# Acknowledgements

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# Introduction: legal systems and economic developmentByKoenraad Verboven and Paul Erdkamp

It is a truism to say that economic development in complex, non-face-to-face societies requires rules, regulations, and reliable third-party enforcement. Regulatory systems (legal systems *sensu largo*), however, differ greatly between cultures and societies. The aim of this book is to study the interrelation between economic developments and changing legal systems in the Roman Mediterranean. Were legal systems flexible and effective enough to stimulate economic development and growth? Did they change in response to economic needs? Did they steer developments in certain directions? Were they prone to favour interests of particular groups against others, for instance land holders against merchants?

Legal systems are at the heart of institutional analyses of economic development and have for that reason enjoyed a lot of interest as New Institutional Economics became the leading theoretical framework in ancient economic history in the first decades of the 2000s.[[1]](#footnote-1) Although the bulk of relevant institutions and organisations in preindustrial societies were informal and non-designed, formal/designed institutions and organisations were the backbone of polities and of how societies consciously organised themselves to ensure provision and distribution of resources, distribution of power, dispute resolution and so on. Legal systems were and still are at the core of these formal/designed systems and thereby weighed heavily on how societies and economies operated. *Sensu largo* legal systems are packages of formal/designed institutions and collectives set up to govern the behaviour of members in a society.

Legal systems powerfully affect how individual and collective actors make goal-oriented decisions and take actions. They lay down explicit rules defining non-acceptable as well as obligatory behaviour, and rephrase social and moral conventions (not to steal, cheat, or use violence, to honour agreements, to pay for purchases, to repay loans and debts and so) into explicit rules, and determine fines and punishments for breaking them. New rules can be added to suit new situations, for instance to underpin contracts of agency, to provide legacies to outsiders, and so on. Legal systems also comprise bodies endowed with authority to impose, interpret and enforce rules—usually specific administrative or political offices in developed systems. Last but not least legal systems define formal codes and procedures that users are required to follow for (some of) the rules and sanctions to apply: for instance, specific formal contracts*,* required number of witnesses, material forms (*triptychs*), legal procedures as the formulary procedure or the *cognitio extra ordinaria*, …

All complex societies have some form of legal system to deal with frictions and conflicts but the differences are huge. Traditional societies mostly rely on custom and non-specific figures of authority, using customary often ritualised, procedures for judging infractions. Ancient Jewish society relied on written-down religious laws prescribing all aspects of social life, with scribes and priests as interpreters and judges. The legal systems of the Hellenistic kingdoms and the Roman empire, however, became highly developed core-systems to hold large culturally and socially diverse populations together and to enable non-violent interactions and dispute resolutions. A crucial condition for this was that these legal systems could no longer rely on unchanging inherited rules of conduct but had to result from conscious decisions by governing bodies to adapt and expand law where necessary and thus (hopefully) achieve desired results. Roman law took the ultimate step by developing law as an intellectual, scholarly discipline to learn and reflect on legal questions. Its practitioners supported the creation of new legal rules when necessary and the interpretations required for old and new rules to apply.

During the last three centuries BCE economies in the Mediterranean rapidly changed. In the east the successors of Alexander consolidated ‘Greek’ states ruling much older cultures—modifying existing and introducing new property regimes, contractual arrangements, procedures, and so on. Rome emerged first as a regional then as an imperial power, gradually taking over previous power centres. Trade intensified, the size of fortunes and land-holding grew. Cities grew. Urban markets developed. Commercial agriculture intensified. These developments called for changes also in legal systems. The best documented are those taking place in Roman law. It developed from an archaic system[[2]](#footnote-2), the *ius civile*, to a much more flexible and fine-tuned *ius honorarium* developed by magistrates with judicial power. This development was complete by the start of the Principate when legal innovations became the *de facto* privilege of the emperor, who served also as supreme judge. However, there was no single legal system in the Roman empire until the *Constitutio Antoniniana* gave Roman citizen rights to all inhabitants of the empire in 212 CE. Even after that local traditions persisted in various forms. Pre-roman legal systems—indigenous, ethnic (for instance Jewish law), or Hellenistic—continued to be used in the provinces. The result was a mosaic of different legal frameworks and statuses. Local legislative bodies, magistrates and courts had ample scope in practice to create, interpret and enforce laws. Governors had wide-ranging discretionary powers to decide which system they would follow and when and where they would intervene in local matters. It would be a mistake therefore to think that Roman law was the law of the Roman empire. This only became reality over the course of the third century.

This too raises important questions that the various chapters in this book address. How easy was it to navigate legal systems for long-distance traders and financiers? How did legal diversity affect predictability of outcomes? Was the law only a discursive and normative framework? Was legal enforcement dependent on voluntary submission by litigants, propped up by social pressures and self-help? How real was legal enforcement as last resort?

Before proceeding, however, a word of caution. NIE has helped us to ask good questions, suggested possible answers, stimulated collaboration with economists and archaeologists. But relying too much on the NIE framework also entails risks. Institutions are the *rules* of the game. They are not “the game”. First of all, NIE is not helpful to study the players of the game, the agents. North pleaded “shared mental models” to argue that different players follow similar rule sets, allowing them to anticipate reactions of others and jointly to coordinate actions. But the concept needs to factor in concrete social, political, cultural realities to capture the effect of different players and their position in the game—something NIE rarely attempts. Mental models are never fully shared; different social backgrounds and positions lead to different expectations.[[3]](#footnote-3) Secondly, NIE has little attention for the availability and distribution of resources needed to play the game. The mere existence of “property rights” as a core set of institutions in NIE models is a far cry from the impact that unequal resource endowments have. Resources include material ones, such as agricultural land, mines, or money, but also immaterial ones, such as social capital and technological skill-sets. These are not only necessary to play the game; they distort it and can be used to cheat or exclude potential players. Thirdly, economies are never just games, they are also complex adaptive systems with emergent properties that cannot be reduced to the actions of goal-oriented agents.[[4]](#footnote-4) New Institutional Economics belongs to the field of micro-economics, not macro-economics. It does not address the effect of macro-level changes on economic outcomes. Rather than prioritise institutions to explain economic development therefore we should study their role in the wider set of determinants. Institutions are merely one part of the story. We cannot address these *caveats* in this book, but readers should bear them in mind.

## Roman law and agriculture

### General

The Roman world was on the whole an agrarian society and the Roman economy largely dominated by agriculture. Braudel, who made a similar claim regarding the 16-century Mediterranean world, corroborated it by pointing out that in monetary terms the total grain consumption of the entire population dwarfed the famous gold import from the Americas to Spain.[[5]](#footnote-5) The same calculation could be made for the Roman world, and the argument would be even stronger when one would include the raw materials for various industries, such as flax and wool, on which the textile industry (after food the second largest premodern economic sector) depended. Whatever criterion one uses, agriculture was the most important sector of the premodern economy. Even though in the Roman world, as in Braudel’s early-modern Mediterranean, a large share of agricultural production was in the hands of smallholders who consumed a large portion of what they produced, this by no means implies a simple autarkic economy. The high rate of urbanization in the Roman world necessitated a complex institutional and physical infrastructure for the distribution of surpluses, which with a few exceptions, such as the grain supply of the capital cities of Rome and Constantinople, and despite governmental interventions, largely functioned through market channels. Moreover, the municipal structure of the Roman empire means that to a large extent its administration was in the hands of a municipal landowning elite, whose socio-political position depended on wealth that was mostly earned through the marketing of the produce of their lands. At the same time, Roman imperial rule siphoned off huge resources in the form of the exploitation of imperial estates and of revenues from the lands owned by great landowners and smallholders alike.

While the importance of agriculture in the Roman world is undeniable, it is questionable whether the Roman authorities had much of a direct policy on agriculture. In so far as they had a policy on agriculture, the question is to what extent agriculture was seen as important in itself, or rather as an instrument to support what was much closer to their heart, that is to say urban food supply and taxation. Without a stable urban food supply, the “empire of cities” could not have functioned. “Power is buying fear when it feeds the people apathetic – a starving mob has no respect”, Lucanus wrote (*Phars.* 3.53-54), a sentiment also contained in Juvenal’s famous words on “bread and games” (10.81). Despite such negative attitudes towards the policies of republican statesmen and imperial rulers, we should not see governmental intervention in the food supply as a bribe of the parasitic masses, but rather as the inevitable consequence of the limitations of the grain market. If one wanted to prevent occasional social unrest, economic malaise and even hunger among city dwellers, some degree of intervention in the urban food supply was unavoidable. [[6]](#footnote-6)

A few passages illustrate the imperial interest in the urban consumers’ wellbeing. At some point, Suetonius (*Aug*. 42.3) writes, Augustus thought about abolishing the *frumentationes* (i.e., the distribution of free grain to a large portion of the populace of Rome), as he considered it a disincentive for agriculture in Italy. He abstained from this severe measure, because he feared that the grain distribution would be restored again to please the urban masses. But, Suetonius adds, from now on he not only considered the interests of the people, but also those of the farmers and grain merchants. Alas, Suetonius does not mention what measures this new policy consisted of. According to the same author (Suet. *Dom*. 7.2), in response to a bad grain harvest a few decades later, Domitian considered the destruction of vines in the provinces, while prohibiting their planting in Italy. No such measure was taken, however – it is even unclear whether Domitian ever really contemplated the implementation of this so-called vine-edict. Nevertheless, the idea reveals the primacy of the (urban) consumers’ interests.

As noted above, the state was also interested in agriculture as a source of revenue, in money and in kind. The Roman empire was no robber state, though—at least, not after the days of the civil wars of the late republic, when competing warlords favoured short-term interests over long-term policies. The imperial authorities realized that in the long term the empire was best served by taxation that allowed farmers to continue farming the land. This idea is explicitly expressed when Tiberius is credited with the very apt metaphor that a good shepherd should shear his sheep, not skin them (Suet. *Tib*. 32.2).

### Management of landholdings

However, it is not only direct Roman policy that had an impact on agriculture. The impact of Roman policies on agriculture has been argued to have gone much further than what the above may seem to imply. D. Kehoe (in this volume) points out that by their rule of law, Roman authorities offered stable and predictable circumstances for all property owners, thereby stimulating investments, including in the land. Roman authorities favoured private property, Kehoe adds, but it was precisely their fiscal interests that caused them to interfere in the rights of property owners. Next to their interest in revenues, Roman policy was aimed at the prosperity of the municipal ruling classes on which the empire depended. Hence, Kehoe sees three interrelated main elements in Rome’s policy: to ensure that all lands are cultivated, that all cultivated lands are subjected to taxation, and to ensure the long-term prosperity of the municipal elites. However, Kehoe adds, it is the latter goal that made the authorities impinge upon the free economic behaviour of the urban landowning elites, thereby hampering the free exchange of land and thus the market-driven performance of the economy.

We may assume that Roman law developed in part in response to the landowners’ increasing involvement in the markets for labour, goods and services. The increased markets for agricultural crops, both food and raw materials, stimulated the investment in agriculture and thus the rise of the villa economy in Italy. As with other sectors of the economy, during the republic, Roman law developed tools that could be used by farmers and landowners to shape transactions with other parties, including seasonal workers, tenants, artisans, slave traders and the merchants who bought their produce. Particularly the development of consensual contracts in the second century BCE, foremost those of sale (*emptio-venditio*), lease (*locatio-conductio*) and mandate (*mandatum*), offered on the one hand clarity on the rights and obligations of all parties engaged in the transaction, and on the other instruments to deal with non-compliance by one of the parties involved.[[7]](#footnote-7) While not particularly aimed at the agrarian economy, the continued development of Roman law thus contributed to the lowering of transaction costs related to agriculture. In his *De agri cultura*, Cato includes a number of contracts for the harvesting and/or processing of crops and for their sale. The contracts offer various options for the landowner, who could, for example, sell the crop in advance of the harvest and who could engage third parties for the harvesting and processing of the crop.[[8]](#footnote-8) Cato also included contracts for the hire of seasonal workers (*Agr.* 144-147).

In his contribution to this volume, Dalla Rosa deals with the various management systems on the large-landowners’ holdings from the perspective of information, communication and related transaction costs, pointing out that for both imperial estates and private absentee landowners it was more attractive to work with tenants paying rents than with servile workers directly producing crops for the owner to sell under the supervision of a slave vilicus. It seems plausible that for absentee landowners the long-distance management of estates involved both greater effort and greater risk, thereby lowering the incentive to invest in capital-intensive and profitable but risky enterprises. Share-cropping was much more attractive under those circumstances, the more so as many large-landowners were rich enough to appreciate stability of income more than its maximisation. Towards the end of the republic, rich Italian landowners expanded their provincial landholding, increasing absentee landownership and therefore a more decentralized organization of estates.[[9]](#footnote-9) Dalla Rosa points to another important element in this development: the improvement of the archiving practices of the *patrimonium Caesaris* in Italy and in the provinces.

Kehoe (in this volume) notes that for its exploitation of the imperial estates, the state relied on small-scale cultivators who were given perpetual leaseholds to ensure long-term continuity of cultivation and who paid as sharecroppers one third of their harvests. The most important source on the management of imperial estates consists of the complex of inscriptions dealing with the emperor’s landholdings in the Bagradas valley. González Bordas (in this volume) identifies two subgroups in this complex, the one primarily recording imperial regulations dating to the reigns of Trajan, Hadrian and Septimius Severus, the other containing petitions by the sharecroppers of the estates addressed to the emperor Commodus. González Bordas concludes on the basis of the imperial regulations that an imperial staff was present on these estates, who conducted the inspections of the lands and yields that were a necessary element of the managerial systems.

Dalla Rosa points out that as a result of a long process of ad hoc decisions regarding separate issues, more or less uniform exploitation patterns emerged on imperial estates. Many of the imperial holdings came into the emperor’s hands as a result of confiscations or inheritance from private owners, so we have relatively many attestations on the imperial estates in Italy of slave *vilici*, indicating direct exploitation by means of slave labour. However, Dalla Rosa argues, the disadvantages of such a management system for absentee landowners meant that most imperial estates evolved gradually towards tenancy. The sheer size of the imperial landholdings made it impossible to implement the same management system that other large-landowners could, a key difference consisting of the information that the emperor possessed about the economic conditions of his properties. The evidence for Africa shows that the emperor relied on multiple agents that on the one hand gathered the information necessary for the management process, on the other hand transmitted and enforced the imperial decisions. Private *conductores* under short-term contracts assessed the production of the individual sharecroppers and determined the rent-in-kind they had to provide. However, there is no evidence for the presence of conductors on the imperial estates in Asia, where tenants probably paid their rents directly to the *fiscus* in a system that seems to have been controlled by imperial officials, soldiers and civic authorities.

### State interests in agricultural production

Both the urban food supply and the need for state revenue meant that the imperial authorities had an interest in stimulating agricultural production on all available land. Rulings concerning the utilization of vacant lands play an important role in the regulations of the imperial lands in Africa. The *lex Hadriana de agris rudibus et iis qui ante X annos omissi sunt excolendis* dealt with vacant lands and lands that had not been cultivated for at least ten years.[[10]](#footnote-10) The *fiscus* offered a rent-free period of five years for newly planted vines and figs and ten years for newly planted olive trees. According to González Bordas, the *lex Hadriana* primarily aimed to attract *coloni* to cultivate the unused parts of the imperial lands, and he notes a marked difference in tone with the *sermo procuratorum*, which instructs rather than invites *coloni* to plant certain crops.[[11]](#footnote-11) One can see the adjustability of Hadrian regulation for landed estates, combining the *lex Hadriana* with regional adaptations.These, on the one hand, address to peasants of specific estates the needs of the Fiscus in a more concrete way and, on the other hand, designate the crops suitable for each kind of soil.

