

János Jusztinger *A vételár az ókori római adásvételnél –  
Price in the Ancient Roman Sale*

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I This book is the author's "Erstlingswerk" as monograph, and with it the Hungarian Romanist János Jusztinger<sup>1</sup> made a valuable contribution to the complex of problems arising from the *pretium* of ancient Rome's *emptio venditio*.

*Emptio venditio* has always been – and will undoubtedly remain – a "Lieblingsthema" among Romanists, and complex monographic analyses of the Roman law of sale are a dime a dozen, enough to fill libraries. Although this statement is also true in the case of monographs on specific topics regarding *pretium* – such as "just price", *laesio ultra dimidium* or *enormis*– the author states (p 16) that his work contains a complete and full analysis of the whole institution of ancient Roman *pretium*, and as such it is the first one internationally.

Although such assertions are to be made with caution, the author's statement is correct with regard to the West-European and North-American literature of the past few centuries. The author is, both in Hungary and internationally, the first researcher who dedicated a whole monograph of such extent to a "pure" Roman law analysis of the complex topic of *pretium*. This Hungarian book therefore deserves to be introduced to a wider professional audience.

II The monograph of Jusztinger is not a simple composition of his published preliminary works on the topic,<sup>2</sup> but an autonomous work providing new results. The

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2 Here I enumerate the author's papers which were published in international journals and/or in a variety of languages (the number of articles published in Hungarian is twenty). See J Jusztinger "Transfer of ownership in Dacian sales documents" in G Szőke (ed) *Essays of the Faculty of Law University of Pécs: Yearbook of 2015* (= *Studia Iuridica Auctoritate Universitatis Pécs Publicata*

book is composed of six chapters: (1) The purchase price as the essential element of the contract of sale (pp 21-44); (2) The purchase price's requirement of being *certum* (pp 45-84); (3) Lump sum price and unit price: Price determination and transfer of risk in the case of *emptio ad mensuram* (pp 85-103); (4) The limits of the price's free definition (pp 105-135); (5) Purchase or rental price? The definition of "price" in hardly definable contracts on the boundaries of *emptio venditio* and on that of similar contracts (pp 137-156); and (6) Payment of the price and the transfer of property (pp 157-192).

The book also contains a *Table of Documents* including papyri (pp 193-197); a bilingual résumé or thesis in Hungarian and English (pp 199-211); a comprehensive bibliography (pp 213-235) composed of some 600 pieces of works published in nine different foreign modern languages; and an impressive *Index Fontium* (pp 237-240) incorporating a dozen of pre-Justinianic primary sources (incl the *Twelve Tables* and many other sources such as *Inst Gai*, *Epit Gai*, *PS*, *IP*, *Ulpiani lib sing reg*, *Cod Theod*, *Nov Val III*, *Nov Anthem*, *Cod Euric*), and an impressive list of sources from the *Corpus Iuris Civilis*, such as twenty texts from the Institutes, 144 *loci* of the Digest, and twenty three sections of imperial laws of the Code.

Among the literary sources we can find Cato's *De Agri Cultura*, Cicero's *De Officiis*, Varro's *De Re Rustica*, the *Iliad* and the *Odyssey*. The enumeration of documents and papyri contains *FIRA III* Nr 87-90; *P Ital 2/P Tjäder* 30, 35-36, 36 7-13, 38-42, 46; and *Tabl Albertini* II 8-11, III 30-34, IV 11-14, VII 16-18, IX 8-12, XVIII 11-14, XXV 3-5. The "Index of Modern Civil Codes" in effect includes several articles and paragraphs of the *BGB*, the *Code civil*, the *Codice civile*, the Swiss *OR*, the *CISG*, and the New Hungarian *Civil Code* as well.

