One Thousand Years of Arra

Introduction

Roman *arra* has been, and still is, susceptible of great controversy. Some jurists insist that the *arra* of Roman law was a continuously uniform legal concept. Intransigent, they cannot envision an imported Greek *arra*, capable of being totally romanized at one period and yet at another succumbing to the potent customary forces of the East. No jurist of modern-day civil law has any difficulty in appreciating that a single legal principle may mean something quite different in one century than in another. Nor should any jurist of the Roman law. Although no startling and innovative theory will assault the reader of this paper, an attempt will be made to provide the reader with an historical perspective of Roman *arra*.

What could be more acceptable, although manifestly less exciting, than the consideration of one of the great conundra of Roman legal science as being without solution! Indeed, any definitive solution would be a travesty of Roman *arra*. However, among the possible interpretations, some appear easier to accept than others.

The *arra* of Roman law differs in no great way from the earnest of the law of sale in modern civil law systems. For most of the one-thousand-year history of Roman law, *arra* was a sum of money advanced by the purchaser to the vendor in order to both ensure the fulfilment of the sale and secure the payment of the balance of price. Both parties, therefore, had a considerable interest in the giving of *arra*. Yet, the modalities of its operation varied with the particular rules governing the law of sale in each of the Roman law's formative periods. Whereas some civil law systems restrict the giving of earnest to promises of sale, the Roman law, in its maturity, allowed *arra* to operate both prior to and at the moment of a binding contract.

The early period

The early period in the development of *arra* occurs before Plautus, for it is Plautus who indicates a metamorphosis in the nature of Roman *arra*.[1] Since the advent of consensualism is generally considered to be the dividing point between the early law and the classical

[1] Titus Maccius Plautus was a Roman comic dramatist who lived from 254 to 184 B.C.

law, the early period is thus characterized by the absence of consensual contracts. This period also witnessed both the development of the autochthonous forces of contract and the acceptance of the *arra* of Greek sale.

Unrefined systems of contract have difficulty in separating contract as a personal obligation from contract as a physical bond. The human body was looked upon as the general pledge of creditors:

> A son point d'irruption l'engagement contractuel d'une chose se confond pour ainsi dire avec l'engagement contractuel de la personne du débiteur.[2]

Consequently, the non-payment of a debt led to dire results under the law of the XII Tables;[3] a creditor could call for the sale of his defaulting debtor. To ensure that the contractual duty was fulfilled, there was the giving of *arra.* The human hostages of primitive law later became small objects intimately connected with the debtor's body: clothes, arms, gloves, *etc.* If the debtor defaulted, he exposed himself to bad luck, the belief being that there was, between a man and his possessions, a certain and ill-defined magical link. Elsewhere in the Roman law, the giving of a ring in promise of marriage, the *arra sponsalicia,* was indicative of this very personal pledge.

There was nothing unusual in this sort of arrangement in very early law. Indeed, such *arra*-giving was common to the formative stages of all legal systems. For example, the Semites and the Babylonians had also developed a similar concept of *arra.* However, the most direct of all influences on the young Roman legal system came from Greece.

The principal distinguishing feature of the Greek law was that, throughout its history, consensual contracts did not exist. The transfer of ownership was dependent upon payment and not, as in the Roman law, upon delivery. However, prior to the payment of the price, the buyer was protected, to a certain extent, by registration, cooperation of neighbours, public announcements and public documents.[4] Although the Greeks lacked a binding contract of sale creating an obligation to convey the thing sold and thereby pass title, an ὠνὴ - πρᾶσις[5] or simply ὠνὴ[6] preceded each cash sale.[7] This trans-

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[2] Cornil, *Ancien Droit Romain* (1930), 96.

[3] The XII Tables, the earliest Roman code of laws, were drawn up in the middle of the fifth century B.C. and were described by the historian Livy as the foundation of all public and private law. The XII Tables codified the city's customary law.

[4] Pringsheim, *The Greek Law of Sale* (1950), 91.

[5] *Ōnā-prasis*: sale-purchase agreement.

[6] *Ōnā*: sale.

