

MESSAGES FROM ANTIQUITY

Roman Law and Current Legal Debates

ed. by Ulrike Babusiaux and Mariko Igimi



böhlau



Ulrike Babusiaux · Mariko Igimi (eds.)

"Messages from Antiquity"

Roman Law and Current Legal Debates

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Preface

This book is a compilation of papers presented at the conference held in February 2016 at Kyushu University (Fukuoka, Japan) under the title "Messages from the Antiquity: How can Roman law contribute to current debates in law?" For the occasion, Prof. Mariko Igimi invited Roman law researchers from around the world to discuss the importance of Roman law with the students of the LL.M. in International Economic and Business Law. The aim was to identify and build links between Roman and modern law through such interaction. We came to understand that Roman law is significant on the one hand because it provides the historical basis of civil law in continental Europe and other civil law jurisdictions, including Japan. On the other hand, the texts of Roman law also provide us with a space to reflect on "new" issues of legal politics. Therefore, they help to analyse legal problems and might provide support for the development of solutions.

The unique experience of having such a diverse group of students from all over the world, including common law jurisdictions such as UK and New Zealand participating in the discussion, served as the main inspiration to open a gateway for a larger group of readers to different ideas and questions on the persisting relevance of Roman law, in the hope that they will discover "new" elements in "ancient" law. Hence, this book is for students, legal practitioners and academics who wish to widen their horizons with a different perspective on Roman law. To the European reader, it might be interesting to find the ongoing importance of the Roman legacy in Japanese law, whereas the almost unbroken continuity of the European legal tradition might be of special interest to Asian readers. By any account, the diversity and scope of the different articles in this book will show once again that the study of Roman law from very different perspectives can be rewarding, valuable and informative.

The approach we have chosen (also to be seen in the introduction) was an "experiment" that required courage and openness on the part of all who were involved. We would, therefore, like to thank all of the contributors, who were ready to partake in this unusual dialogue between modern legal problems and legal culture from the antiquity.

Special thanks are given to the students and the staff of the International Programs in Law at Kyushu University, 2015–2016, who made the conference a great success as well as to all those who were instrumental in the editorial work for the articles gathered here, namely the assistants of the chair of Roman law, private and comparative law at the University of Zurich: Franca Eckstein,

Adrian Häusler, Yvonne Kastner, Una Paunovic, Elisa Stauffer, Martina Steiner and Thamar Xandry.

Finally, we would like to thank you – the reader – for your intellectual curiosity and we wish you both inspiring and thought-provoking reading.

Ulrike Babusiaux (Zurich)

Mariko Igimi (Fukuoka)

Ulrike Babusiaux, Zurich, and Mariko Igimi, Fukuoka

Messages from Antiquity

Roman Law and Current Legal Debates. Introduction

When we speak about Roman law, we refer mainly to the collection of Roman legal writings (*Digesta*) and imperial constitutions (*Codex*) assembled by the Byzantine emperor Justinian in the 6th century AD. Together with Justinian's introduction to the study of Roman law (*Institutiones Justiniani*) and his new legislation (*Novellae*) these two collections form the so-called *Corpus iuris civilis*¹. Despite the extensive editing and deleting as well as some interpolations, the Justinian sources still pass down the law of the late Roman republic, and of the imperial period, which lasted roughly from the 1st century BC to the 3rd century AD². Roman law, however, is not just a historical topic but must be considered to be the origin of many modern legal systems, which is why it is continuously taught at the law faculties in many countries around the world.

This book is not a manual of Roman legal sources nor a traditional textbook on Roman private law but aims to approach Roman law from an unprecedented perspective. As the title of the book indicates, this is an attempt to use ancient law, i. e. Roman law, in order to engage with current legal debates by analysing it from a modern perspective. The underlying assumption is that Roman law is not only a tradition simply maintained from the past but also a window to another legal experience from a different time setting that might prove beneficial to solve contemporary issues.

Although it is a general question of whether lessons can be learnt from history, it is commonly accepted that our perception of history changes according to our current needs and contexts.³ Hence, every generation has been obliged to reconsider the historical sources, in order to identify new aspects of the issues from the past. Even the renowned texts are not free from innovative interpretations and unanticipated questions. Contrariwise, dealing with the past simulta-

1 The name *Corpus iuris civilis* has only been given in the Middle Ages.

2 On Justinian and his collection see the survey (in English language) written by *Wolfgang Kaiser*, Justinian and the Corpus iuris Civilis, in: David Johnston (ed.), *The Cambridge Companion to Roman Law*, Cambridge 2015, 119–148.

