verlagsrecht im Alterthum», in: *Rheinisches Museum für Philologie*, Neue Folge, Band 49 (1894), p. 559ff., esp. 576; Schickert, *Der Schutz literarischer Urheberschaft im Rom der klassischen Antike*, p. 61ff.; De la Durantaye, «The Origins of the Protection of Literary Authorship in Ancient Rome», p. 66ff.

¹¹⁸ Examples taken from Benöhr, «Der Brief», p. 141.

¹¹⁹ On this economic interest see also Ulpian in D. 29.3.2pr. and the discussion of this text in Benöhr, «Der Brief», p. 142. On a discussion of D. 29.3.2pr. see also see De Sarlo, *Il documento*, p. 124ff.

¹²⁰ Benöhr, «Der Brief», p. 143. Comp. Marcell.-Ulp. D. 9.2.41pr.

took the *custodia* or *receptum* liability upon himself,¹²¹ and in that case he could, or if he took wages to deliver the letter, in which case he also had an interest in the completed transfer of the letter when e.g. the letter contained an instruction that something should be returned to him or become his (the carrier).¹²² The same applies to a letter in which the sender recommended the carrier to the addressee,¹²³ and for the *viaticum* (*legativum*) or the *merces* – in which case there seems to be a *locatio conductio* contract – to be received by the carrier after the successful completion of the transfer from the sender.¹²⁴ An exception had to be made if a person undertook to carry something at the request of someone else (*mandatum*) and dealt fraudulently with it, because in that case he could not bring an action for theft.¹²⁵

3.5. Unlawfully caused loss to letters: liability based on the “Lex Aquilia”

In cases of the theft of a letter, when an addressee could never have read the letter meant for him, this of course would usually, although not necessarily, have led to an infringement of the confidentiality of mail – seen from a contemporary point of view. If a letter was not stolen but damaged or destroyed, it became impossible to take note of the contents thereof.

Although no texts in the *Corpus Iuris* explicitly dealt with damage to personal letters, some texts do concern the destroying, breaking or damaging of parchments, papyri or *tabulae*. In the event of the destruction of or damage to letters the Roman law delict *damnum iniuria datum* (wrongfully caused loss),¹²⁶ dealt with in the so-called *lex Aquilia* (286 BC), is relevant.¹²⁷ The first chapter of the *lex Aquilia* applied in case of loss caused by unlawfully killing a male or female slave belonging to another or a four-footed animal in the category of *pecudes* belonging to another. In such cases the highest value in that year had to be paid.¹²⁸ The third chapter of the *lex Aquilia* provided for recovery for all other wrongful damage to property inflicted by burning (*urere*), breaking

¹²¹ See also Benöhr, «Der Brief», p. 144.

¹²² See De Sarlo, *Il documento*, p. 293 and also Benöhr, «Der Brief», p. 143, with references.

¹²³ See e.g. Cicero, *Ad Atticum*, V.21.4.

¹²⁴ Benöhr, «Der Brief», p. 143f.

¹²⁵ Ulp. D. 47.2.14.9, read together with the preceding text, D. 47.2.14.8.

¹²⁶ Contrary to *furtum*, which is a continuing delict where the *actus reus* is undefined, the *lex Aquilia* is concerned with a specific (kind of) act which is done once and for all. See Joseph A. C. Thomas, «Furtum of Documents», *RIDA*, 15 (1968), p. 437.

¹²⁷ See on the *lex Aquilia*, amongst the multiplicity of literature on this, e.g., Reinhard Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Oxford, 1996, p. 953-1049 with references. Relevant and/or related to the topic of damaging various kinds of documents are in particular D. 2.13.10.3 in fine (stealing or obliterating a *cautio*), D. 9.2.40 (erasing a *chirographum*), D. 9.2.41pr. (destroying a will), D. 9.2.41.1 (destroying a document), D. 9.2.42 (altering a testament or any other document so that it can no longer be read), D. 10.2.16.5 (erasing or falsifying accounts relating to an inheritance), D. 47.2.27.3 (defacing documents), D. 47.2.31pr. (defacing a portrait or book). On (most of) these texts concerning cases in which documents are destroyed, see Bernhard Schebitz, *Berechnung des Ersatzes nach der lex Aquilia* (diss. Berlin), Berlin 1987, p. 218ff. (with reference to the literature including textual comments/suspicions); De Sarlo, *Il documento*, p. 295ff.