[7] See *supra,* note 4.

action would be accompanied by the giving of *arra*. Since there was nothing substantial, save a non-binding promise, the *arra* could not be evidence of a pre-existing contract. Under a law which provided no actions on mere promises, the buyer was penalized by the loss of the *arra* if he failed to pay the price. The defaulting seller restored the buyer's *arra* and paid him as much in addition. This was the νόμος τῶν ἀρραβώνων,[8] described as the "real sanction of sale in the Greek East throughout the Hellenistic period".[9]

It is not known how Greek *arra* was received by Roman law, only that it was current practice in the time of Plautus, probably imported into Rome in understandable recognition of an already sophisticated legal system. Even before the advent of classical law and its doctrine of consensual contracts, some liability must have seemed desirable.

Not unlike other civilizations, certain aspects of Roman life were best revealed (and ridiculed) by their playwrights. Plautus, in particular, through the medium of his somewhat bawdy plays, has been regarded as accurately representing the language and mores of his times.[10] Although most of Plautus's plays can be traced back to Greek comedies on similar themes, the dramatist adapted his Greek models to Roman taste. The extent to which Plautus was affected by his Greek originals is difficult to determine. Unlike Terence,[11] who strived to preserve the atmosphere of Hellenistic Athens and conceded little to popular taste, Plautus romanized his originals to suit his comic purpose. Was Plautus, therefore, presenting Greek *arra* to his audience and counting on their familiarity with this aspect of the Greek law of sale or was he faithfully portraying an already romanized adoption of the Greek law?

Academic opinion is varied. Pringsheim is not much concerned "[w]hether it was the original Greek arra of Greek New Comedy or an imported, but not yet adopted, Hellenistic arra drawn from the Roman law of his time".[12] Nevertheless, he says, the Plautine *arra* "would in substance be the pure Greek arra"[13] and continues:

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[8] *Nomos tōn arrabonon*: the law of *arra*.

[9] De Zulueta, *The Roman Law of Sale* (1945), 22.

[10] Duckworth, *The Nature of Roman Comedy* (1952), 143-46, 331-40, 384-85.

[11] Publius Terentius Afer lived from *c.*190 to *c.*159 B.C.

[12] *Supra*, note 4, 429. Greek New Comedy, some say, was the last creative literature of Athens. It belongs to the last quarter of the fourth century and the third century B.C. Its principal representatives are Philemon, Diphilus and Menander. The models for Plautus's plays came from this literary period.

[13] *Ibid.*

> In this way the old dispute as to whether Plautian comedy should be used as an illustration of Roman or of Greek law can perhaps be disposed of.[14]

However, Pringsheim has already suggested that the legislation of the emperor Justinian allowed the Greek concept of *arra* to "again prevail"[15] which leaves his suggestion that much the weaker for lack of precision. But Plautine sales, almost invariably, deal with *arra* intricately; consequently, it seems unlikely that a Greek-type *arra* was not already Roman law because constant repetition of a foreign institution would have little, if any, comic effect.[16]

Watson[17] denies that the *arra* of Plautus's plays is necessarily always Greek *arra*, and insists that it is, at times, not of a legally penal nature, being both Roman and in harmony with consensualism. He points to the plays of *Mostellaria* and *Rudens* as containing examples of non-Greek, non-penal *arra*. Since Watson maintains that at the time of Plautus consensual contracts were actionable, *arra* would have no particular legal significance.[17a] The recourse open to the aggrieved party would be an action on the contract itself, not an action for return of the *arra*. However, Watson must account for the multiplicity of references to *arra*:

> The stress in them on *arra* would, of course, derive from Greek law, but it is equally understandable on a purely social plane and may have been seen by Plautus in that light. In the mind of the man in the street, a consensual contract is that much more binding where *arra* has been given — even where he is aware that legally it makes no difference to the contract.[18]

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[14] *Ibid.*

[15] *Ibid.*, 416.

[16] In the *Curculio*, line 618 *et seq.*, Plautus has the boastful soldier claim fourfold and not double damages for a free girl whom he claims to have bought by *mancipatio*, thinking she was a slave. Such comic exaggeration would only be of immediate relevance if penal *arra* were current practice in Rome. Watson, *infra*, note 17, 46-47, seems to think that the Roman audiences were capable of understanding Greek law.

[17] Watson, *The Law of Obligations in the Later Roman Republic* (1965), 46-57.