III Jusztinger states that he tries to break with the "textbook-taste" tradition of analysing *pretium* in a *static* manner through its three main requirements, namely *verum*, *certum* and *iustum*. The author emphasises that the role of the *pretium* in Roman law was much more than the plain value or the simple consideration of the

153) (Pécs, 2016) 89-102; J Jusztinger "Acquisition of ownership in the sales contract practice of ancient Rome" in A Földi, I Sándor & I Siklósi (eds) *Ad Geographiam Historico-Iuridicam Ope Iuris Romani Colendam: Studia in Honorem Gábor Hamza* (Budapest, 2015) 221-234; J Jusztinger *Venditio spei*: "Inverse" purchase of a hope in Roman law? in E Štenpien (ed) *Kúpna zmluva – história a súčasnosť II* (Košice, 2014) 112-130; J Jusztinger "Acquisition of property and payment of the purchase price in the contract practice of ancient Rome" in E Štenpien (ed) *Kúpna zmluva – História a súčasnosť* (Košice, 2013) 183-200; M Petrak, N Žiha & J Jusztinger "Universal foundations of local laws – example of a 'just price' (*iustum pretium*)" in T Drinóczi, M Župan & M Vinkovic (eds) *Law – Regions – Development* (Pécs / Osijek, 2013) 307-338; M Petrak, N Žiha & J Jusztinger "Univerzalni temelji lokalnih prava – primjer „pravedne cijene" (*iustum pretium*)" in M Župan & M Vinković (eds) *Pravo – regije – razvoj* (Osijek, 2013) 243-273; J Jusztinger "The principle of *laesio enormis* in purchase and sale contracts in Roman law" in Gy Zs Balogh (ed) *Essays of the Faculty of Law University of Pécs: Yearbook 2011* (= *Studia Iuridica Auctoritate Universitatis Pécs Publicata* 149) 107-123.

thing sold: The institution's dynamic and functionalist examination showed that this method of investigation would be correct.

These efforts of following an entirely novel method of analysis, which rejects the other way of investigation using the trifold frame following the three main characteristics of the *pretium*, are not fruitless. However, this endeavour of the author partially resulted in a mere reorganisation of the parts, and in a visual or, in some cases, only a virtual cutback of the significance of such analysis of the accentuated three characteristics of the price as its requirement of being, for example, *iustum*.

The real value of the *opus* may rather be found in the following: (i) The book is unique in that it widely collects and criticises the difficult and also serious issues of the topic, and it does not hesitate to form an own standpoint regarding even the most debatable problems regarding the matter; (ii) The other virtue of the work is that it not only summarises and epitomises the huge amount of information about the examined topic, but it also investigates them meticulously; (iii) The third salient point of the monograph is that the author uses an excellent method of criticism. This he learnt from his late master, Professor Ferenc Benedek (1926-2007), according to whom primary sources should be compared – if possible – with other primary and literary sources in order to describe the global characteristics of the Roman world with respect to the targeted issues and questions. And, in conclusion he sets out his own standpoint, which should then be compared with other views in Roman legal studies.

IV I shall now briefly review certain sections of the work. The review follows the same scheme as in the monograph's chapters, and this will probably confirm my view of the author's laudable efforts. The purpose of the review is not pointing out typing errors, and I will mention but one word which is misspelled, namely *essentialia* which has three times been spelled as "essentialie" (pp 15, 39, 138).

(1) The historical overview in Chapter 1 emphasises that the feasibility of crediting the *pretium* together with the mutuality of services were the most meaningful factors which made possible the genesis of the consensual *emptio venditio* (pp 21-23).<sup>3</sup>

The book mentions and analyses a wide range of primary sources from Gaius to Justinian on the issue of the "price" requirement of being pecuniary (pp 24-38).<sup>4</sup> The author points out that the famous debate between the Sabinians and Proculians in connection with the requirement to pay money clearly proved that the controversy concerning the requirement of *pecunia numerata* – contrary to other views in literature – is not the main distinction between *permutatio* and *emptio venditio*. It was evident to classical jurists that common barter had to precede the contract of sale – including monetary consideration as an essential component – in ancient Rome. Homeric sources also confirm the obvious historical fact that barter appeared prior to