¹²⁸ See Gai. D. 9.2.2pr. and see, for a discussion of the three *capita* of the *lex Aquilia*, also, e.g., John A. Crook, «Lex Aquilia», *Athenaeum*, 62 (1984), p. 67-77 and Giuseppe Valditara, «Damnum iniuria datum», in: Arnaldo Biscardi et al., *Derecho romano de obligaciones: homenaje al profesor José Luis Murga Gener*, Madrid, 1994, p. 830ff.

(*frangere*) or tearing (*rumpere*).¹²⁹ At a later point in time, already in the republican period, *rumpere* was interpreted as spoiling (*corrumpere*) and with that significantly extended.¹³⁰ The damage was understood as the economic loss (*damnum*) resulting from these damaging acts to property. The *poena* was equal to the value of the object in the thirty nearest days.¹³¹ It is clear that the damage caused by the complete or partial destruction of letters or changed letters or broken seals fell under the third chapter of the *lex Aquilia*. As in other cases in which actions concerned documents, special problems would occur in calculating the interest of the owner.¹³²

The first text that is of importance with regard to damaging or destroying documents is D. 9.2.41; it reads as follows.

D. 9.2.41 (Ulpianus *libro quadragésimo primo ad Sabinum*)

pr. Si quis testamentum deleverit, an damni iniuriae actio competat, videamus. Et Marcellus libro quinto digestorum dubitans negat competere: quemadmodum enim, inquit, aestimatio inibitur? Ego apud eum notavi in testatore quidem hoc esse verum, quia quod interest eius aestimari non potest, verum tamen in herede vel legatariis diversum, quibus testamenta paene chirographa sunt. Ibidem Marcellus scribit chirographo deleto competere legis Aquiliae actionem. Sed et si quis tabulas testamenti apud se depositas deleverit vel pluribus praesentibus legerit, utilius est in factum et iniuriarum agi, si iniuriae faciendae causa secreta iudiciorum publicavit.

1. Interdum evenire Pomponius eleganter ait, ut quis tabulas delendo furti non teneatur, sed tantum damni iniuriae, ut puta si non animo furti faciendi, sed tantum damni dandi deleverit: nam furti non tenebitur: cum facto enim etiam animum furis furtum exigit.

Ulpian, *Sabinus, book 41*

Let us see whether an action lies for wilful damages¹³³ if a man destroys a will. Marcellus, doubting this in the fifth book of his *Digest*, says that such action does not lie; for how, he says, can the damage be assessed? I make a note in

¹²⁹ On the third chapter of the *lex Aquilia*, see, e.g., Herbert F. Jolowicz, «The Original Scope of the Lex Aquilia and the Question of Damages», *LQR*, 38 (1922), p. 220-230; Max Kaser, *Quanti ea res est. Studien zur Methode der Litisästimation im klassischen römischen Recht*, Munich, 1935, p. 167ff.; David Daube, «On the Third Chapter of the *lex Aquilia*», *LQR*, 1936, p. 258-268; Geoffrey MacCormack, «On the Third Chapter of the *lex Aquilia*», *IJ*, 1970, p. 164-178.

¹³⁰ Gaius, *Inst.* 3.217; Heinrich Honsell, *Römisches Recht*, 7th ed., Berlin/Heidelberg, 2010, p. 169.

¹³¹ Ulp. D. 9.2.27.5; Gaius, *Inst.* 3.217-218. On this matter, see, e.g., Herbert Hausmaninger, *Das Schadensersatzrecht der lex Aquilia*, 4th ed., Vienna, 1990, p. 30f.