[17a] See Watson, *The Origins of Consensual Sale: A Hypothesis* (1964) 32 Tijdschrift voor Rechtsgeschiedenis 245, 253-54 where he suggests the middle of the third century for the advent of consensual contracts between *cives*, citizens, there being no reason to ascribe their introduction to the *peregrine praetor* alone. Crook, *Law and Life of Rome* (1967), 220, counters Watson and has strong doubts about the date of consensualism. He conjectures that Plautus is full of *arra* because his plays were written before consensual sale had become fully recognized. Likewise Cornil, *supra*, note 2, 97, believes that because in Plautus reciprocal promises of sale and purchase were not binding, the giving of *arra* took the place of the later *vinculum iuris* and acted as a pledge of the buyer executing his promise.

[18] *Supra*, note 17, 51.

The "social usefulness" theory of Watson[19] creates a demi-monde, an alternative justice unrecognized by the law. Such a theory is the unhappy consequence of reconciling consensualism with the texts. For example, it is no doubt quite possible, although not convincing, to consider the following *arra* as of no inherent legal validity, but merely of social value:

> nunc si me adulescens Plesidippus viderit quo ab arrabonem pro Palaestra acceperam, iam is exhibebit hic mihi negotium. (*Rudens*, 1, 554-56).
> now if that young lad Plesidippus catches sight of me — for he's the one I accepted *arra* from for Palaestra — then he'll hold me to the bargain, he will.

Certainly, this text would indicate consequences more penal than social.

The Greek law of sale was not ambiguous; it obligated the seller, on receipt of the *arra*, to pay a penalty in the event of non-delivery of the object sold. As such, judgment could be given for double the amount. Thus *arra* was legally enforceable. In the *Mostellaria*, Theopropides hopes to have judgment against the seller of the house in question and says:

> tanto apud iudicem hunc argenti condemnabo facilius (1.1099).
> so much the easier will I be able to obtain judgment for the money in court.

Such a statement is susceptible of two interpretations: the seller might be condemned to pay a penalty (double the *arra*) or the judge would have him hand over the house to the buyer. The mention of *argenti* leads most authors[20] to believe the anticipated judgment to be financially penal. Watson says this is a judgment in a Greek case of *arra*.[21] Other judgments produce similar problems.[22] Watson

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[19] *Ibid.*, 49, where Watson says: "But the social value of *arra* must not be ignored. Even if it had no legal effect whatsoever, sellers would still want to extract substantial *arra* from the buyer."

[20] MacCormack, *A Note on Arra in Plautus* (1971) 6 Ir.Jur.(n.s.) 360, 363, n.13.

[21] *Supra*, note 17, 56.

[22] In the *Rudens*, Labrax announces the judgment which Plesidippus has obtained against him at lines 1281-83:

> "Quis me est mortalis miserior qui vivat alter hodie,
> quem ad recuperatores modo damnavit Plesidippus?
> abiudicata a me modo est Palaestra."
> Name me one man who has had a more miserable day than I? To begin with, Plesidippus has got a verdict in court against me and Palaestra has been snatched right out from under me.

Pringsheim, *supra*, note 4, 423, believes that Labrax was not condemned to perform a contract but to pay back the *arra* and being unable to do so, handed over Palaestra to the plaintiff (*contra*, Watson, *supra*, note 17, 52-53). However, MacCormack, *supra*, note 20, 364, thinks it strange that if the judg-

argues[22a] that (1) *arra* was not legally sanctioned but socially current, (2) adjudications were for the object sold and never for monetary compensation, and (3) in cases where *arra* forms part of a sales transaction, the *arra* was Greek *arra* of Greek law, easily comprehended by the audience.[23] Those texts which clearly provide a choice between producing the object sold or returning the *arra* given[24] are not, Watson says, examples of the classical Roman law of consensual contracts.

Perhaps there is an easier solution: the *arra* of Greek law was adopted in Rome and legally sanctioned in the pre-consensual or transitional period, a two-sided liability being therefore enforced. A judicial ruling, in the classical law, would not condemn the vendor to forfeit the *arra*, let alone double its amount. However, the Greek law would allow such a condemnation since, as has been mentioned above, the contract would not be complete until full payment of the price. To dichotomize Plautus's plays into those where *arra* is Greek and those where *arra* is Roman is a delicate operation indeed.