3 Cf Paul D 18 1 1pr.

4 Cf Gai 3 141; Paul D 18 1 1 1; Paul D 19 4 1pr; Gord C 4 64 1; Diocl et Maxim eod 7; 1 3 23 2; Const Omnem 11.

monetary sale.<sup>5</sup> However, parallel to the development of financial management, the significance of exchanging *only* goods gradually disappeared, and it was the *pretium* which appeared as one of the mutually provided objects of barter. On the one hand, monetary consideration provided by the purchaser separated *bonae fidei* contracts of sale from other legal relationships, such as *permutatio*, and on the other hand, in the case of an agreement on additional services in addition to the price, the availability of *actio empti* depended on a measure of monetary consideration.

The next section examines the significance of the agreement on price, and the determination of the price having an effect on the division of risk between the contracting parties.<sup>6</sup> A noteworthy statement of Ulpian (that is, *sine pretio nulla venditio est*), which emphasises the importance of consensus on the determination of the price, not only states that this element is indispensable for a valid *emptio venditio*, but also that the transfer of risk (*periculum est emptoris*) presupposes a determined price (pp 38-43).

(2) The second chapter – analysing the requirement of the price being determined – offers a survey of the fragments regarding clear and “borderline cases” of *certum pretium*. On the basis of the analysed *loci* we can conclude that Roman jurists regarded the requirement of *certum pretium* as the purchase price being determined by *objective* factors at the time of the contract’s conclusion, and that *subjective uncertainty* is not a relevant factor (pp 46-48).

For this reason contracts of sale concluded with either of the following clauses, namely *quanti tu eum emisti* or *quantum pretii in arca habeo*, were regarded as valid.<sup>7</sup> And, consequently, if the parties managed to make a bargain with each other in return for the amount that could be found in the cash-box of the purchaser, the contract was regarded as valid even with this price-clause. Likewise, if the vendor sold his goods in return for a *pretium* that had been bargained during the previously concluded sale – as it were, at procurement price – it was regarded as a determined price even if the purchaser was not aware of the fixed amount. Because of the possible extremely high risk in the *arca*-case the author facetiously calls it a kind of an “inverse purchase of a hope” (*venditio spei*). However, the author states that a comparison between the case of selling with an “*arca*-clause” and the *emptio spei* cannot be based on the special character (*spes*) of either of the mutual services, and not even because of the lack thereof (*scil* analogously: *etiamsi nihil inciderit* or *etiamsi nihil capit*<sup>8</sup> in the case of *spei emptio*). The only connection between the two transactions is the risk exceeding the average measure (pp 48-53). Although this statement is correct, it should be kept in mind that the risky or almost aleatoric

5 Cf II 6 234-235 & 7 472-475; Od 1 430.

6 Cf Gai 3 139; I 3 23 1; Ulp D 18 12 1; I 3 23 3; Paul D 18 6 8pr.

7 Cf Ulp D 18 1 7 1.

8 See Pomp D 18 1 8 1 and *eod* 19 1 11 18.

character of contracting with an *arca*-clause lies in the obvious uncertainty of the equilibrium, or the great possibility of the lack thereof. Perhaps we can really call one of the mutual services – as Pomponius did in the case of *spei emptio* – *spes* (see my further reviews on this issue below at IV (3), in its last paragraph).<sup>9</sup>

Indirect primary legal sources (*quanti a testatore emptus est*)<sup>10</sup> may be found in order to prove that Roman jurists regarded the purchase price as fixed even in the case of a subjectively uncertain price which was objectively certain for *both* of the contracting parties (pp 54-56).