3 *Karl Popper*, *The Open Society and Its Enemies*, Vol 2, *The High Tide of Prophecy: Hegel, Marx and the Aftermath*, London 1945, Ch. 25: Has History a Meaning?, 246–267, especially the "searchlight theory of science" (247).

neously mirrors current issues and challenges of our time and possibly opens a dialogue between the past and today.

Dialogues can be carried out from various points of view. Firstly, we should stress the role of Roman law as the evolutionary basis of modern private law in numerous jurisdictions. Indeed, the civil law systems not only in continental Europe but also in other parts of the world, such as Japan, derive from Roman law. In some respect, even the common law systems are influenced by it. Going back to the sources of our own laws and considering solutions and arguments developed there, can lead us to better applications of the law today.

Roman law, however, is not limited to the retrospective approach to trace back to the origin of our legal rules and concepts. Roman law sources are the testimony that the jurists in ancient Rome, just like the lawyers of today, had to tackle with new and unsolved questions of their times. The Justinian legislation, therefore, offers excellent materials for legal reasoning that has been in use for centuries and still is, to deal with the contemporary issues of the time. Very common methodological instruments of the legal studies today, such as analogies and fictions, can be found in the Roman legal sources. More importantly, the casuistic approach of Roman law also provides modern jurists with experiential knowledge.

This significance of Roman law further offers a space for reflection to the modern jurists by presenting legal interpretations from the past, that can be used for comparison. Roman law scholars are constantly reflecting on their own modern legal systems through their research on Roman law. They often realise the similarities of legal conflicts and interests in human life between antiquity and today. Material for the comparative law can be found, therefore, not only in other contemporary jurisdictions but also in history. The geographical as well as the historical search for solutions and applicable rules might even disclose what is essential in law.

All three approaches are to be seen in this book. The first part of the book re-assembles the contributions dealing with the Roman law as the historical foundation of modern law and thus attempts to find applicable reasoning in the ancient sources for modern debates and current legal problems. In the second part, modern debates and open questions are examined from the point of view of a Roman jurist with contemplation to provoke dialogue on legal reasoning in specific contexts. The third part, finally, is a collection of reflections on challenges for modern jurists. It draws a contrast between problems of Roman legal history and current debates in order to raise awareness and to promote the analysis of legal developments today and in the past.

The dialogues presented here are embedded in an international polyphonic choir. In fact, the very diverse backgrounds of the contributors lead to the mul-

ti-layered discussion reaching from the modern to ancient world as well as from the Orient to the Occident. The variety of topics, the range of methodology, and the richness of arguments presented here prove the importance of such dialogues in the globalised world, which would foster a mutual understanding by providing better knowledge of similarities and differences. This, finally, is the reason for choosing the English language; it allows us to share our views to more people than could ever be reached if we applied the predominant languages used in the study of Roman law today.⁴ The present work is an experiment that shares the spirit of any historical discovery: nothing ventured, nothing gained.

4 For a brief historical background and the state of Roman law today, see *Ulrike Babusiaux*, *The Future of Legal History: Roman Law*, in: *American Journal of Legal History (AJLH)* Nr. 56, Oxford 2016, 6–11.

**PART ONE:
ROMAN LAW AS THE HISTORICAL
FOUNDATION OF
MODERN PRIVATE LAW**

Johannes Platschek, Munich

Strict Liability for Defects as to Quality of an Object Sold

Application and Exclusion in Roman and Contemporary German Law

I. Vendor's Liability for Defects as to Quality of an Object Sold in German Law: Statutory Warranty, its Exclusion and Consumer Protection

An object has been sold. It turns out it is deficient as to quality and that it already had been deficient at the time of its delivery to the purchaser. According to the German Civil Code (*Bürgerliches Gesetzbuch*, BGB), the vendor is liable to the purchaser regardless of his fault for the defects as to quality of the purchased good, which already existed at the time of the transfer of risk, i. e. generally at the time of delivery (§§ 437, 434 BGB). First, the purchaser is entitled to demand supplementary performance ("*Nacherfüllung*", § 437 n. 1 BGB). Thereafter, if the supplementary performance fails, he can withdraw from the contract or reduce the purchase price ("*Rücktritt*" or "*Minderung*", § 437 n. 2 BGB). This strict liability, a statutory warranty, can be excluded by the parties by mutual agreement in advance (so-called "*Gewährleistungsausschluss*"):

§ 444 Exclusion of liability. ... [A]n agreement that excludes or restricts the rights of the buyer with regard to a defect ... (transl. Langenscheidt Übersetzungsservice)