On the municipal level, uncultivated lands were a point of attention too, but some sources indicate that uncultivated land remained a problem. In one of his orations, for example, the Greek orator Dio Chrysostomus (c. 40 – 120 CE) presents a speaker in a popular assembly in a small town in mainland Greece who complains about the many untilled acres that he and some of his fellow-citizens possess in the territory of their community. Cultivated lands, this landowner says, “become more valuable to me, and at the same time the sight of land occupied and under cultivation is a pleasing one, while waste lands are not only a useless possession to those who hold them, but very distressing evidence of some misfortune of their owners.” He adds that nearly two-thirds of the town’s public lands are “a wilderness because of neglect and lack of population”. Therefore, he presents a scheme not unlike the one we saw in the lex Hadriana, in which landless citizens may cultivate vacant public lands for free for ten years, after which they would pay a small portion of their arable crops (but none of their cattle), while non-citizens are offered free cultivation for five years, paying double the rent of a citizen afterwards. In addition, any foreigner who would clear some of the land would be offered citizenship (D. Chr. 7.34-37). Of course, Dio’s fictional speech is not free from the typical discourse regarding the pleasantness of agriculture, opposed to the idleness of the urban poor, but that does not mean that the practical sentiment of this citizen is totally a figment of Dio’s imagination. A different matter is to judge on the basis of such anecdotal evidence the extent to which abandoned and untilled arable land was a problem in the various parts of the Roman world. It is at least interesting to see that at about the same time Pliny the Younger (*Epist*. 7.18), in a letter discussing options for private donations to the town of Comum, complains about the neglect of public land: “If you give land, it is neglected as other public land”.[[12]](#footnote-12)

Kehoe rightly points to the potential conflict between, on the one hand, the interests of the imperial authorities, who wanted to ensure prosperous agriculture as a source for their revenues and who therefore also had a stake in the wellbeing of the smallholders and tenants who worked the land, and, on the other hand, the wealthy municipal landowners, who had an immediate interest in the profits that could be gained by imposing harsher conditions on their tenants and by benefiting from the vulnerability of smallholders in times of crisis. Part of the evidence for the imperial estates in Africa and Asia consists of petitions by the tenants concerning the conditions of tenure, but imperial regulations were not limited to fiscal lands. The petitions from Asia show that tenants on imperial and private lands resisted attempts by local landowners and municipal officials to impose unlawful charges, including the requisition of draft animals beyond the requirements of the various edicts issued on this matter.[[13]](#footnote-13) One of the issues that the emperors had to deal with in the third and fourth centuries was the attempt by landowners to change the conditions of lease in open-ended tenure arrangements, which according to the law were automatically continued. In 260 the emperors Valerian and Gallienus ruled against such practices, prohibiting landowners from raising rents or changing the conditions of these tenure arrangements in other ways (*Cod. Iust.* 4.65.16), a ruling that is supported by Constantine (*Cod. Iust.* 11.50.1), when he provided tenants with legal instruments against landowners who raised rents on perpetual leaseholds.[[14]](#footnote-14)

The vagaries of the weather caused fluctuations in the size of annual harvests, and while farmers adapted their cultivation strategies to this fact of nature, there were limitations to which farmers could protect themselves from the risks of harvest failures. They preferred the horizontal relationships within their communities, as we for example see in the above-mentioned oration by Dio Chrysostom (7.69), where we find a smallholder borrowing seed corn from a wealthier relative, paying it back after the next harvest. However, weather-induced harvest failures—let alone even greater catastrophes, like floods or wars—generally meant hardship for the entire community, so that family and neighbours were of little use. Smallholders had little resilience in terms of capital, which made them dependent on their wealthier neighbours. Debt-bondage, which plays an important role in the early history of both Greece and Rome, was abolished in both Athens and Rome, but seems to have remained a fact of life in many parts of the Roman world. Both Varro and Columella, writing in the first century BCE and CE respectively, mention debt-bondsmen in Asia, Egypt and Illyricum. Under Roman law a person could not pledge himself as security for a debt, and therefore the options for impoverished smallholders and tenants were limited. Pliny sees the indebtedness of the tenants on one of his estates as threatening the long-term productivity of his lands, as the tenants, so he writes, despair “of paying their debt in full, and thus seize and consume all the produce of the lands” (Plin. *Epist*. 9.37). It is in response to the financial problems of his tenants that he shifts the tenancy system on his estate from one based on fixed rents to a sharecropping system. In other words, in the interest of long-term profitability, he shifts part of the risks inherent in farming from his tenants to himself as landowner.[[15]](#footnote-15)

Similar efforts by imperial authorities to protect the long-term agricultural production of smallholders explain the legal rulings that prohibited loans by smallholders against the security of their land, animals or equipment (*Cod. Theod.* 2.30.1, *Cod. Iust.* 8.16.7 (315 CE); 16.8 (414 CE)).[[16]](#footnote-16) The reasoning is clear, as the authorities intended to avoid that the cultivators of the land lost their main production factors. According to Kehoe, these laws show the primacy for the Roman authorities of the state’s revenues at the cost of the creditors and estate owners, hampering the credit market and limiting property rights.[[17]](#footnote-17) Whether these imperial measures protected smallholders against financial problems may be doubted, though, as they did not solve – unlike Pliny’s shifting of the risks – the fundamental vulnerability of small-scale producers to harvest shocks and personal setbacks.

Restrictions on economic actions were not limited to the small-scale cultivators of the land, as also the municipal landowners were prohibited from using their lands to underwrite loans. Kehoe emphasizes that the imperial authorities limited the rights of the municipal class, which they increasingly made responsible for the tax income of the state, in order to ensure their prosperity and financial strength. The administrative and financial obligations of the *decuriones* became hereditary, while they were bound to their communities. At the same time, the town councils became responsible for the financial obligations of their individual members. Hence, the risks and costs for landowners increased, as they now had to gather information on the obligations tied to certain estates and became liable for abandoned land. Kehoe concludes from these measures that, from the perspective of the state, the land of the *decuriones* was “a kind of public trust”.[[18]](#footnote-18)

While Kehoe emphasizes the increasing infringement by imperial legislators on the economic freedom of the propertied classes, we have to keep in mind that Roman economic thinking never had been guided by a “liberal” or “laisser faire” attitude. There was no general belief that things could best be left to the natural workings of the market. That was clearly not the case regarding the urban food supply, as the activities of landowners and merchants were limited by municipal and imperial rulings that were based on the conviction that the avarice of traders and landowners needed to be constrained by law on behalf of the common good. It was widely accepted that it was the obligation of imperial officials and municipal magistrates to ensure that consumers paid a just price, i.e., a price that was not driven up by sellers’ and traders’ greed and manipulation of the market. The morals of the urban elite are, for example, explicitly addressed by Philostratus (*VA.* 15), whose hero Apollonius of Tyana during a famine in Aspendus censures the local landowners with the following words: “The earth is mother of us all, for she is just; but you, because you are unjust have pretended that she is your mother alone.” In other words, the landowners are only caretakers of the earth’s products; since the earth is for all, all are entitled to its harvests. By withholding from the populace their share of the harvest, the wealthy farmers are offending the morals of the urban market. Similar thoughts concerning the moral obligations of landowners are expressed by Roman lawgivers such as Diocletian and Julian and are, as Kehoe argues, implicit in the legal infringements of possessors’ rights.[[19]](#footnote-19)

Although there is still much debate concerning the development of the late Roman colonate, it is clear that the state’s interest in tax revenues is the driving factor behind it. In 342 CE a category of agricultural labourers was tied to the land by the *ius colonatus*. Binding the small-scale cultivators to the land, the state wanted to ensure continuation of the agricultural production on which its revenues were based. This was followed by further restrictions that limited the tenants’ rights to sue their landlord, to sell their possessions or to engage in marriage. *Coloni* were registered at the census as belonging to a certain estate. Legal sources indicate that *coloni* still fled the land, but lawgivers ruled that if registered farmers fled and stayed on another landowner’s estate for at least 30 days, they became *coloni* of that estate. *Coloni* belonged to the estate, and could therefore not be transferred by the estate’s owner.[[20]](#footnote-20) Kehoe points out that this primarily fiscal measure of the Roman lawgivers potentially hampered an efficient exploitation of the land, as it restricted the owner’s economic choices.[[21]](#footnote-21) The consequence of this development was, Giardina notes, that the figure of the rich tenant who invested in market-oriented activities disappeared.[[22]](#footnote-22)

Sarris’ analysis of the sixth-century *Novellae* shows the continuation of these policies in the early-Byzantine period. The population loss as a result of the Justinian plague caused a shortage of labour, stimulating tenants to demand a higher income, but in *Novellae* 120 and 122 Justinian prohibited tenants to negotiate better conditions. In 572, Justinian’s successor Justin II (Iust. *Nov.* 144) reversed a decision by his predecessor that gave the Samaritans of Palestine the right to make wills and to leave property to non-Christians. Justin II made an exception though for the agricultural workers among the Samaritans, explaining this as beneficial for the estates on which they work and thus for the revenue from these estates to the public treasury.

In short, as Kehoe notes, the imperial authorities guarded their revenue income by seeking to ensure the prosperity of both the municipal landowning class and the small-scale cultivators, partly by protecting their position, partly by limiting their economic behaviour.

### Rural power and the limits of the law

Social inequality and the rule of law was already an issue in democratic Athens, but remained so in Roman times. In law courts it was a good strategy against the powerful to address the helplessness of the common citizen when facing the high and mighty. When it benefits his case, Cicero frames his powerful opponents in ways similar to Demosthenes.[[23]](#footnote-23) In the biography of Solon written by Plutarch, who wrote in the first century CE, a king is introduced who laughs at Solon’s attempt to solve the problems of his day by issuing laws, saying that the law is like a spider’s web, catching only small creatures. The imperial legislation shows that it may have been the ambition and intention of the emperor and his officials to protect the humble and the weak, and the petitions addressing the emperor, often on relatively small issues, confirm that the common citizens saw him as the ultimate source of justice. We have to realize, though, that the law was as strong as its enforcers and that it functioned in a wider context of social and economic relations.

Apuleius addresses the issue of injustice throughout his Metamorphoses, culminating in a series of incidents in book 9.[[24]](#footnote-24) The most relevant for our discussion involves a rich landowner of noble birth, who abuses his power to encroach on the land of one of his neighbours, a humble landowner. He killed his neighbours’ flocks, stole his cattle, and trampled down his crops before they ripened. “He was now bent on driving him off the very soil itself by instigating an unfounded lawsuit over boundaries and claiming the entire land for himself”. The smallholder invited a large number of people for a formal indication of the boundaries. During that meeting, three neighbouring brothers, “well educated and modestly behaved”, confronted the wealthy landowner, one of the brothers pointing out “that it would do him no good to depend on his wealth and make threats like an arrogant tyrant, since now, as always, even the poor were defended against the insolence of the rich by the liberating protection of the law” (Apul. *Met.* 9.35-36). The following events clearly reveal Apuleius’ point, as the three brothers are killed by the rich landowner’s dogs and slaves. Law plays a major role in this narrative, as the rich landowner intends to use legal proceedings to rob the smallholder of his land, while the latter invokes a kind of community mediation, to no avail. The educated voice of reason, which naïvely claims that the rule of law protects the weak against the powerful, is silenced by violence. There is no good end to this story, as injustice prevails and a father loses three good sons. Apuleius relates several narratives that offer the same message, so we may be sure that this was one of the major moral points of his work.

There are other instances of the law as an instrument of power. In the early fifth century, a conflict arose between two landowners in the province of Africa. *Coloni* had left the estate of one of them to work on the lands of the other. Their new patron wrote a letter to the first landowner, complaining about the attempt of the addressee to force these *coloni* to return to his estate by threatening them with legal action. “I do not know at all why you want to scare poor farmers, and I cannot understand why you want to press upon my farmers the fear of a production in court.” He continues by reminding his opponent that they both had studied law so, he says, he knows the rights and proceedings by which *coloni* are reclaimed.[[25]](#footnote-25) The letter writer emphasizes the fear of the farmworkers involved, who clearly are afraid of being summoned to court. The *coloni* fear legal action, so is suggested, because they do not know the law, unlike the landowners, who have studied law. Hence, the *coloni* are presented as powerless and dependent on the help of the estate owner. It is on the basis of their knowledge of the law that the one landowner can threaten and the other protect them. In sum, legal expertise is an instrument of power that can be used for and against the common people.

Sirks, who discusses the above case in an article on the role of law in the relations between farmers and landlords in the fifth century, offers another interesting contemporary observation concerning the dependence of common country dwellers. “When they are not capable of doing what they would prefer, they do the only thing they are capable of: they render themselves to the powerful in order to be protected and shielded, they turn themselves into rich peoples’ conquests and pass into their property and power of disposition.”[[26]](#footnote-26) The author, Salvian of Marseille, who was born in the first decade of the fifth century and died sometime after 470 CE, clearly sees no role for the law in protecting the lower layers of society. This may be in part linked to the situation in Gaul at the time, shortly after the region was wrestled from Roman rule by Franks, Goths and Burgundians. However, one may question whether this is the entire story, as already long before late Roman law had forced *coloni* to be bound to the estate of the one landowner or the other. Giardina observed that the tone of the late Roman law—harsh, cruel, continually verging on contempt—likens them to slaves.[[27]](#footnote-27) It is questionable, therefore, whether the commoners saw the law as an instrument protecting them, and equally uncertain whether they had access to the legal instruments that were provided. Moreover, even during the Principate, Hill Harries has pointed out, governors often seemed unaware of the legal rulings that protected the rights of accused citizens, or they wilfully ignored them, so that occasionally people were sentenced in unlawful proceedings.[[28]](#footnote-28)

We certainly must not conclude that the law did not rule in the Roman world, but we must realize that there were limitations to the rule of law—limitations that undoubtedly differed according to socio-political context, time and place.[[29]](#footnote-29) The abuse of power in an urban context and under the eyes of Roman officials differed from that in a rural context, where one or a few great landowners may have dominated social and political life. We cannot generalize in one or the other direction, but must be aware that the emperor’s justice, enforced by urban based imperial officials and municipal authorities, may not have reached every corner of the empire in equal measure, and that the law sometimes was an instrument of power rather than of justice.

## Commerce and finance

### Obligations

Regardless of its being an agrarian empire, the Roman empire had a highly urbanised, diversified, and well-connected commercial and financial economy, tied together by short- and long-distance trade ranging from raw materials to luxurious finished products. The organisation and operation of this trade and finance depended on legally defined obligations and procedures.

Already in the third century BCE Roman society and that of its allies experienced profound changes as the whole of Italy, including Magna Graecia, became integrated under the political domination of Rome. Plautus’ plays, performed around the end of the third century BCE, presuppose an audience that is familiar with commerce and retail, money and finance. The development of Rome’s monetary system suggests that this evolution accelerated during the last quarter of the third century and was at least partly driven by the hugely disruptive second Punic war. Nevertheless, it began earlier in the area around Rome, Latium and southern Etruria. The creation of the office of *praetor peregrinus* in 242 BCE testifies to the presence of foreigners in the city. Kay, in this book, argues that the traditional system of *legis actiones* experienced significant changes allowing *inter alia* Greek style deposit bankers to operate. First the legal procedure *per condictionem* was created through which any obligation could be sued regardless of its precise ground. Secondly, according to Kay, the *lex Silia de condictione* also introduced the *obligatio litteris* as a ground for the contractual obligations underlying deposit banking. So, by the middle of the third century Roman elites approached law and legal practice not as an inherited immutable frame of reference but as an instrument to implement necessary changes to support new economic needs. This culminated in the second century BCE when the primacy of *ius honorarium* was established by the *lex Aebutia*. Over a period of about two centuries legal specialists developed a flexible legal institutional framework that supported economic life.

Roman elite clearly recognised the opportunities of overseas’ trade by the end of the third century BCE. While the scope of the *lex Claudia* forbidding senators to own large merchant ships is unclear, its promulgation testifies to the growing importance of trade.[[30]](#footnote-30) Cato the Elder’s scheme to benefit from trade by lending money to a trade-partnership with 50 merchants also illustrates the eagerness with which political elites eyed these new opportunities.[[31]](#footnote-31) Not surprisingly during the second century BCE legal solutions were created to facilitate trade. The most important of these related to problems of agency, a hitherto underdeveloped part of Roman law. Traditionally, a *paterfamilias* or master automatically acquired whatever accrued to his children or slaves *in potestate* but (except for damages) he could not be held liable for agreements entered into by his children of slaves. This was remedied by the *actiones adiecticiae qualitatis* created in the second century BCE, which allowed principals various options to appoint agents able to accept legal commitments binding the principal. These agents were nearly always slaves or freedmen, i.e., they firmly stood in a relation of dependence. The *actiones adiecticiae qualitatis* made it possible for *familiae*, with sons, slaves, and freedmen, to become flexible business units. They remained the core of Roman business enterprises until late antiquity.

Business associations beyond the *familia*, however,received less support. Under *mandatum* an agent accepted a commission to act on behalf of his principal but remained personally liable for all obligations incurred on behalf of his principal. Conversely, the principal himself did not automatically acquire anything his agent had acquired by fulfilling his commission. In addition, *mandatum* was gratuitous, with only expenses being disbursed. In short, *mandatum* was a commission of trust between family members or friends.[[32]](#footnote-32)

As an alternative, business associates could create a partnership (*societas*) to operate a joint business enterprise. But *societates* only existed as contractual agreements between the partners to share profit and loss. They did not form separate entities with separate assets or liabilities vis-à-vis third parties. A *societas* stopped whenever a partner wished to end the cooperation, or when he died. Every partner remained personally liable. Creditors of a bankrupt *socius* could demand the sale of any goods co-owned by other *socii*. Not surprisingly we have no indication in the sources that *societates* ever comprised more than a handful of partners, nearly always related through family or friendship.[[33]](#footnote-33)

During the first centuries of the Principate jurists became more flexible in accepting the *actiones* associated with the different options for agency and in formulating similar *actiones in factum* to overcome formal objections. But the overall framework for agency developed in the late republic changed little. Direct agency and (a limited form of) corporate capacity (*universitas*) were allowed in the case of public bodies, guilds, and to some extent business associations working for the state (*societates publicanorum*), but they were never extended to private business associations. Does that mean that economic development was institutionally constrained because the legal framework failed to accommodate the needs of businessmen?

We find a similar pattern if we look at the legal framework to support financing business operations. Credit was pervasive in Roman commerce. “If you want to do business, you will have to incur debts” (Sen. *Luc.* 119). Yet Roman financial instruments always remained basic compared to their counterparts in early modern Europe. Contractual obligations were recorded in sealed *chirographa*. Procedures were developed to facilitate the transfer of these obligations with the *chirographa* containing them, but the *chirographa* never became anonymous instruments that could be used to make payments or circulate on markets.[[34]](#footnote-34) Given the legal developments and flexibilities we noticed before, we may surmise that the demand for such developments was never very strong. Verboven argued repeatedly elsewhere that the existing arrangement worked well in business contexts characterised by relations of extended *familia* (i.e., including freedmen) and personal instrumental friendships.[[35]](#footnote-35) The demand for anonymous credit and freely circulating *chirographa* was absent or went unnoticed because the prevailing personal networks around which trade and finance was organised obviated the need. This, however, raises the obvious question of whether the importance of personal networks signifies that the Mediterranean economy failed to develop to a level where person networks were no longer sufficient.