Thus, continues the author, *pretium* was held *certum* even if the price was a fixed amount of money plus a thing or another service, the value of which was *objectively uncertain* at the time of the conclusion of the contract. Primary sources confirm that a contract of sale concluded with the price clause *quanto pluris eum vendidero* also complied with the requirement of being *certum*. Therefore, a purchase price determined at the time of the conclusion of a contract could be completed – depending on the agreement of parties – with the profit deriving from a re-sale: either with the whole profit<sup>11</sup> or with a certain percentage thereof.<sup>12</sup> Thus, such profits from the re-sale of the sold goods had to be paid on the basis of *iusta causa venditionis*, and this amount could also be demanded *ex vendito*. *Certum pretium* included profit arisen from future contracts of sale as well (pp 56-60).

Still, it clear that the purchaser was not allowed to determine the price all by himself, since in this case there would be no consensus between the parties – an essential element of the conclusion of a contract. After examining a wide range of literary views regarding the question of such contracts' validity or conditional effectiveness (Windscheid,<sup>13</sup> Grosso,<sup>14</sup> Arangio-Ruiz,<sup>15</sup> Seckel and Levy,<sup>16</sup> Albertario,<sup>17</sup> Bechmann,<sup>18</sup> Daube,<sup>19</sup> Nelson and Manthe,<sup>20</sup> Zimmer-

9 *Scilicet* Pomp D 18 1 8 1.

10 *Cf* Ulp D 18 1 37.

11 *Cf* Ulp D 18 1 7 2.

12 *Cf* Ulp D 19 1 13 24.

13 See B Windscheid *Lehrbuch des Pandektenrechts* II (Frankfurt am Main) 1891<sup>7</sup> 407ff.

14 See G Grosso *Obbligazioni. Contenuto e requisiti della prestazione. Obbligazioni alternative e generiche*, (Torino, 1966<sup>3</sup>), 117ff; *idem* "Le clausole 'si putaveris', 'si aestimaveris', e simili, nei fedecomessi, e la dottrina dell'arbitrium boni viri" in *Studia et documenta historiae et iuris* 1 (1935) 85ff.

15 See V Arangio-Ruiz *La compravendita in diritto romano* I (Naples, 1956<sup>2</sup>) 111-112<sup>2</sup> & 141<sup>3</sup>.

16 See E Seckel / E Levy "Die Gefahrtragung beim Kauf im klassischen römischen Recht" in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte – Romanistische Abteilung* 47 (1927) 152<sup>6</sup>.

17 See E Albertario "L'arbitrium boni viri del debitore nella determinazione della prestazione" in *Studi di diritto Romano* III (Milan, 1936) 309; and *idem* "L'arbitrium boni viri nell'onerato di un fedecomesso" in *Studi di diritto Romano* III (Milan, 1936) 357.

18 See A Bechmann *Der Kauf nach gemeinem Recht* II (Erlangen) 1884 (repr Aalen 1965) 347ff.

19 See D Daube "Certainty of price" in *Studies in the Roman Law of Sale. Dedicated to the Memory of Francis De Zulueta* (ed) (Oxford, 1959) 21-24 & 44.

20 See HLW Nelson & U Manthe: *Gai Institutiones* III 88-101. *Die Kontraktobligationen. Text und Kommentar* (Berlin, 1999) 262.

mann,<sup>21</sup> Pennitz,<sup>22</sup> Kooiker<sup>23</sup> and Leessen<sup>24</sup>), the author ascertains that a contract of sale concluded with the clause *quanti velis, quanti aequum putaveris, quanti aestimaveris*<sup>25</sup> must be regarded as void since it is regarded as a sale *sine pretio* (pp 60-66).

