

## Remarks on Consensual Sale (with special attention to *periculum emptoris*)

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This paper was written with David Daube, teacher and friend, always present to my mind. What a pity I could not discuss it with him! Would he have approved? I shall never know. So I can but submit my thoughts to those who may be interested in the topic, in the first place to his friends and pupils.

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To keep this paper within plausible limits, it is necessary to confine it to a clearly defined topic. Introductory remarks will have to be brief, almost telegraphic.

In Rome, like elsewhere, sale had a predecessor: barter, the exchange of goods, one chattel for another, e.g., a barrel of wine in exchange for a donkey. (As a matter of fact, barter has survived to this very day and will, presumably, till the end of days, albeit to an ever-diminishing degree.) The roles of the parties to the transaction were identical: there is no difference between the "barterers." Much later (how much later is anybody's guess) someone, somewhere, came up with the idea of facilitating the process by injecting a substitute — preferably some rare (or not so rare) metal — for one of the objects of barter (in our example, either the wine or the donkey). When this happened, a distinction arose

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\* Two introductory remarks:

Consensual sale has been investigated, disputed, discussed, etc., by many a Romanist. I have read this and that, but altogether only a small part of what is available. The task is immense, and I could spend the rest of my years on it. I have no intention of doing that, also not wishing to break off somewhere in the middle. There is another risk: I may have unwittingly trespassed on the thoughts of others. In case this should have happened, I would wish to apologize profoundly.

Secondly: this paper is not intended to be an exercise in interpolationist text-criticism, a topic to which, in this instance, too much effort (and printer's ink) have been devoted. I am resigned to the belief that, in the present context, the assertion that a given text reflects early (Republican) law, or classical law, or the views of Justinian's lawyers, is particularly unproductive. I feel no wish to join that fray.

between the parties; the one who had contributed the "true" object had become the "seller," the one who had responded by giving the metal in return had become the "buyer."

Before we leave barter for good, we should note that some of its characteristics were taken over by the early law of sale. Especially noteworthy is the synchronicity, both in barter and in early sale. Also, the notions "to sell" and "to convey" referred to synchronic happenings and were one and the same. The same can be said of the corresponding pair "to buy" and "to acquire." In common usage we speak then of the transaction as a "cash sale" or a "cash purchase" (*Barkauf*). Even now, in the course of everyday retail transactions, synchronicity prevails. In most cases there is neither need nor purpose nor opportunity to separate between purchase and acquisition.

Yet, this is only part of the picture: ere long, situations arose for which a cash purchase, pure and simple, could not provide an answer. This paper concentrates on such cases, where there existed a desire to transact shared by both parties, but for some reason or other (objective or subjective) they were not yet ready for performance: this might involve periods of delay, long or short. On the seller's side, the object of the intended sale might still be in the course of being transported, from nearby or from afar. So also, on the other side, difficulties of payment might occur: if the seller would not agree to lend, and other sources of immediate credit were not available to the buyer, an agreed postponement (depending on the circumstances) of the transaction as a whole might be desired or unavoidable. On a less weighty level, but in everyday commerce more frequent and no less awkward, were other conditions or obstacles. Cash purchase required that seller and buyer be present at the same place. It also required that the object be handed over by the seller to the buyer. Even though both were together, an object which happened to be elsewhere could not pass from one to the other; a common purpose, shared by both parties, was there alright, but the legal tools necessary for giving effect to it were lacking. What then, if cash purchase could not deal with the above-mentioned situations?<sup>1</sup>

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<sup>1</sup> Some of them could indeed be tackled by resorting to an exchange of mutual *stipulationes*, but this legal device had rules of its own: it too required the coming together of both the parties. Another legal tool might have alleviated some of the difficulties of cumbersome laws of sale: the Roman law of agency (*Stellvertretung*) was and remained backward and retarded. It remained unaffected even after the positive developments in the field of sale: see, for all others, *D.50.17.73.4* (Scaevola, *Definitions*): "Nec paciscendo nec legem dicendo nec stipulando quisquam alteri cavere potest." See, especially, G. Wesenberg, *Verträge zugunsten Dritter* (Wei-

The consensual contracts, of which sale is the most important, came into being in response to such (and other) ever-growing needs of Roman trade, at home and abroad. It is surprising that such a significant innovation took place in misty darkness. We do not know when (even approximately) it happened, nor who set it in motion. Teachers and researchers of Roman law are wont to speak of the consensual contracts in glowing terms. And indeed, we shall see, the reasons for doing so are understandable. In introductory surveys of the laws of contractual obligations, the consensual contracts are applauded as the culmination of a process starting with real contracts, passing through types which rely heavily on elements of form (so the contracts *verbis*<sup>2</sup> and *litteris*), to a final group of four contracts, which rest on agreement only, renouncing any postulate of a formal nature.<sup>3</sup> Conceptually, the emergence of four consensual contracts, that is, sale and with it three others — hire (*locatio-conductio*), partnership (*societas*), and mandate (*mandatum*) — setting aside all demands of form, constituted a great step forward. Even so, all this progress cannot absolve us of the duty to keep our eyes open, to ponder and query.<sup>4</sup>

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mar, 1949), 3; Schulz, *Classical Roman Law*, 487–90; see also R. Yaron, "Reichsrecht, Volksrecht and Talmud," 11 *RIDA* (3rd series) 281, 290–95 (1964). Kaser, *Das römische Privatrecht*, 1:260–61, throwing up his hands, observes: "Die Denkform, daß jemand mit seinem rechtlichen Handeln unmittelbar Wirkungen in einer am Rechtsvorgang nicht beteiligten Person erzeugen könne, setzt ein hohes Maß juristischer Abstraktion voraus und ist in ihrer heutigen Gestaltung erst eine Errungenschaft der Neuzeit." This is rather too apodictic, and see already the brief review of Kaser's work in R. Yaron, Book Review, 17 *Am. J. Leg. Hist.* 86 (1973).