¹³² Benöhr, «Der Brief», p. 145f. See also Kaser, *Quanti ea res est*, p. 174 n. 26, where he discusses [the suspicions (of interpolations) regarding] the texts on damage to and the loss of documents; Fritz Raber, *Grundlagen klassischer injurienansprüche*, Vienna-Cologne-Graz, 1969, p. 131-139, esp. 135 n. 20; Ulrich von Lübtow, *Untersuchungen zur lex Aquilia de damno iniuria dato*, Berlin, 1971, p. 130 n. 203. On the calculation of the interest of the owner, see also Andreas von Tuhr, *Zur Schätzung des Schadens in der Lex Aquilia*, Basel, 1892; Giuseppe Valditara, *Superamento dell'aestimatio rei nella valutazione del danno aquiliano ed estensione della tutela ai non domini*, Milan, 1992, 124-137, 245-252; Hausmaninger, *Das Schadensersatzrecht der lex Aquilia*, p. 29ff.; Bénédicte Winiger, *La responsabilité aquilienne romaine. Damnum iniuria datum*, Basel/Frankfurt am Main, 1997, 144f.

¹³³ It would be somewhat more accurate to translate the words '*damni iniuriae actio*' with 'an action for wrongful damage'.

his book that this is certainly true from the testator's point of view; for his interest cannot be valued, but that it is otherwise for an heir or a legatee; for to them wills are almost like receipts, and in the very same book, Marcellus writes that when a receipt is erased, action lies under the *lex Aquilia*. And if someone who is looking after someone's will makes an erasure or reads it out with other people present, it is better to bring an action *in factum*¹³⁴ or sue for *injuria* if he published the secrets of one's legal affairs with an insulting intent.

1. Pomponius most elegantly says that sometimes it happens that a man does not render himself liable for theft by destroying a document, but he does incur liability for wrongful damage, as, for instance, where he does it with that intent. He will not then be liable for theft, because theft requires the deed to be accompanied by theftuous intent.¹³⁵

In D. 9.2.41pr. Ulpianus discussed the destruction of *tabulae testamenti*— it is unclear whether that was done before or after the succession—¹³⁶ in a reaction against the view of the jurist Marcellus, and compared it to the destruction of a written acknowledgment of a debt (*chirographum*).¹³⁷ With regard to the question whether, if a will was destroyed, the *actio legis Aquiliae* was applicable, Marcellus had expressed his doubts, due to the impossibility of determining the *aestimatio*. It is unclear, and can no longer be made clear, whether his refusal regarded the possibility of an action brought by the testator or the heir or undifferentiatedly related to both.¹³⁸ Ulpian¹³⁹ agreed as far as it concerned the testator, but as to the heir or legatees the case was different since for them a will was almost the same as a written acknowledgment of a debt (*chirographum*). Marcellus gave a different view if a *chirographum* was defaced by erasure, because in that case an *actio legis Aquiliae* could be granted.¹⁴⁰ The *actio in factum*, although not clear in character nor purpose,¹⁴¹

¹³⁴ Carl E. Otto, Bruno Schilling & Carl F. F. Sintenis, *Das Corpus juris civilis*, I, Leipzig, 1830, p. 785, refer to the conjecture of Gerard Noodt (see *Ad legem Aquiliam liber singularis*, c. XVI, in: *Opera omnia*, edn. 1760): *furti* (instead of '*in factum*') and state – correctly to my opinion – that there is much to say for this point of view, especially when one reads the next paragraph (D. 9.2.41.1). See also already the Basilica text 60.3.41 (see BT 2764/3) which instead of '*utilius est in factum ...*' reads '*τῆ ἀγωγῆ τῆ τὸ διπλοῦν ἀπαιτούσῃ*'; this claim to ask for the double could be the *actio furti manifesti*.

¹³⁵ The fragment of D. 9.2.41 is part of the English translation made by Colin Kolbert.

¹³⁶ Schebitz, *Berechnung des Ersatzes nach der lex Aquilia*, p. 223; D. Medicus, *Id quod interest. Studien zum römischen Recht des Schadensersatzes*, Cologne/Graz, 1962, p. 243. See also Schebitz, *Berechnung des Ersatzes nach der lex Aquilia*, p. 231f., who argued that Marcellus and Ulpian must have meant before the death of the testator.