The next – fairly large part of the work – deals with a detailed and lucid analysis of the old problem of price-determination by third parties (pp 66-82). On the first pages of this section (pp 66-71), the author examines this question in the pre-classical and classical eras, during which a debate between the Sabinians and Proculians had emerged after Gaius (Gai 3 140). The author follows the standpoint (eg of Kübler,<sup>26</sup> Falchi,<sup>27</sup> Thomas<sup>28</sup> and Torrent<sup>29</sup>) that this controversy is not a debate in the “classical” sense of the word. Thereafter he discusses the matter as it appears in Justinian’s constitution (I 3, 23, 1 and C 4, 38, 15pr-3). As for *emptio venditio* concluded with a purchase price determined by a third person, it is well-known that Justinian regarded contracts of sale concluded with the price clause of *quanti Titius rem aestimaverit*<sup>30</sup> valid, thereby putting an end to the earlier debate between classical jurists.<sup>31</sup>

Now (pp 71-77) the question regarding the effect of the third person’s statement must be answered: Does it have a constitutive or a mere declarative effect? This important question is somewhat anachronistic (Jusztinger himself also mentions the same problem later on p 77), but the author’s aim, and also the way he approaches it, is correct. He declares that Justinian’s constitutions (in I 3 23 1 and C 4 38 15) do not answer this question. Thereafter, he analyses analogous cases emerging in the field of *locatio conductio* (in Cato’s *de agri cultura* 144, 2-3 and 145 3) and *societas* (Procul D 17 2 76 & 78). After an examination of analogous cases, he states that the third party, while determining the price, had to behave as a *vir bonus* because objectiveness had to prevail in such cases too. Thus, if the price was determined by a third person at the request of the parties, it was obligatory only if he had made a

21 R Zimmermann *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Oxford, 1996<sup>3</sup>) 254-255; R Feenstra & R Zimmermann (eds) “Römisch-holländisches Recht. Ein Überblick” in *Das römisch-holländische Recht ...* (Berlin, 1992) 151.

22 See M Pennitz *Das periculum rei venditae. Ein Beitrag zum „aktionenrechtlichen Denken“ im römischen Privatrecht* (Wien / Köln / Weimar, 2000) 223.

23 H Kooiker “*Pretium certum esse debet*” in *Groninger Opmerkingen en Mededelingen* 21 (2004) 37-62.

24 T Leessen *Gaius Meets Cicero. Law and Rhetoric in the School Controversies* (Leiden, 2010) 215.

25 Cf Gai D 18 1 35 1.

26 See B Kübler *sv Rechtsschulen* in *Realencyclopädie der Classischen Altertumswissenschaft* 2 1 (1914) col 380-394.

27 See GL Falchi *Le controversie tra Sabiniani e Proculiani* (Milan, 1981) 263-267.

28 JAC Thomas *The Institutes of Justinian. Text, Translation and Commentary* (Oxford, 1975) 231.

29 A Torrent “‘*Pretium certum*’”, determinación del precio ‘per relationem’” in *Bullettino dell’Istituto di Diritto Romano «Vittorio Scialoja»* 98-99 (1995-1996) 105.

30 Cf C I 4 38 15 pr-3 and I 3 23 1.

31 Cf Gai 3 140.

correct decision on the basis of objective criteria, in a fair and honourable process, and without arbitrariness (*arbitrium boni viri*).

In the next part (pp 77-82) Jusztinger, also keeping in mind the danger of anachronism, asks: “Is the clause “*quanti Titius rem aestimaverit*” a *condicio suspensiva* or a *pactum adiectum*?” After having discussed Gaius on *locatio conductio* (D 19 2 25pr) and Proculus on *societas* (D 17 2 76), the author concludes that their views – according to which such contracts are regarded as suspensive conditions – are correct. He thereupon discusses the possibility of transferring this standpoint to *emptio venditio*. Then he correctly states that we do not have enough primary sources to support the one or the other view (pp 80-82). The phrase *sub hac condicione*, even in Justinian’s constitution, cannot be interpreted in a technical meaning. The author holds that the controversy of invalidity and ineffectiveness, which also established the incorrect debate of *pactum adiectum* or *condicio suspensiva*, depended on the different standpoints regarding the interpretation of the certainty of price-matter: On the one hand that of *Labeo* and *Cassius* (exact sum already at conclusion of the contract, and without it the contract is void), and on the other hand that of *Ofilius* and *Proculus* (according to whom the price can be defined later on, too, and that a contract with a clause *quanti Titius rem aestimaverit* is valid, albeit ineffective until the determination). He states that this “debate” had originally turned around the *perfection* of the contract of sale.