The classical law

After consensual sale became fully actionable, there is no doubt the *arra* was suppletive, a security device additional to the action on the sale. The nature of *arra* changed, incurring liability only on the part of the giver. In the event of non-performance, the *arra* was either lost by the giver or returned by the receiver, according to the nature of the default. Before Gaius espoused the classical doctrine, Varro, the first century B.C. scholar, defined *arra* in his treatise *De lingua latina*:

> Arrabo sic data ut reliquum reddatur; reliquum, quod ex eo, quod debitum, reliquum (5.175).
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> Thus, *arra* is given so that the balance might be paid; the balance is that which remains from the amount owing.

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ment had been for money, the amount should not have been stated — and exploited — by Plautus.

[22a] *Supra*, note 17.

[23] The following comment of Duckworth, *supra*, note 10, 81-82, may help temper Watson's high regard for the Roman audience when he says: "The prologues of Terence, as we have already seen, give us an interesting insight into the nature of the audience which viewed Roman comedy in the second century B.C. The playwright's constant plea for silence and a fair hearing implies that the spectators were a noisy and unruly lot, and if a play had less appeal than some nearby attraction, such as a boxing match or a gladiatorial combat, they might rush from the theatre, as in fact happened in the case of the first two presentations of the *Hecyra*."

[24] *Curculio*, line 612; *Pseudolus*, line 1183.

The text is not informative. Furthermore, there seems to have been an association of *arra* with *pignus*, pledge, so that in Apuleius,[25] gold and silver objects were given to secure a loan, to be forfeited if the money were not paid on time.[26] Nothing much more is known of *arra* before Gaius:

> This first period ended with the recognition of the actionability of the consensual contract. In the next period arra could still be used, but had to be adapted to the new legal situation . . . .
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> If [the references to the *pignus-arra* in the early classical law] show a one-sided liability that does not necessarily mean that arra, when imported, was at once confined to the task of securing the vendor's claim to the price. It is more probable that the two-sided arra was at first used as such by the Romans and only later restricted, when Roman sale created full liability. The purchaser's liability could still be increased by the addition of a pledge-like arra.[27]

The role of *arra* in the classical period, at least in theory, is expressed in Gaius:

> Emptio venditio contrahitur cum de pretio convenerit, quamvis nondum pretium numeratum sit, ac ne arra quidem data fuerit. nam quod arrae nomine datur, argumentum est emptionis et venditionis contractae (3.139).
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> A contract of sale is concluded when the price has been agreed, although it have not yet been paid and even no earnest have been given. For what is given by way of earnest is evidence of a contract of sale having been concluded.[28]

This *arra confirmatoria* was evidence[29] of a binding contract, a mode of proof by which it was recognized that the sale had been concluded by the mere consent of the parties.[30] Gaius may have been warning against adopting the view prevalent especially in the East, that *arra* was penal in nature.[31] His rule lasted, despite vulgarization, in the Western Roman Empire until the fifth century A.D. and was applied by Roman jurists and emperors in Hellenistic *arra* cases.[32]

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[25] Apuleius was a second century A.D. Roman satirist-novelist.

[26] *Supra*, note 4, 417.

[27] *Ibid.*, 418.

[28] Text and translation of de Zulueta, *The Institutes of Gaius*, Part 1 (1946).

[29] See Didier-Pailhé, *Cours Elémentaire de Droit Romain* 4th ed. (1895), vol.2, for a possibility of a contrary stipulation.

[30] Cuq, *Les Institutions Juridiques des Romains* (1902), vol.2, 403, gathers from Varro and Isidorus that *arra* was also a guarantee that the balance of the price would be paid.

[31] Crook, *supra*, note 17a, 221, adds that Roman Egypt had a law of *arrhabo* which was penal. Also of the same opinion is Taubenschlag, *The Law of Greco-Roman Egypt in the Light of the Papyri 332 B.C. — 640 A.D.* (1955), 407-409.

[32] *Supra*, note 4, 344.