Capital for commercial or other enterprises could be mobilised also in other ways, most importantly by creating partnerships in which one (or some) partner(s) invested money, while others performed services. Insofar as ordinary private *societates* are concerned, the same limitations as mentioned above constrained the options. But a special case of *societas* was that of *publicani*. The best known are those of tax farmers, but all contractors with the state—for instance to operate mines—could form *societates publicanorum*. Contrary to ordinary *societates* public interest required that a *societas publicanorum* persisted even if a *socius* wanted to end the partnership, if he died, or if he went bankrupt. *Societates publicanorum* seem to have taken over some features of *universitates* (corporate entities) but not all.[[36]](#footnote-36) Most importantly, the *societates* could not be dissolved, or its common property divided, before the end of the contract with the state. There is a long-standing debate on the existence of “shares” (*partes*) of *societates publicanorum*. Wealthy outsiders could have invested money in the *societas* by buying a share from the partners. An elusive reference in Cicero’s oration for Vatinius has often been interpreted to indicate that these shares could then be bought and sold on a “stock market”. The interpretation has time and again been contradicted but keeps popping up. Sirks in this book shows how *socii*,even of private *societates*, could sell or donate all or part of their share of the common assets. Since the common assets of a *societas publicanorum* could not be divided the acquirers became “shareholders” for the duration of the contract. They did not, however, become partners of the *societas*. Theoretically the new owners could sell on their part of the common assets, but there is no indication this ever happened on a significant scale. Rome never had a stock market, nor anonymous debts that could circulate as substitute money.

### Enforcement

A legal system is only effective if it ultimately allows enforcement of the rules it lays down. Roman law has often been dismissed as a system to coordinate private dispute settlement. Different parties in a trial had to agree voluntarily to put their dispute first before a legal magistrate, then before a judge, then to respect the verdict. Several procedures were available to pressure litigants to show up and respect verdicts, but enforcement was always left to the victor’s private means. This, however, is a simplification of reality. Contrary to disputes in rural hinterlands, between large landowners and modest farmers or peasant, disputes regarding crafts, trade, or finance, enjoyed high visibility in urban contexts. This permanent public gaze boosted the effectiveness of legal enforcement. A person refusing to let a dispute be settled in court or through private arbitration lost face and risked social isolation. A litigant refusing to comply with a verdict against him could be pressured by a *missio in possessionem* giving the counterparty a right of seizure. While is true that this was only a *right* of seizure, not an actual confiscation by public authorities, it implied that the convicted party was no longer secure in his property and would have a hard time to continue any business.[[37]](#footnote-37)

Ancient legal culture, therefore, was more than a discursive reality structuring social expectations. It was also enforcement system. Yet, legal enforcement was not a separate sphere that existed in isolation from other social dynamics. Formal procedures themselves are not merely a matter of exact formal rules and regulations to measure up reality. Social reality, moral expectations, prejudices and principles permeate proceedings. Günther, in this volume, uses frame analysis to show how the formal legal frames expressed in the exact words of the *formulae* used in the Roman formulary procedure were the outcome of preliminary negotiations and how these legal frames themselves were intertwined with social and moral frames.

Regardless, however, of whether enforcement is left to private arbitration or formal litigation legal rules and procedures require clear unambiguous information to act upon. The writing tablets found in Pompeii and Herculaneum, and elsewhere in the empire, papyri and *ostraka*, all show this concern to register agreements in terms that unequivocally refer to the legal obligations that the parties accept. Account books show a similar concern to create paper trails that would be useful in settling disputes.[[38]](#footnote-38) Accounts and sealed contract only represented a static paper reality. In reality commerce was considerably messier. Ships commonly had multiple cargoes and different destinations. Not surprisingly therefore trade goods were “signed” with *tituli picti* specifying the type of goods, where they were loaded, who the responsible merchant or transporter was, where port taxes had been paid and so forth. While the meaning of the *tituli picti* is not always clear to us, they nevertheless testify to the importance of the overall legal institutional framework within which trade took place. Together with the account books, the *tituli picti* informed interested parties on intentions, agreements, and obligations. This information itself, and the formulaic way in which it was recorded allowed activating the enforcement dimensions of the legal system, whether private or public. Mataix in this volume discusses a particularly interesting example of a sample jar with a *titulus pictus* recording the subsequent resending of a cargo initially destined for Ostia.

### Influence on and from non-Roman legal systems

As we mentioned earlier the Roman empire was not a unified legal structure before the third century CE. Until then, we need to envisage a mosaic of dynamic institutional solutions. The empire was a political entity, taxing, monitoring, and controlling local polities. It was not a state in the modern sense of the word. Local polities maintained their own legal and political traditions. In Egypt and other formerly Hellenistic kingdoms different legal traditions already existed: Greek, Egyptian, Jewish. Of course, Roman law quickly asserted itself as the dominant frame of reference. Governors had wide discretionary powers to decide which legal frames they would use. Roman citizens could always appeal to it. Roman authorities would be asked to judge cases in which citizens from different local communities, or from different backgrounds, were involved. Roman solutions influenced local traditions. In terms of enforcement, the primary difference was that provincial governors outranked local courts and could impose verdicts. Egyptian and Jewish papyri and *ostraka* show their jurisdiction was a popular venue for many.

But local legal traditions influenced economic life in profound ways and they too changed under the influence of the new conditions. Haklai in this book discusses the different role of money in contracts of sale. This was a controversial point in Roman law during the first centuries of the Principate. Was money, or a price expressed in money, required for a contract of sale to be valid? Can a transaction have a price expressed in kind in such a way that the transaction is enforceable as a sale, with all legal obligations inherent to that, or does that mean that the transaction is merely barter (*permutatio*) subject only to general legal requirements (for instance against *dolus malus*), but not to the much wider set of rules regulating the consensual contract of *emptio venditio*. Needless to say, the question was closely related to the degree of monetisation that the Roman economy experienced. Ultimately Roman legal scholars opined that a price expressed in money (*pretium in numerata pecuniae*) was a prerequisite for a contract of sale to be valid; that is for the corresponding *actio* and all its conditions and options to be applicable. Jewish law had a very different background but struggled itself to define the role of money to establish the legal obligation accruing from the sale. In the context of Mediterranean-wide trade and of Roman soldiers and citizens availing themselves of Roman legal principles, Jewish scholars were faced with the question of how the problem could be framed in Jewish law. Although their solution was not simply copy-caste from Roman law, it used (borrowed?) a very similar dichotomy establishing “money” as intrinsically different from all other goods. The case is interesting because it shows the intricate relations between shared realities that required legal modification, intellectual inspirations, and a hierarchy of regulations in practice to which Jewish law had to adapt. In both cases legal changes occurred in response to (new) economic realities. The outcome was different yet functionally very similar.

The multi-ethnic and cultural nature of the empire affected the development of legal systems also in other ways—most importantly perhaps in the field of inheritance and testamentary law. Babusiaux in this book studies *fideicommissum* as an institutional change in response to the new realities imposed by the empire’s size and many different non-Roman traditions and citizenships. While traditional inheritance law developed to protect Roman family interests of which testators were seen to be the natural heads, the *fideicommissum* was meant merely to uphold the will of the testator regardless of other considerations. *Fideicommissa* were possible by and on behalf of non-Roman citizens. Their flexibility accommodated the volatility and uncertainty of Roman markets much better than the traditional inheritance regime, which had developed originally to suit a society predominantly based on non-market-oriented agriculture. In that sense *fideicommissa* developed naturally from the enhanced flexibilities which praetorian law had already injected into civil inheritance law.

Greco-Roman urban culture relied on civic elites to guarantee the financial expenses of cities. By the late Hellenistic period this reliance led to the creation of endowments donated by elites to cities whereby the benefactor stipulated terms on which the money derived from the gift had to be used. These foundations guaranteed a regular income, rather than unpredictable one-off donations. Legally, however, such foundations were challenging because the conditions were imposed on the same body that would have to enforce them. Girdvainyte, in this volume, shows how this tension was a source of legal innovation. The legal grounds for the conditions derived fundamentally from the formal acceptance by the city-council of the donation. The decree by which it did so created the possibility of legal enforcement. Roman law seeped in in the formulation of conditions but did not fundamentally alter this basic Hellenistic principle. Roman authorities are sometimes mentioned and the *fiscus Caesaris* is sometimes the secondary beneficiary if the original *polis* broke the terms of the donation, but Roman legal authorities are not named to enforce the terms or exact the penalty. The social reality of public benefactions led, among other things, to the right of non-local citizens (other Greeks or Romans) to initiate proceedings against public authorities who infringed the terms of the donation. Overall the practice generated a great legal flexibility and integrated local law into the new imperial legal institutions.

### Late antiquity

Economic needs, however, were not the only or main driver for legal innovations. In late antiquity fiscal preoccupations again lead to important changes. Emperors now more frequently intervened. The Price Edict of Diocletian, fixing maximum prices for goods and services offered for sale, is a spectacular example. More fundamentally the expectation and in some cases obligation for craftsmen and traders to form guilds testifies to the fiscal preoccupations of the emperor but also implies the increased corporate capacity given to these groups.[[39]](#footnote-39) Sarris in this book discusses the wide-ranging and favourable dispositions introduced by Justinian in favour of bankers because of their crucial role in the collection of taxes.[[40]](#footnote-40) It raises important questions for the institutional frameworks for the late antique economy. While many of the old solutions were upheld, new ones were introduced that significantly changed realities for economic actors to the extent that it seems legitimate to think of three broad era’s in the economic legal history of the Roman world: the first being the formation of a new legal framework, roughly between c. 250 BCE to the Augustan era, the second from the Augustan era until Diocletian during which modifications were made but the basic system remained intact, and the third from Diocletian to the early seventh century, during which the state created new solutions to stimulate and guarantee fiscal revenues. The latter period ended in the west with the successor states but continued in the Byzantine empire until the Islamic conquest.

## History of law

All agree that Roman law was a tremendous achievement. It developed an effective body of law in the field of property, contractual obligations, and slavery that deeply influenced later development. However, it never developed a distinctive “commercial law”. Does that mean that modern commercial was an intellectual creation *ex nihilo*, unaffected by the work of Roman jurists? Gialdroni, in the last chapter of this book, argues against this. She discusses the capital role played by Levin Goldschmidt in developing the field of commercial law history and in developing the study and application of commercial law in 19th-century Germany. Goldschmidt was thoroughly educated in Roman law, repeatedly published on it, and used in his analysis of commercial law questions. He emphasized the importance of legal history to understand how the development of commercial law was conditioned by specific historical contexts. The question of whether it is possible to distinguish a meaningful body of “Roman commercial law” is doubtful. The legal principles applied by Roman jurists to commercial activities remain firmly embedded in the whole of civil law. There was no separate body of law applied to commercial activities, such as would develop only in the late Middle Ages. Goldschmidt showed, however, that this does not imply that Roman jurists neglected the needs of traders, nor that Roman solutions were not used by modern jurists to develop commercial law. So, although there was no body of “Roman commercial law” concepts and ideas from Roman law concerning trade did influence the development of such a body in the early modern period.

#  Private Property Rights and Public Claims on Land in the Roman EmpireByDennis P. Kehoe

## Introduction

The status of land is of fundamental importance in the debate over the role of law in the economy of the Roman empire. In the empire’s predominantly agrarian economy, agriculture provided the bulk of the wealth for the Roman elite, as well as the most important source of tax revenues. The Roman imperial government, moreover, fostered a political system that relied on local landowning elites to serve on city councils and to carry out basic governmental functions, especially those connected with the collection of taxes. From this perspective, the legal policies that the Roman government developed toward land had significant implications for the organization of the Roman economy and for the distribution of wealth across society. In a previous paper for the research programme “Structural Determinants of Economic Performance in the Roman World,” I argued that the Roman government’s policy of extending and protecting private property rights in land contributed to increasing specialization in agriculture and the emergence of the class of elite landowners crucial to the governance of the empire.[[41]](#footnote-41) Roman policy created incentives for investment by defining property rights precisely and providing authoritative legal institutions to resolve disputes in a predictable manner. The increasing stratification of wealth fostered by legal institutions was to some degree countered by Roman administrative policies that had distributional consequences. In this paper, I refine this understanding of the Roman government’s policies toward land by considering closely the nature of the constraints that public policy placed on private property rights, and by exploring the likely consequences of these policy constraints for the economy.

To summarize at the outset, the restrictions that the Roman administration imposed on private property rights stemmed largely from fiscal concerns broadly conceived, in that the Roman administration sought to accomplish two goals. First, the Roman administration sought to assure to the extent possible stable revenues from taxes on land, which required measures both to enforce tax obligations on land, especially on land that had fallen out of cultivation, as well as to take every step possible to make sure that land liable for taxation remained cultivated productively. This latter effort often involved accommodating systems of land tenure that compromised the rights of landowners in conventional Roman law. Second, Roman administrative policies increasingly imposed restrictions on the freedom that property owners, especially the local landowning elite serving on town councils, had in disposing of their land. These restrictions stemmed from the efforts of the Roman government to maintain the viability of the municipal structure throughout the empire. The Roman government’s fiscal concerns often resulted in liens imposed on private land by the Fiscus, which constrained the ways in which landowners could use their land, such as pledging it as security in credit transactions, or selling it to use the proceeds for other types of investments. In addition, Roman administrative policy limited the capacity of key social groups, particularly decurions, to alienate their land. Eventually, in the later empire, local town councils exercised a degree of corporate control over the land belonging to decurions. In theory, then, much of the land belonging to the wealthiest class of landowners throughout the empire was subject to liens by both the Fiscus and by local councils.

All of these factors affected the capacity of landowners to dispose over their land, and the Roman legal authorities faced the difficulty of balancing efforts to promote freedom of contracting against the government’s fiscal concerns. These administrative policies are likely to have had some distributional effects, which would complement those resulting from the Roman administration’s intervention in the agrarian economy by maintaining control over extensive imperial properties. This policy, grounded in the Roman government’s efforts to secure stable revenues, made the state a major economic actor, with property that rivalled the combined holdings of the senatorial order, and so to some degree inhibited the seemingly inevitable stratification of wealth in Roman society.[[42]](#footnote-42) My focus will be primarily on the late Principate and the fourth century. I believe that it is legitimate to link together these two periods in examining Roman administrative policy, since in the fourth century the Roman administration strove to maintain the same municipal system that was crucial to the governing of the empire in earlier periods, even if its efforts were less successful than before.[[43]](#footnote-43)

## Private property and tax liability

The fiscal concerns of the Roman government affected the market for land in significant ways, as they influenced many areas of the law. A guiding principle for the Roman administration that affected the alienation of land was linking its tax liability to its potential productivity, and imposing the obligation to pay taxes on the persons who benefited from the land’s productivity. To cite one example, in a dispute over the non-payment of the purchase price for the farm, the emperor Diocletian reminded the petitioner that the fruits belong to the purchaser, and that the seller’s only recourse is to sue for the purchase price (*Cod. Iust.* 4.49.13, 294 CE). But it is noteworthy that the emperor emphasizes that the fruits from a property sold belong to the buyer precisely because that is the person on whom the burden of taxation, the *functionum gravamen*, falls.[[44]](#footnote-44) Similarly, in an earlier rescript, Valerian and Gallienus ruled that the each of the heirs of a landowner had to pay that person’s debts in proportion to his share of the inheritance, but that only the holder of the property was responsible for the land taxes, since that person obtained the fruits (*Cod. Iust.* 10.16.2, 260 CE). Decius had ruled that an indiction (a special tax assessment) attached to the land and not a person, and so reassured a petitioner that he would only be assessed for land that he actually possessed (*Cod. Iust.* 10.16.3, 249 CE). To return to Diocletian, that emperor ruled that a buyer of land was entitled to a price adjustment if the seller underreported its capitation assessment, but that the buyer would have no recourse if she was aware of “the burden and charge of the public obligation” (*onus et gravamen functionis*, *Cod. Iust.* 4.49.9, 293 CE).

In late antiquity, the Roman government’s concern to protect its sources of taxation resulted in a clearer definition of tax liability, in that tax charges were attached to the land, rather than to the taxpayer who owed them. There were frequent enactments to emphasize that anyone acquiring property by purchase had to acknowledge the land’s fiscal obligations, including its tax arrears. For example, Constantine sought to crack down on purchasers who, taking advantage of the financial difficulties of landowners in arrears on their taxes, would buy property for which taxes were owed, presumably at a discount, and then fail to pay the arrears (*Cod. Iust.* 4.47.2, *Cod. Theod.* 11.3.1, 319 CE). The emperor ruled that such purchasers had to acknowledge the tax obligations of the land in question, including any back taxes that had not been paid.[[45]](#footnote-45) Somewhat later, the emperor Julian characterized as illicit agreements that a seller or donor of land might enter into to retain the tax obligation for land (*Cod. Iust.* 4.47.3; *Cod. Theod.* 11.3.3, 363 CE). In this case, such an agreement would put the interests of the Fiscus at risk, since, in the event of tax default, there would be no land that it could confiscate to cover its losses. The possibility of tax liability would impose a potentially substantial cost on buyers, either to gain information about the tax status of the land in question or actually to pay past taxes. Certainly, purchasers of property would be prevented from gaining full ownership of any land if there were liens on it, say, if it had been pledged as security for a loan. The laws of Constantine and Julian suggest that buyers and sellers often sought to work around the fiscal demands of the imperial government, and that this effort cost tax revenue. At the very least, the interventions by Constantine and Julian reveal a potentially distorted market for land.