(3) The third chapter (pp 85-103) attempts to find the answer to the following question: In the case of *emptio ad mensuram*, to what extent did the price-clause chosen by the parties have an influence on the division of risk between vendor and purchaser? The analysis of certain cases of selling at a lump sum (*uno pretio, per aversionem*) and selling at a unit price (*in singulas amphoras, in singulos metretas, in singulos modios*) justified the fact that the method of price determination chosen by the contracting parties had a decisive impact on the date of transfer of risk. In the case of selling at a lump sum, *periculum* transferred to the purchaser immediately, while in the case of selling at a unit price the seller had to bear the risk until the goods had been measured. The literary sources (Cato: *lex vini in doliis*,<sup>32</sup> and Varro: *emptio ovium*<sup>33</sup> and *emptio canum*<sup>34</sup>) make it clear that in normal contract practice either of the “lump sum-unit price”-clause pairs could already have been applied in the Republican age in the case of *emptio ad mensuram*.

The next part deals with the sale of replaceable things for a lump sum (*emptio per aversionem*). Comparing it briefly with the purchase of a hope (*emptio spei*), the author repeatedly<sup>35</sup> states that the important difference between these contracts is not the distinction of *rei* and *spei emptio* as held by others in the topic’s wide literature,

32 Cf Cato Agr 148.

33 Cf Var Rust 2 2 5.

34 Cf Var Rust 2 9 7.

35 See the so-called *arca*-case in IV (2).

including the author of this review. The author opines that the relevance of *emptio spei* is not its special object, but the aleatoric character appearing in the obligation of the purchaser to pay the price unconditionally: It means that the contractual risk is much higher than its average extent. Jusztinger states that the difference between these two transactions can be found more likely in their “dogmatic structure” than in the nature of their objects. In other words, in the case of an *emptio spei*, according to the agreement of the parties, the purchaser’s risk has a special measure and nature; that is why he has to pay the price even if the vendor cannot give him the goods, the quantity and quality of which is unknown at the time of the contract’s conclusion. As for *emere per aversionem*, the purchaser is obliged to pay the lump sum stipulated in advance. The author concludes that the regulation of bearing risk, such as the measure of purchase price, was negotiable (pp 94-95).

I agree with the author’s final statement, and also with the outcome of his reasoning on the fairly free allocation of contractual risks by the parties’ consensual agreement. However, he does not seem to understand those views (including mine<sup>36</sup>) which emphasise the different natures of the objects of these contracts. I can confirm that the latest concepts in legal history, which *literally* interpreted the picturesque and imaginative words most likely of Pomponius appearing in D 18 1 8 1 (in the *sedes materiae* of *spei emptio*), stem from the late medieval Canon law. These misinterpretations (eg of Mantica, Turri and Gonzalez-Tellez) did not belong to the mainstream of Jesuit Canon law. The mainstream<sup>37</sup> has always tried – legally or illegally – to contentwise and substantially interpret the (probably) Pomponian metaphor. For example, when the *opinio communis* states that “the object of *emptio spei* is the hope (itself)”, this statement is mainly an abbreviating grammatical structure based on the detailed analysis of the legal character and phrasal nature of *spes* during the age of this important legal phrase’s creation. However, this correction is marginal.

