THE ROMAN LAW OF SALE

INTRODUCTION AND SELECT TEXTS

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PREFACE

THE criticisms which, some years ago (*SZ* 1932, 533–4), Professor Ernst Levy passed on the English practice of publishing annotated editions of isolated titles of the *Digest*, though justifiable from one point of view, rested on a misconception. These works are not the result of traditionalism in method, but are an attempt to meet a practical academic need. English Universities do not greatly value the study of Roman law unaccompanied by at least some first-hand acquaintance with the texts, and if it is desired to make Roman law part of the ordinary curriculum for a degree in law, and in any branch of that law to advance beyond the *Institutes*, texts must be made accessible to the mind and purse of the average law-student.

It must, however, be admitted that the separate publication of one or two titles of the *Digest* is an inadequate solution of this problem. In the first place, it will invariably be found that essential texts lie outside the selected titles, so that the conscientious teacher is driven to fill gaps by private reproduction, and in the second place, the prescribed title or titles will certainly contain many passages with which the junior law-student can well dispense: his study of Roman law is not promoted by loading it with a weight of unnecessary Latin.

These are the considerations which have led me to compose a collection of texts not limited to one or two titles of the *Digest*, dealing with the Roman law of sale, which is the most fruitful subject in Roman law for the English law-student. I trust that the selection will substantially meet academic requirements, but of course no anthology can be fully satisfactory.

The form of Justinian's legislation imposes on the teacher some measure of historical treatment, and I have therefore included a modest selection of pre-Justinian texts. But the prime interest of the English law-student is certainly not in Roman legal history. The value to him of the study of Roman law lies chiefly in its being the best introduction to a general familiarity with the basic conceptions of most continental systems, such as an educated English lawyer ought to possess. I was thus led on to add not only constitutions from the *Codex Iustinianus*, but also the relevant articles of the *Code Civil*. The inclusion, for ready reference, of the *Sale of Goods Acts* and the *Factors Act* was a matter of course; that of the two American statutes (without comment) was due to a hope that the book would be found useful in the United States.

At one time I was inclined to add some Greek texts at the

beginning and the relevant sections of the *Bürgerliches Gesetzbuch* at the end. But Greek law will remain obscure even for the learned until the appearance of Dr. Fritz Pringsheim's expected work, and is in any case too recondite for the ordinary law-student, while the extreme systematization of the German Code makes it impossible to isolate the title *Kauf-Tausch*. Also, these additions would have been prejudicial to the main purpose of the book, by making it considerably longer and more costly.

Nevertheless, I regret the absence of the German texts, the more so that in the handling of them Professor Ernst Rabel most generously offered me his powerful assistance. But I can let the following selection of texts which he suggested[1] speak for itself—

1. *BGB*: *Allgemeiner Teil*: 3. *Abschnitt*, ss. 104–85, especially ss. 145–51 (conclusion of contract) and ss. 119–24 (*error*, *dolus*, *metus*).
2. Obligations of seller and buyer: *BGB*, ss. 433–61, 269–71.
3. Initial obstacles: *BGB*, ss. 305–9.
4. Exoneration and responsibility for breach of contract: *BGB*, ss. 275–304, 320–7, 346–61. *HGB*, ss. 373–6.
   Warranty of quality: *BGB*, ss. 462–93. *HGB*, ss. 377–8.
5. Special forms of sale: *BGB*, ss. 494–514.

If the selected texts do not cover all that my more ambitious colleagues would wish to deal with, they cover more than I could myself adequately treat of in the *Introduction*. There, I have abstained from any detailed exposition of English law, which the student can obtain easily and better elsewhere, and I have supported such comparisons as I have ventured on with French law by constant references to Planiol's admirable *Traité*. For such German law as there is I have relied mainly on ss. 21–5 of Professor Rabel's masterly *Warenkauf* (Berlin-Leipzig, 1936); but the topics of warranty and risk are reserved for his as yet unpublished second volume. As a comparative exposition of the whole modern law of a central legal institution this work stands unrivalled.