¹³⁷ One has to bear in mind that defacing documents presupposed a *contrectatio* of the documents, see Franz Wieacker, «Furtum Tabularum», in: *Syntelesia Vincenzo Arangio-Ruiz*, Naples, 1964, p. 569. D. 9.2.41 is taken from the 41st book of Ulpian's commentary *ad Sabinum* (i.e., on the *libri tres iuris civilis* of Sabinus), which both discusses *De furtis* as also the *lex Aquilia*; Lenel allocates this fragment – after D. 47.2.27, and followed by D. 47.2.29 and 31- in the title '*De furtis 2*'. See Lenel, *Palingenesia iuris civilis*, II, col. 1163, pal. nr. 2863.

¹³⁸ Georg Klingenberg, «Das Beweisproblem beim Urkundendiebstahl. Die These der quidam und die Klassiker», *ZSS RA*, 96 (1979), p. 241.

¹³⁹ In this sense also Pietro de Francisci, *Συνάλλαγμα. Storia e dottrina dei cosiddetti contratti innominati*, II, Pavia, 1916, p. 88; De Sarlo argued that this view was Marcellus' not Ulpian's, see De Sarlo, *Il documento*, p. 298.

¹⁴⁰ See on D. 9.2.41pr. also De Francisci, *Συνάλλαγμα*, II, p. 88; De Sarlo, *Il documento*, p. 298f., 305ff.; Giuseppe Valditara, «A proposito di D. 9.2.41pr. e dell'*actio in factum* concessa per il danneggiamento delle tavole testamentarie», *SDHI*, 60 (1994), p. 649-657. The reply by Ulpian

and the *actio iniuriarum*, if someone published the secrets of one's legal affairs with an insulting intent, will be discussed in section 3.3 which concerns the disclosure of private information. In general, the text of D. 9.2.41pr. is peculiar in the sense that a reference to a (possible) contractual action is missing (*actio depositi?*), as is also a precise delineation between the mentioned *actio in factum* and the *actio iniuriarum*, the form *utilius est*, and the coordination between the principles and arguments presented in the preceding part of D. 9.2.41pr.¹⁴²

In the next part, D. 9.2.41.1, Ulpian agreed with the decision of the jurist Pomponius concerning a case in which someone destroyed someone else's *tabulae* with the intention of causing him damage and not with the *animus furandi* (an intention to appropriate the *tabulae*). In this case he was held liable based on the *lex Aquilia*, for which such an intention is not needed, and had to pay damages based on the *lex Aquilia* and not the double penalty (*poena dupli*) to be paid in case of theft.¹⁴³ Another text, from a different Roman jurist, but also regarding damaging a document, is D. 9.2.42, and reads as follows.

D. 9.2.42 (*Iulianus libro quadragesimo octavo digestorum*)

Qui tabulas testamenti depositas aut alicuius rei instrumentum ita delevit, ut legi non possit, depositi actione et ad exhibendum tenetur, quia corruptam rem restituerit aut exhibuerit. Legis quoque Aquiliae actio ex eadem causa competit: corrupisse enim tabulas recte dicitur et qui eas interleverit.

Julian, *Digest*, book 48

Anyone who is looking after a will or a title deed and alters it so that it cannot be read is liable to an action on the contract of deposit and also to an action for its production in court because he has returned and produced the thing in a damaged state. The Aquilian action also lies on these same facts; for it is rightly said that he who has falsified a document has spoiled it.¹⁴⁴

This text concerns the destruction of a testamentary table or another kind of instrument in a way that it was made illegible. Julianus argued that an *actio*

is considered to have been interpolated, and it has been stated that it is difficult to imagine what the interest of the testator mentioned in the first part of the text is. See Medicus, *Id quod interest*, p. 243, who states that Ulpian and Marcellus possibly had a case in mind in which not the loss of writing material but the hurt of the testator was at stake. This interest was immaterial, and in that case the assessment was impossible and an *actio legis Aquiliae* would be denied on good grounds and the injured party would be referred to an *actio iniuriarum*.

¹⁴¹ De Sarlo, *Il documento*, p. 180.