A more intrusive intervention in the market for land and the property rights of landowners involved making landowners liable for the tax charges on uncultivated lands. In Egypt, this system, involving forms of compulsory leasing termed ἐπιβολή and ἐπιμερισμός, required landowners to be responsible for certain uncultivated lands in their villages.[[46]](#footnote-46) The landowner, of course, could cultivate this land and profit from its crop, but in many cases assigning land in this way was for all practical purposes a tax increase. The emperor Aurelian, as we learn from a constitution of Constantine (*Cod. Iust.* 11.59.1), made city councils liable for the taxes for uncultivated lands within their territories. Constantine reformed this enactment first by granting city councils a three-year immunity before they would be required to pay the customary dues, and, then, if the town councils were unable to sustain the charges for uncultivated lands, to spread this burden more broadly by dividing these among other lands in the territory of the city in question. Either Constantine or Constantius II required people who had purchased lands from emphyteutic possessors or from the imperial patrimony (imperial estates) to cover the tax charges for other properties that had been sustained by the ones they were purchasing (*Cod. Iust.* 11.59.2, *Cod. Theod.* 11.1.4, 337 CE). The requirement to accept fiscal charges attaching to unproductive lands remained a basic theme in Roman fiscal policy in the fourth century. Thus in 371, the emperors Valentinian, Valens, and Gratian established that heirs must acknowledge tax burden for less suitable farms or yield all the inherited property and anything they had gained from it (*Cod. Iust.* 11.59.4, *Cod. Theod.* 11.1.17). The emperors Valens, Gratian, and Valentinian ruled that people (presumably decurions, to judge by the sanction described below) who occupied lands useful to a municipality (that is, productive, but without a current owner) also had to accept responsibility for deserted property, or yield the land in question to other decurions (*Cod. Iust.* 11.59.5).[[47]](#footnote-47) In 394, the emperors Theodosius, Arcadius, and Honorius decreed that people who accepted lands from the imperial patrimony while guaranteeing the tax payment also had to accept the responsibility for less fertile land (*Cod. Iust.* 11.59.9, *Cod. Theod.* 5.14.34). From another perspective, the fiscal liability that people occupying deserted properties bore also affected the other land that they owned. Accordingly, the emperors Valentinian and Valens ruled that such people had to affirm, by providing suitable sureties or pledging properties, that the land that they occupied would not be abandoned at a cost to the public (*Cod. Iust.* 11.59.3, *Cod. Theod.* 5.15.14, 364 CE).

Although it is impossible to estimate what portion of land was affected by the requirements imposed by the Roman government on people who took up unused land for cultivation, the consistent policy of the Roman government suggests that fiscal obligations were a potentially serious obstacle to the free exchange of land on the market. Indeed, the Roman government seems to have recognized this, since in 412 the emperors Honorius and Theodosius II essentially abolished the imposition of tax obligations for uncultivated land on the owners of productive land (*Cod. Iust.* 11.59.12, *Cod. Theod.* 11.1.31, 412 CE): “By this enactment We ordain that no possessor of productive property (*praedium munificum*) is to be retained for the debts of another or for his desertion of it, nor is (the possessor) to be burdened by a contract for properties that are by no means demonstrated to be among the ones that are being retained, lest the exaction (of taxes) be harmed by any tricks and fabrications.”[[48]](#footnote-48)

## Property rights and land tenure

The imperial administration also sought to make sure that the lands on whose taxes it depended would remain productive. Simply assigning the tax obligations on various individuals was clearly not sufficient; the approach that the imperial administration took to this problem arose from a fundamental assumption that the continued long-term production of small-scale farmers, whether tenants or owner cultivators, best assured the production of a crop and thus the possibility of gaining stable revenues, whether in the form of rents or taxes. This assumption about the value of land stands behind the policy of the late antique Roman government when it endeavoured to protect the cultivators on whose production it depended for taxes by prohibiting loans against the security of their land, animals, or equipment (*Cod. Iust.* 8.16.7, *Cod. Theod.* 2.30.1, 315 CE; *Cod. Iust.* 8.16.8, 414 CE). The point is that the Roman legal authorities focused not on the property rights of creditors or even estate owners, but only on the production of the crop that provided the basis for tax revenues. All other considerations were secondary. These measures imposed costs on society, including the loss of revenues to towns and a restricted credit market, but these costs were apparently outweighed by the importance of protecting the security of the farmers on whom tax revenues depended.[[49]](#footnote-49)

The focus by the imperial government on the production of a crop as the surest way of gaining revenues can most clearly be seen on the North African imperial estates, as documented by the inscriptions from the Bagradas valley. These estates produced grain, wine, and olive oil, providing important revenues that the imperial treasury, or Fiscus, could use to support the *annona*, the food distributions in Rome, or potentially also to support armies or other expenses of the Roman government.[[50]](#footnote-50) To assure the long-term productivity of these estates, the Fiscus relied on small-scale cultivators, *coloni*, who had secure tenure. The *coloni* cultivated their lands under perpetual leaseholds and paid shares of their crops, generally one-third*,* to middlemen lessees, or *conductores*, who leased the estates from the Fiscus on a shorter-term basis and in so doing acquired the right to collect the share rent from the *coloni* as well as to use this group’s labour services and draft animals to cultivate certain lands within the estate. The Roman policy in administering imperial estates in North Africa essentially removed from the private market considerable tracts of productive farmland and provided firm protections for the *coloni*.

A similar form of land tenure is documented on imperial estates in Asia Minor. Thus tenants, or γεῶργοι, on an imperial estate at Aga Bey in the third century sent a petition to the emperor in which they complained about the failure of the imperial authorities to protect them against officials from nearby towns who sought to impose taxes and liturgical obligations on them, and they claimed exemption from such obligation on the basis of their right of cultivation, τὸ τῆς γεωργίας δίκαιον.[[51]](#footnote-51) To add urgency to their petition, the imperial tenants threatened to abandon the estate that they had cultivated for generations and seek the protection of private landowners. It is likely that the farmers on this and other imperial estates in Asia Minor came from communities already in place on private estates when these came under imperial control. One example of a private estate organized in this way is that of the Ummidii, a senatorial family that owned an extensive estate in southwest Asia Minor during the second and early third centuries.[[52]](#footnote-52) This estate incorporated an ethnic group called the Ormeleis, ὁ δῆμος τῶν Ὀρμελέων, which provided a structure to govern the internal affairs of the cultivators on the estate. Like the imperial tenants, the cultivators on the estate of the Ummidii had secure tenure, and imperial and private estates alike derived their revenues by exacting some portion of the surplus produced by the permanent cultivators. Estates in Asia Minor organized in this manner may owe their origins to lands belonging to the successor kings to Alexander the Great, who took over land that had previously been held by the Achaemenids. These earlier estates also encompassed villages, where it seems likely that the community played a large role in establishing the terms of land tenure for individual members.[[53]](#footnote-53)

The Fiscus’ policy of protecting favourable terms of tenure on its own properties will have affected the terms of tenure on private land. The tenants on the estate at Aga Bey seemed to be aware of this since they threatened to abandon the estate and seek the protection of private landowners. At the very least, many landowners depended on the production of tenants in long-term tenure arrangements in a manner comparable to that of the Fiscus, and, at least in the third century, the imperial government struggled to provide a legal definition for such long-term tenure arrangements that derived from local custom. The legal principle of the tacit renewal of the lease, or *relocatio tacita*, provided a ready way to describe open-ended tenure arrangements in terms of conventional Roman lease law.[[54]](#footnote-54) According to this principle, if the tenant remained on the land and continued to cultivate it without the landlord’s objecting, the lease was deemed to be continued on the same terms as had existed previously. The chancery’s use of this principle to understand long-term tenure arrangements based on custom is confirmed by a rescript from the emperors Valerian and Gallienus in 260 prohibiting landowners from raising rents or otherwise altering the conditions of tenure in tacitly renewed leases (*Cod. Iust.* 4.65.16).[[55]](#footnote-55) The emperors were seeking to prevent landowners from taking advantage of their tenants who had invested their own resources in the land. In the early fourth century, Constantine demonstrated that customary rents were legally binding when he created a mechanism by which tenants could sue when their landlords raised their customary rents (*Cod. Iust.* 11.50.1, 325 CE?).[[56]](#footnote-56) The emperors Honorius and Arcadius in 396 (*Cod. Iust.* 11.50.2.4) emphasized that bound *coloni* continued to have recourse against their landlords for unlawful rent increases, referring to decisions by previous emperors, even while excluding such *coloni* from other lawsuits against their landlords. Clearly disputes between long-term tenants and landowners over customary rents occurred again and again. The solutions to these disputes were different from what we might expect in other areas of Roman contract law, where the tenant did not have possession rights over the property under cultivation, but instead, in the event of a violation of the terms of the lease by the landowner, would be entitled to monetary compensation. The remedies envisioned by both Valerian and Constantine were designed to keep the cultivators in place. The landowner, even in the third century before the establishment of the bound colonate, clearly faced restrictions in how he could use his or her land.

The fusion of Roman concepts of private ownership of land with customary tenure arrangements could result in ambiguities about the precise legal status of land and the rights of its cultivators. Such ambiguities could impede the efforts of landowners to dispose of their land freely. We can see the types of conflicts that could arise from this situation in the efforts of the Roman legal authorities to deal with claims on land based on the *longi temporis praescriptio*, or “the long-time prescription”.[[57]](#footnote-57) This prescription protected lawful possessors of provincial land (as opposed to Italic land, where a lawful possessor would gain prescriptive ownership through *usucapio*) against defects in their title to their property. First documented in Egypt under the reign of Septimius Severus, this principle precluded rival claims for ownership of land after the passage of time, ten years if the suit came from the same city in which the possessor lived, and twenty if the rival claimant came from a different city. No such prescription existed for claims by the Fiscus. The creation of this prescription was certainly designed to afford greater protection of property rights in the provinces, and it seems plausible to link it with the disorder that is likely to have resulted from the Antonine plague in 165 CE, with frequent disputes about the exact status of land. It is likely that many were able to use the protection of the long-term prescription to establish full ownership rights over their land. It certainly provided lawful possessors of property protection against potential creditors, as we can see in a rescript of Gordian. Here the possessors of property that had at one time been pledged as security for a debt were protected against the claims by the creditors to the pledged land.[[58]](#footnote-58) From another perspective, in a rescript of Diocletian, a son who had been emancipated and had not succeeded his father as heir would be able to regain a farm belonging to him but sold by his father without his consent, if the current possessor was not protected by the long-time prescription (*Cod. Iust.* 4.51.5, 294 CE). The rescript suggests how good-faith buyers, without the long-time prescription, would face potentially harmful uncertainty about their rights to their property.

At the same time, however, the efforts of the Roman legal authorities to resolve legal disputes suggest how difficult it was to define property rights precisely when customary tenure arrangements were involved. In an earlier publication, I argued that the consistent policy of the Roman legal authorities that tenants could not establish formal possession rights over their land, and so by implication could not benefit from the long-time prescription, revealed the existence of land tenure arrangements in the Roman empire in which the tenant could plausibly be viewed as exerting far greater rights over the land than could be accommodated within the norms of Roman private law.[[59]](#footnote-59) Thus the emperor Alexander Severus ruled that a tenant could only establish possession for the owner of the property who leased it to him (*Cod. Iust.* 7.30.1, 226 CE).[[60]](#footnote-60) Similarly, Diocletian would not allow a tenant to sell the land that he was cultivating (*Cod. Iust.* 7.32.5).[[61]](#footnote-61) One question concerns the precise nature of the right that the tenants in these rescripts were asserting. One possibility is that they were claiming outright ownership of the land in question, much as the emperor Justinian would envision in his own constitution addressing claims to ownership rights by putative long-term tenants (*Cod. Iust.* 11.48.20, 529 CE; see below). Another possibility is that the tenants were claiming something more modest, that they could alienate their own cultivation rights within an estate, while not disputing the estate owner’s right to rent. This would be a situation that would potentially be a cause of concern to the landowner, who might lose some of his control over his estate. In the fourth century, the emperors Valentinian and Valens reiterated a principle affirmed in a law of Constantine that people occupying property at the will of the owner (under the legal category of *precarium*) or lessees could not establish possession rights (*Cod. Iust.* 7.39.2, 365 CE).[[62]](#footnote-62) The problem that the emperors were countering was the same that Justinian would address in the sixth century, that tenants would use their prolonged time on the land as a way of establishing ownership and so raise disputes with the owners whom the law recognized (*Cod. Iust.* 11.48.20, 529 CE). Valentinian and Valens emphasized that *coloni* (in this case bound tenants) lacked the right of possession over their land and so could not transfer their rights to it, just as they could not transfer their own property without the permission of their landowner (*Cod. Theod.* 5.19.1, 365 CE). About two decades later, the emperors Valentinian II, Theodosius, and Arcadius ruled that lands alienated by imperial tenants had to be restored (*Cod. Iust.* 7.38.2, Constantinople, 387 CE).

The point is that Roman legal and fiscal policies helped to create a broad class of tenants with rights to their land that were protected by the law but that also might conflict with the rights of landowners. It seems clear that ambiguities about the precise ownership of the land could arise, even without the types of long-term land tenure that I have described. For example, the New Testament parable of the absentee landowner who leases out his vineyard, only to see the tenants resist his agents and eventually his son, presupposes that such disputes could arise (Mt. 21:33-45, Mc. 12.1-12, Lc. 20:9-19). In this parable, the tenants even go so far as to kill the landowner’s son, in the hopes of taking his inheritance and becoming landowners themselves. The Roman government, if made aware of such a situation, would obviously defend the rights of the legal landowner. However, the sales of cultivation rights within a larger estate documented in the Vandal Period Albertini Tablets in North Africa suggest that the distinction between a tenant and a landowner could be a fine one, and the Roman government faced the continuing task of differentiating between owners with the right to alienate land and tenants who lacked such rights, even when their rights, and in the case of the bound colonate, their obligation, to remain on the land and pay customary rents were recognized in the law.[[63]](#footnote-63)

The genesis and implementation of the bound colonate is a subject of continuing debate, but clearly its major purpose was to create more certainty about tax revenues by tying farmers to the land they cultivated.[[64]](#footnote-64) The binding of *coloni* who were not otherwise registered as landowners in their place of origin to the estates on which they cultivated land parallels an earlier policy, documented in Egypt, of binding of landowners to their cities or villages of origin. The binding of *coloni*, designed as it was to assure that land would be cultivated, impinged on the capacity of landowners to dispose over their private property. The clearest indication of how fiscal policies restricted landowners can be seen in two late antique laws on the disposition of bound *coloni* when the land they were cultivating was sold. The emperor Constantius II ruled that it was unlawful to alienate property and with a private agreement to retain the bound *coloni* for use on other property (*Cod. Iust.* 11.48.2, *Cod. Theod.* 13.10.3, 357 CE). In this case, the emperor only considered the link of the *coloni* to the land that they were cultivating, and regarded as irrelevant the possibility that the seller might make more productive use of the *coloni* on other land, let alone the apparent fact that a buyer would be willing to acquire the land without *coloni* attached to it.[[65]](#footnote-65) Somewhat later, the emperors Valentinian, Valens, and Gratian forbade selling *coloni* and slaves registered on an estate separately from the land itself (*Cod. Iust.* 11.48.7).[[66]](#footnote-66) When such a sale took place, the buyer would lose the purchase price, while the seller or later the heirs could sue for the return of the slaves with their offspring. These restrictions indicate that slaves were not a commodity that landowners could use as they saw fit, but rather a resource that, along with the bound *coloni*, made it possible to achieve a crop from their land and pay their taxes.

## Restrictions on alienating land

The Roman legal policies that promoted landownership stemmed from the legal authorities’ basic understanding of the Roman economy, that land represented not only the basis of wealth, but, from the point of view of developing legal rules that would apply across society, the only way to invest wealth that could reasonably assure financial security for the long term. Thus, the private and imperial alimentary foundations, which provided food to children in cities in Italy and the provinces, depended on revenues from land, and the Fiscus held a lien over lands pledged in the imperial foundations.[[67]](#footnote-67) Landownership also remained the basis for offices and liturgical services throughout the empire, as well as the most important source for tax revenues. As a corollary, the loss of access to land represented the greatest risk to people’s economic stability, and thus to their capacity to remain in the social class into which they were born and fulfil their social obligations. Consequently, the legal authorities sought to protect vulnerable social groups against any threat to access to their land, limiting their rights to alienate it, and seeking to check the capacity of the powerful people to take advantage of the economically vulnerable.