<sup>2</sup> But one of them, *dotis dictio*, was a unilateral oral *Leistungsversprechen*; see W. Kunkel, *Römisches Recht: auf Grund des Werkes von Paul Jörs*, 3rd ed. (Berlin, 1949), 285; possibly the undertaking did not require a fixed form. [This is the third edition of a book originally written by Paul Jörs and Leopold Wenger: P. Jörs, *Geschichte und System des römischen Privatrechts* (Berlin, 1927) (including L. Wenger, *Abriss des römischen Zivilprozessrechts*). But, the third revised edition (of 1949) was the work of Wolfgang Kunkel, and will be quoted (as above) by his name only. The fourth revised edition (of 1987) was the joint (but separate) work of three other authors: H. Honsell, Th. Mayer-Maly, and W. Selb, *Römisches Recht: aufgrund des Werkes von Paul Jörs, Wolfgang Kunkel, Leopold Wenger*, 4th ed. (Berlin, 1987). All references in this paper to the fourth edition are from Honsell (and cited by his name only).]

<sup>3</sup> See Schulz, *Classical Roman Law*, 524: "Consent was required here as in any other contract, but nothing more — no deed, no witnesses, no symbolic acts, no formulas, and no delivery of a thing as in real contracts."

<sup>4</sup> In a critical vein, see already A. Watson, "The Origins of Consensual Sale: A Hypothesis," 32 *T. v. R.* 245 (1964).

The most detailed and significant developments took place in the sphere of sale, while the other three were affected by the winds of change to a smaller degree. All four share a common achievement: the recognition of the existence of a legal tie prior to the actual performance of the transaction. Having acknowledged the presence of the three others we shall, for the purposes of this paper, concentrate on sale only. Once a fixed set of essential details, in the main determining the identity of the object and the price payable, had been agreed upon, a contract had come into being, the infraction of which might occasion mutual claims.<sup>5</sup> Here, then, novel concepts brought new remedies into being.

What was the technique underlying the creation of consensual sale? The method chosen by the Roman jurists was, at least in hindsight, ingeniously simple. The concept of an essentially monolithic unity of the transaction was abandoned. It was now construed as consisting of two separate parts, as remote from each other as could be. Part one was ostensibly new: a final agreement, free of all demands of form, recognized as a "binding" contract, described as "perfect," was presented as the answer for cases such as those mentioned above, where conveyance was not yet possible. With a kind of unconcerned nonchalance, this newly invented contract took its place in the law concerning obligations, and was given a leading role at the head of the group of consensual contracts. Indeed, when one comes to think of it, there is some exaggeration in the way in which this change is presented: this meeting of minds had been there all along; without it the

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<sup>5</sup> These were, in the case of sale, the *actio empti* and *venditi*. In the others, respectively, the *actio locati* and *conducti*; the *actio pro socio*; finally, the *actio mandati* and *mandati contraria*.

For our purposes it is immaterial whether these developments were simultaneous or — rather more likely — started in one particular sphere (perhaps in sale) and were followed in the others. In fact, hire (especially hire of service(s)) is a plausible companion with sale. By contrast, partnership (*societas*) by its very nature is a complex relationship, and as such would justify closer contacts, based, at least in its beginnings, on a more formal approach.

In this context, *mandatum* is the odd case out, and one may wonder how it came to be added. And see already Walker, writing in 1879, who distinguishes mandate from the other consensual contracts. He notes, *inter alia*, that "it differs from the rest of them . . . it is gratuitous, whereas the others are upon valuable consideration . . ." B. Walker, *Selected Titles from the Digest* (Cambridge, 1879), 1:1 (quoted without approval by A. Watson, *Contract of Mandate in Roman Law* (Oxford, 1961), 69). More cutting is the remark of Schulz: "One may doubt whether it was a good idea to make mandate a contract at all; but it arose comparatively late and was closely connected with the customs of Roman social life." Schulz, *Classical Roman Law*, 525.

conveyance could not have taken place. But it had modestly remained in the background, almost hidden.

Part two was devoted to "modes of conveyance," belonging to the law of property. This part, formerly all-important, was demoted from its prominence and turned into a "mere" formality. It consisted of the ceremonial handing over of more important objects (*res mancipi*), their conveyance to the new owner (by means of *mancipatio* or *in iure cessio*), whereas lesser objects were conveyed by informal handing over (*traditio*).

Under the new approach, the two components — the underlying contract and its final consequence, the conveyance — were separated from each other, with the limelight on the newly independent agreement.<sup>6</sup> Possibly, here the seeds were sown for the eventual disappearance of *mancipatio* and *in iure cessio*, a process which would continue over centuries to come.<sup>7</sup> SIC TRANSIT GLORIA MUNDI.

One last preliminary question: how did all this happen? One answer opts for a slow process, extending over a very prolonged time.<sup>8</sup> This would also dispose of the question which had bothered me, concerning the anonymity of it all. I do not wish to deny such a possibility categorically, but I have a hunch that it is too simple. The change, we would suggest, was too sophisticated for a slow start; there is likely to have been a concerted significant step, which brought about a major change and led the Roman principles of sale in a new direction. But this is not a point on which to tarry too long.