(4) Chapter four (pp 105-135) deals with the evolution of legal regulations which defined the limits of freedom of price determination. In ancient Rome, as a result of a long-term development, they managed to develop a useful system of laws situated somewhere between the limitless freedom of contract on the one hand and detailed regulations restricting the contractual will of the parties on the other hand. The author found it necessary to correctly re-construct the requirement of *verum pretium* defined

36 See, eg, A Földi “József Benke, Reményvétel. Az európai magánjogi gondolkodás a reményvétel mikrokosmoszán keresztül” [Der Hoffnungskauf. Europäisches privatrechtliches Denken im Mikrokosmos des Hoffnungskaufs] HVG-Orac (Budapest, 2011) 448 in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte – Romanistische Abteilung* 131 (2014) 460-465.

37 See, also, J Benke “Aleatorischer Kauf nach römischem Recht” in *Orbis Iuris Romani* 11 (2006) 7-29. Here, I had so many problems trying to re-interpret all the rules of *emptio venditio rei* according to the special characters of *spes* and *spei emptio* that I decided that it would be better to develop my new standpoint in a monograph (see review *supra*).



as a “real” price that was mentioned in a popular regulation during the nineteenth century, namely *Pandektistik: pretium debet esse verum, certum, iustum*. Jusztinger reasons that the difference between the value of the goods and the sum of the purchase price never resulted in a nullity of sale-contract. However, if the purchase price was so low that the intention of acquisition in return for consideration became unreliable, it excluded the conclusion of a valid contract. The author points out that legal sources<sup>38</sup> regarded the parties’ rather extensive freedom to define the sum of the price even by means of speculative manoeuvres (*invicem se circumscribere*) as an inherent element of the contract of sale, the most important limit of which was the *bona fides* in its objective sense (*mutatis mutandis* like “*Treu und Glauben*”). Despite the fact that Roman law did not require *total* equivalence between the purchase price and the objective value of goods, it has already turned its attention to the fairness of the purchase price prior to the introduction of *laesio enormis*. Jusztinger proves that, on the one hand, classical Roman law respected the contractual will of the parties and did not interfere with the process of price determination; on the other hand, however, classical law tried to keep the parties’ bargaining process within bounds in order to prevent it from becoming endless with respect to the principle of *bona fides*. Two imperial rescripts, for example, indicated the first steps in order to find the optimal balance between the freedom of contract and equity.<sup>39</sup> The aim was to defend the more unprotected party, and for this the laws used the strict criterion of *dimidia pars*.

(5) The fifth chapter (pp 137-156) analyses the “borderlands” of *emptio venditio* and *locatio conductio*. This section intends to verify that the determination of monetary consideration played a key role in these cases as well. The author correctly states that the common rules of the determination of consideration, such as the requirement of paying money; the permission of circumscription; and the possibility of *pretium* or *merces* being determined by a third party, are the reasons for this problem according to which some cases of sale and rent are difficult to separate.<sup>40</sup> Therefore it is difficult to decide whether the contracting party pays a purchase price or a rental price.<sup>41</sup> This is important for various aspects: to determine liability; the transfer of risk; and the legal consequences of the determination of monetary consideration.

After analysing the most important common features of *pretium* and *merces*, both pecuniary services (pp 138-142),<sup>42</sup> the author classifies this chapter according to the nature of the *casus paralleli* of *emptio venditio*: (i) with the *locatio conductio rei*: Ulp D 19 5 20 1; Gai 3 146; (ii) with the *locatio conductio operis*: Gai 3 147;

38 Cf Paul D 19 2 22 3; Ulp D 4 4 16 4.

39 Cf Diocl et Maxim C 4 44 2 and *eod* 8.

40 Cf Gai 3 145.

41 Cf Gai 3 147; Iav D 18 1 65.

42 Jusztinger examines further pros and cons: Afr D 19 2 35 1; Ulp D 10 3 23; Ulp D 16 3 1 9; Ulp D 19 5 17 3; Paul D 19 5 5 2-3; I 3 24 2; Paul D 19 2 22 3; Gai D 19 2 25; Gai D 19 2 2pr.