Hellenistic and Byzantine arra

The Hellenistic peoples, though subjugated by the Romans, did not cease giving *arra* of a significant amount to secure the bargain before a written contract:[33]

> The arra system, coming from the orient, seems as characteristic of the Greeks as the system of consensual contracts of the Romans.[34]

The transactions of *arra* and sale are distinct: a Ptolemaic draft letter of the third century B.C. speaks first of *arra* and then of τὴν τῶν κτημᾶτων πρᾶσιν, "the purchase of the goods."[35] A letter of the same period speaks of an anticipated sale of poppy: δοὺς τὸν ἀρραβῶνα... οὐκέτι ἠγόρακας "although you have given *arra*, you have not yet purchased".[36] Pringsheim has an impressive list of *arra* transactions spanning the whole period of Hellenistic influence until the Byzantine era. They demonstrate: (1) that an *arra* transaction was separated from the sale, (2) that *arra* regularly represented a part of the price, and that ownership passed on the payment of the full price, (3) that *arra* consisted of money and was to be set off against the price, (4) that *arra* could not simply be returned by the receiver without penalty, (5) that the giving and taking of *arra* created liabilities,[36a] (6) that *arra* must be given immediately, and (7) that *arra* was a first step to and security for a future sale. Justinian in 528 A.D., in Codex 4.21.17,[37] was to allow the parties

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[33] *Ibid.*, 344 *et seq.* and *passim.* See also Cornil in *Mélanges P.F. Girard* (1912), vol.1, 254 *et seq.*

[34] *Supra,* note 4, 376-77.

[35] *Ibid.*, 384 *tān tōn ktāmatōn prasin.*

[36] *Ibid., dous ton arrabōna ... ouketē āgorakas.* Pringsheim adds that the contrast between the giving of *arra* and the future sale is evident also in Byzantine commercial transactions.

[36a] *Ibid.*, 399-400: "For the act of the giving διδόναι ἀρραβῶνα is used by Aristotle, Theophrastus, Isaeus and Harpokration, in the Ptolemaic papyri and the New Testament and in the papyri of the Roman epoch. In correspondence with this term the comedies of Plautus, Varro and the classical jurists, and even Justinian speak of *'dare arrabonem', 'dare arrae nomine', 'datio arrarum'.* The act of the receiver, on the other hand, is called λαμβάνειν ἀρραβῶνα by Theophrastus, Harpokration and Ptolemaic and later papyri. Plautus, the Roman jurists and the Codex Euricianus use the corresponding term *'accipere arrabonem (arram)'.* What renders this terminology so characteristic is that there are no exceptions. In all epochs everywhere not an agreement, but the giving and taking is decisive."

[37] This is the date assigned by de Zulueta, *supra,* note 9, 23-4, as being that of the first version of the Codex. Marasinghe, *Arra — Not in Dispute* (1973) 20 R.I.D.A. 3e série, 349, 353, n.23, agrees. Watson, *Arra in the Law of Justinian* (1959) 6 R.I.D.A. 385, says that the *communis opinio* is that the Codex is earlier in date than the Institutes.

at their own initiative to enter into an effective *arra* transaction. The text of the Codex demonstrates that all the above characteristics, save the second, of Hellenistic *arra* were precisely those encompassed by this imperial constitution.[38]

The Corpus Iuris Civilis

Justinian's codification, illustrative of the mature Roman law, has given rise to disputes both textual and substantive in nature, involving Institute 3.23.pr. and Codex 4.21.17. The older text will be dealt with first.[39]

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[38] This is not to suggest or to articulate the fear of Thomson, *Arra in Sale in Justinian's Law* (1970) 5 Ir.Jur.(n.s.) 179, 183: "I cannot accept, for example, the view that the Hellenistic law of sale was so prevalent that the consensual Roman contract was quite unknown in the period immediately prior to Justinian."

[39] The text of the Codex is Krueger's reading (Krueger, *Corpus Iuris Civilis, Codex Justinianus* (1959), vol.2). The translation of the Codex is Scott's (*Corpus Iuris Civilis, The Civil Law* (1973), vol.xii). The text and translation of the Institute are Thomas's (Thomas, *The Institutes of Justinian* (1975)). Both translations adeptly avoid the neat problems of interpretation, some of which are outlined in the text of this paper (see *infra*, "The Corpus Iuris Civilis").