I wish now to attempt a more exact assessment of the Roman achievement by following the road of comparison. One must distinguish between two details, to be considered separately: on the one hand, the problem which had to be solved, and on the other hand, the method chosen and applied. We have (arbitrarily) concentrated on a topic at the outset of this paper, and have already seen how the Roman jurists responded to it. Now it is our task to see how the same problem, ubiquitous and going back to very early times, was met elsewhere. The Roman approach was based

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<sup>6</sup> The separation of "modes of conveyance" (or "modes of acquisition") from the consensual contract of sale finds its expression also by their separate location in the *Institutes* of Gaius: the "modes" are discussed in the context of the law of property (beginning of book 2); the contract of sale follows in 3.139–141, in the chapter on obligations (which commences at 3.88).

<sup>7</sup> For its description, see Kaser, *Das römische Privatrecht*, 2:274.

<sup>8</sup> See, e.g., Kunkel (note 2), 226–27. Also V. Arangio-Ruiz, *La Compravendita in Diritto Romano* (Naples, 1952, 1954), 45–81; Jolowicz/Nicholas, *Historical Introduction*, 288–91.

on a clever theoretical grounding (we have already recognized this, even admired it). Its uniqueness is stressed again and again. All that existed elsewhere (in contemporary Greek and Hellenistic sources, well known to Romans themselves and to their modern researchers) or in earlier times (largely unknown then and little known even now), symbolized by a single word *arrabon*, shortened to *arrha*,<sup>9</sup> was banded together, not without faint disdain, under the heading "practice."

I concede the difference between theory and practice.<sup>10</sup> It may also — occasionally — give satisfaction to find a theoretical explanation for reality (or practice). Further, I am willing to accept that theory may be based on a more strenuous and (hopefully) more successful intellectual effort. I have no intention to doubt or belittle the historical fact that the consensual contract was, as far as is known, invented by the Romans (thus providing an example of "pure" Roman law, a notion so dear to the heart of some of our colleagues). But the absence of a consensual contract of sale from other systems of law of the ancient world may perhaps have another, simpler, explanation. May it not be, that the non-Roman world did not consider it necessary or useful, that they managed quite well without it? An indication in that direction may be the absence of a discernible rush, elsewhere in the regions around the Mediterranean sea, to adopt consensual sale. It is only relatively late, after centuries of Roman rule, that Roman attitudes make their appearance felt.<sup>11</sup> Put on a very low, pedestrian level, the merchants, the class primarily concerned with such issues, were concerned not with principle, but with practical solutions for practical problems. This they understood very well, and asked for no more.

<sup>9</sup> To be discussed shortly.

<sup>10</sup> The distinction between theory and practice has been underlined by J. A. C. Thomas, "Arra in Sale in Justinian's Law," 24 *T. v. R.* 253 (1956). At the outset, he speaks of C.4.21.17 (AD 528) and *Institutes* 3.23 pr. as a "compromise between Roman principles and those of eastern practice." *Id.* at 253. This may well be a correct statement. But at 261 he asserts that "as a practical matter . . . if a large sum were given by way of *arra*, the vendor would . . . be content simply to retain the *arra* . . . . That, however, would be a practical result, not a matter of legal principle." Here Thomas puts principle above praxis, and I would not follow suit. Incidentally, the paper, which is well written, was the very first in the long list of his publications, as Peter Stein, in his obituary of Thomas, points out: P. Stein, "J.A.C. Thomas (1923–1982)," 32 *IVRA* 300, 302 (1981).

<sup>11</sup> See F. Pringsheim, "Gegen die Annahme von 'Vorstufen' des konsensualen Kaufes im hellenistischen Recht," 6 *IVRA* 18, 29 n.62 (1955), speaking of "die nach langem Widerstande schliesslich unabwendbare, aber zögernd und unwillig fortschreitende Aufnahme der Regeln des römischen Reichsrechtes."

What were merchants<sup>12</sup> anywhere, Romans and their foreign predecessors and fellows alike, looking for?<sup>13</sup> A preliminary topic, perhaps outside the scope of this paper, but too important to go unmentioned here, is the apprehension which merchants trading abroad must have felt for the security of their lives and of their property. These problems were indeed beyond regulation by any law-merchant. They could be dealt with only by inter-state agreements.<sup>14</sup>

In addition, two main desiderata will have been shared by merchants. Their first objective was certainty: a way must be found to bind buyer and seller to each other, to ensure that each would be standing by his promises, even though the performance of their declared intentions had *a priori* been postponed to a later date. The Roman answer was the consensual sale, a contract binding at once, on fixing the specific object which was to pass to the buyer, and agreeing on the price to be paid to the seller (including also secondary remedies furnished to both parties).

Their second objective reflects their innate, instinctive dislike of litigation (*absit iurisconsultus* might have been their motto, in early times no less than millennia later): if litigation could not be avoided altogether, it should at least be limited to the minimum. It is the way in which the law reacted to such expectations, by providing for (or recognizing) effective remedies and arrangements, which will have to be scrutinized.

The Eastern Mediterranean world had developed and matured, a long time ere Rome had joined the club. How had the Greeks dealt with the problem of litigation? Their solution centered around an arrangement designated by the term *arrha*.<sup>15</sup> The *arrha* was a down-payment to be made by the would-be buyer. No need to worry about its nature, its exact definition. Those who came up with this device looked for (and found!) practical answers to their problems. They were not equipped for theo-

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<sup>12</sup> In using the term "merchants" I wish to point to the fact that the basic interests of buyer and seller need not be in conflict. Also the roles are interchangeable. The buyer of today is the seller of another day.