In conclusion I wish to express my gratitude to Professor E. Fraenkel for advice on the early Latin texts, to Mr. F. H. Lawson for checking the selection of texts from the *Digest*, and to Professor Hugh J. Fegan for information as to the American statutes. Professor W. W. Buckland and Mr. P. A. Landon read the *Introduction* in manuscript; to both I am greatly indebted for valuable corrections and suggestions. And I am under a special obligation to Dr. H. G. Hanbury, who read the *Introduction* in proof and made a number of improvements.

[1] 10 March 1938.

I deeply appreciate the honour of being allowed to dedicate (with war-time economy of paper) this book

POLONORVM
IN VNIVERSITATE OXONIENSI
FACVLTATI IVRIS
ADMIRABILI CONSTANTIA ENITENTI
VT NON SOLVM ARMIS DECORATA SED ETIAM LEGIBVS ARMATA
TOTIVS EVROPAE COLVMEN FVTVRA
DEO FAVENTE
REDINTEGRETVR RES PVBLICA

F. de Z.

OXFORD,
August, 1944.

ABBREVIATIONS USED

BGB = *Bürgerliches Gesetzbuch.*
BIDR = *Bullettino del Istituto di Diritto Romano.*
Bruns = C. G. Bruns, *Fontes Iuris Romani Antiqui*, ed. 7, 1909, by O. Gradenwitz.
Buckland = W. W. Buckland, *A Textbook of Roman Law from Augustus to Justinian*, ed. 2, 1932.
Buckland and McNair = W. W. Buckland and A. D. McNair, *Roman Law and Common Law*, 1936.
C. = *Codex Iustinianus.*
CAH = *Cambridge Ancient History.*
CC = *Code Civil.*
Chalmers = *Chalmers' Sale of Goods Act, 1893*, ed. 11, 1931, by R. Sutton and N. P. Shannon.
Cheshire = G. C. Cheshire, *The Modern Law of Real Property*, ed. 4, 1937.
C.T. = *Codex Theodosianus.*
D. = *Iustiniani Digesta.*
Festschr. Koschaker = *Festschrift Paul Koschaker*, 1939.
F.V. = *Fragmenta Vaticana.*
Gaius = *Gai Institutiones.*
Girard = P. F. Girard, *Manuel Élémentaire de Droit Romain*, ed. 8, 1929, by F. Senn.
Girard, *Mél.* = P. F. Girard, *Mélanges de Droit Romain*, 1912, 1923.
Halsbury = *Halsbury's Laws of England*, vol. xxix, ed. 2, 1938 (pp. 1–232 *Sale of Goods*, by Leslie Scott and K. Diplock; pp. 233–467 *Sale of Land*, by J. M. Lightwood).
Hanbury = H. G. Hanbury, *Modern Equity*, ed. 3, 1943.
Inst. = *Iustiniani Institutiones.*
Jolowicz = H. F. Jolowicz, *Historical Introduction to the Study of Roman Law*, 1932.
Kunkel = W. Kunkel, *Römisches Privatrecht* (based on P. Jörs's work), 1935.
Lenel, *Ed.* = O. Lenel, *Das Edictum Perpetuum*, ed. 3, 1927.
Lenel, *Pal.* = O. Lenel, *Palingenesia Iuris Civilis*, 1889.
LQR = *The Law Quarterly Review.*
Mackintosh = J. Mackintosh, *The Roman Law of Sale*, ed. 2, 1907.
Monier = R. Monier, *Manuel Élémentaire de Droit Romain*, i, 1935; ii (ed. 2), 1940.
Moyle = J. B. Moyle, *The Contract of Sale in the Civil Law*, 1892.
Planiol = M. Planiol, *Traité Élémentaire de Droit Civil*, vol. ii, ed. 11, 1937.
Pothier = R. J. Pothier, *Traité du Contrat de Vente*, first published 1762.
P. Sent. = *Pauli Sententiarum ad Filium Libri Quinque.*
PW = G. Wissowa, *Paulys Realenzyclopädie der klassischen Altertumswissenschaft*, 1894–
Rabel = E. Rabel, *Das Recht des Warenkaufs*, i, 1936.
(N)RH = *(Nouvelle) Revue Historique de Droit Français et Étranger.*
SGA = *The Sale of Goods Act*, 1893.
Siber = H. Siber, *Römisches Recht in Grundzügen für die Vorlesung*, 1925, 1928.