C.4.21.17 Contractus venditionum vel permutationum vel donationum, quas intimari non est necessarium, dationis etiam arrarum vel alterius cuiuscumque causae, illos tamen, quos in scriptis fieri placuit, transactionum etiam, quas instrumento recipi convenit, non aliter vires habere sancimus, nisi instrumenta in mundum recepta subscriptionibusque partium confirmata et, si per tabellionem conscribantur, etiam ab ipso completa et postremo partibus absoluta sint, ut nulli liceat prius, quam haec ita processerint, vel a scheda conscripta, licet litteras unius partis vel amborum habeat, vel ab ipso mundo, quod necdum est impletum et absolutum, aliquod ius sibi ex eodem contractu vel transactione vindicare: adeo ut nec illud in huiusmodi venditionibus liceat dicere, quod pretio statuto necessitas venditori imponitur vel contractum venditionis perficere vel id quod emptoris interest ei persolvere ... 2. Illud etiam adicientes, ut et in posterum, si quae arrae super facienda emptione cuiuscumque rei datae sunt sive in scriptis sive sine scriptis, licet non sit specialiter adiectum, quid super isdem arris non procedente contractu fieri oporteat, tamen et qui vendere pollicitus est venditionem recusans in duplum eas reddere cogatur, et qui emere pactus est, ab emptione recedens datis a se arris cadat, repetitione earum deneganda.

We order that contracts of sale, exchange, or donation, registry of which is not necessary, gifts of earnest money, or those made for any other reason which are required to be in writing, and also such as relate to compromise, shall not have any force unless evidenced by written documents and confirmed by the signature of those who execute them; and if they have been drawn up by a notary, they must be completed by him, and finally acknowledged by the parties interested, so that, where these formalities have not been complied with, no one will be permitted to claim any right for

The *principium* of C.4.21.17 explains that the validity of those transactions which the parties have agreed to be executed in writing will depend on the writing itself. The execution of the document,

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himself growing out of a contract or compromise based upon a written memorandum (even though it be signed by one or both the parties), whether it has not yet been carried out, or is complete; in order that in transactions of this kind it cannot be said that the vendor was required to sell the property at a certain price; or that the contract of sale was perfected; or that the purchaser should be compelled to make payment ... 2. We also add that, hereafter, where earnest money has been given for the purpose of making a sale of any kind of property whatsoever, whether the contract is in writing or not, even though it may not have been expressly stated what disposition must be made of the earnest money in case the contract was not carried out, he who promised to sell the property, and then refuses to do so, shall be compelled to pay double the amount of the deposit; and he who agreed to purchase it, and refuses to do so, shall lose the sum which was given, and shall be denied the right to recover it.
Institute 3.23.pr.

Emptio et venditio contrahitur simulatque de pretio convenerit, quamvis nondum pretium numeratum sit ac ne arra quidem data fuerit. nam quod arrae nomine datur argumentum est emptionis et venditionis contractae. sed haec quidem de emptionibus et venditionibus quae sine scriptura consistunt obtinere oportet: nam nihil a nobis in huiusmodi venditionibus innovatum est. in his autem quae scriptura conficiuntur non aliter perfectam esse emptionem et venditionem constituimus, nisi et instrumenta emptionis fuerint conscripta vel manu propria contrahentium, vel ab alio quidem scripta, a contrahente autem subscripta et, si per tabellionem fiunt, nisi et completiones acceperint et fuerint partibus absoluta. donec enim aliquid ex his deest, et poenitentiae locus est et potest emptor vel venditor sine poena recedere ab emptione. ita tamen impune recedere eis concedimus, nisi iam arrarum nomine aliquid fuerit datum: hoc etenim subsecuto, sive in scriptis sive sine scriptis venditio celebrata est, is qui recusat adimplere contractum si quidem emptor est, perdit quod dedit, si vero venditor, duplum restituere compellitur, licet nihil super arris expressum est.

Sale is contracted as soon as there is agreement on the price, even though it be not paid nor earnest (*arra*) given in respect of it; for what is given by way of earnest is but evidence that the sale is concluded. This, however, applies to sales which are made without writing; for we have made no innovation in respect of such sales. But, for sales effected in writing, we ordain that the sale shall not be complete unless the document of sale be completed in the very hand of the contracting parties or drafted by another but signed by the parties; and, if it be prepared by a scribe, only when it be completed and executed by the parties. So long as any of these requirements be lacking, there is room for reconsideration and either vendor or purchaser may resile from the contract with impunity. However, we allow them to withdraw with impunity only if no earnest has been given: for in that event, whether the sale be in or without writing, the party who refuses to implement the contract loses what he has given, if it be the purchaser and, if it be the vendor, he must restore two-fold: and this, although nothing be expressed about the earnest.