<sup>13</sup> I once committed the mistake of putting this question to my class. One wise-crack reacted on the spot, calling out "profits, of course!" The class burst out laughing. And I? I joined the laughter, but on other occasions I refrained from creating the opportunity for it.

<sup>14</sup> See, e.g., R. Yaron, "Foreign Merchants at Ugarit," 4 *Israel L. Rev.* 70 (1969).

<sup>15</sup> The Semitic origin of the term (and its basic meaning "guarantee," "pledge") is generally accepted. However, in the present context, it is the immediate contacts that count. References to early Oriental sources might have their uses, but I have decided to leave them aside for the moment. Perhaps some other time.

retical considerations, nor concerned about them. Actually, this is not to be seen as a victory of practice over legal principle: it was simply too early for a competition, conscious or unconscious, between the two.

Important were the following features: the object and price had to be agreed by the parties. They also had to agree about the size of the down-payment; in this they had full freedom of choice. In case the would-be buyer did not live up to his undertaking, the amount given would be forfeited. But it also fixed automatically — on the identical level — the amount the seller had to render.<sup>16</sup> The higher the *arrha* was set, the stronger would be the bond of each of the two parties. The higher the stake, the heavier the burden of withdrawal. On the other hand, if the *arrha* was in fact very small, a mere token, both parties had actually retained their freedom of action.

When one turns to the Roman contract, the consequences of the breach of undertaking were apt to be disappointing: the offender had indeed to make good the loss which he had caused to the other party. But, in absence of an amicable settlement, this loss had to be established in court (in itself a burden); also as often as not it might be disappointingly low. This means that the bond which has been created between the parties will, more often than not, have been of rather limited effect. The idea, or ideal, of *bona fides*, a significant and welcome innovation in the realm of sale, would not affect the judge's estimate of the actual loss suffered by the offended party.<sup>17</sup>

There is another point to be noted, and that is the doubt, the uncertainty, whether a contract had indeed been reached. So much attention is devoted to freedom from form, that the very existence of an agreement may occasionally remain in doubt. Here the Roman contract might occasionally lean for support upon the Greek *arrha*, as modern scholars unwittingly emphasize, when speaking of "only" the evidentiary role assigned to it in Roman texts.<sup>18</sup>

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<sup>16</sup> He has to return "double": this means return of the sum which he has received plus an equivalent amount.

<sup>17</sup> Watson (note 4), 247, warns generally that "too much emphasis ought not be placed on the part played by *bona fides* in the emergence of sale."

<sup>18</sup> See, e.g., Buckland, *Text-Book of Roman Law*, 481 ("In classical law it seems to have only an evidentiary purpose . . ."); A. Watson, *The Law of Obligations in the Later Roman Republic* (Oxford, 1965), 46 ("*Arra* was purely evidentiary in legal function in classical law . . .," relying on Gaius 3.139); Kunkel (note 2), 190 ("Hier wurde sie . . . zu einer bloßen Bekräftigung des Vertragsabschlusses: die Hingabe der *Arrha* bewies, daß



So far these general remarks on the Greek and Roman approaches. In brief, one might say that on both counts, that is, (a) the provision of maximum certainty, and (b) the restriction of the need to litigate, the established Greek *arrha* had the upper hand over the new Roman solution. *Arrha* was better adapted to the needs and wishes of both the parties. It furnished more definite, clearer, and equitable solutions than did the Roman consensual contract. Also, the need for litigation was considerably limited: the sums due from a buyer in default had already been provided by the down-payment (not to be reclaimed). In turn, the sum to be repayable by the seller was already fixed by his accepting the down-payment. Judicial intervention would ordinarily only be required to make him pay the sum, which was not in doubt (double of what he had received).

Roman jurists, eager to promote the formless contract of sale etc., were naturally cool to *arrha*. They did not support or push it, but they had the good sense to use it (we have seen) as evidence; beyond that *arrha* was tolerated and available to those who wished actively to resort to it. The superior features of *arrha* are demonstrated also by its survival throughout centuries, many centuries, of Roman rule, with an imposing comeback to prominence under Justinian. In other forms it continues to exist, in various fields, to this very day.

A last observation on a topic which has been touched briefly: that of legal principle versus practice. It happens occasionally that these two are in agreement. It is nice when that is so. If they move in opposite directions, the agony of choice is not too burdensome. More often than not, I would prefer practice to principle, as long as the practice is equitable, and not in conflict with our sense of justice. I conclude this part of the paper, by referring to an *obiter dictum* of Hermogenianus, *D.1.5.2* (1 *epit.*). The jurist reminds us that "all law is established for the sake of humans" (*hominum causa omne ius constitutum est*) — and not vice versa. It is a statement worth bearing in mind.

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der Vertrag endgültig zustande gekommen war, und gab somit der formlosen Einigung einen sichtbaren Ausdruck . . ."). Kaser, *Das römische Privatrecht*, 1:548 n.21, points to *D.18.1.35 pr.* (Gaius 10 *ed. prov.*) as containing "eine fühlbare Spitze gegen das griechische Recht," but I prefer to regard *ut evidentius probari possit convenisse de pretio* as giving greater weight to the Greek *arrha* over other proof of the consensual agreement.