Textes = P. F. Girard, *Textes de Droit Romain*, ed. 5, 1923.

Tijdschr. = *Tijdschrift voor Rechtsgeschiedenis*, otherwise *Revue d'Histoire du Droit.*

SZ = *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung.*

Williams = T. Cyprian Williams, *A Treatise on the Law of Vendor and Purchaser of Real Estate*, ed. 4, 1936, by the Author and J. M. Lightwood.

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PART I: INTRODUCTION

CHAPTER I

INTRODUCTORY

A. General notion of sale. B. Historical development. C. Sale in relation to the general law of contract. D. General characteristics of *Emptio Venditio*.

A. General Notion of Sale

Sale is the exchange of a thing for money. Till money was invented, there could only be barter; as soon as money was invented, there was sale, the precise object of money being to serve as a medium of exchange.[1] This definition is, and is meant to be, economic; a universal legal definition of sale would, even if possible, serve no useful purpose because of the wide variations in the conception of sale during the course of legal history, in the various legal systems, and even in branches of the same system.

Evidently sale implies agreement, but it is not always and everywhere a contract in the sense of being an agreement which generates obligations. In early law there was no such thing as an executory contract of sale, and in very early law it is believed that sale always took the form of a simple exchange of the thing against cash which left no outstanding obligations. Of course in later law, even if a sale takes place by delivery and payment made at the very moment of the agreement, as where goods exposed in a shop are taken for cash, it is only barely conceivable that the seller, at least, should not incur contractual responsibility in regard to title, not to speak of quality, which in the event may give a cause of action. To question whether in developed law sale is a contract would be mere pedantry. But developed systems of law vary considerably in their conception of that contract. Let us consider one cardinal point.

Under the executory contract of mature law the agreement can be severed from its execution, that is to say, a buyer can be sued on his promise of the price and a seller on his promise of the thing. Here the price can be seen in one way only: it can only be *in obligatione*; but as regards a specific thing of which future delivery has been promised the law may take one of two views:

i. That the agreement has produced only an obligation that the seller shall convey the thing to the buyer, or
ii. That the agreement of itself, or, maybe, the agreement *plus*

[1] P. 18, 1, 1 pr. Cf. Aristot., Nic. Eth. 5, 5.

payment of the price, has forthwith made the buyer owner of the thing, even before delivery or other conveyance.

Roman law takes the first view: the contract of sale is one thing, creating merely obligations between the parties, and the conveyance is another,[1] which it is the duty of the seller to carry out, as it is that of the buyer to pay the price.

Our own law takes the second view. Though legal ownership of land sold remains in the vendor until he shall have executed the proper conveyance, equitable ownership passes to the purchaser from the moment of the contract.[2] In goods sold the legal property formerly remained with the seller till they were delivered,[3] but in modern law it passes to the buyer by the contract, where that is possible.[4] It is much the same in French law[5] without distinction between movables and immovables. German law,[6] however, still keeps to the Roman principle that property passes to the buyer only by conveyance.

More important from the practical point of view than the question of property is the question which of the two parties must bear losses occurring by accident before the thing has passed from the seller's to the buyer's control.[7] It might be thought that this second question would be decided by the answer to the first, the risk passing to the buyer when he becomes owner, or at any rate that the same answer would be given to both. In fact, English and French law agree in transferring the risk to the buyer normally from the moment of the contract, that is, when they hold him to become owner. But Roman law has the same rule of risk and is thereby committed to the inelegance of separating property and risk. German law preserves the principle *res perit domino*, but at the cost of standing alone in leaving the risk with the seller until the requisite conveyance; this is consistent, but the problem is one of commercial convenience, not of legal logic.

B. Historical Development

From primitive sale transacted by reciprocal conveyances to the modern contract of sale is a far cry. Substantially the modern con-

[1] *C.* 2, 3, 20 (293). Strictly there is not an obligation to convey in the sense of giving a good title: below, p. 36.

[2] Now a registrable landcharge under the *Land Charges Act* 1925 s. 10 (1). Class C. Cheshire 667.

[3] Holdsworth, *History* iii, 354.