We can see the Roman government’s efforts in this area most clearly in the regulations developed during the later Principate restricting the capacity of tutors, or guardians, managing the property of pupils, or wards.[[68]](#footnote-68) Tutors were responsible for all aspects of the upbringing of the pupil, and most important for our purposes, the management of their property. The tutor was required to make sure that the pupil’s money was invested in such a way as to provide an income, and he was financially liable if he failed to invest the pupil’s funds or to enforce obligations on behalf of the pupil. The Roman legal authorities considered land to be the safest form of investment, the one that could best guarantee the pupil a stable income commensurate with his or her social class. Accordingly, the tutor was to use any funds available to the pupil to purchase land; only when it was not possible to purchase land for the pupil, either because the pupil did not have enough money or no land was available, was the tutor authorized to invest the pupil’s money in other ways, by lending it out at interest. At the same time, the Roman legal authorities discouraged tutors from alienating land that belonged to the pupil. This policy reached its logical conclusion with the legislation of the emperor Septimius Severus, the *Oratio Severi* (195 CE; Ulp. *Dig.* 27.9.1 pr. ff.). The *Oratio Severi* prohibited tutors from alienating property belonging to pupils under any circumstances except to pay off debts, and to take this step, a tutor would have to obtain a decree from the praetor or provincial governor. The legislation was soon applied to curators responsible for the property of minors (adults up to the age of twenty-five).

The legal principles guiding the administration of property by tutors and curators are important for two reasons. First and foremost, they presuppose that land was a fungible commodity, whose value could be determined on the market, as a function of its income.[[69]](#footnote-69) In the case of tutorship and curatorship, the Roman legal authorities intervened in the economy by establishing rules that apparently conflicted with the market, making land a commodity that, for a large part of the population, was essentially not fungible. As Richard Saller emphasizes, the high mortality rates in Roman society meant that a majority of children will have lost their fathers before reaching their twenty-fifth birthday, when they would be fully competent to manage their property.[[70]](#footnote-70)

The purpose behind this Severan legislation, apart from protecting a vulnerable social group, is likely to have been to safeguard the finances of the curial class that comprised local town councils and performed vital liturgical services. Wealthy pupils who lost their land as children would not be able to fulfil their duties to the state. In late antiquity, the Roman government took its intrusion into the affairs of curial families to its logical extent by prohibiting town councillors from selling their land without a decree from a judge (*Cod. Iust.* 10.34.1, *Cod. Theod.* 12.3.1, Constantinople, 386 CE). In 423, the emperors Theodosius II and Valentinian III required the decurion seeking to sell land to obtain permission from the provincial governor (*Cod. Theod.* 12.3.2).[[71]](#footnote-71) Moreover, the late imperial government restricted the testamentary rights of decurions; if the decurion’s estate did not pass to someone who could take up service on the council, one-fourth of the property would be reserved for the council’s use. The emperors Theodosius II and Valentinian III ruled that funds acquired for the city council should be used to purchase lands, the revenues from which would be used to support the council’s public services (*Cod. Iust.* 10.34.2.1, Constantinople, 428 CE).

## Decurions and land

The late antique developments indicate that, from the perspective of the Roman imperial government, the land belonging to decurions was held in a kind of public trust, so that the capacity of the individual landowner to dispose of his or her property was limited. These limits came in the form of restrictions on how an individual decurion could use his wealth, as well as in the liens that the state, both the Fiscus and the local town council, exercised over his land.

The policy concern of the imperial government was to assure that decurions retained control over sufficient resources to meet the potential liabilities connected with his office. Clearly frequent questions arose about the circumstances under which decurions could become liable, and the jurists in the late Principate devoted considerable attention to this issue (*Dig.* 50.1). The range of financial liabilities that a decurion had, can be seen in a text from Ulpian concerning a *paterfamilias* whose son in power, with his consent, had become a decurion (*Dig.* 50.1.2, 1 *disput*.). The father would become liable in much the same way as a surety (*fideiussor*) for a range of potential activities, including the handling of public money, the appointment of people to supervise public works or other tasks, the nomination of a successor in office, and leasing out of public imposts (*vectigalia*). In addition, the decurion would be liable for any appointment of tutors for under-aged children, or for curators to supervise the financial affairs of minors. On top of these responsibilities, a decurion could be liable for arrears that a colleague in office had accumulated in connection with his services, as the emperor Antoninus Pius ruled in a constitution quoted by Papinian (*Dig.* 50.1.11, 2 *quaest*.). The late third-century jurist Hermogenianus, moreover, provides a long list of the various liturgies that could involve financial liability, not just ones involving the exaction of various service or imposts from fellow townspeople, but also managing property belong to a town, including land, and appointing curators to manage people’s property (*Dig.* 50.4.1, 1 *epit*.). Possibly the greatest liabilities that decurions faced arose from their responsibilities in collecting taxes. Late classical jurists emphasize that this was a duty properly imposed on decurions.[[72]](#footnote-72) As we have seen, in the latter part of the third century, the emperor Aurelian made decurions liable for the taxes on ownerless lands within a town’s territory. Constantine apparently recognized that this was a difficult burden to impose when he allocated the taxes for such land among all the lands in the town’s territory (*Cod. Iust.* 11.59.1).

The complexities surrounding the potential liability of decurions are suggested in a case discussed by the third-century jurist Modestinus concerning the administration of loans of a city’s funds (*Dig.* 50.1.36.1, 1 *resp*.). In this case, an office holder lent out public money and accepted land as security, with an agreement that the land could be sold immediately if the loan was not repaid. The loan was passed on through several iterations of office holders until, after the debtor defaulted, a magistrate sold the land, only to learn that the size of the parcel in question was not adequate to fetch a price to cover the loan. In this case, the original office holder who had accepted the inadequate pledge was not liable to the town, but rather the one who passed on the obligation to the final set of magistrates without a suitable guarantee. This case indicates how a decurion could be held liable for a transaction into which he had not originally entered on behalf of the town. Moreover, magistrates could be held liable for a variety of circumstances beyond their immediate control, but that would originate as a normal function of their offices, not just lending the town’s money or leasing its property, but also the appointment of tutors. There are other duties for which decurions could be liable, such as the enforcement of legacies in favour of their town, as Marcus Aurelius and Lucius Verus ruled (Papir. *Dig.* 50.1.38.2, 2 *de constit*.).[[73]](#footnote-73)

In view of this situation, the imperial government took steps to prevent decurions from dissipating their property. As we have seen, imperial policy restricted the capacity of decurions to alienate their property. At the most basic level, decurions might try to avoid liturgies that impinged on their property rights by transferring ownership to other parties. Papinian ruled that properties transferred in this way would be claimed by the Fiscus (*Dig.* 50.1.15.2, 1 *resp*.). In addition, people in debt to a town, including for formal promises to undertake some form of expenditure, were prohibited from serving as decurions, as Ulpian reports; candidates were not excluded from office who had borrowed money from a town, or those who provided suitable pledges and sureties to underwrite their debt, as Marcus Aurelius and Lucius Verus ruled in a rescript (*Dig.* 50.4.6.1, 4 *de offic. proc*.). But the imperial government also restricted the capacity of decurions to enter into business arrangements that potentially created private liabilities that would impinge on their service to the town. Decurions were barred from leasing the right to collect imposts (*vectigalia*) on behalf of their town (Pap. *Dig.* 50.2.6.2, 1 *resp*.); only if the decurion inherited such a lease would he be able to remain in it, as ruled by the Severan-age jurist Marcian (*Dig.* 50.2.4, 1 *de iudic. publ*.).[[74]](#footnote-74) In late antiquity, the emperors Gratian, Valentinian II, and Theodosius forbade decurions from serving as procurators to manage the property belonging to other people (*Cod. Iust.* 10.32.34, *Cod. Theod.* 12.1.92, 382 CE), The person employing the decurion as a manager would be subject to punishment, but the decurion himself, “who, unmindful of his free status and birth, condemns his reputation through servile obsequiousness by taking up a (thing of) most disreputable baseness,” was to be deported.[[75]](#footnote-75) To be sure, the social debasement that the decurion was deemed to be undergoing in taking up service on behalf of another motivated this constitution, but it would also serve an economic function in preventing a decurion from diverting his own resources away from his managing his own land and performing his duties to the council. Despite the view of these emperors, upper-class people in the Roman empire did perform managerial services on behalf of their peers. The most famous example of this is the equestrian and estate owner Alypios, who played a major role in administering the estates of the third-century Egyptian magnate Aurelius Appianus in the Fayyum.[[76]](#footnote-76) Moreover, when necessary, the Roman administration was willing to recruit decurions with less desirable backgrounds. For example, the third-century jurist Callistratus discusses the possibility of recruiting to understaffed town councils people engaging in petty business, even if they have been scourged by magistrates (*Dig.* 50.2.12, 6 *cognit.*). From a different perspective, according to the late-classical jurist Hermogenianus, it was permissible to grant to sustenance (*alimenta*) to decurions who had lost their property, particularly if they had spent their resources on their home town (*Dig.* 50.2.8, 1 *iuris. epit*.).[[77]](#footnote-77)

Restrictions on their business activities notwithstanding, the most important leverage that the imperial government exercised against decurions was to establish a claim over their property by the town council.[[78]](#footnote-78) At a basic level, decurions were tied to the towns in which they had citizenship, and at east by the third century the responsibilities of the decurionate were inherited. In the late-classical *Opiniones* attributed to Ulpian it is emphasized that the provincial governor is to take care to recall decurions who have abandoned their towns and have them perform their liturgical obligations (*Dig.* 50.2.1, 2 *opin*.). At the end of the fourth century, the emperors Arcadius and Honorius ruled that decurions who fled their towns for a country estate would see that property confiscated by the Fiscus (*Cod. Iust.* 10.38.1, *Cod. Theod.* 12.18.2, 396 CE). One of the major issues that the legal authorities had to confront, then, was determining precisely to which town a potential decurion might be bound, since many had property in several locations, and there could be ambiguities about a person’s home town (*origo*). In the fourth century, the imperial government sought to check the tendency of some decurions to avoid service, either by entering the clergy or a monastery, or by accepting promotions to the senate (at Constantinople) or to other offices in the imperial administration (*Cod. Iust.* 10.32, *Cod. Theod.* 12.1). As a general rule, when decurions accepted positions elsewhere, their sons would remain obligated to the town, and the property of decurions who left their hometown to seek positions elsewhere would be placed at the disposal of the council that they had left behind. For example, the emperor Constantine ruled that if people nominated for magistracies fled their towns, their property was to be placed at the disposal of those who were called to take up the office in their place (*Cod. Iust.* 10.32.18, *Cod. Theod.* 12.1.16, 329 CE). Later, the emperors Valentinian and Valens took a dim view of decurions who abandoned their service to become monks: such individuals were to be called back to their towns, or, failing that, have their property placed at the disposal of people willing to perform public duties (*Cod. Iust.* 10.32.26, *Cod. Theod.* 12.1.63, 373 CE).[[79]](#footnote-79) At the end of the fourth century, the emperors Arcadius and Honorius ruled that decurions who evaded their duty to the council by pursuing other offices would have one year to return or see their property put at the disposal of the council (*Cod. Iust.* 10.32.51, *Cod. Theod.* 12.1.161, 399CE). In the fifth century, as mentioned previously, property that came to the council in the form of bequests, including the one-fourth share that councils retained over the property of decurions without heirs to serve on the council would be used to purchase land to be leased out, with the revenues set at the disposal of the council (*Cod. Iust.* 10.34.2.1, 428; see above at n. 31).

This survey suggests some of the basic constraints that the fiscal needs of the imperial government placed on the freedom of contracting of Roman property owners and thus the range of ways in which they could invest their wealth. Both for the imperial government and for private landowners, land represented the preeminent resource to assure economic stability, so that the imperial government to some extent competed with private property owners over the control of private land. Roman policy sought to guarantee the performance of vital public functions, especially the liturgical duties of decurions, by holding liens over the land belonging to the same people whom its policies otherwise supported. Roman administrative policy led to the careful recording of liens that the state itself held against property owners. The establishment in the Flavian period of the ‘property registry,’ or βιβλιοθήκη ἐγκτήσεων, in each nome in Egypt supported the liturgical system by keeping accurate records of the ownership of land and any liens upon it, but the maintenance of precise records about the legal status of land facilitated selling it or using it as security in loans.[[80]](#footnote-80) Although the property registry seems to have been an institution unique to Roman Egypt, it seems clear that the Roman administration there pursued the same basic policy toward land as it did in other provinces in the Roman empire, that is, to support a landowning class capable of taking on the financial responsibilities in performing liturgical services.

There should be little doubt that the liens that the imperial government held over liturgists’ land could impose significant costs. As Marco Maiuro has shown in his study of imperial property in Italy, the vast majority of the property that came to the Fiscus through bequests or confiscations was auctioned off. [[81]](#footnote-81) Sales by the Fiscus could be susceptible to corruption, so that the imperial government took some steps to address this problem. Thus, the emperors Caracalla (*Cod. Iust.* 10.3.1, 213 CE) and Gordian (*Cod. Iust.* 10.1.2, 239 CE) responded to petitioners alleging fraud on the part of the imperial procurator supervising sales. The emperor Diocletian (*Cod. Iust.* 10.1.5) sought to curb abusive seizures of property by the Fiscus and to curtail the activities of *Caesariani*, agents of the Fiscus involved in the seizure and auctioning off of property, ruling that property could not be seized by the Fiscus without the emperor’s approval (*Cod. Iust.* 10.1.5 pr.).[[82]](#footnote-82) Whatever fraud might have accompanied individual sales, the existence of a network of officials charged with selling land points to an open market for agricultural land. At the same time, the ultimate control that the imperial government exercised over land belonging to decurions is likely to have compelled people to carry out significant transactions within established legal conventions, and to use Roman courts to resolve disputes. If the imperial government exercised a heavy hand with the possibility of confiscating the property of defaulting liturgists, this control also helped it to maintain governmental functions and to protect the economically disadvantaged against the depredations of the powerful. The difficulty was to balance public interests against potentially harmful incentives imposed on liturgists, such as the ones responsible to collect taxes, who, as Diocletian emphasized in a constitution, were liable to make up any shortfall from their own property (*Cod. Iust.* 10.2.3).

In both the Principate and the later empire, the Roman imperial administration struggled to balance its preference for private property rights and freedom of contracting against its own fiscal needs. In theory, maintaining private property rights to land would help to promote productive contractual arrangements that would increase economic activity. This overall policy surely promoted the economic interests of the local elite landowning classes on which the Roman administration depended for the governance of the empire. However, simply allowing an economically elite class to increase its wealth at the expense of more humble people in the empire carried consequences, as it potentially eroded the resources of the broad class of small-scale cultivators on whose production the Roman state, and many landowners, depended for revenues. To some degree the Roman state competed with local landowners over the resources of small-farmers, as is indicated by the frequent disputes between imperial estates and neighbouring towns.[[83]](#footnote-83) In late antiquity, the Roman government sought to safeguard a system of revenues that depended on the production of small-scale farmers by binding them to the land — this involved not simply binding *coloni* to the estates where they were registered for tax purposes, but restricting the movement of all landowners from their village or town of origin — and imposing on larger landowners increasing responsibilities to collect the taxes. The privileges that the Roman administration accorded local elites came with significant responsibilities, which the Roman government sought to enforce by placing restrictions on how this group could dispose over its land. The success of the municipal system that was at the heart of the Roman system of government depended on the imperial administration’s ability to tax or otherwise appropriate some portion of the wealth controlled by the empire’s elite. The measures imposed on decurions beginning in the third century suggest a very grim outlook for decurions, but they would continue in their essential role for maintaining the integrity of the Roman system of government for many decades to come.

# Hadrian, Middlemen and the Exploitation of Imperial DomainsByA. Dalla Rosa

## The NIE approach to agency

Roman emperors were the absentee landowners par excellence. During the first three centuries of the Principate, we have practically no evidence that they spent any significant time on any of their numerous estates scattered around the empire apart from their residences in Italy[[84]](#footnote-84). On the contrary, most senators were, like Pliny the Younger, much more directly involved in the management of their estates: they could take some time off from public duties to visit the estates and find solutions to the problems affecting them, from the choice of the right profile of the tenants, to the definition of the best type of contracts of exploitation and the best ways to commercialize the produce[[85]](#footnote-85).

The immense size of the *patrimonium Caesaris* made it impossible for the emperor to take care of his properties in the way Pliny or Cicero could. Relying on a more or less complex structure of agents and middlemen was therefore inevitable, and our sources reveal an ample number of contractors, equestrian officials and members of the *familia Caesaris* charged with the administration and the exploitation of imperial estates around the empire. This does not mean that the emperor did not care about the profitability of his estates, but only that decisions concerning their exploitation were not taken in the same manner. In this respect, a key difference concerned the quantity and quality of the information that the emperor possessed about the economic conditions of his properties. The extension and the administrative complexity of the *patrimonium* meant that – apart from a small number of estates actually visited – the emperor had to rely on multiple agents with potentially divergent interests in order not only to acquire the knowledge necessary to the decision-making process, but also to transmit and enforce decisions. If we consider the known shortcomings of document transmission and archiving systems in the ancient world, we can easily imagine that the knowledge available at the central administrative level in Rome must have been quite imperfect and the capacity to quickly adjust to market, social, and demographic variability relatively limited[[86]](#footnote-86).

It is in this respect that the notion of “transaction costs”, which has a central role in the theory of the *New Institutional Economics* (henceforth NIE), can be a useful tool for the interpretation of the economic behaviour of the imperial administration. Contrary to neoclassical theory, for which actors are perfectly informed and conscious of their economic goals, NIE recognized that in real-world historical contexts actors only possess limited knowledge and any effort to gather more information is costly, sometimes to the point of out-weighing any economic benefit that would derive from a better-informed decision. An inefficient choice according to the neoclassical approach could therefore represent a perfectly rational one if the costs involved in shifting to the theoretically more productive scenario were prohibitive[[87]](#footnote-87).