That means that the vendor's strict liability is non-mandatory ("*dispositives Recht*"), with the sole exception of the case where an entrepreneur sells to a consumer ("B2C", "*Verbrauchsgüterkauf*"). In that case the vendor's statutory warranty cannot be excluded in advance (§ 476[1] BGB):

§ 476 Deviating agreements. (1) ¹ If an agreement is entered into before a defect is notified to the entrepreneur and deviates, to the disadvantage of the consumer, from sections 433 to 435, 437, 439 to 443 (= sections on seller's liability for defects) ..., the entrepreneur may not invoke it. ... (transl. Langenscheidt Übersetzungsservice)

In the field of the so-called "*Verbrauchsgüterkauf*", the vendor's strict liability is therefore *compulsory*. This is applicable since the major reform of the German law of obligations in 2002, implementing European law on consumer protection.⁵

It has been harshly criticised: the law not only restricted the entrepreneur in the name of consumer protection; it also restricted and infantilised the consumer. There could be a valid interest of the consumer (and purchaser) to agree with the entrepreneur (and vendor) on an exclusion of the statutory warranty, since in case of exclusion, the consumer could achieve a more favourable price by negotiating with the entrepreneur. It had been emphasised that it was a kind of state paternalism to take away the consumer's possibility to reach a better price by renouncing his own statutory rights and to save money. According to this view, § 476(1) BGB is unconstitutional ("*verfassungswidrig*"), violating the principle of private autonomy.⁶

This, in turn, was countered by a sobering but realistic insight: There was no effective consumer protection without compulsory law. An exclusion of statutory warranty brought an aleatory character to the sale. The consumer would buy a pig in a poke (German: "*die Katze im Sack*" – "the cat in the bag"). Therefore, any non-business-minded, inexperienced consumer needed protection, even against his own adventurousness (that can be heavily supported by the vendor). The fact that any business-minded, skilled consumer is incapacitated along with the others ("*mitentmündigt*") was due to "the essence of typified consumer protection".⁷

Furthermore, in many areas of trade it is not realistic to describe exclusion of warranty by agreement as a result of individual price negotiations. Frequently, the exclusion of warranty by agreement is customary in a particular trade; before the enacting of § 476(1) BGB it was simply impossible, for example, to buy a used car without the exclusion of warranty. No used car dealer would ever have been disposed to sell a car at a *higher* price, against *not* excluding statutory warranty. The car dealer did not want to bear the risk of a defect, even if his risk would have been rewarded by a higher purchase price. He had to avoid intricate,

5 Article 7(1) of the Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

6 Claus-Wilhelm Canaris, Wandlungen des Schuldvertragsrechts – Tendenzen zu seiner "Materialisierung", AcP 200 (2000) 273–364, 362; Klaus Adomeit, Das Günstigkeitsprinzip – jetzt auch im Kaufvertrag oder: der Kfz-Mechaniker von Canaris, JZ (2003) 1053–1054; Stephan Lorenz, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Munich 2016⁷, BGB § 475 n. 1 fn. 1.

7 Boris Schinkels, Zur Abgrenzung von zulässiger Beschaffenheitsvereinbarung und Umgehung der Gewährleistung beim Verbrauchsgüterkauf, ZGS (2003) 310–316, 314: "*liegt im Wesen des typisierten Verbraucherschutzes*"; simililar Johannes Wertenbruch, in: Hans-Theodor Soergel (Begr.), Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Stuttgart 2009¹³, BGB § 475 n. 49.

time-consuming calculations about risk and price. There simply was no such dealing. To talk about § 476(1) BGB as "infantilising" and "incapacitating" the purchaser in these cases is nearly absurd, given that in former times the purchaser had no room for negotiations.

Others see congruence of the goals of private autonomy and consumer protection under § 476(1) BGB. If the entrepreneur (and vendor) wants to avoid liability despite § 476(1) BGB, he has to test the object for defects and has to inform the purchaser about any found defects. Since if the purchaser is aware of a defect at the time of conclusion of the sales contract, he loses the right of warranty in respect of this defect (§ 442(1) BGB). Therefore, they claim, § 476(1) BGB supports the purchaser's information and optimises the basis of his decision to buy, i. e. the basis of private autonomy.⁸

II. Vendor's Liability for Defects of an Object Sold in Roman Law: The Aedilician Edict on Sale of Slaves on the Market

1. "Message from Modern Times" ?