¹⁴² Arguments provided by Bernardo Albanese, «Studi sulla legge Aquilia», *Annali del Seminario Giuridico della Università di Palermo*, XXI (1950), p. 94. Elaborately on the second part of D. 9.2.41pr. and the *actio in factum* mentioned in particular, see Valditara, «A proposito di D. 9.2.41pr.», p. 649ff., with various references to other literature. A discussion of all these topics falls beyond the purpose of the present study.

¹⁴³ On Ulp. D. 9.2.41.1, see also De Sarlo, *Il documento*, p. 296f.; Bernardo Albanese, «La nozione del *furtum* da Nerazio a Marciano», *Annali del Seminario Giuridico della Università di Palermo* 25 (1956), p. 129ff.; Theodor J. Gerke, 'Geschichtliche Entwicklung der Bemessung der Ansprüche aus der 'lex Aquilia'', *SDHI*, 23 (1957), p. 112f.; Hans Ankum, «Towards a Rehabilitation of Pomponius», in: Alan Watson (ed.), *Daube noster. Essays in Legal History for David Daube*, Edinburgh, 1974, p. 8.

¹⁴⁴ The fragment of D. 9.2.42 is part of the English translation made by Colin Kolbert.

*depositi*¹⁴⁵ and the *actio ad exhibendum* could be granted.¹⁴⁶ As to the latter, the *actio ad exhibendum*, the object of this action may be to gain evidence in view of a (possible) *actio legis Aquiliae*.¹⁴⁷ Furthermore, according to Julianus, also the *actio legis Aquiliae* applies, as making *tabulae* illegible (*interleverit*, by means of smearing the wax so that the writing became unreadable¹⁴⁸) falls under *corrumpere*.¹⁴⁹ Here it becomes visible that important was not only the object itself (the table or instrument) but also, or even primarily, the information contained in it. The concurrence of the *actio depositi* with the *actio ad exhibendum* does not lead to problems, as both are also equal in their degree of liability (*dolus*). If the *dominus* of the table or instrument would however have preferred to bring an *actio legis Aquiliae*, he only had to prove *culpa*.¹⁵⁰

3.6. Disclosure of private information and forgery

First of all, a distinction between instances in which an intentional opening of letters seems to have been allowed and other instances in which that was not

¹⁴⁵ In the case described in Ulp. D. 4.3.35 someone destroyed or in any other way damaged the tables of a will (*tabulae testamenti*) deposited with him after the death of the testator. In that case Ulpian allowed the instituted heir and those to whom had been bequeathed legacies, an *actio de dolo* against the perpetrator. See also De Sarlo, *Il documento*, p. 181-183, 375; Benöhr, «Der Brief», p. 146. This fragment originally concerned the applicability of the action based on the contract of deposit as Lenel placed this fragment in his *Palingenesia* in book thirty of Ulpian's commentary on the edict, under the title *De bonae fidei contractibus I. Depositum vel contra*, see Lenel, *Palingenesia iuris civilis*, II, col. 616, pal. nr. 856. Apparently, no *actio depositi* could be brought. The *actio de dolo* mentioned in D. 4.3.35 is a subsidiary action in the sense that it could be brought when no other legal remedy was possible – this was apparently, according to Ulpian, the case here. See also Marrone, «Actio ad exhibendum», p. 408. If Ulpian would have argued that with the destruction of a testament there was an intentional loss of possession, he would not have hesitated to suggest an *actio ad exhibendum*, with the consequence that the *actio de dolo* was excluded. On this text see Marrone, «Actio ad exhibendum», p. 408f.; Bernardo Albanese, «La sussidiarietà dell'a. de dolo», *Annali del Seminario Giuridico della Università di Palermo*, 28 (1961), p. 284; Klingenberg, «Das Beweisproblem beim Urkundendiebstahl», p. 245; Schebitz, *Berechnung des Ersatzes nach der lex Aquilia*, p. 236f.

¹⁴⁶ D. 9.2.42 is categorized by Lenel under the 48th book of Julian's *Digesta* under the title '*De tabulis exhibendis*', see Lenel, *Palingenesia iuris civilis*, I, col. 445, pal. nr. 653.

¹⁴⁷ Charles H. Monro, *Digest IX.2 Lex Aquilia. Translated with Notes*, Cambridge, 1898, p. 65.