Economic choices are also affected by the asymmetric distribution of information arising from the use of agents. Agency costs play a prominent role in the NIE because of the potentially huge impact they have on the enforcement of property rights. In an agent-principal relationship, the agent normally has more complete information at his disposal about the business or the asset he is managing than his principal[[88]](#footnote-88). The agent makes it possible for the principal/owner to enjoy property rights on a certain asset; however, the unequal distribution of information between the two actors inevitably limits the capacity of the principal/owner to make economic choices with full knowledge of the conditions in which the asset finds itself[[89]](#footnote-89). Managerial transaction costs can be interpreted as agency costs and are to be added to the information costs intrinsically bound to the agent-principal relationship. In fact, the agent may not always act in perfectly good faith and in the full interest of the principal: he may – intentionally or not – hide information from the principal or mislead him with false reports; he may also fail to effectively apply directives coming from the principal, thus forcing him to incur additional monitoring costs[[90]](#footnote-90). The principal may, in turn, create unfavourable conditions for the agent; bad remuneration or excessively intrusive checks may actually limit the willingness of the agent to collaborate. This empirical approach to agency is typical of NIE and goes under the name of “positive agency”; it focuses on the institutional and practical frameworks in which this basic separation of ownership and management unfolds[[91]](#footnote-91).

In the work of Jensen and Meckling, Fama, and Fama and Jensen, the classical idea of a firm operated singlehandedly by an owner-manager with the aim of maximizing profits is rejected in favour of a theory that sees the firm as a nexus of contracts, in which management, control and residual risk-bearing are allocated in different degrees to different actors. The question of ownership, therefore, becomes less relevant than the determination of how residual claims and decision functions are distributed among the various actors[[92]](#footnote-92). In the classic configuration, the manager-owner takes all the decisions and bears all the risk; in NIE, this scenario is not only inapplicable to complex organizations, but is also counterproductive, since the transaction costs attached to such a strong centralization would be prohibitive. Participating in the residual risk can, for example, constitute an incentive for the agent to work in the interest of the firm and therefore lower the costs associated with enforcing decisions[[93]](#footnote-93).

Fama and Jensen have proposed analysing agency costs looking at three main functions: residual risk-bearing, decision management and decision control[[94]](#footnote-94). The consideration of how these three functions are distributed among different agent makes it possible to give a general evaluation of the magnitude of agency costs of a given organization. In the modern firm, residual risk is borne by those who contract for the right of net cash flow (often called residual claimants); in our context, we can define in this way all actors that were bearing the risk of the economic enterprise of exploiting imperial estates, that is the emperor himself but also the various tenants. Decision management functions are those attached to the initiation and the implementation of all sort of decisions affecting the estate (contractual rights, cultivation choices, work division etc.), while decision control includes ratification and monitoring of the decisions taken.

There is no optimal solution *per se*, since each firm is different in size, complexity and scope; however, similar firms tend to use a similar function distribution and, generally speaking, the more complex the firm, the higher the propensity is to separate the three functions, assigning them to different agents[[95]](#footnote-95).

## The exploitation of imperial domains and the role of agency

This general framework can be useful when considering the complex organization of the *patrimonium Caesaris* and scholars like Dennis Kehoe and Elio Lo Cascio have often highlighted not only the various economic incentives but also the control systems deployed by the imperial administration in order to restrict the opportunistic behaviour of its agents[[96]](#footnote-96). The Romans were clearly aware of the costliness of decision enforcing, particularly when new directives had to be implemented. In a well-known passage, Cicero praises the fact that the tithe in Sicily (the *decuma*) continued to be regulated according to the *lex Hieronica*, since – he adds – a new system with a new name could have been met with resistance by the locals, thus rendering the collection of the tax more difficult (and costlier). Leaving in place the traditional arrangement and its reference to a beloved former ruler was considered a more enforceable – and therefore a more efficient – solution[[97]](#footnote-97). As legal historians know all too well, the so-called practical sense of the Romans pushed them to maintain as much of the previous administrative arrangements as possible when establishing a new province on a conquered territory. This resulted in an administrative patchwork that could certainly be more easily imposed at the local level, but was less readable and adaptable to the changing economic needs of the state at the central level[[98]](#footnote-98). However, many examples show that the Romans could introduce unique and coherent rules for entire territories, like when, at the end of the second Punic war, they decided to impose the *lex Hieronica* – which at the time was in use only in the former Syracusan territory – on the western part of Sicily, which was not accustomed to this specific regulation[[99]](#footnote-99). The development of a regular provincial *census* and the implementation of successive reforms from Augustus onward gradually brought more uniformity to the system, but differences continued to persist nonetheless[[100]](#footnote-100).

Similar considerations can be made when studying the different ways in which the landed estates belonging to the *patrimonium Caesaris* were administered and exploited. In this respect, we have to consider that the wide variety of geographic, demographic and cultural contexts in which imperial possessions were scattered made the application of a single management model not only impossible, but also unsuitable. A strong continuity with local exploitation patterns seems therefore natural and this view is normally accepted in current research, even if our documentation remains fragmentary[[101]](#footnote-101). We have no traces of the emperor behaving like other smaller landowners, who could rapidly enact new productive schemes, invest heavily in new cultivations and obtain sometime spectacular returns[[102]](#footnote-102). On imperial estates, such economic choices were left to slave managers or to tenants and it does not seem that procurators ever had any say about it. It has often been argued that, as many other large landowners, the emperor simply sought a stable revenue from his properties and therefore was keen to leave existing contractual conditions in place in order to minimize costs linked to the enforcements of a new system; at the price of a reduced income, he thus avoided the risks of more audacious economic choices[[103]](#footnote-103). A traditional aristocratic aversion to rapid enrichment perhaps played a certain role in this picture, but other historians have rightly pointed out the great practical hurdles that hindered optimization on large properties disseminated in many distant places[[104]](#footnote-104).

The NIE approach allows to move on from the simple scheme security vs. optimization and evaluate the efficiency of each situation in relation to the agency costs involved. I will argue that, while certain economic choices like crop selection were generally left to the managers on the estates, the imperial administration could and did eventually organize exploitation patterns along more uniform lines. This could sometimes happen relatively rapidly, but, more often, changes were the product of a slow decision process involving a long preliminary phase of petition and response on punctual issues. Despite the lack of sources, we know that the administration of the *patrimonium* was affected by some important reforms at the central level, as with the creation of the *ratio privata*; other reforms interested single provinces, as with the creation of the *ousiakos logos* in Egypt or the *tractus* in Africa or again of the *provincia Phrygia* in Asia[[105]](#footnote-105). We do not always know how much these improvements went beyond accounting and archiving purposes, but we cannot exclude that they also allowed the administration to have a better global idea of the different managing patterns in use and of their potential advantages and flaws. In other words, I will argue that the emperor and his administration possessed the required information, although imperfect, to initiate, implement and enforce optimizations on imperial estates and that they did so on multiple occasions[[106]](#footnote-106). They could abandon inefficient agency structures and choose solutions envisaging a more effective distribution of decision functions.

## Direct cultivation by imperial slaves

Apart from a few cases, we know relatively little about agency structures in the management of imperial estates. Direct exploitation by slaves under the supervision of a *vilicus* was certainly practiced. The large number of imperial *servi* bearing the title of *vilici* and *saltuarii* attested in Latium, Campania and Istria suggests that cultivation by slaves or waged freeborn workers under the supervision of slave managers was actually in use, but the fragmentary status of our documentation rarely allows the identification of particular estates[[107]](#footnote-107). This kind of organization is not unrelated to the fact that many of the properties present in these regions formerly belonged to senators and we know that the direct exploitation through slaves was, if not the most common, certainly one of the most adopted solutions among the members of the Roman elite in Italy during the republican period[[108]](#footnote-108). After the estate was inherited or confiscated by the emperor, the *familia* of slaves already in place followed the same destiny and continued to fulfil for the new owner the same duties as before. Continuity assured that the transactions costs linked to the change of ownership were kept to a minimum in the initial phase, but that does not mean that the solution remained the most convenient one in the long term.

A rare known example of this phenomenon is offered by the imperial estate of the *insulae pullariae* in Istria. The property, which included the islands of Briuni/Brioni and the olive oil production facility of Fažana/Fasana on the continent, originally belonged to the Laecanii Bassi, a senatorial family from the nearby Roman colony of Pola. The estate was bequeathed to Vespasian in 77 or 78 and the transfer of property is confirmed by a change in the formulas stamped on the amphorae used to transport the olive oil of the estate. As Paolo Baldacci has shown, the fact that the name of the *officinator* CLYM (Clymenus) appears on Dressel 6B amphoras first with the stamp C LAEK BAS and then with the IMP stamp clearly indicates that the change of ownership did not alter the way in which the estate was managed and that the same personnel remained in place[[109]](#footnote-109). Other *officinatores* of servile status are attested by stamps with similar formulas dating between Domitian and Hadrian[[110]](#footnote-110). However, between the end of the second and the beginning of the third century, the mentions of imperial slaves disappear and amphoras produced in Fažana are stamped with the name of M. Aurelius Iustus and of an unknown T.N.P. On the basis of this evidence, Francis Tassaux has argued that not only the *figlina*, but also the entire estate was initially exploited by imperial slaves, and that sometime after Hadrian it was leased to a *conductor*[[111]](#footnote-111). The fact that M. Aurelius Iustus is also attested as the dedicator of a votive altar on the main island of Briuni seems to confirm that his role was not limited to the management of the *figlina* on the continent. Another sacred dedication from Briuni attests the presence of *coloni*, represented by a certain Allius, who could have been a *conductor* but also a representative of the tenants[[112]](#footnote-112). These documents do not allow to reconstruct the exact agency arrangements that were put in place in the later period, however they strongly suggest that the slave administration inherited from the Laecanii Bassi was left fundamentally unchanged for several decades before being replaced by tenancy.

In the absence of sources concerning specific estates, Marco Maiuro has looked at the variation in the number of the attestations of imperial slaves in Campania in order to reconstruct a possible passage from a direct to an indirect exploitation of the imperial estates of the region. On the basis of Camodeca’s calculations, he observed that 55% of the inscriptions relating to the *familia Caesaris* dated to the Julio-Claudian period, 18% to the Flavians or Trajan, 20% from Hadrian to Commodus and 7% to the Severan dynasty[[113]](#footnote-113). The progressive diminution of the attestations contrasts with the growing number of acquisitions of properties in the same regions for the second century, and this fact is interpreted by Maiuro as a gradual switch to tenancy instead of direct exploitation through imperial slaves[[114]](#footnote-114). This transformation is part of a wider trend that has been documented among all large landowners during the first three centuries of the empire and it would not be surprising if it had also affected imperial estates, since they mainly originated from private landownership. One can ask, however, if the numbers simply reflect the overwhelming acquisition of properties which were already leased to tenants or also management changes on the estates that were initially run by slaves. Unfortunately, the current status of the documentation does not allow for a clear answer. A shift towards tenancy would seem rather reasonable, since the system is generally acknowledged to be more suited than direct exploitation for estates belonging to absentee landowners.

In the direct exploitation form, we are in a situation similar to that of the owner-manager of the classical firm, where all the risk-bearing belongs to the owner, who must possess good managerial skills and dedicate a large amount of time to his business. The direct exploitation form envisages the use of agency and the allocation of certain managerial and control duties to a specialized *vilicus*, but the two functions remain mostly in the hands of the owner. However, if an absentee landowner becomes only marginally involved in the decision-making process, then decision functions are de facto transferred to the manager, who still bears none of the risks[[115]](#footnote-115). Following Fama and Jensen, we could say that, in this scenario, the residual claimant (the emperor) would then have little protection against the opportunistic actions of his main decision agent (the *vilicus*)[[116]](#footnote-116). Maintaining the direct exploitation form exposes the absentee landowner to higher monitoring costs which can render this solution less economically rational than tenancy[[117]](#footnote-117). It would therefore not be surprising if some or all estates initially run by slaves at the moment of their acquisition were gradually leased out to tenants.

A handful of epigraphic sources seems indeed to attest this transition. Imperial *vilici* of the *praedia Galbana* (located just outside Rome) erected a dedication to the *domus Augusta*, to Aesculapius and to *Salus Augusta* after having obtained the required concession of the soil from a freedman *procurator patrimonii Caesaris nostri* sometime under Hadrian or shortly thereafter*.* The inscription lists also the 56 members of a collegium, reuniting freeborn men and women as well as imperial and private slaves and freedmen[[118]](#footnote-118). A similar monument of 205 CE citing a freedman imperial procurator and an imperial *vilicus* comes from the *praedia Rusticeliana*, which were situated near Ostia; here also a religious *collegium* is mentioned, but the members are not listed[[119]](#footnote-119). Two lead tablets from Pola in Istria also record a list of slaves including *vilici* and *dispensatores* along with other freeborn persons, one of whom is qualified as *colonus*[[120]](#footnote-120). While the last example does not concern an imperial property, all three are considered to relate to estates on which direct farming by slaves and tenancy coexisted, much like what happened on the *fundus* of Tifernum Tiberinum belonging to Pliny the Younger[[121]](#footnote-121).

If we observe more closely the names of the members of the collegium of the *praedia Galbana*, we can immediately notice a preponderance of imperial gentilicia, partly belonging to imperial freedmen or to their descendants[[122]](#footnote-122). While none of them displays a title, we can imagine that some of them could indeed have been tenants of plots of the *praedia Galbana.* Moreover, if we could somehow prove that these freedmen were ancient slaves-farmers or their offspring, we could identify one of the possible patterns followed by the *fiscus* to gradually transform a directly exploited estate into one cultivated by tenants. A form of transition from direct to indirect exploitation seem to have actually been put in place on an imperial estate near Croton, where a funerary inscription dating to the second century mentions a certain Amethustus *Caesaris nostri servus item colonus*. This person was employed in a role that Roman jurists usually define as *servus quasi colonus*, a trusted slave to whom the master had decided to confer a larger autonomy in the management of the *fundus*, as if he was a freeborn tenant[[123]](#footnote-123). We have no idea if Amethustus was a former *vilicus*, if his role was meant to last in the long term or to rapidly leave place to a more typical lease to freeborn tenants. We also ignore how frequent such arrangements could have been on imperial estates, but it is clear that slaves like Amethustus could be emancipated by the emperor as a sign of gratitude for their good management or could directly buy their own freedom with the money they could accumulate during a successful quasi-tenancy[[124]](#footnote-124). From an economic point of view, freeing former slaves with proven farming skills and installing them as tenants on the same estate reduced the burdensome agency costs of direct exploitation, while assuring continuity of farming by the same trusted families[[125]](#footnote-125).

## The two-tier tenancysystem of the Bagradas Valley

With tenancy, decision management is shared between the owner and the lessee, who also participates in the risk. This configuration normally constitutes a strong incentive for the lessee to work in the interest of the owner, while it also reduces the monitoring costs linked to agency problems. The owner does not enjoy any more the benefit of being the sole residual claimant, but this loss can be outweighed by the reduction of agency costs[[126]](#footnote-126). This general theoretical scheme can be helpful if we want to consider the actual solutions implemented by the imperial administration from the point of view of agency costs.

The well-known dossier of the agrarian inscriptions of the Bagradas Valley in Africa proconsularis provides us with invaluable insights into the organization of the numerous imperial estates present in the province[[127]](#footnote-127). The documents tell us that, at the beginning of the 2nd century, tenancy on imperial estates was defined by a general lease regulation called *lex Manciana*, whichis first mentioned in an inscription dated to the reign of Trajan and found on the site of Henchir Mettich in Tunisia. The inscription contains a directive of the imperial procurators of the *tractus Karthaginiensis* concerning the *fundus* *Villae Magnae Varianae sive Mappalia Siga*. The text indicates with abundant details the conditions under which the *coloni* of the estate were allowed to cultivate *subseciva*, generally intended as marginal, unoccupied land, situated on hilly ridges on the borders of the main river plain[[128]](#footnote-128). The procurators’ action was probably the result of a petition by the *coloni* themselves, seeking to obtain assurances over their rights to occupy and cultivate unused land inside the *fundus*. The procurators responded to the request extending to the newly cultivated land the same general terms that the *lex Manciana* established for the plots that the *coloni* had previously rented from the fiscus[[129]](#footnote-129).

We do not need to go through all aspects of the regulation, but to concentrate only on a few key elements. First, the *coloni* cultivating land under the terms of the *lex Manciana* enjoyed perpetual tenancy rights, with the possibility of passing them to their heirs. In return for this privilege, the *coloni* had to pay roughly a third of their agricultural production and must not interrupt the cultivation of their land for more than a year. If these conditions were not respected, the *colonus* could be replaced with a new one.