In the most important textbook of Roman law in German language one reads that "[i]n modern terms, the edict serves **consumer protection**".⁹ "The edict" means the edict of the *aediles curules*, concerning the sale of slaves (and cattle) on the market.

The *aediles curules* are Roman magistrates, controlling the slave market in the city of Rome. Trials between vendors and purchasers can be brought before them. They are promulgating the principles of their jurisdiction in their edict that has been – partially – transmitted to us in its wording:

D. 21,1,1,1 Ulp. 1 ed. aed. cur.

Aiunt aediles: 'QVI MANCIPIA VENDUNT CERTIORES FACIANT EMPTORES, QUID MORBI VITIIVE CVIQQVE SIT, QVIS FVGITIVVS ERROVE SIT NOXAVE SOLVTVS NON SIT: EADEMQVE OMNIA, CVM EA MANCIPIA VENIBVNT, PALAM RECTE PRONVTIANTO. QVODSI MANCIPIVM ADVERSVS EA VENISSET, SIVE ADVERSVS QVOD DICTVM PROMISSVMVE FVERIT CVM VENIRET, FVISSET, QVOD EIVS PRAESTARI OPORTERE DICETVR: EMPTORI OMNIBVSQVE AD QVOS EA RES PERTINET IVDICIVM DABIMVS, VT ID MANCIPIVM REDHIBEATVR.' ...

8 *Tilman Reppen*, Kein Abschied von der Privatautonomie. Die Funktion zwingenden Rechts in der Verbrauchsgüterkaufrichtlinie, Paderborn et al. 2001, 98.

9 *Max Kaser/Rolf Knütel/Sebastian Lohsse*, Römisches Privatrecht, Munich 2017²¹, 266: "Modern gesprochen dient das Edikt dem **Verbraucherschutz** [emphasis in the original]".

(transl. J. A. C. Thomas:) "The aediles say: 'Those who sell slaves are to apprise purchasers of any disease or defect in their wares and whether a given slave is a runaway, a loiterer on errands, or still subject to noxal liability; all these matters they must proclaim in due manner when the slaves are sold. If a slave be sold without compliance with this regulation or contrary to what has been said or promised in respect of him at the time of his sale, it is for us to declare what is due in respect of him [better: and if it will be said that there has to be responsibility for that (not: *quid eius praestari oporteat* dicitur), J. P.]; we will grant to the purchaser and to all other interested parties an action for rescission in respect of the slave. '"

2. Edictal Duty to Inform

The vendor is compelled by the edict to inform the purchaser about certain features of the slave: his possible illness, physical handicaps, a predisposition to escape from his master or rove about, or his being charged with tort actions. If any of these defects is later found without previous information by the vendor, he is liable regardless of his knowledge, i. e. regardless of his fault. The purchaser can bring an action for rescission, i. e. to return the slave within six months after the conclusion of the sale, receiving back the paid price (so-called *actio redhibitoria*), or he can claim back a part of the paid price (so-called *actio quanti minoris*).

3. Edictal Duty to Give Contractual Warranty (*stipulatio duplae*)

Furthermore, the *aediles* oblige the vendor to give the purchaser a contractual warranty on the absence of edictal defects in form of an oral promise (*stipulatio*). A model of this contractual warranty is included in the aedilitian edict, being formulated as *stipulatio duplae* ("stipulation for double the price"), as we learn from:

D. 21,2,37,1 Ulp. 32 ed.

Per edictum autem curulium etiam de servo cavere venditor iubetur.

(transl. *Thomas*:) "The vendor of a slave is also required to give the undertaking [*cautio* = *stipulatio*, J. P.] in respect of a slave under the edict of the curule aediles."

D. 45,1,5 pr. Pomp. 26 Sab.

Item duplae stipulatio venit ab iudice aut ab aedilis edicto.

(transl. *S. Hart*:) "Also a stipulation for double the price comes from a judge or from the aedile's edict."

D. 21,2,31 Ulp. 42 Sab.

... stipulatio quae ab aedilibus proponitur ...

(transl. *Thomas*:) "... the stipulation required [better: promulgated, J. P.] by the aediles ..."