¹⁴⁸ Wieacker, «Furtum Tabularum», p. 568f.

¹⁴⁹ On Julianus D. 9.2.42, see also De Sarlo, *Il documento*, p. 295; Matteo Marrone, «Actio ad exhibendum», in: *Annali del Seminario Giuridico della Università di Palermo*, XXVI (1957), p. 405ff.; Klingenberg, «Das Beweisproblem beim Urkundendiebstahl. Die These der quidam und die Klassiker», p. 240f. See also D. 10.2.16.5, concerning the situation in which one of the heirs destroyed accounts belonging to the estate or falsified them. Ulpian argued that he was liable under the *lex Aquilia* for destroying (*corrumpere*), and he would also be liable to an action for the partition of the estate. Similarly the decision of Ulpian in D. 47.2.27.3, if portions of documents were defaced (*interlevit*), not only was there a ground for an *actio furti*, but also for an *actio legis Aquiliae*, as anyone who defaced property was held to have broken it (*corrumpere*). For classical Roman law, the actions could be brought cumulatively in accordance with the principles of poenal actions. See also De Sarlo, *Il documento*, p. 279.

¹⁵⁰ Marrone, «Actio ad exhibendum», p. 587. In that case, when he initially sued by means of an *actio legis Aquiliae*, he would no longer bring an *actio ad exhibendum*. According to Marrone, Julianus' mention of the two other actions, the *actio depositi* and the *actio ad exhibendum*, was made because the use of the *actio legis Aquiliae* in cases of the destruction of documents (and so also of *tabulae*) was subject to a lively legal dispute; because of that the jurist thought it opportune to mention first the *actio depositi* and the *actio ad exhibendum*. See Marrone, «Actio ad exhibendum», p. 587f.

the case has to be made. The inclusion of letters and the investigation of papers was allowed in criminal proceedings according to Roman law.¹⁵¹ With regard to cases in which the opening of letters was not allowed, it remains unclear whether or not an unauthorised reading of the contents of a letter was punished. An explicit statement on this matter is not handed over to us in Roman law sources. A parallel can be seen in the case in which on the occasion of a damage calculation after somebody obliterates a will, Ulpian discussed the depositary who read part of the deposited testamentary document out loud to several persons.¹⁵² Labeo – says Ulpianus in D. 16.3.1.38 – allowed an *actio depositi* in that case. Likewise, according to Benöhr, the *actio locati* or *actio mandati* would be applicable when a courier, during the transfer of a letter in a work contract or order, did not do his job correctly. Furthermore, a breach of contract would be possibly assumed if the courier had not read it out in the presence of more persons but only intentionally and informally gave note of the contents to an unauthorized person or broke it out of curiosity.¹⁵³ Although this might have been the case, it is difficult to say due to a lack of (foundation in the) sources. When the depositary had the *animus iniuriandi*¹⁵⁴ when he made the information (from a testament) public, the *actio iniuriarum* would be applicable.¹⁵⁵

The *actio in factum*, mentioned by Ulpian in D. 9.2.41pr. – if part of the original fragment and if it does not have to be emended into the *actio furti (manifesti)* as mentioned above –, might be, after all the other possibilities already mentioned, the final option in the event of erased (or read out in the presence of more people) *tabulae testamenti*, which must have been before the death of the testator,¹⁵⁶ by the one who took the object in deposit, namely the actions based on contract, while it appears that the *actio ad exhibendum*, *actio legis Aquiliae*, *actio iniuriarum* or *actio de dolo* were not possible.¹⁵⁷ In this fragment it becomes clear that, in the case of a testament, Marcellus was willing to accept an *actio in factum* in the case of destruction, and an *actio iniuriarum* in the case of the disclosure of the contents of the secrets of someone's last will.¹⁵⁸ According to De Sarlo, it seems that the *actio in factum* mentioned in D. 9.2.41pr. is directed at the compensation of moral damages resulting from the disclosure of a secret and thus protects the right on the contents of the document.¹⁵⁹

¹⁵¹ See on this topic Van den Velden, *Academisch proefschrift over het geheim der brieven*, p. 10ff. The (great) freedom of the *accusatores* in detecting evidence was somewhat limited by some legal provisions, see on these matters Van den Velden, *Academisch proefschrift over het geheim der brieven*, p. 12.