Second, the provisions of the *lex Manciana* were not enforced directly by the procurators, but by the *conductores*,who were also bound with a contract to the *fiscus*, but under different conditions. *Conductores* rented from the *fiscus* an entire *saltus* or a part of it for five years. In return they probably paid a fixed sum, either in money, or in kind or perhaps both[[130]](#footnote-130). Even if our text does not give us any information about this point, we can assume that, as in other administrative contexts, the sum was determined by the procurators according to the estimated productivity of the land and could be readjusted at the end of each five-year period[[131]](#footnote-131). The Henchir Mettich inscription shows that the *conductores* directly cultivated some plots of land (for which they probably did not enjoy perpetual leaseholds), but their main duties were others: they (or their *vilici*) assessed production in accordance with the *coloni* and determined the share that these had to provide as rent for a given year. They certified with the help of witnesses that a *colonus* had neglected a plot of land for two years and could therefore remove the tenant from the plot. They collected fees for the use of pastureland by the *coloni* and determined who had to be responsible for guarding the cattle. Finally, the *coloni* had to provide six days a year of free labour to the *conductor*, probably to work on his land inside the estate. In other words, the *conductor* practically run the estate for the emperor and replaced the actual *dominus* for many aspects[[132]](#footnote-132).

As Dennis Kehoe has already demonstrated, *conductores* and *coloni* represented two distinct groups with different economic goals. Because of their short-term leases, the *conductores* aimed at a more immediate return, and therefore must have tended to privilege cultures like grain, that can be harvested in the first year of cultivation. On the contrary, the *coloni* were attracted by the prospect of improving the long-term rentability of their land, thus investing in olive trees, vines and fruits.

This fundamental divergence in the interests of the two groups is also the reason of the disputes that continuously arose between *coloni* and *conductores*, particularly – but not exclusively – around the right of the *coloni* to bring new land under cultivation[[133]](#footnote-133). In fact, the regulation of Henchir Mettich established a grace period of five years for newly planted figs and vines and ten years for newly planted olive trees, during which period the *coloni* did not have to pay any rent to the *conductor*. Evidently, such an arrangement could not satisfy the *conductor*, since the new cultivations could potentially subtract resources from the other plots rented by the *colonus* and – in the case of fruits, vines or olives – would not have brought in any new income during his five-years lease.

## The direct lease to a tenant-farmer

The well documented system of the Bagradas Valley has attracted much scholarly attention, but it certainly was not the most widely adopted on imperial properties around the empire. A structure with large-scale *misthotai* and small-scale *georgoi* was in use in parts of Egypt and perhaps in other regions of the empire where massive imperial estates are attested, but close analogies are difficult to draw[[134]](#footnote-134). However, despite the absence of documents comparable with those from Africa, it seems that in Italy and in most provinces the imperial administration leased land plots directly to tenants, who cultivated the land and were therefore defined either as *conductores* (lessees) or *coloni* (farmers)[[135]](#footnote-135). Imperial procurators were charged with stipulating and enforcing leases, but had also other duties that could vary from one context to another. Unfortunately, our sources are particularly scanty and need to be analysed with caution before attempting any sort of general considerations.

An interesting inscription of 211 coming from Rome’s suburbium provides some information on the structure of the *praedia Amarantiana*,a large estate near the capital. The text mentions the sale of a flight of stairs attached to a private funerary monument. The stairs belonged to the *fiscus*, since it had been constructed on soil owned by the emperor, and two individuals, P. Aelius Chrestus and Cornelia Paula – to whose family the tomb probably belonged – had bought it from the imperial freedman procurator Agathonicus. Land-surveyors measured the surface of land to be sold and their services were billed at 100 sesterces to Chrestus and Paula. The small portion of land is precisely identified as belonging to the *praedia Amarantiana*, more specifically to one of the former properties of Aelius Onesimus and Aelius Fortis; this specific property was situated on the left side of the *via Ostiensis*, between the first and the second mile, and was leased to a certain Sulpicianus (*quod conductum habet Sulpicianus*). Without going into any detail concerning the identity of the persons involved, it is interesting to note that the precise description of the cadastral location of the sold land includes references to the former owners and to the current *conductor.* What went under the name of *praedia Amarantiana* was actually a conglomerate of estates inherited from different persons over a certain period of time. No single *conductor* is mentioned either for the entire *praedia* or for those which once belonged to the two Aelii, and we have no idea if Sulpicianus was leasing other plots in the same estate[[136]](#footnote-136).

Further useful elements can be found in an inscription found in Ağa Bey Köy, in the ancient region of Lydia (Turkey). The stone preserves a large portion of a petition submitted by farmers cultivating an imperial estate[[137]](#footnote-137). It is addressed to two emperors, either Septimius Severus and Caracalla (197–211) or, as seems more likely, Philip the Arab and his co-ruling son (244–249). Desperately seeking help, the tenants-cultivators (*georgoi*) complained about extortion and other abuses they suffered at the hands of imperial tax officials (*kolletiones*), as well as military personnel (*frumentarii*). The *kolletiones* interfered with the performance of agricultural work on the estate and went so far as arrest nine people, putting them in chains. The petitioners went on claiming that these acts of violence made them unable to attend to their farming duties and to fulfil their obligations to the imperial *fiscus*: “since we are unable for the future to comply with our imperial rent obligations (*despotikai* *apophorai*) and obey to the imperial account (*despotikai psephoi*) as a result of being prevented from cultivating the land” (lines 28-30)[[138]](#footnote-138).

The use of the term *apophora* is interesting here, since it normally indicates a fixed sum of money that is due as contribution or tax. The same term occurs also in a text from Sülümenli (Phrygia) containing the minutes of the hearing of the dispute between two villages about the contribution they had to provide for the maintenance of public roads passing through their territory. In this inscription, the term indicates the fixed contribution in money the administration determined for each village in accordance with the length of the road section under their responsibility[[139]](#footnote-139).

The text of Ağa Bey Köy is only one of the many epigraphically preserved petitions by imperial and non-imperial tenants that have been found in the province of Asia. The most important surviving inscriptions are those of Güllüköy in Lydia, Aragua and Takina in Phrygia, Tabala in Caria. We may also add another petition from the imperial estate of Appadana in Mesopotamia. All documents date to the Severan period or to the middle of the 3rd century[[140]](#footnote-140). These texts clearly show the painful efforts incurred by imperial tenants to resist unlawful impositions of liturgies and other charges, especially the provision of requisitioned draft animals (*angareia*), an ancient, never fully solved issue despite the publication of numerous imperial rulings, among which a special edict by Hadrian in 132[[141]](#footnote-141).

While in the inscriptions of the Bagradas Valley the main problem that is dealt with is the conflictual relationship between *coloni* and *conductores* (with the occasional complicity of procurators), we have no trace of *conductores* whatsoever in the petitions from Asia and Mesopotamia. On the contrary, we find abundant evidence of various imperial officials, soldiers, civic authorities and other villagers. This silence is certainly not a simple result of the fragmentary status of many of our documents, but it tells us that the exploitation of the imperial domains of Lydia, Phrygia, and along the Euphrates was not organized along the same lines than those of Africa proconsularis. The petition of Ağa Bey Köy indicates that the tenant-farmers enjoyed perpetual leases and that their families had resided on the estate from many generations already[[142]](#footnote-142). They probably paid their rents directly to the *fiscus*, that is to imperial officials working under the local freedman procurator of the *regio Philadelphena* and no intermediaries or hierarchical levels apart from the provincial procurators and the governor are mentioned by the petitioners when they expose all the steps they took seeking to put an end to the acts of extortion. Moreover, if large-scale *conductores* had been a common feature on these imperial domains, we would probably have found them at the side of the petitioners, since the arrests perpetrated by the soldiers had put cultivation in serious danger. *Conductores*, if actually present, would thus have seen their own economic interests gravely threatened and would certainly have taken urgent action and complained to the procurators.

The reason why large-scale *conductores* are not clearly documented in Asia or in Italy are impossible to determine with precision. It was perhaps because such a figure was not traditionally widespread in private landownership in these regions, or because our documentation concerns estates which mainly produced for local markets and therefore did not require the complex organization of the export-oriented *saltus* of the Bagradas Valley[[143]](#footnote-143). Another factor that needs to be considered is the strong impression, given by the use of the term *apophora*, that the tenants of Ağa Bey Köy were not sharecroppers but had to pay a fixed rent. This solution, particularly when the payment is given in money, presented a number of advantages for the imperial administration. First, the *fiscus* could count on stable revenues, which facilitated accounting operations and budgetary planning. Second, the collection of fixed sums was far less complicated to implement, since it avoided the time-consuming process of estimation of agricultural output described in the Henchir Mettich inscription, for which the imperial administration would have been required to employ a larger staff.

## Comparing the agency costs of the different systems

The fixed rent imposed on the Ağa Bey Köy estate made agency requirements less burdensome and the presence of large-scale *conductores* unnecessary, at least from this point of view. In fact, too many gaps remain in our documentation and one must not fall into a circular reasoning: we cannot deduce that *conductores* were absent there because of the use of fixed payments, nor that sharecropping was not practiced because of the lack of these middlemen[[144]](#footnote-144). In view of the missing information about the exact nature of contracts governing the relation between the *fiscus* and the various lessees, our considerations remain speculative to a certain degree; however, a connection between destination of production, type of rent and agency structures can be made, and NIE provides a general theoretical framework against which the surviving sources can be projected.

As we have seen, direct exploitation of an estate through the emperor’s own slaves seem to have gradually become rarer, and this tendency is visible also on non-imperial properties. The causes of this movement away this form of management and towards the use of tenants are multiple, but we must surely count the high monitoring costs involved for absentee landowners. The concentration of the functions of decision management and decision control in the hands of independent *vilici*, who shared almost none of the risks, exposed the distant proprietor to the potential dire consequences of the opportunistic behaviour of their managers. While we have just one example documenting a change from direct exploitation to tenancy for imperial estates, traces of this process can be detected elsewhere in the Italian documentation. If this impression could be verified, we could prove that the *fiscus* was ready to introduce significant changes in the exploitation model of its estates in order to switch to a system with reduced agency costs.

If we turn our attention to tenancy, the estimation of the agency costs involved in each of the attested solutions is less straightforward. In this system, residual claims are always divided among the owner and the tenants. What changes is the proportion in which the risk is allocated and particularly how decision functions are distributed. In the two-tier model of the Bagradas Valley, residual claims are distributed among the *fiscus*, the larger-scale *conductores*, and the smaller-scale *coloni*, but are concentrated in the two main agents: the *fiscus* and the *conductor.* The lease regulation clearly allocates decision management to the *coloni*, while leaving decision control to the *conductor* and, in lesser part, to the imperial procurators. This arrangement recognizes that the *coloni* possess the best knowledge to initiate and implement decisions about production and investment for their plots; the delegation of decision management to these agents is therefore particularly efficient, while opportunistic behaviour is limited by the attribution of control duties to different agents[[145]](#footnote-145). However, as it has already been noted, *conductores* were also important residual claimants, but had different economic interests than the *coloni*. If not properly checked by the procurators, they tended to usurp the management functions of the tenants, therefore concentrating decision functions in their hands. This situation eventually generates a series of troubles for the main residual claimant, that is the *fiscus*, which must therefore incur in increased monitoring costs.

The system seemingly in use in the *praedia Amarantiana* and in Ağa Bey Köy avoided this problem since decision control was exclusively delegated to the procurators and their staff, who had no risk-bearing functions and had therefore no interest in interfering with the economic choices of the tenants. This solution preserved the benefits of the diffusion of residual claims and decision management among many tenants with specialist knowledge and of a separated decision control to limit opportunistic behaviour; however, the sources reveal that this system was open to abuses when control agents were unable to protect the *coloni* from interference from soldiers and other officials or, even worse, when they were conniving with the extortioners.

The larger-scale *conductor* of the Bagradas Valley played in many ways the role of the ancient *dominus* of the *saltus*, but did not enjoy the economic freedom corresponding to the amount of the risk borne and could not organize work at his discretion in order to optimize output[[146]](#footnote-146). In the case of the *lex Manciana*, it was the *fiscus* that guaranteed the rights of the *coloni*, who were not simple subcontractors of the *conductores*. This created an unbalanced situation which was probably more systematically open to conflicts than the one attested for Asia. However, the solution could be efficient if the higher monitoring costs were compensated by other advantages. We already mentioned the benefits linked to having the *conductores* assessing the production of the *coloni* and performing other tasks related to the administration of the estate, like the reallocation of abandoned plots to new tenants. It has also been proposed that, because of their knowledge of the local economy, *conductores* were better placed than procurators to recruit new *coloni* with the right skills and experience[[147]](#footnote-147). We may also add that *conductores* probably had a better knowledge of the grain market and could sell more profitably not only the production of their own plots, but also the agricultural production that the tenants delivered them as part of their obligation to the *fiscus*. This point is particularly crucial if the five-year leases of the *conductores* involved a payment of a fixed amount of money to the imperial administration: the *fiscus* certainly expected experienced middlemen to handle the sale of the produce better than the *coloni* and thus regularly meet its demands.

When the system did not envisage larger-scale lessees, these tasks were necessarily divided among the remaining agents. Procurators must have been more involved in monitoring the tenants, in allocating vacant or neglected lands, and in recruiting new *coloni*, although we have no explicit sources confirming that they did so. If the tenants payed a fixed canon in money, then they must have been directly responsible for selling their produce on the market in order to meet the demands of the *fiscus*[[148]](#footnote-148)*.* We are too ill-informed about many of these aspects to judge why the *fiscus* preferred to employ this system instead than the one of the Bagradas Valley in Asia and certainly elsewhere. From the point of view of agency costs, the direct lease to *coloni* under the supervision of the procurator operates a more efficient separation of decision management from decision control and distributes residual risk-bearing to a multitude of actors. Despite the problems linked to the concentration of control functions in one main agent (the procurator), this solution is certainly the one that most resembles those adopted by contemporary complex organizations and has, according to the study of Fama and Jensen, a good survival value[[149]](#footnote-149). The system regulated by the *lex Manciana* also implies some trade-offs, but it was certainly deemed convenient by the imperial administration since, after having been inherited with the acquisition of the estates of the Domitii brothers under the Flavians, it was applied to other imperial estates distributed over a larger area[[150]](#footnote-150). It could be argued that the presence of *conductores* allowed the export-oriented grain production to work more efficiently[[151]](#footnote-151). This may be true, but would anyway tell only part of the story. *Conductores* were not supposed to interfere with the cultivation and investment choices of the *coloni* and were especially useful in reducing agency costs linked to the administration of the estates. Rooted in private regulations for several decades, the system must have been particularly adapted to the context of the Bagradas Valley because of the large amount of available arable land and of the existence of a social class suitable to produce a sufficient number of larger-scale lessees. Different conditions in other parts of Africa suggested the implementation of different models: in fact, as François Jacques noted in his study about imperial properties in southern Numidia, nothing indicates that the organization of the domains of the Bagradas Valley also applied to this region of Roman Africa[[152]](#footnote-152).

In view of the unsatisfactory status of our sources, any conclusion must remain hypothetical. However, looking at our sources through the lens of agency theory allowed to formulate further appreciations, in particular: that the direct exploitation by slaves was the least efficient of the attested systems and was probably gradually abandoned; that the solution in use, among others, in the *praedia Amarantiana* and in Ağa Bey Köy was the most efficient in relation to agency costs and, perhaps for this reason, the most widely adopted; that the use of larger-scale *conductores* was less common and justified for particular contexts only, like the Bagradas Valley.

## Changes to the system: petition, response and information costs

Working on the dossier of the Bagradas Valley, scholars have thoroughly analysed the nature of these regulations and the actions taken by the authorities to protect the tenants. However, comparatively little attention has been given to the ways in which the imperial administration tried to assure that the regulations were known among tenants and duly enforced by the procurators. In fact, changes in contractual relations are not implemented without costs and an easy access to information about the new rights was essential for the new rules to be successfully enacted.

According to the plausible reconstruction of Dennis Kehoe, after the Domitii took over the properties of T. Curtilius Mancia, they began to progressively extend the use of the *lex Manciana* to their other African estates in the second half of the first century[[153]](#footnote-153). After some of these properties were inherited by Trajan after the death of Domitius Tullus in 107/108, the imperial administration not only decided to perpetuate this exploitation model on the newly acquired properties, but decided to extend the regulation to other estates[[154]](#footnote-154). We cannot determine the exact chronology of this process, but the fact that the *lex Manciana* is attested by inscriptions located hundreds of kilometres south of the main group of estates of the Bagradas Valley confirms that the imperial administration had pushed for a wide adoption of the regulation[[155]](#footnote-155). We have no idea of how imperial estates were previously managed, but it is not unlikely that they used a similar model also envisaging large-scale *conductores*. This would have facilitated the adoption of the new regulation and it is perhaps one of the reasons of its broad diffusion.

The *lex Manciana* established farming rights on already allotted land plots, but demographic expansion, installation of newcomers and other reasons soon pushed *coloni* to petition the imperial administration to extend cultivation under the same conditions to marginal land. It is at this point that we can imagine that certain *conductores*, because of their already mentioned different economic interest, made use of their higher social position, their authority over the *saltus* and their privileged relationship with the procurators to obstruct these requests. Judging from the title of *defensor* borne by one of the *coloni* mentioned on the basis of the Henchir Mettich inscription, we may assume that the tenants had organized themselves in order to assure that the petition could finally be received[[156]](#footnote-156).