[4] A very rough statement, of course. *SGA* s. 1 (3), (4). ss. 16–18.

[5] *CC* 1138. 1583. This was a victory of customary over Roman law. Before the *Code* custom was reconciled with the learned law by means of the doctrine of *traditio ficta*, detention by the seller on behalf of the buyer being produced, or held to be produced, by clauses in the contracts. Pothier s. 313. Rabel 29.

[6] *BGB* 925. 929. But see Rabel 29.

[7] Details and references below, p. 30.

tract is the product of a long and arduous Roman evolution extending from the Twelve Tables to Justinian, to which various sources contributed. Even in the *Corpus Iuris* the fusion of these sources into a unitary institution is not complete, at least in form. Thus a cursory review of the Roman evolution is imposed even on a work which is not primarily historical, because without a modicum of historical information Justinian's texts are not fully intelligible.

The ceremony of *mancipatio* shows sale in its earliest form, transacted *donnant donnant*, and the double name, *emptio venditio*, understood in the older senses of the words *emere*[1] and *venum dare*, tells the same story. But even a fairly primitive society feels the need of credit and the propriety of imposing certain obligations on sellers. The earliest developments of the law came about at Rome in two ways: the State, in certain cases of manifest injustice, intervened between buyers and sellers, and the parties themselves made use of such law of contract as existed. It was only much later that a unitary law of sale began to be developed doctrinally, with the conscious purpose of giving effect to the agreement of the parties, interpreted as a matter of good faith between man and man; even so, the effects of earlier legislation and of secular practice were never entirely obliterated.

The intervention of the State is encountered as early as the Twelve Tables. (1) It was enacted that a seller by *mancipatio* should be under an obligation to defend the buyer against being evicted from the thing bought until he should have had time to acquire title by *usucapio*. The sanction was an action for double the price (the so-called *actio auctoritatis*); it was a semi-delictual obligation, imposed by statute and not avoidable even by express agreement.[2] (2) If we may believe the principal text,[3] it was also enacted that ownership of the thing should not pass to the buyer by *traditio*, unless he had either paid the price or given real or personal security for its payment. The historical accuracy of this report is more than questionable, but it seems unreasonable to doubt that it contains a kernel of truth. The bilaterality of sale lies on its surface, and if, as is likely, conveyance of the thing sold did not of itself create an actionable obligation to pay the price, it would be natural to enact that the conveyance should not be final so long as the price remained unpaid, unless indeed the seller had provided himself with legal means of recovering it.[4]

[1] Pomp. 40, 7, 29, 1. [2] Below, p. 43. [3] *Inst.* 2, 1, 41.

[4] A complete account of the decemviral legislation should mention both the *actio de modo agri in duplum*, which lay for deficiency of acreage stated in a *mancipatio*, and also the special case of *legis actio per pignoris capionem* mentioned by Gaius 4, 28. The former is referred to below, p. 47. The latter is not safe evidence as to the development of the general law of sale, because the seller's right perhaps arose by subrogation to one possessed by the religious authority for the enforcement of a religious obligation.

Other notable, but later, cases of intervention by the State which left an abiding mark on the law of sale will be found in the aedilician Edict.[1] But even more important than action from above is the use made by buyers and sellers from very early times of such law of contract as was available. Putting the evidence of the recently discovered text of Gaius 4, 17a at the lowest, it is now undeniable that from the time of the Twelve Tables a *sponsio* of *pecunia certa* was enforceable by *iudicis postulatio*. Even if no other kind of promise was thus enforceable, it was possible for the parties to a sale, if they were so minded, by means of a penal *stipulatio* to create an effective sanction for any engagement into which they desired to enter.

Comparative jurisprudence tells of various devices for meeting the problem of deferred payment of the price: it may be that the buyer gives something in earnest, whether by way of symbol, with the effect of binding himself legally, or by way of penal part-payment; or, if a loan of money creates an enforceable debt, the buyer's debt of the price, which is not *per se* enforceable, may be converted by fiction into a debt of money lent to him by the buyer. The precise form of this side-contract will be determined by the state of the law of contract in the given system. At Rome, as we have learnt from *Inst.* 2, 1, 41, deferred payment of the price could, at the time of the Twelve Tables, be made enforceable by the buyer giving, by separate contract, real or personal security. For the succeeding centuries of the Republic the evidence is scanty and unsatisfactory; while utilization of *pignus* in sales cannot be doubted,[2] the most authentic evidence indicates that its influence on the evolution of *emptio venditio* is negligible in comparison with that of *stipulatio*, the countless applications of which pervade Roman law to an extent not always realized.