The contractual warranty by *stipulatio duplae* stands beside the sales contract. If the warranty is given, it creates an obligation of the vendor to pay compensation in case any deficiencies that were already there at the time of conclusion of the sale appear. The action deriving from *stipulatio duplae* is the civilian *actio ex stipulatu*. It can be brought before every Roman jurisdiction magistrate (particularly the *praetor*) for an indefinite period of time. The *aediles* are treating the vendor's *stipulatio duplae* as a kind of accessory to the slave sold. If the vendor does not grant this contractual warranty, the purchaser is *therefore* entitled to return the slave within two months using the *actio redhibitoria* in the *aediles'* court receiving the paid price. Otherwise, he can claim compensation for the missing *stipulatio duplae* within six months:¹⁰

10 *Nunzia Donadio*, La tutela del compratore tra *actiones aediliciae* e *actio empti*, Milan 2004, 85. Differently, *Berthold Kupisch*, Römische Sachmängelhaftung: Ein Beispiel für die 'Ökonomische Analyse des Rechts?', TRG 70 (2002) 21–54, 40 invokes scholion "ἐὰν" to B. 18,6,2 (*Scheltema* 1148): If the sale was accompanied by a *stipulatio*, the mentioned time limit of six, respectively twelve, months is applied to the *actio redhibitoria*, respectively *quanti minoris*, because of a defect of the slave sold. However, if there was no *stipulatio*, there were reduced time limits applying to the same actions – *because of a defect of the slave sold*. According to *Kupisch*, it is the extended time limit for actions caused by defects in cases of sale with *stipulatio* that "justified the surcharge on the purchase price because of giving a warranty stipulation in the first" ("*die den Aufschlag auf den Kaufpreis wegen Erteilung einer Garantiestipulation überhaupt erst rechtfertigte*", supra 41). By giving his warranty promise and thereby extending his liability in time, the vendor signaled a higher quality ("*mit dem Garantieverprechen und der damit einhergehenden längeren Gewährleistungsfrist signalisiert der Verkäufer eine höhere Qualität*", supra 41 fn. 74). Does that mean that everything else – court's competence, cause of action, type of action, amount of liability for defects as to quality – would be the very same in slave sales with and without *stipulatio*, the *only* difference being the time limit of the actions? Concerning the "economic analysis of law": Is the difference of four, respectively six, months between the time limits really of such an importance that "the purchase price as regulating element" ("*der Kaufpreis als regulatives Element*") becomes relevant? Can we expect a Roman purchaser to pay a higher price only to reach a time limit of six months instead of two for *actio redhibitoria*? *Kupisch* does not consider *actio ex stipulatu*. As mentioned above, the *stipulatio* makes the vendor liable to compensation by *actio ex stipulatu* (*Kaser/Knützel/Lohsse* [fn. 5] 268, who – *nota bene* – agree with *Kupisch*) – certainly with no time limit. Furthermore, D. 21,1,58,1 Paul. 6 resp. shows that the liability from the *stipulatio* can be realised by the rescission of the sale. That means that the *actio ex stipulatu* can have the very same content as the *actio redhibitoria*. Why then should the time limits of the aedilician actions depend on the fact whether the vendor is liable (without time limit) by *actio ex stipulatu* or not? The mentioned Byzantine scholion is – as it proves by citing D. 21,1,28 – not an independent witness. It rather tries to combine the information from the Digest. In doing so, the scholion has no more authority than any modern attempt to explain D. 21,1,28, see *Éva Jakab*, *Cavere* und Haftung für Sachmängel. Zehn Argumente gegen Berthold Kupisch, in: *Kaufen nach Römischen Recht. Antikes*

D. 21,1,28 Gai. 1 ed. aed. cur.

Si venditor de his quae edicto aedilium continentur non caveat, pollicentur adversus eum redhibendi iudicium intra duos menses vel quanti emptoris intersit intra sex menses.

(transl. *Thomas*): "Should the vendor not give an undertaking on the matters contained in their edict, the curule aediles promise against him an action for rescission within two months and an action for diminution [better: for the purchaser's interest (not: *quanti minoris sit*), J. P.] within six."

4. *Stipulatio duplae* and *stipulatio simplae*

In our sources, we find both *stipulatio duplae* and *stipulatio simplae* (even *stipulatio triplae* or *quadruplae* are possible)¹¹. According to the dominant view, the different designation only concerns the amount of the vendor's liability in case of the so-called eviction: *duplam pecuniam dare* or *simplam pecuniam dare* means that the vendor has to pay either the double or the simple price to the purchaser, if a third party successfully sues the purchaser, invoking property of the purchased slave (case of eviction). Therefore, *dupla* and *simpla pecunia* exclusively concerned the vendor's liability for the purchaser's undisturbed possession of the slave (*habere licere*), i. e. in modern legal terminology, the liability for defects *in title*. Concerning defects *as to quality* (illness etc.), the wording of the *stipulatio duplae* and *stipulatio simplae* were basically identical: The vendor is promising his liability for the slave to be healthy etc. (*sanum esse ... praestari*). Hence, he is liable to pay compensation.