¹⁵² Ulp. D. 9.2.41pr.; Ulp. D. 16.3.1.38; Benöhr, «Der Brief», p. 146f.

¹⁵³ Benöhr, «Der Brief», p. 147.

¹⁵⁴ See Kaser, *Das römische Privatrecht*, I, p. 624

¹⁵⁵ Ulpian in D. 9.2.41pr. and D. 16.3.1.38; Alfred Pernice, *Labeo*, 2 Bd., 1 Abt., Halle, 1895, p. 39f.; Benöhr, «Der Brief», p. 148. On these texts also Raber, *Grundlagen*, 131-139. See also Elemér Pólay, «Der Schutz der Ehre und des guten Rufes im römischen Recht», *ZSS RA*, 106 (1989), p. 529 n. 38.

¹⁵⁶ Also Schebitz, *Berechnung des Ersatzes nach der lex Aquilia*, p. 233.

¹⁵⁷ Benöhr, «Der Brief», p. 148 with references.

¹⁵⁸ Ulp. D. 9.2.41pr.; De Francisci, *Συνάλλαγμα*, II, p. 88.

¹⁵⁹ De Sarlo, *Il documento*, p. 180. This *actio in factum* is regarded as interpolated by Antonio Marchi, «Il risarcimento del danno morale secondo il diritto romano», in: *Bullettino dell'istituto di diritto romano*, XVI (1904), p. 236f.; De Francisci, *Συνάλλαγμα*, II, p. 88ff.; also Albanese, «Studi sulla legge Aquilia», p. 94.

A final possibility is the occurrence of forgery. The privacy of letters was not directly mentioned in the in that connection relevant *Lex Cornelia de falsis* (issued in 81 BC).¹⁶⁰ This *lex* provided (criminal) penalties for the forgery of a will or another kind of document. Nevertheless, this legislation was presumably also applied to mail confidentiality.¹⁶¹ The *Lex Cornelia de falsis* was applicable provided the requirement of falsity (*fraudulosa veritates imitatio*) was met.¹⁶² Apart from the availability of the original correct information, integrity is particularly essential in such cases since modifications made to a letter may have deteriorating effects and give rise to wrong decisions, based on incorrect information.

An interesting case, of which unfortunately a part is missing in the source (Mod. D. 50.1.36pr.), is the following. A letter was sent by the magistrates of his native city (*patria*) to Titius, who stayed in Rome to study (which must have been law or Greek or Latin oratory¹⁶³), in order to offer the emperor the decree of the community. Titius, however, came to a secret understanding with Lucius Titius, who was also in Rome and gave the letter to him. The latter removed the name of Titius and wrote his own name instead and handed over the decree to the emperor according to the mandate of the community. The question in this case was who could ask for the travelling allowance (*viaticum*). This travel money is also called a *legativum*, paid to ambassadors sent to the *sacrarium principis*.¹⁶⁴ Apparently a variant of the standard procedure, in which a formal embassy would have travelled to Rome to present the decree, was used – a case from practice.¹⁶⁵ Apparently, the persons involved in the case of D. 50.1.36pr. were not employees of the city, but, on the contrary, persons of

¹⁶⁰ But see Marc. D. 48.10.1.4; Marc. D. 48.10.1.6; Paul. D. 48.10.16.1/2; Paul. D. 48.10.23; Ulp. D. 48.10.25; Modest. D. 48.40.29; Callistratus D. 48.40.31. Not regarding private writings, but with regard to testaments, the following applied. For opening, recounts, or unseals the will of a person in his lifetime and for the revealing of the document see also Paul. D. 48.19.38.7-9 and PS. 5.25.7/8/10.