The *expromissor* of the price, mentioned in *Inst.* 2, 1, 41, seems to have been a third-party; whether by his stipulatory promise he became sole legal debtor or guarantor is a question with which we need not concern ourselves here. In later times the buyer could give his own *expromissio nummorum*, as is shown by Varro's advice on how to deal in sheep.[3] This deserves special attention, as being the most authentic piece of evidence as to *emptio venditio* in the critical closing years of the Republic. The bargain is struck in traditional form (*antiqua forma*) by the buyer saying 'Tanti sunt mi emptae?' and the seller replying 'Sunt'. This is not a *stipulatio*, though its closeness to one shows how natural it was to the Romans to strike a bargain by clear-cut question and answer.

[1] Below, p. 50.

[2] E. Champeaux, *Mélanges Girard* (1912) i, 155. But the term *pignus* is often applied to what is really *arra*.

[3] *De re r.* 2, 2, 5–6.

Next the buyer gives an *expromissio nummorum*, presumably by *sponsio* for the price. Lastly, the seller by *sponsio* undertakes warranties for quiet enjoyment and of quality. The point to observe is that, the bargain having been made, the principal obligations of the parties are at once secured by side-contracts in the form of *stipulatio*. The passage ends by allowing the buyer an action for non-delivery, even though he should not have paid the price, and the seller an action for the price, presumably even though he should not have delivered. This lack of bilaterality is natural if the actions are thought of as being actions on *stipulationes*, but Varro speaks of them as being *ex empto vendito*, and we know from Cicero[1] that *bonae fidei* actions *ex empto* and *ex vendito* already existed in Varro's day. If the latter are the actions referred to by Varro, one must conclude that it had not yet been recognized that *bona fides* implies bilaterality. It would not be unnatural that the new actions should have inherited this defect from the older *stricti iuris* remedies.

The existence of so powerful and elastic a method as *stipulatio* of making any engagement binding thus rendered possible the development of a substantial law of sale without the help of any special contract of sale. A great part of this development seems to have consisted in the gradual perfecting of formularies or precedents of *stipulationes* adapted to the various, but limited needs of the Roman peasant. They had the disadvantages, which would be increasingly felt, of being, even when reciprocal, unilateral and independent of each other, and of being very literally construed. From the beginning of the second century B.C. the pulse of trade began to beat too fast for the leisurely methods which had suited the cautious Roman peasant well enough. The kinds of things dealt in multiplied indefinitely and the dealers were often *peregrini*, men outside the native cautelary tradition. It became necessary to give effect, not merely to what the parties had had the foresight to incorporate in a formal contract, but also to the general implications of good faith. The *bonae fidei* actions, when introduced, enabled this to be done, but of course many more years were to pass before jurisprudence had settled what were the implications of good faith which it would recognize. It is therefore not surprising, especially in view of Roman conservativism, that for centuries the traditional side-contracts continued to be made, although these *stipulationes* embody obligations which seem to us, the heirs of the Roman development, inherent in the relation of buyer and seller.

Exactly when, and by what agencies, the special *bonae fidei* actions for the enforcement of formless consensual contracts came

[1] *De off.* 3, 17, 70.

to be established is a matter of much interesting conjecture, but the various theories are so well expounded in easily accessible books[1] that there is no need to recount them here. The problem, it should be noted, concerns not only sale, but also the whole group of consensual contracts and indeed the general movement which led to the reception of principles and institutes of the *ius gentium* into the *ius civile*.[2] But if the origins of the *bonae fidei* actions are obscure, the importance of their introduction is patent. The words of the *formulae ex empto* and *ex vendito*: 'quidquid ob eam rem Numerium Negidium Aulo Agerio dare facere oportet ex fide bona', for the first time brought into full light the fundamental question between buyer and seller, and the answer of Roman jurisprudence is the classical contract of *emptio venditio*, from which the modern law of sale is descended.