For my heresies I deem to find some support in the writings of Pringsheim, equally at home in Roman and Greek law.<sup>19</sup> From him we quote, rather briefly.<sup>20</sup>

Scientific legal thinking in its proper sense is confined to Roman law in its second period. . . . Nevertheless Greek law was not unable to satisfy the requirements of life. It must be emphasized that a legal science like that of the Romans is not an indispensable condition for a vivid legal progress and the adaptation of existing legal rules to new and complicated economic situations. The supposition that strict scientific, i.e. Roman, jurisprudence alone was able to master the problems of legal life has hampered the understanding of more than one historical process.

. . .

Greek legal imagination was not active enough to conceive a more progressive and abstract theory of sale. The conception of cash sale was never superseded by the idea of a binding contract of sale which created enforceable obligations on vendor and purchaser. But this lack of inventive spirit was counterbalanced by an abundance of notarial intelligence and an admirable skill in finding expedients. Legal life did not fare any the worse in the end.

Pringsheim goes on to list a number of problems requiring further efforts. Then he continues:<sup>21</sup>

These practical considerations are the economic origin of the earnest money. Since both parties risk something it is appropriate that both give and take the same insurance against this risk. If the intending buyer gives to the intending vendor a part of the price and it is agreed that in case of non-performance the buyer shall lose his earnest, the vendor pay back the double amount, the risk is equal.

This ends our general remarks. From this brief *tour d' horizon* we return to Rome. In the wake of the basic Roman consensual contract of sale there followed some further, concomitant developments. These developments were occasioned by it, could not have come into being without it, but none of them is its necessary consequence. Two points (*A* and *B* below) deserve to be men-

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<sup>19</sup> F. Pringsheim, *The Greek Law of Sale* (Weimar, 1950). His chapter on *arrha* (333–429) is introduced by "Jurisprudence of *arra*" (333–35).

<sup>20</sup> *Id.* at 333–34 (notes omitted).

<sup>21</sup> *Id.* at 335 (notes omitted).

tioned, but will not detain us for long. The last (C) will require more detailed attention, not — I hasten to add — because of its true importance (which may in fact be limited), but because of the heat (rather than light) generated by the controversy of scholars.

A. The sale of *res aliena*: such a suggestion would have been meaningless within a system which combined the preliminary agreement and conveyance. Nobody could transfer what was not his property, but the (newly established) contract of sale allowed a move in that direction.

Such a surprising innovation could not rest on the mere fact that it was possible; rather it may be expected to respond to some concrete need. Here are the brief comments by Buckland:<sup>22</sup>

There was nothing to prevent the sale of a third person's property. It might be difficult to carry it out, but that was the vendor's fault. It is plain that such a sale might be in good faith, with full knowledge of the facts; the vendor might intend to acquire from the owner, or induce him to convey to the buyer.

This tells less than little about the actual background of such transactions, about their *raison d'être*. On the face of it, as long as the vendor did not conceal the facts, he was free to go about "selling" whatever he pleased, without much connection to reality. I would suggest that the question ought to be approached the other way round: the non-owning vendor may have been acting, from the beginning, in concert with the owner,<sup>23</sup> on his behalf, as his (shadowy, unofficial) agent.<sup>24</sup>

B. The duty of delivery of the object sold still rested upon the vendor, but the effect of such delivery had undergone a change: he was no longer duty-bound to make the buyer owner. Kaser: "Der Verkäufer einer Sache schuldet aber nicht . . . die Verschaffung des Eigentums, sondern nur die Einräumung eines Besitzes, der von allen faktischen und rechtlichen Eingriffsbefugnissen des Verkäufers selbst oder dritter Personen frei ist (*vacuam possessionem tradi*)."<sup>25</sup> The circumlocution may appear strange, but in practice it does not seem to have mattered significantly. It may have its origin in the desire to facilitate the sale-transaction

<sup>22</sup> Buckland, *Text-Book of Roman Law*, 484 (citing *D.18.1.28* (Ulpian 41 *Sab.*)).

<sup>23</sup> One may, perhaps, compare the *aestimatum* (also known as *Trödelvertrag*): see Buckland, *Text-Book of Roman Law*, 522, 523–24; Kaser, *Das römische Privatrecht*, 1:581–82.

<sup>24</sup> And see already note 1, above.

<sup>25</sup> Kaser, *Das römische Privatrecht*, 1:550 (notes omitted); so also Buckland, *Text-Book of Roman Law*, 488.

where one of the participants was not a Roman citizen.<sup>26</sup> As time went by, it suited also the trend of diminishing ceremony and formality. *Obiter* one might mention, in comparison, that the *actio auctoritatis* was replaced by the *stipulatio duplae*, but the substance remained much the same.

C. Many a battle has been fought over the issue known under the name *periculum emptoris*. Its applicability was in each case limited in time; it commenced from the moment the contract was "perfect," it terminated the moment that the object was handed over (in accordance with the version just presented under *B*).<sup>27</sup> The problem is, who will bear the loss, in case the object was destroyed (or damaged) in the course of this interim period? Within this frame of time, we devote our attention exclusively to cases where the loss was due to *vis maior*, in other words, the object perished in circumstances entirely beyond the control of either seller or buyer.

At the end of the fray a dominant opinion has emerged, accepting in essence as classical the ruling in favor of the seller. This means that the buyer had to pay the price, in full, even though he received nothing in return, or else received only the damaged remnants. (There is currently little dissent, and I, for one, have no desire to see that issue reopened.) What bothers me are the explanations of the rule, offered by the protagonists. By and large I regard these explanations as inadequate. A *caveat* may be in place: my objections are essentially negative. My purpose is to clear the ground. Assuming that I succeed in that effort, I declare from the outset, that I am not able to offer much that would contribute to explanation and understanding.