¹⁶¹ Van den Velden, *Academisch proefschrift over het geheim der brieven*, p. 8; see De Vries, *Spec. jur. de commercio epistolarum ex juris principis*, p. 66. See on this also elaborately Antonius Matthaeus, *De Criminibus*, lib. LXVIII, tit. VII (ed. Antwerp, 1761). According to D. 48.10.1.6, a person who alleged that another to whom he had given documents in deposit (*depositum*), who betrayed him to his adversaries, could accuse the other of forgery. See also Antonius Matthaeus, *De Criminibus*, lib. LXVIII, tit. VII, nr. 7 (ed. Antwerp, 1761).

¹⁶² According to Wilhelm Rein, *Das Kriminalrecht der Römer von Romulus bis auf Justinian*, Leipzig, 1844 (reprint Aalen, 1962, p. 785), p. 785, withholding and embezzling documents, not being testaments, fell under the falsity of the *lex Cornelia*, but according to the contents of that law it was only punished at a later date. Indeed, Paul. D. 48.10.16pr. stated that the secret removal of (private) documents was not a crime requiring a public trial. In that case an action for theft was brought or punishment occurred *extra ordinem*, see D. 47.2.27ff. and Antonius Matthaeus, *De Criminibus*, lib. LXVIII, tit. VII, nr. 6 & 7 (ed. Antwerp, 1761). See also Van den Velden, *Academisch proefschrift over het geheim der brieven*, p. 8f. (n. 4). Possibly the rules on the *stellionatus* were also applicable (an addition to the *lex Cornelia de falsis*). In Ulp. D. 47.20.3.1 it is stated that wherever the name of a specific offence is missing, swindling (*stellionatus*) could be charged.

¹⁶³ Fergus Millar, *The Emperor in the Roman World*, 2nd ed., London, 1992, p. 364.

¹⁶⁴ Arcad. Charis. D. 50.4.18.12; title D. 50.7, esp. Ulp. D. 50.7.3; see also Benöhr, «Der Brief», p. 130, and the literature references mentioned there.

¹⁶⁵ Differently Millar, *The Emperor in the Roman World*, p. 363, who called it an 'imaginary example' designed to raise problems in relation to existing law and custom; there seems no reason to think of such a theoretical example.

standing, who were able to go to Rome to study or for other (their own) business purposes.¹⁶⁶

According to Herennius Modestinus, Titius could not ask for a travelling allowance, but Luvius Titius could “after this statement some Latin words have apparently been lost”.¹⁶⁷ But what about the behaviour of the person who did not hand over the letter as he should have based on his *mandatum*?¹⁶⁸ What about the actions of Lucius Titius who delivered the *decretum* to the emperor and by that acted as if he was instructed by his *patria* having removed someone else’s name and writing his own instead? These questions were mentioned in the source but unfortunately not answered in the part handed down to us.¹⁶⁹

4. Conclusion

In this contribution the question whether the secrecy of correspondence can already be found in Roman law and whether or not this basic right was already protected back then is studied. The problem of an unauthorised infringement of the privacy of letters in Roman Antiquity is described and although this concept was not known as such, the problem of how to safeguard the secrecy of correspondence did exist. This article discussed the problem of safeguarding correspondence by means of a functional approach; it studied how cases in which correspondence did not reach the addressee or was read by others than the addressee were (legally) solved. It is shown that besides a possible moral pressure not to view another man’s letters, and this prohibition of such behaviour might have been morally present in the Roman Republic – mainly based on Cicero’s statements on this matter –, legally no breach of confidentiality existed as an action, but along various ways one could possibly have reached a similar result. First of all, solutions were found in practice to protect the privacy of correspondence. Furthermore, the Romans protected the missing, stealing, and possibly also the falsifying, of letters, and in any case in the event of testaments also the destruction thereof, by means of various legal actions granted to the injured party. Although this is not the same as an infringement of the (contemporary) confidentiality of mail, and although no right to enforce such a basic right to mail confidentiality existed for the benefit of the injured party, the just mentioned acts often led to a similar result.

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¹⁶⁶ Millar, *The Emperor in the Roman World*, p. 363.

¹⁶⁷ See also Benöhr, «Der Brief», p. 131.

¹⁶⁸ See on this matter Benöhr, «Der Brief», p. 145.

¹⁶⁹ See on this topic Benöhr, «Der Brief», p. 131; on this text see also De Sarlo, *Il documento*, p. 192f.