We can find illustrating examples within the documentary practice from the first two centuries AD:

Erbe in den europäischen Kaufrechtsordnungen, eds. *Éva Jakab/Wolfgang Ernst*, Berlin et al. 2008, 123–137. *Jakab's* own theses on the impact of *stipulatio*, as pronounced in *Éva Jakab*, *Praedicere und cavere beim Marktkauf*, Munich 1997, can be considered as being disproved as well (particularly by *Kupisch* supra; *Dario Mantovani*, *Le formule del processo privato romano*, Padova 1999², 113 fn. 630, und *Donadio* supra); see also *Kazunori Uemura*, *Zur Normstruktur des Edictum aedilium curulium*. Exegese von D. 21,1,14,9 und D. 21,1,28, in: *Aus der Werkstatt römischer Juristen*, eds. *Ulrich Manthe* et al., Berlin 2016, 462–476, 469–474 (himself agreeing with *Kupisch*).

¹¹ D. 21,2,56 pr. Paul. 2 ed. aed. cur.

TH 61
(Pompeii, 63 AD)

[hunc hominem
san]um
furtis noxisque solutum
esse

[praestari

FIRA III 132
(Seleucia, 166 AD)

**Eum puerum
sanum**
esse
ex edi[cto],

FIRA III 88
(Dacia, 142 AD)

**Eum puerum
sanum**
traditum
esse,
furtis noxaeque solutum,
erronem, fugitivum, ca-
ducum non esse praestari,

et si qui]s eum hominem

**partemve quam eius
evicerit,**
quo [minus L. Comi-]
nium Primum heredemve
eius habere [uti frui]
possidere recte liceat,

simplam pecuniam

r[ect]e [dari
haec] ita uti adsolet recte
praestari

**stipu[latus est] L.
Comin-]ius Primum
spondit P. Cornelius
Popp[a]eu[s] [Erastus].**

et si quis eum puerum

**partemve eius
evicerit,**

simplam pecuniam
sine denuntiatione
recte dare

**stipulatus est C. Fabul/
lius Macer
spondit Q. Iulius
Priscus:**

... et tradidisse ei man-
cipium s(upra) s(criptum)
Eutythen bonis condi-
tionibus.

et si quis eum puerum

q(uo) d(e) a(gitur)
**partemve quam quis ex eo
evicerit,**
q(uo) m(inus) emp-
torem s(upra) s(criptum)
eunve, ad q(uem) ea res
pertinebit, uti frui habere
possidereque recte liceat,
tunc quantum id erit,
quod ita ex eo evictum
fuerit, t(antum)

p(pecuniam) duplam
p(robam)
r(ecte) d(ari)

**f(ide) r(ogavit) Dasius
Breucus,
d(ari) f(ide) p(romisit)
Bellicus Alexandri,**

In the first part of the *stipulatio*, the vendor is promising liability for defects as to quality: *sanum esse etc. praestari* – “to be liable for this slave (*homo*)/this young

slave (*puer*) to be healthy etc.”; in the second part (*et si quis ...*), he is promising to pay single the purchase price in TH 61 and FIRA III 132: *simplam pecuniam recte dari/dare* – “to pay duly single the money”, while in FIRA III 88 he is promising to pay double the price: *pecuniam duplam probam recte dari* – “to pay duly double the money in good coin” in the case of eviction. We can translate the documents’ common structure as follows: “To be liable for this slave to be healthy ... and to pay single / double the purchase price in case that someone will successfully claim the slave ..., the purchaser has taken the promise, the vendor has given the promise.”

It should be emphasised that *dupla pecunia*/the *duplum* in FIRA III 88 is referring – grammatically unambiguously – to the eviction, *not* to defects as to quality. Back in 1927, *Otto Lenel* went even further: “There is no example of a formulation [of liability for defects as to quality] in *duplum* transmitted to us”.¹² Meanwhile, this does not correspond to the evidence any more. We now know of two Greek documents dated to the middle of the second century AD, written at Side in the Roman province of Pamphylia (Southern Turkey). They refer the stipulated *dupla pecunia* both to the case of eviction and to the appearance of defects as to quality.¹³ Both of them could have been written by a public scribe in the city archive of Side,¹⁴ with nine years between them. We also have Theophilus’ Greek *paraphrasis* of the Justinianic Institutes from the sixth century AD, talking – as an example (*λόγου χάριν*) – about the vendor’s promise in the frame of the “aeditilian stipulation” to pay “the double” (*διπλάσιον*) in case of the appearance of a hidden defect (*πάθος κρυπτόν*) of the slave sold (Theophil., *paraphr.* 3,18,2).