Various arguments are set out by Buckland. Let us see some of them:

*The survival theory.* Buckland writes: "[*Periculum emptoris*] may be a mere traditional survival. The rule existed when sale and transfer occurred at the same moment, and though sale changed its character the rule remained."<sup>28</sup> In the same vein

<sup>26</sup> So Kaser, *Das römische Privatrecht*, 1:550–51. Differently Buckland, *Text-Book of Roman Law*, 488–91.

<sup>27</sup> So also Honsell (note 2), 309: "Schwierigkeiten bot allenfalls die Frage nach der Gefahrtragung in der kurzen Zeitspanne zwischen Vertragsschluß und Übergabe."

<sup>28</sup> Quoted from second edition of Buckland's *Textbook*: W. W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian*, 2nd ed. (Cambridge, 1932), 487. In Stein's edition this is reformulated in a clearer fashion: "It may be a mere survival. When sale and transfer occurred at the same moment, the risk was on the buyer and after they were separated it remained on him." Buckland, *Text-Book of Roman Law*, 487

Kunkel: "Im Rahmen des klassischen Rechts läßt sich die Gefährtragung des Käufers leicht als eine der zahlreichen Nachwirkungen des Barkaufgedankens verstehen."<sup>29</sup> So also Kaser: "Diese Regel [i.e., *periculum emptoris*] sieht wieder den Barkauf, bei dem Abschluß und Vollzug zusammenfallen, als Normalfall an und rechnet, wenn die Leistung der Ware aufgeschoben wird, die Kaufsache, auch wenn sie noch im Eigentum des Verkäufers bleibt, nicht mehr zu seinem Vermögen."<sup>30</sup>

A development of this approach is offered (with some reserve) by Hausmaninger/Selb:<sup>31</sup>

Die klassischen Juristen wiesen die Preisgefahr grundsätzlich dem Käufer zu: *periculum est emptoris*, die Gefahrtragung der Käufer (uzw regelmäßig bereits ab dem Kaufabschluß, dh mit der Einigung über Ware und Preis). Der Käufer hatte den Kaufpreis zu zahlen, obwohl er keine oder nur eine verschlechterte Ware bekam und obwohl er anstelle der Primärleistung auch keinen Schadenersatz erhielt. Es scheint, als lägen dieser Regel Fälle des Barkaufs zugrunde: Verblieb die Ware ausnahmsweise auf Wunsch des Käufers noch beim Verkäufer, so wurde sie dennoch nicht mehr zum Vermögen des Verkäufers gerechnet.

History is the preferred escape route whenever understanding and/or justification are beyond reach. In this instance, I should argue in rebuttal, that *periculum emptoris* is in no fashion rooted in earlier times, that it came into being as an answer to a problem that had, unrelated to any *Barkaufgedanken*, arisen in the wake of consensual sale.

A central place in the law of property is occupied, since early times, by the owner or master (*dominus*). Usually it is one person<sup>32</sup> who reaps all the benefits of ownership, and correspondingly bears all the risks that may ensue. He bears all the losses, and most explicitly those which have been caused in circumstances which do not point to particular persons, who could be held responsible for what has happened, whether as tortfeasors or as

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(notes omitted). I accept Stein's paraphrase as a correct and improved version of Buckland's statement.

<sup>29</sup> Kunkel (note 2), 229 n.8.

<sup>30</sup> Kaser, *Das römische Privatrecht*, 1:552.

<sup>31</sup> H. Hausmaninger and W. Selb, *Römisches Privatrecht*, 9th ed. (Vienna, 2001), 237. See also the remarks of Honsell (note 2), in note 34, below.

<sup>32</sup> In various circumstances, there may be a plurality of owners.

contrahents (in a variety of relationships *not* including consensual sale, which did not yet exist).<sup>33</sup>

One might describe *Barkauf* as the direct, immediate sequence of two owners, two *domini*. There was no *interregnum*, no interim state, which would necessitate or provide the occasion to ponder potential complexities. It was, if one may borrow an example from another sphere of law, like the succession of a son (or sons) to the property which had been his father's. For these ideas, one may point also to the very concise, well-formulated statements by Honsell: "Ursprünglich gab es nur den Barkauf und auch später war es die Regel. Obligation und Vollzug fielen also zusammen. Die kritische Zwischenzeit konnte nicht entstehen."<sup>34</sup>

It was only the innovation, the arrival of the consensual sale, recognized by law as a separate entity, which necessitated the search for a solution to problems which could not have existed earlier. This should also refute the suggestions of my Viennese colleagues, as to the role (possibly) played by "exceptional circumstances" (*ausnahmsweise*). In early times — that is, the time preceding consensual sale — a court would have to consider only one question: had ownership passed? If the answer was negative, the loss was the concern of the first (and only) owner. If the answer was positive, the loss was incurred by the new (and only) owner.<sup>35</sup>

<sup>33</sup> For this debit side of ownership, maxims often employed are *res perit domino* (D. Liebs, *Lateinische Rechtsregeln und Rechtssprichwörter*, 6th ed. (Munich, 1998), 208) and *casum sentit dominus* (*id.* at 42). The ideas may be Roman, but the formulation apparently is not.

<sup>34</sup> Honsell (note 2), 310. Less convincingly, Honsell continues at once: "War es ausnahmsweise einmal anders, so trug eben grundsätzlich der Käufer die Gefahr, der sich auf eine regelwidrig späte Übergabe der Sache ja nicht einzulassen brauchte." *Id.* Particularly questionable is the use, in this context, of the term *regelwidrig*, which would hint that the delay was improper, an infringement — which is not the case.