duly signed, was, in such cases, essential.[40] Until that moment either party could withdraw but not without penalty. The penalty was the forfeiture of the *arra* for the prospective buyer and the double indemnity for the vendor. The great controversy with this text lies in the words *"si quae arrae super facienda emptione cuiuscumque rei datae sunt sive in scriptis sive sine scriptis ..."*. Does the phrase *"sive ... sive"* refer to the *datio arrarum* or to the future sale? The natural construction has *"sive ... sive"* clearly belonging to the giving of the *arra*.[41] The preponderance of *arra* documents and indeed the *principium* (which speaks of written memoranda not fulfilling the requirements) indicate that a written document of *arra* is neither particularly unusual to the Byzantine mind nor, necessarily, a fundamental breach of Roman consensualism. If this is so, then the *arra* of C.4.21.17.2 is penal since there is no agreement for it either to confirm or evidence. Honoré[42] and Thomas both remark that the language of the constitution: *facienda emptione* not *contractum emptionis*, [is] *qui vendere pollicitus est* not *venditor, qui emere pactus est* not *emptor*, indicates a future sale in writing. This would be in harmony with the remarks on the validity of a written sale made in the *principium*. What conclusions can be made of this passage? Thomas has one:

> In the light of what has been seen earlier, it would clearly appear that Justinian is indeed applying to the written sale the regime which characterised the Hellenistic sale. Just as in the latter, the agreement to buy and sell did not of itself bind the parties, so now the agreement of sale does not bind them before the completion of the document: but if *arra*

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[40] Cornil, *supra*, note 33, 259 remarks on the deep-rooted belief in the East that it was impossible to conceive of a contract which was not executed in writing and at p.260 he says: "D'ailleurs la décision de Justinien relative aux contrats à conclure par écrit ... ne s'inspire-t-elle pas des pratiques usuelles dans le bas-empire, bien plutôt que des principes du droit classique?"

[41] *Contra*, Honoré, *Arra As You Were* (1961) 77 L.Q.R. 172, 174 who says that *arra* cannot take place in writing. *In favorem*, Thomas, *Arra in Sale in Justinian's Law* (1956) 24 Tijdschrift voor Rechtsgeschiedenis 253, 266-67, who says that such a conclusion is envisaged by the *principium* and evidenced by the papyri. He adds at p.267: "From the point of view of the sale, as the constitution is concerned with written sales, it is at least improbable that a reference to unwritten transactions would have been here introduced without more, by a simple *sive ... sive*: the improbability becomes the more manifest when one remembers the full distinction taken between the written sale and the normal consensual regime in the *principium*. From a purely linguistic and syntactical standpoint, the phrase clearly goes more easily with the *arra* than with sale."

[42] Honoré, *supra*, note 41, is quick to point out that such a conclusion does not mean he accepts *"sive ... sive"* as going with the giving of *arra*.

has been given, the parties are subjected to the νόμος τῶν ἀρραβώνων in the event of their not proceeding to the appropriate completion.[43]

The younger text presents as many problems. The first portion of the Institute states the general rule of consensual sale, to wit, that *arra* is merely evidentiary, as in Gaius. The next part is a simplification for handbook purposes of C.4.21.17.pr., that is, the law of written contracts.[44] Finally the Institute seems to redirect itself toward a general discussion of *arra.* The troublesome *"nam nihil a nobis in huiusmodi venditionibus innovatum est"* does not purport to say that the Institute should be interpreted in accordance with classical Roman law but rather that the introduction of such a concept should not shock those used to the laws of Byzantine sale and Hellenistic *arra,* so prevalent in the sixth century. Indeed, Justinian is archaizing here. He is reintroducing the evidentiary *arra* to sales where no writing was envisioned.[45] The Institute continues to speak of the applicability of *arra* to sales both written and unwritten. Clearly Justinian was allowing for penal *arra* in a complete unwritten sale. Thus, by extending the rules of *arra* covering written contracts of the Hellenistic tradition to cases where the parties required no formalities of each other, Justinian gave a new right.[46] *Arra,* therefore,

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[43] Thomas, *supra,* note 41, 266, a conclusion supported by Arangio-Ruiz, *Istituzioni di Diritto Romano* 2d ed. (1927), 315-16.