Yet, several aspects make us believe that the Side documents are atypical deviations of the standard formula: On the one hand, even the smallest defect of the slave sold would cause the vendor’s liability to pay double the price. On the other hand, nothing is said about where the slave himself would remain in such a case. If the Side documents were specimens of an established formula, one would expect that they would show an explicit ruling about the slave’s restitution to the vendor – but they do not. However, slave vendors in Side seem to have lived with this ruling for years. Similar problems arise from the description given by Theophilus. Furthermore, if the designation as *stipulatio duplae* would concern the liability for defects as to quality, in a *stipulatio simplae* one would expect the promise of *simpla pecunia* in case of defects as to quality. But there is no surviving document

12 Otto Lenel, *Das Edictum perpetuum. Ein Versuch zu seiner Wiederherstellung*, Leipzig 1927³, 562: “Ein Beispiel der Fassung in *duplum* ist uns nicht erhalten.”

13 P. Turner 22 (142 AD); BGU III 887 = FIRA III 133 (151 AD); both in: *Johannes Nollé*, *Side im Altertum. Geschichte und Zeugnisse II*, Bonn 2001, 613–622.

14 *Nollé* (fn. 9) 616–617.

like that. Regarding defects as to quality, most of the surviving documents (with the only exception of the Side documents) show the promise of *praestari*, i. e. the promise to pay compensation for the purchaser's interest. So if the designation of a *stipulatio* accompanying sale would depend on the content of the promise regarding defects as to quality, all these documents would neither be called *stipulatio duplae* nor *simplae*, but "*stipulatio praestandi*" or "*stipulatio eius quod interest*". However, such a designation is nowhere to be found. Moreover, Paul is dealing with the question if based on *stipulatio duplae* one can claim *both* the repayment of the purchase price (the single one, of course) *and* a compensation, D. 21,1,58,1 Paul. 6 resp. If Paul and his readers called *stipulatio duplae* the promise to pay the double price in case of defects as to quality, Paul's said question would lose relevance. Therefore, the passage can be used as an argument that the standard content of the promise regarding defects as to quality is *praestari*, i. e. to pay the purchaser's interest. Finally, we learn from D. 21,2,31 Ulp. 42 Sab. that the *aediles'* model stipulation reads *sanum esse etc. praestari*. As seen above, their model stipulation is a *stipulatio duplae*. Therefore, the designation as *stipulatio duplae* or *simplae* does not concern the amount of liability for defects as to quality.

However, we have to insist that for the sale of slaves on the market the aedilician edict is just providing conclusion of the *stipulatio duplae*. It is the *stipulatio duplae* that the purchaser can expect. If the vendor is only willing to give a *stipulatio simplae*, the purchaser has to be aware that the "risk management" regarding defects *in title* is deviating from the standard to his own disadvantage.

5. Non-mandatory Character of the Edictal Rulings

All the edictal duties can be excluded by a mutual agreement of both parties. The duty to give *stipulatio duplae*, as well as edictal liability because of missing information about defects, can be modified or completely abrogated by the parties:

D. 2,14,31 Ulp. 1 ed. aed. cur.

Pacisci contra edictum aedilium omnimodo licet, sive in ipso negotio venditionis gerendo convenisset sive postea.

(transl. G.M. MacCormack:) "It is quite [better: at any rate, J. P.] lawful to make a pact contrary to the edict of the aediles, whether the agreement is made in the course of arranging the sale or afterward."

If the edictal rulings are completely excluded and no *stipulatio* is given, then there is no non-fault liability of the vendor, regarding defects as to quality; the purchaser cannot bring *actio redhibitoria* or *quantum minoris*, he cannot bring *actio ex stipulatu* nor claim rescission or compensation because of a missing *stipulatio*.

It seems likely that any renouncement of possible claims by the purchaser will have influence on the purchase price: "Under the edict", the slave will be more expensive than if the edict's rulings are abrogated.¹⁵ However, to avoid his liability the vendor has to reach an explicit renouncement of the purchaser. Therefore, the purchaser must understand that he will be less protected than he would be according to the edictal standard. Hence, the edict could not prevent agreements about exclusion of liability from becoming customary on the slave market. Nevertheless, it seems that there were always slaves available on the market to be sold with full warranty.