<sup>35</sup> To the point is the remark of Peters:

Daß der Ursprung des römischen Kaufes der Barkauf gewesen sei, ist gewiß richtig. Nur liefert er keine Handlungsanweisungen für die Behandlung der Fälle, in denen Vertragsschluß und Übergabe zeitlich auseinanderfallen. Wenn diese beiden möglichen Anknüpfungspunkte in ihm noch vereinigt sind, wäre es nicht weniger denkbar, den beiden Elementen des Barkaufs das andere, die Übergabe, für ausschlaggebend für die Gefahrtragung zu halten.

F. Peters, "Periculum est emptoris," in H.-P. Benöhr, et al. (edd.), *Iuris Professio. Festgabe für Max Kaser* (Vienna, 1986), 223. He goes on to remark that "Als *dominus* der Sache kann man den Käufer von der Perfektion des Kaufes an jedenfalls in wirtschaftlicher Hinsicht befreien." *Id.* After stating his reasons, he adds: "Einzuräumen ist, daß der Käufer einstweilen noch kein Anwartschaftsrecht im Sinne einer dem

*Correspondence to commercial needs.* Buckland again:<sup>36</sup> "This rule remained and seems to have raised no question. The fair inference is that it corresponded to commercial needs." This is rather vague, and does not explain what these "commercial needs" are supposed to be. Moreover, since the rule is one-sided, it might be more exact to speak of "vendors' needs."<sup>37</sup>

Also, on this particular point, I would like to point to the tendency of modern laws not to separate risk from the transfer of ownership.<sup>38</sup> So German law is in agreement with Roman law in delaying ownership until the handing over of the object, but (differently from Rome) delays the passing of *periculum* to the moment of handing over the object. By contrast, French law and English law fix their attention on the time of the contract of sale, advancing to it the passing of ownership and of risk: both *march pari passu*.<sup>39</sup>

And, going back to early non-Roman law, I may point to one Talmudic text, of the 3rd century C.E.: "R. Jochanan said: It is a rule of law, that the payment of money acquires; and why did they say, 'pulling' acquires? This was imposed, lest he (the seller) say to him (the buyer) 'thy wheat was burnt in the store-room'."<sup>40</sup> This too demonstrates the desire not to separate risk from the transfer of ownership.

*Periculum emptoris can always be excluded by agreement.* So Buckland, once more.<sup>41</sup> This is no doubt correct.<sup>42</sup> But this argu-

Verkäufer gegenüber gesicherten Rechtsposition erlangt. Der Verkäufer ist vielmehr an anderweitigen Verfügungen nicht gehindert, vgl. Paul D. 18, 4, 21." *Id.* at 224 n.26. This points in the other direction.

<sup>36</sup> Buckland, *Text-Book of Roman Law*, 487 (notes omitted).

<sup>37</sup> So recently, expressly, O. Cortesi, *Die Kaufpreisgefahr. Eine dogmatische Analyse des schweizerischen Rechts aus rechtshistorischer und rechtsvergleichender Sicht unter besonderer Berücksichtigung des Doppelverkaufs* (Zurich, 1996). See also the detailed review of this dissertation, by H.-P. Benöhr, Book Review, 118 ZSS (germ. Abt.) 793 (2001).

<sup>38</sup> Compare Honsell (note 2), 311: "Die modernen Rechtsordnungen haben das Prinzip des *periculum emptoris* aus begreiflichen Gründen überwiegend nicht übernommen."

<sup>39</sup> For a concise survey of post-Roman developments, see A. Watson, *Legal Transplants* (Edinburgh, 1974), 82–87. Arangio-Ruiz (note 8), 251, points to Swiss law as the only modern legislation that has fully adhered to the Roman rules: "Il regime romano è . . . pienamente riprodotto nel codice civile svizzero: benchè, infatti, questo ordinamento faccia nascere dal contratto solamente obbligazioni, tuttavia il rischio passa nel compratore fin dal momento del contratto."

<sup>40</sup> Babylonian Talmud, Bava Metsi'a 46b (and elsewhere). See Maimonides, *Sale* 3.5.

<sup>41</sup> Buckland, *Text-Book of Roman Law*, 487.

<sup>42</sup> See *Institutes* 3.23.3a; D.18.1.35.4 (Gaius 10 *ed. prov.*).

ment has been neatly finessed by de Zulueta; he calls it "an important practical attenuation," but "no defence of the rule."<sup>43</sup> An exclusion by agreement, ostensibly impartial, in effect tilts towards the vendor and *periculum emptoris*. By mere silence of the contrahents, they have accepted it. To avoid it, active opting-out is required. In effect, very often, the buyer (who would in every instance be the interested party) would overlook the matter until it was too late.<sup>44</sup>

*A recompense for the seller.* The following is the explanation suggested by Schulz: "The seller had bound himself to treat the thing like a thing belonging to the buyer; he owed the fruits of the thing to the buyer<sup>45</sup> and had taken over a liability for *culpa* and *custodia*. For all this he deserved a recompense, and this he received in the form of the price."<sup>46</sup> His crowning conclusion: "The rule in the classical context, so far from being unjustified, is an ideal solution of the problem."<sup>47</sup> One cannot help being surprised at such an excess of enthusiasm! He went on to a final remark, about later change: "Under Justinian's law the seller was only liable for *culpa* and the recompense is perhaps a little too high compared with the duties which he had undertaken, but the opposite rule *periculum est venditoris* is still worse."<sup>48</sup> This implies a drastic change in assessment: what has just been acclaimed "ideal" has all of a sudden been implicitly degraded to "bad" through the juxtaposition with the (hypothetical) "opposite rule *periculum est venditoris*," described as "still worse."