[44] Marasinghe, *supra,* note 37, 351 says: "One gets the impression that the *Codex* was a development from the *Institute."* Such a conclusion is not necessary given the different purposes of Justinian's tomes. Thomas, *supra,* note 41, 264-65 distinguishes.

[45] Levy, *Western Roman Vulgar Law The Law of Property* (1951). Levy says at p.149: "Nothing could more graphically characterize the spirit of renaissance permeating the codification", and again at p.150: "The parties were at liberty to choose between the old and the new with the legislator regarding as the new what to the practicing lawyer was the inveterate thing."

[46] Watson, *supra,* note 37, presents the contrary arguments. According to his analysis, Justinian did not modify the law of unwritten sales, that is to say that *arra* could serve only an evidentiary function and not a penal one. Consequently, the *"sive in scriptis sive sine scriptis venditio celebrata est"* must not be made to refer to complete written sales and complete unwritten sales. It refers to sales where there is writing which does not fill all the formal requirements of C.4.21.17, and to sales where there is no writing but where writing is clearly envisioned. To this end Watson considers *venditio* to mean "an imperfect sale" and *celebrata est* to mean "was made", so that the whole reads: "where an imperfect sale was made in writing or without writing". However, even if *venditio* means an imperfect sale, *celebrata est* cannot be easily diluted. *Celebrare* is a formal verb with strong overtones of solemnization. Honoré, *supra,* note 41, demonstrates that the *celebrata est* must refer to a complete sale which is, so to speak, signed, sealed and delivered. Furthermore, references to *celebrare* throughout classical and post- classical literature,

fulfilled in a complete unwritten sale both an evidentiary and a penal function. This combination appears less bizarre when consideration is given to the amount of the *arra* — often a substantial proportion.[47] There may not have been any need for ordinary judicial damages since *de facto* damages, achieved by the giving of *arra,* would have been determined by the parties at a preliminary stage. Yet there existed the possibility of a suit for damages in addition to the liquidated damages of *arra.* The two are not incompatible.[48] In cases where no *arra* was given, the aggrieved party had at his disposal the judicial recourse of an action on the sale, or an action for recovery of the thing sold would lie.[49]

Conclusion

An absolute freedom of contract may be defined, for these purposes, as the capacity to determine the moment when the contract becomes legally sanctionable, its form and substance, the extent of the legal sanction, and its effect on pre-contractual agreements. Those who hold that consensualism precludes the application of penal *arra* as being unnecessary, since contractual liability would arise from the contract itself and not additional arrangements of a penal nature, would do well to remember that contractual freedom also embraces those instances where the mere will of the parties determines the contract. Consequently, parties desirous of unwritten agreements need not extend the *arra* beyond its evidentiary functions, should that be their intention. However, it is submitted that con-

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although not in legal writing, would militate against Watson's conclusions. Watson's hypothesis is based on a separate appreciation of each word. It would appear more sensible to analyze *venditio celebrata est* as a whole, especially since both words, separately considered, are susceptible of different meanings in different contexts. A natural reading therefore, would be "whether the sale had been completed in writing or without writing". See also Moyle, *The Contract of Sale in the Civil Law* (1892), 43, and Tylor, *Writing and Arra in Sale under the Corpus Iuris* (1961) 77 L.Q.R. 77. Tylor comments that the real contrast should not be between written and unwritten sales, but between sales with a fixed price and those void until the formalities of writing were entered into. He notes that agreement as to a fixed price was crucial to the consensual contract of sale.

[47] Cornil, *supra,* note 33, 261-62 says that the amount of damages would generally be inferior to the *arra* given.

[48] *Contra,* Buckland, *Elementary Principles of Roman Private Law* (1912), 274. *In favorem,* Honoré, *supra,* note 41, 174, explains that since sale was *ex fide bona* any forfeiture of *arra* would be taken into account in an action for damages.

[49] D.19.1.11.6 (Ulpian) where it is revealed that Julian favoured the *actio ex empto* while Ulpian himself preferred the *condictio* or action for recovery.

sensualism is only a stepping stone to the larger, more generous principle of freedom, and that such a freedom is contained in Justinian legislation on *arra* when the modalities of the sales transaction were entirely subject to the will of the parties. What could be a more liberal attitude than to allow written or unwritten *arra* agreements in written or unwritten contracts of sale with evidentiary and penal function? All was regulated. Everyone was satisfied.

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