6. *Simplariae venditiones* and Exclusion of *redhibitio*

According to modern scholarship the following statement by Pomponius is also to be located within the context of abrogating the edictal duties:

D. 21,1,48,8 Pomp. 23 Sab.

Simpliariorum venditionum causa ne sit redhibitio, in usu est.

(transl. *Thomas*:) "It is not our practice to allow rescission [better: it is our practice not to allow rescission, J. P.] in the case of sales where undertakings have been specifically excluded [better: in the case of 'simplarian' sales (since *simplarius* is a *hapax legomenon*), J. P.]"

Since late antiquity, the mentioned *simplariae venditiones* are identified as sales contracts with an exclusion of edictal liability, at least with an exclusion of *actio redhibitoria* by mutual agreement.¹⁶ However, it is notable that such sales contracts were not called "simple" sales (that would be "*simplices venditiones*"), but "simplarian" or "singlarian" sales (*simplariae venditiones*). It is also notable that, according to the statement's linguistic structure, it is not the exclusion of rescission (*redhibitio*) that makes the sales *venditiones simplariae*. In fact, the practice of excluding *redhibitio* seems to align with contracts that *already have* the quality of being *simplariae*. Exclusion of *redhibitio* and qualification as *simplaria venditio* are two different aspects.

All over Latin literature, the word *simplarius, -a, -um* occurs only here. It is a so called *hapax legomenon*. Obviously a made-up word, it seems to be used in a very technical sense. It is deriving from *simplicus, -a, -um*. Looking for parallels, the most similar kind of saying is *duplā emere* which occurs for example in:¹⁷

¹⁵ *Kupisch* (fn. 6) 41; *Uemura* (fn. 6) 464.

¹⁶ *Liber Syro-Romanus* 35,101; *Fritz Pringsheim*, *The Greek Law of Sale*, Weimar 1950, 483–484.

¹⁷ See also FIRA III 134 = SB III 6304 = CPL 193 (Ravenna, ca 151 AD), ll. 3–8 (Latin in Greek

D. 21,1,58,2 Paul. 5 resp.

Servum duplā emi ...

(transl. *Thomas*:) "I bought for double his value [better: with *stipulatio duplae*, J. P.] ..."

Duplā emere cannot be understood in any other way than "to buy with the conclusion of *stipulatio duplae*". The translation given by *Thomas* "to buy for double the value", creates an oddity¹⁸. *Duplā emere* means – *vice versa* – the very same as *duplā vendere*, which as a substantive would be *duplaria venditio*. Therefore, *simplaria venditio* is nothing else than *simplā vendere/emere*, the sale with the conclusion of *stipulatio simplae*. If we now project this interpretation onto the text of D. 21,1,48,8, the statement has to be read as follows:

"It is our practice not to allow rescission in the case of sales with *stipulatio simplae*."

a) *Usus* as established law

One could understand "our practice" as the practice of courts, the "settled jurisdiction".¹⁹ That is how we have to understand *in usu esse* – for example – in:

D. 48,15,7 Her. 5 iur. epit.

Poena pecuniaria statuta lege Fabia *in usu esse* desiit.

(transl. *Robinson*:) "The money penalty laid down by the *lex Fabia* has fallen out of use."

Gai. 1,184

Olim cum legis actiones *in usu erant*, etiam ex illa causa tutor dabatur, ... qui dicebatur praetorius tuto, quia a praetore urbano dabatur. Sed post sublatas legis actiones quidam putant hanc speciem dandi tutoris *in usu esse* desisse; aliis autem placet adhuc *in usu esse*, si legitimo iudicio agatur.

(transl. The Institutes of Gaius, eds. *W. M. Gordon/O. F. Robinson*, London 1988:) "In former times, when procedure by actions in the law was *in use*, a guardian was also appointed on the grounds, ... He was called the 'praetorian' guardian, because he was appointed by the Urban Praetor. But after the abolition of the actions in the law, some jurists think that this kind of appointment of guardian has *fallen into disuse*; it is ac-

characters): *κουαμ ει δουπλα οπτιμικον- / δικιωνιβους βενδιδι<<τ>> ετ τραδιδι (= quam ei duplā optimis condicionibus vendidi et tradidi – "which I have sold to him with *stipulatio duplae* in best state/under best terms of contract").*

18 Neither convincing is the explanation of sales "with double money" (i. e. with *stipulatio duplae*) in documents from Roman Egypt given by *Friedrich Preisigke*, *Zum Papyrus Eitrem Nr. 5*, Heidelberg 1916, 12, who believes that there are "two payers" making "double payment". See also infra at fn. 20.

19 *Jakab*, *Praedicere und cavere* (fn. 6) 187.