This comparison is questionable, but one can accept the basic conclusion which appears to emerge from it, by necessary implication. The concrete *periculum emptoris*, and its shadowy negative *periculum venditoris*, were both bad solutions for the narrow case here under discussion. They were bad because they both envisaged equally one-sided, extreme answers, in what was in essence a bilateral relationship. In these bleak circumstances, one argument, perhaps marginal, could be brought forward (to give prefer-

<sup>43</sup> F. de Zulueta, *The Roman Law of Sale* (Oxford, 1945), 35.

<sup>44</sup> The purchase of wine will be an exception; its deterioration is such a frequent occurrence that buyers will usually be alert to it, and stipulate the proper exception. See de Zulueta (note 43), 58 (regarding *emptio ad gustum*), and my discussion of the topic: R. Yaron, "Sale of Wine," in D. Daube (ed.), *Studies in the Roman Law of Sale* (Oxford, 1959), 71–77.

<sup>45</sup> The argument of Schulz about fruits due to the buyer is hollow, since not everything being sold bears fruits. In case fruits were expected, they could easily be calculated into the price.

<sup>46</sup> Schulz, *Classical Roman Law*, 533.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*



ence to the direction which was not taken) to *periculum venditoris*: it would not have involved the premature and unexplained transfer of the risk, from a possessor to one who was neither owner nor possessor.

It is the achievement of Schulz to have thrown light — without intending to do so — upon this complicated situation. A new legal device had been created, namely the contract of sale. One of its unavoidable results was the emergence of a quasi-partnership, for an interim period. During these days or weeks, the two parties to the contract, the one (the seller) not yet out, the other (the buyer) not yet in, might have to face losses due to *vis maior*, that is to say, due to events to which they had not contributed and which they could not have averted. In such a situation it would have been reasonable, and preferable, to look for some solution which apportioned the loss which had taken place. Nothing of the kind happened. This was not the Roman way: it may be that they preferred clear-cut decisions, and gave us the *periculum emptoris*.

In voicing such misgivings I do not find myself standing alone. It was David Daube himself, who already in the opening remarks of his inaugural lecture at the University of Aberdeen (on April 30, 1951) observed: "It would seem . . . that justice as a living phenomenon contains an element that is averse to finer differentiations, quite apart from practical difficulties,"<sup>49</sup> and notes "a deep-rooted tendency to see no shades between black and white, to admit no degrees of right and wrong, to allow no distribution of loss and gain among several litigants, to send a party away either victorious or defeated."<sup>50</sup> Discussing various examples, among them the risk put on the buyer, he remarks that "the law inclines to an attitude of 'either-or' in a far higher degree than is necessitated by practical considerations."<sup>51</sup> His unhappiness with early "either-or" justice emerges in his statement, that "The modern development is clearly hostile to the 'either-or' attitude and, within the limits of the practicable, tends to do away with the vestiges of this element."<sup>52</sup> At the end of his paper, Daube notes that "By

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<sup>49</sup> D. Daube, "The Scales of Justice," 63 *Jur. Rev.* 109 [= *Collected Studies*, 1:447], 109 (1951).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 110.

<sup>52</sup> *Id.* at 126. More than twenty years later, Daube's reserve is taken up by disciples of his. See Watson (note 39), 87, dealing with developments in French, German and Swiss law, remarking "that most people in these countries . . . believe both that ownership and risk are transferred to the buyer at the moment of delivery, and that that is the way it should be whatever lawyers and courts say to the contrary." Peter Stein and John Shand are critical of "either-orness" in law: "If a thing which has been sold

the *lex Rhodia de iactu*, a Roman statute modelled on Rhodian sea law, it was provided that, if one freighter's cargo was thrown overboard to save the ship from peril, the loss must be shared between all."<sup>53</sup>

*Postscript:* After the above paper was completed, I learned of the recent publication of a monograph, dealing with the problem of *periculum emptoris* from a different angle.<sup>54</sup> Its approach is indicated by its subtitle.

I have now seen that impressive volume, and desire to remark on it. Obviously, it would be unwise and unfair to do so in haste. On the other hand, this book must not be unduly delayed. In consultation with the editor, Dr. Metzger, it was then agreed that this paper be published as submitted.

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is accidentally destroyed before the seller is due to deliver it to the buyer, [the law will either require the buyer to pay the price, or not]. No law, however, divides the accidental loss between the two innocent parties . . . ." P. Stein and J. Shand, *Legal Values in Western Society* (Edinburgh, 1974), 92.

<sup>53</sup> Daube (note 49), 128. Compare Babylonian Talmud, Bava Qamma 116b. Note that the *lex Rhodia* and the Talmud differ in the mode of assessment of the contributions.

In torts, the idea of loss-sharing is encountered in the Laws of Eshnunna, sec. 53, and thence in the Bible (Exodus xxi. 35) and in the Talmud (Mishnah Bava Qamma 1.4). See D. Daube, "Direct and Indirect Causation in Biblical Law," 11 *Vetus Testamentum* 246 [= *Collected Works* 3:409], 258–59 (1961); R. Yaron, *The Laws of Eshnunna*, 2nd ed. (Jerusalem, 1988), 291–97.

<sup>54</sup> M. Pennitz, *Das periculum rei venditae. Ein Beitrag zum "aktionrechtlichen Denken" im römischen Privatrecht* (Vienna, 2000).