Iav D 18 1 65; Pomp D 18 1 20; Paul D 19 2 22 1-2; Ulp D 6 1 39; and (iii) with the *locatio conductio operarum*. In this last comparison, the author critically examines the analogues emerging from the object lessons of *spei emptio* (Pomp D 18 1 8 1), such as fishing and hunting for an unconditional payment of the purchase price, and the case of a labour-contract like fishing also for an unconditional payment. In these cases of fishing for an unconditional payment regardless of the outcome (*captus piscium vel avium*), Jusztinger perceives and examines the “hard nut” of the acquisition of property *per occupationem*, namely which party and how he is to enjoy this *modus adquirendi*: either the fisher (as vendor or employee), who catches (occupies) the lordless objects (fish, birds, etc), or the other party (as emptor or employer), to whom or for whom the fisher caught it.

(6) The investigations of chapter 6 (pp 157-192) analyse the connection between the payment of price and the transfer of ownership. Here the author intends to confirm that both the determination and performance of *pretium* (could have) indicated significant turning-points regarding the conclusion of sales contracts. I epitomize the author’s statements as follows: Although with different intensity and originating from different causes, the rule of paying the purchase price appeared from the time of the Twelve Tables<sup>43</sup> and continued in various stages of the development of Roman law. It consequently has a place in the codes of the Justinian codification. The early act of real-sale by means of *mancipatio* entailed the requirement of paying the purchase price as an indispensable element of the transaction fulfilled immediately from hand to hand. However, concerning the formation of consensual sale, it does not seem to be unreasonable that despite the handover of goods, the purchaser does not acquire the ownership without the performance of *pretium*. Thus, if the buyer does not perform, the seller can at least reclaim his goods. The most obvious way to ensure the seller’s interest – without a concrete stipulation referring to the maintenance of ownership – is the application of the rule which makes the transfer of ownership dependent on the payment of *pretium*. Of course, all these possibilities are true since the purchaser can postpone the performance or pay by instalments. As soon as the seller’s position becomes equal, the examined prescription ensuring the significance of the balance of performances decreases. Thus, by the classical age, once it had been acknowledged that the parties’ agreement regarding the postponed performances is sufficient to establish the sale, and *emptio venditio* functions merely as the title of acquisition in connection with the transfer, the prescription is no longer as it had been previously. The requirement of paying the purchase price remains in a less strict form; its functional significance was more or less depleted. Even Tribonian’s committee accepted the reduced importance of simultaneity.<sup>44</sup> Considering the Dacian sales documents<sup>45</sup> and sales contracts concluded in Ravenna,<sup>46</sup> everyday contract

43 Cf 7 11.

44 Cf Gai D 18 1 53; Pomp D 18 1 19.

45 Cf FIRA III Nrs 87-90.

46 Cf P Tjäder 36 7-13.

practice provides examples which either diverge from the prevailing (imperial) legal standpoint or follow it. The regulation attaching the transfer of ownership to the payment of the purchase price, in any stages of the development of Roman law, may be regarded rather as a provision depending on the agreement of the parties and their everyday practice than as a general legal rule or principle.

V Finally, the author states that it can clearly be seen that the influence of price determination and the payment of the purchase price exerted on the functional *synallagma* conflicts only at first glance. On the one hand, the transfer of *periculum* is not inconsistent with it, since the buyer bears the risk of accidental destruction of goods (not owned by him yet) only if the handover of goods depends solely on the buyer and the seller is ready for performance. On the other hand, Roman law has already recognised payment of the purchase price as a requirement for the transfer of ownership during the Archaic Age, but this requirement was continuously exceeded by newer legal possibilities of crediting the purchase price, pledge, or bail.

To conclude: I hope that this commendable book of János Jusztinger will receive the deserved support for publishing it in a world language, which would make the book more easily accessible to a wider audience consisting of Romanists and legal historians.

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