C. Relation of Sale to the General Law of Contract

English law, like other modern systems, has a general theory of contract; it has general rules for determining whether a given agreement is a valid contract and what, if any, effect it shall have, rules which apply to every contract irrespectively of its economic nature, except in so far as certain types of contract, of which sale is one, have been subjected to special regulation. Thus, the sale of goods is governed by the common law save in so far as the express provisions of the *Sale of Goods Act* (and other Acts) are inconsistent with the common law.[3] To a large extent this Act is merely declaratory of the common law, so that its repeal would leave the law of the sale of goods in the main unaltered. Moreover many of its provisions are not imperative, but can be set aside by the agreement.[4] Nevertheless, there are important statutory rules which make it necessary to define the contract of sale. A familiar illustration is that the enforceability of a contract may, owing to s. 4 of the *Sale of Goods Act*, depend on its not being a contract of sale, though, supposing it to be sale, it necessarily satisfies the requirement of consideration, which is our general test of actionability, and, but for the statute, would be a perfect contract.

Roman law likewise is obliged to define sale, for different reasons. Although there were general rules of contract, such as those of capacity or those relating to duress and reality of consent, which were applicable to *emptio venditio* as to any other contract, there was no general theory of the formation of contract. There were indeed two ways in which a promise might become actionable which have some generality. Any promise not forbidden by law

[1] Jolowicz 298. Monier ii, 165.
[2] *CAH* ix, 861. 867.
[3] *SGA* s. 61 (2). Cf. ss. 2 and 3.
[4] *SGA* s. 55.

could be put into stipulatory form: we have seen that a workable law of sale was actually built up in this way. Again, in late law, any promise was actionable in return for which the promisor had obtained some thing or act—an unperformed counter-promise was not enough—from the promisee. But outside these two cases promissory agreements were enforceable only if they were of certain types, known to us as the real and consensual contracts. The real contracts required that a thing should have been delivered under one of the recognized agreements, but the consensual, which included *emptio venditio*, were enforceable on the ground of mere agreement, just as a modern contract. If an agreement was *emptio venditio*, it could be enforced by the *actiones empti* and *venditi*; if it was not, these actions would not lie, though some other might. So long as the formulary system was in vigour, it was necessary to proceed by the correct *formula*, and even later the fact that the contract was not *emptio venditio* would render the whole body of special law built up for *emptio venditio* inapplicable, except in so far as it might be extended by analogy.

Thus both English and Roman law have to define sale, though for different reasons. In both systems the question of definition depends on the substance of the agreement: an agreement does not become a sale by being expressed as such.[1]

D. General Characteristics of *Emptio Venditio*

The contract possesses the characteristics which the *Institutes*[2] mention as common to the consensual group.

i. *Consensuality*. All contracts require consent, but consensual contracts require nothing more—neither formality nor delivery of a *res corporalis*—for their formation. Hence they can be concluded *inter absentes*, by letter or messenger.[3]

ii. *Bilaterality*. The text (*alter alteri obligatur*) contrasts contracts, such as *stipulatio* and *expensilatio*, which impose obligations on one party only, with those which like the consensual contracts impose them on both. But *emptio venditio* is bilateral also in the more important sense that the liability of the one party depends on the other having discharged or being ready and willing to discharge his own liability. All modern systems make bilaterality in this sense a characteristic of sale,[4] though it can be, and frequently is, modified by the terms of the contract.[5] The only question is

[1] Pomp. 18, 1, 55. The point will recur incidentally. Cf. *SGA* s. 61 (4). Chalmers 4–5. [2] Gaius 3, 135–7. *Inst.* 3, 22. [3] Below, p. 20.

[4] *SGA* s. 28 states the common law, which applies equally to sale of land. *CC* 1184. *BGB* 320–4. Rabel 128.

[5] Thus, under a c.i.f. contract providing for payment 'net cash', the buyer must pay against tender of the shipping documents, without waiting for the arrival and examination of the goods. *Clemens Horst* v. *Biddell*, [1912] A.C. 18. Chalmers 101.