We do not know if the request of the *coloni* had to go all the way up to the emperor to be accepted. The Henchir Mettich inscription simply reveals that the procurators of the *tractus Karthaginiensis* authorized the tenants of the *Villa Magna Variana* to occupy and cultivate *subseciva* under the terms of the *lex Manciana*. As we have seen, the *conductores* only had the right to reallocate abandoned plots, but had no right over marginal or rough land[[157]](#footnote-157). Only the owner of the estate could allocate it and it is therefore normal to see the imperial procurators acting here. This still leaves a few questions open: if the emperor was not consulted, did the procurators autonomously decide to accept the request? did they then take the liberty to initiate such an important economic policy by their own initiative or did they act according to general *mandata* coming from Rome? It would be surprising to see procurators acting in such a way without having received instructions from above, since they did not have managerial functions; but, as in other cases, we remain in the dark and cannot easily determine at what level the decision was taken and how much the emperor had actually been involved[[158]](#footnote-158).

A second issue raises from this unanswered question: the imperial administration responded favourably to the petition of the *coloni*, but did not transform this decision into a new policy. Neither the procurators nor the emperor apparently took the step of promulgating a general regulation extending the same rights to all imperial estates. As a matter of fact, no general regulation was known to the petitioners of the various *saltus* mentioned in another inscription of the dossier coming from Ain-Jammala and dated under Hadrian. Here the *coloni* legitimated their request by indicating that their neighbours of the *saltus Neronianus* had received the right to cultivate marginal land under the terms of the *lex Manciana*[[159]](#footnote-159). This reveals that the imperial administration had initially considered these issues as simple local disputes, with no obvious repercussions on the wider regional context and to be settled with the traditional procedure of petition and response. The consequence of this behaviour was a slow and patchy diffusion of the new rights. Information circulated among *coloni* in informal ways – i.e., by personally realizing that neighbours actually enjoyed better rights – and wider diffusion could be hindered on purpose by the *conductores*. This situation generated additional transaction costs for the economy of the estates and shows that, while willing to punctually deploy incentives for the *coloni*, Trajan’s administration had been unable to formulate a more coherent response.

## Hadrian’s regulation: toward a reduction of transaction costs

A general regulation, the *lex Hadriana de agris rudibus et iis qui ante X annos omissi sunt excolendis* was eventually published sometime under Hadrian. We do not know what caused the new emperor to act differently than his predecessor, but we can be certain that the accumulation of petitions similar to those documented in Henchir Mettich and Ain-Jammala must have induced the imperial administration to settle the issue in a more definitive way. As far as we know, this statute aimed at encouraging farming on previously never cultivated land (*agri rudes*) and on land neglected for at least 10 years, and it was to be applied to imperial properties of the entire province[[160]](#footnote-160). Its very name indicates that it emanated from the centre of power, and this fact alone should have boosted its chances of widespread adoption. We do not know exactly how the *lex* was published, but we do know that it was complemented by the *sermo procuratorum*, an administrative order issued by the procurators of the *tractus* that spelled out the concrete implementation of the statute for a group of *saltus*. The order is preserved on three different inscriptions and the reading of the text has recently been established with greater accuracy thanks to new discoveries[[161]](#footnote-161).

Our epigraphic evidence shows us that the adoption of the *lex Hadriana* also suffered some problems. The *coloni* of Ain-Jammala had probably no idea of its existence when they petitioned the procurators in order to obtain the same rights enjoyed by the neighbours of the *saltus Neronianus.* Only after receiving the petition did the procurators respond transmitting the *sermo procuratorum*, that is applying the new *lex Hadriana* to the estate[[162]](#footnote-162). Knowledge of the law and of the new rights was therefore still far from perfect, but this time the procurators had clearer orders and proceeded by responding in accordance to the new statute and also took care of publishing it widely, as the instructions to display the text in *loci celeberrimi, civitates,* and *conciliabula* attest[[163]](#footnote-163).

If we judge from the controversies that arose under Hadrian and later, it seems that *conductores* did not put all their efforts in promoting the *lex* and it is probable that the imperial administration was also aware of this. For the new imperial regulation to be effective the imperial administration had to overcome the resistance of the *conductores*. The wide publication of the *sermo* was certainly an important step, but the regulation also had to contain appropriate incentives for the *conductores* aimed at reassuring them that the long-term investments of the *coloni* would have generated benefits for them also. A passage of the *sermo procuratorum*, whose reading has been recently restored, seems to bring some new interesting elements in this respect[[164]](#footnote-164).

After having determined the perpetual tenancy rights of the *coloni* and made clear the shares they had to provide to the *conductores*, the *sermo* defines the grace period of ten and seven years that the *coloni* enjoyed if they planted olives or fruit trees respectively[[165]](#footnote-165). The passage states implicitly that after the end of the period the tenants will again have to pay their shares to the *conductores* as usual. No grace period was foreseen for grain, but some special conditions applied here in relation to the *conductor*. As preserved on the newly reedited Lella Drebblia inscription, the last sentence of the *sermo* indicates that (l. 14-20): *Quas partes arida*[*s | fructuum*] *quisque debebit d*[*a|re eas p*]*roximo quinquen*[*n|io ei dab*]*it in cu*[*i*]*us condu*[*cti|one*] *agrum occu*[*paue*]*rit. Post i*[*d*] *tempus* [*ratio*]*|ni Caesaris n(ostri) IN+*[*….*]*|SIS e lege relocan*[*di dabit*](Whatever dry shares of crops each person will be obliged to give, he will give them for the next five years to that person in the course of whose lease he will have occupied the field, after that time [he will give them] to the account of our Caesar … according to the lease regulation).

This passage is commonly interpreted as meaning that, if the *coloni* cultivated the new plot with grain, they would not benefit of any exemption and would have to provide shares from the first harvest. The shares had to go to the *conductor* that was leasing the *saltus* at that moment and then always to him for the next five years (*proximo quinquennio*). This is generally understood as meaning that the *conductor* would have enjoyed a full five years of rent even if the remaining time left on his lease contract had been shorter[[166]](#footnote-166). The *sermo* thus “provided the *conductores* with some compensation if a *colonus*slackened his effort on existing fields in order to bring a new field under cultivation”[[167]](#footnote-167).

This interpretation of the meaning of *proximo quinquennio* is most probably the correct one; however, this provision would not have worked particularly well as an incentive for the *conductores* to respect the initiative of the *coloni* willing to bring new land under cultivation. Given that the compensation is envisaged in relation to the cultivation of grain only, the clause would have induced the *conductores* to put pressure on the *coloni* not to plant olives, vines and other fruits – which would have raised the long-term productivity of the estate – and choose grain instead. Fortunately for us, thanks to the new edition of the Lella Drebblia inscription, we now possess the missing part of the clause. After having established the attribution of the rent to the *conductor* for five years, the text indicates that, after that time, the rent would have been payed directly to the *ratio Caesaris n(ostri)*, i.e., directly to the *fiscus* without recurring to the intermediation of a *conductor*. The shares would still have to be provided according the *lex relocandi*, that is to the regulation establishing perpetual leasehold for that particular plot (like the *lex Manciana* or the *lex Hadriana*)[[168]](#footnote-168).

The new reading completely changes the scope of the provision. On one hand, if the *coloni* opted for arboriculture, the *conductor* would not have realized any immediate gains, but would have benefitted permanently of the higher rentability if he had also opted to renew his lease for a further five to ten years. On the other hand, there was little incentive to force the *coloni* to cultivate grain, since the *conductor* would have been compensated in the short term, but would have lost the revenue from the new plots after the expiration of the *quinquennium*. Only an outgoing *conductor* would have found the compensation interesting and pushed for this crop choice. In this way, the *fiscus* not only helped the *coloni* willing to invest in high-return crops through the provision of rent-free periods, but encouraged *conductores* also to commit to this long-term productivity effort by introducing long-term disincentives if they pushed the *coloni* to choose lower-value crops.

The clause was not meant to dissuade the *coloni* from the cultivation of grain. On the contrary, Hadrian – aided by jurists and by other members of his *consilium* – decided to slightly increase the administrative duties directly performed by the imperial procurators and the *familia Caesaris* in order to create more favourable conditions for the *coloni*. Bypassing the *conductor* and having the *coloni* directly pay their shares to the *fiscus* augmented managing costs, but – as we have seen – reduced overall agency costs thanks to the more efficient distribution of decision and control functions that, in the end, was less plagued by conflicts and encouraged a wider adoption of the new regulation.

## Conclusions

We remain helplessly ignorant about the details of the myriad of different contractual arrangements that the *fiscus* used and that mirrored the great diversity of economic, cultural, geographic and historical contexts of imperial patrimonial acquisitions. Despite this limited knowledge, scholars have been able to identify three main models of exploitation: direct management by slaves, subdivision among tenants under the control of a procurator and the two-tier tenancy solution of the Bagradas valley. The use of a certain model was often not a deliberate choice, but was determined by practical constraints and by the preoccupation of maintaining continuity with previous traditions. Such behaviour can be economically rational, if the transaction costs of the introduction of a different, theoretically more efficient system, were prohibitive.

However, agency theory permits to go beyond the justification of this “practical sense” and opens the way to a better appreciation of the efficiency of each model. Despite inevitable extrapolations and generalizations on the basis of our limited documentation, we have been able to identify the model of one-tier tenancy under the supervision of a procurator as the one better corresponding to the efficient distribution of residual risks and decision functions found in modern complex organizations. This model is not only the most frequently encountered in our sources, but, as I tried to argue, the one into which less efficient solutions, like the direct exploitation by slaves, gradually evolved. The tendency among all landowners to abandon slave management in favour of tenancy is a well-known phenomenon of this period, but agency theory shows more clearly what sort of tenancy was to be preferred, if it could be properly implemented. While many uncertainties remain, our documentation seems to confirm that the imperial administration, in gradually shifting toward the more convenient model on *praedia Caesaris*, could reason in terms of economic efficiency and often did so. The new reading of the final lines of the *sermo procuratorum* show that Hadrian’s administration had been willing to bypass the *conductores* and abandon the typical two-tier tenancy model even for the *saltus* of the Bagradas Valley, albeit only for new plots brought under cultivation under the terms of the *lex Hadriana* and on which the *coloni* had decided to farm grain.

Another reason for which this drive for optimization is sometimes difficult to acknowledge was the high information gathering and decision enforcing costs that the imperial administration had to face. The wider shift toward the one-tier tenancy with the payment of a fixed rent calculated on the productivity of each *fundus* was certainly made possible by important improvements in the archiving practices of the *patrimonium* in Italy and in the provinces. This was a slow and costly process, but it could eventually lead to optimizations once brought to completion. The dossier of the Bagradas Valley shows that the *lex Hadriana* was introduced probably after decades of punctual answers to single petitions. The effectiveness of decision enforcing was also promoted by a wide publication, which ensured a better dissemination of knowledge of the new rights among tenants. The elaboration of new incentives/disincentives for the *conductores* in order to induce a more cooperative attitude from their part also contributed to the reduction of transaction costs.

What our fragmented documentation allows only too rarely is to identify actual decision processes taken at the central level, in which the emperor was involved along whit his advisers. NIE helps considering all the costs surrounding the decisions taken in Rome about the *patrimonium Caesaris*, and this is a valuable contribution to our understanding of what sort of landowner the emperor was.

# Adapting Imperial Economic Choices to Regional Contexts: New Evidence from the *sermo procVratorVm* and the *lex Hadriana*ByH. González Bordas

The Large Agrarian Inscriptions of Africa (LAIA) from northern and central Tunisia provide a unique opportunity for the study of a great number of topics, particularly, for the administration of imperial estates and the share-cropping system of agriculture[[169]](#footnote-169). We shall not again explain here the system of exploitation that these documents display since it has been discussed in the chapters by Kehoe and Dalla Rosa of this volume. However, since recent finds have now been added to the LAIA and new documents have been identified in the inscriptions already known, it is worth saying a few words about the current state of the dossier in order to have a more precise idea. Eight of the LAIA have been published, namely the inscriptions of Souk el Khmis (from now on, SK), Gasr Mezouar (GM), Aïn Zaga (AZ), Aïn Wassel (AW), Sidi Bou Hamida (SH), Henchir Mettich (HM), Aïn Jammala (AJ) and Lella Drebblia (LD)[[170]](#footnote-170). The Henchir Hnich inscription (HH), however, remains unedited as a whole but two preliminary papers have been published[[171]](#footnote-171) and its *editio princeps* will soon see the light too (see fig. 1).

**INSERT BORDAZ\_FIG. 1 HERE**

Within the LAIA, two subgroups can be identified. The first is formed by HM, AJ, LD, AW and HH that primarily record imperial regulations, or related texts. Dating to Trajan’s reign, HM contains a document related to the *lex Manciana*, a general regulation for the exploitation of private and imperial estates. Based on the opinion of various scholars, this document presents the inclusion of the *lex Manciana* within the regulations regarding the estate of *Villa Magna Variana*, or simply a modification of the *lex Manciana* for unused lands, called *subseciua*, or even a list of additions to the *lex Manciana*[[172]](#footnote-172). AJ and LD, dating to Hadrian’s reign, and AW, dating to the Severan period, contain the *sermo procuratorum*; a modification for the imperial estates of the *regio Thuggensis*[[173]](#footnote-173) of the *lex Hadriana de agris rudibus*, which is a general regulation for the exploitation ofvacant land and land that had not been cultivated for ten years in imperial estates. Though fragmentary, these three inscriptions contain other documents that precede the *sermo procuratorum*. On the one hand, we have AJ and LD, which contain particularly complex dossiers, consisting of five and four documents respectively, three of which are common to both inscriptions. On the other, we have AW, which only includes a dedication to the Severans and a declaration of publication by the imperial procurator preceding the beginning of the *sermo*. HH closes this subgroup. It contains in essence the first copy of the *lex Hadriana de agris rudibus*, on which the *sermo procuratorum* is based.

The second subgroup is formed by SK, AZ, and GM. Dating to Commodus’ reign, they contain *petitiones* by the *coloni* or the sharecroppers of imperial estates addressed to the emperor. These *petitiones* receive favourable answers from the imperial power. Finally, the lost SH inscription is the least known of the LAIA. Only seven fragmentary lines of its text survive.

The creation of some of the mentioned documents can precede by a long time the moment when the inscriptions were set up. For example, the *lex Manciana*, has almost certainly been enacted before the reign of Trajan[[174]](#footnote-174). Besides, HH has not been dated precisely, even if it seems highly plausible that it was inscribed during the first half of the second century. Either way, the *lex Hadriana* itself is, of course, to be dated in Hadrian’s reign. Finally, the three inscriptions bearing the *sermo procuratorum* are not contemporary but this document also dates to Hadrian time,[[175]](#footnote-175) though, of course, later than the *lex Hadriana*, the former being a modification of the latter.

In the context of the work-in-progress edition of HH, this contribution will focus on the comparison between the beginning of the *lex Hadriana* and the *sermo procuratorum*. Namely, it will deal with the types of crops sown on the imperial estates following Hadrian’s regulation. It will also provide some clues as to how the imperial administration intervened, in the frame of the two-tier tenancy system[[176]](#footnote-176), at a regional or even local level with regards to these arrangements. For this purpose, it will also make use of the first document of LD.

In order to analyse the first point, it is important to take a closer look at the geographical space in which the Hadrianic and the immediately preceding legislation was in use, despite the problems caused by the lack of information. First of all, it is very difficult to delimit the reach of the *lex Manciana* on the basis of existing documentation. We are certain that, in Trajan’s time, this *lex* or a modified version of it was in use on the estate of *Villa Magna Variana*, modern Henchir Mettich. Later, in Hadrian’s time, the *lex Manciana* is said to have been in use in the *saltus Neronianus*, next to Aïn Jammala[[177]](#footnote-177). After that, we find no more attestations of this *lex*. Instead ‘Mancian peasants’ show up in the Severan period, in Jenan ez Zitouna, just 40 km south-east of where the *lex Manciana* is previously attested[[178]](#footnote-178). Even later, ‘Mancian’ farming lands are mentioned in the Vandal period in an arid southern region, 100 km south of *Theveste*[[179]](#footnote-179). On the basis of these pieces of evidence, scholars have tentatively deduced that the *lex Manciana* very likely remained in use in private and imperial estates of North Africa[[180]](#footnote-180).

What about the *lex Hadriana*? The first thing to bear in mind is that, contrary to the *lex Manciana*, we know precisely which kinds of land the *lex Hadriana* dealt with, namely vacant land and land that had not been cultivated for ten years. This can be read in lines 2-3 of HH: *[Lex H]adriana de agris rudibus [et] iis qui ante [X̅ (decem) ann]os omissi sunt excolendis*[[181]](#footnote-181). This is further confirmed by the *sermo procuratorum*: *lege Hadriana (…) de rudibus agris et iis qui per decem annos continuos inculti sunt*[[182]](#footnote-182).Even though the formulations are different in the two documents, the sense is the same.

The inscription bearing the *lex Hadriana* has been found close to a farm in an undoubtedly rural context, in a hilly landscape 3.5 km west of *Mustis*. The monument originally belongs in this location; there is no indication, nor any reason to believe, that the stone was moved from another site to the location where it was found.[[183]](#footnote-183) Hence, this was one of the places where this regulation in fact operated. Secondly, it was clearly in use in the area where the inscriptions recording the *sermo procuratorum* have been found. The fact that a modification of the *lex*, which is precisely what the *sermo* is, was in use in this region, shows, in my opinion, that it also formed part of the reach of the *lex Hadriana*. In fact, some references in SK support this idea. In this document, the *coloni* of the *saltus* *Burunitanus* ask to pay only the shares required in the *lex Hadriana* and the *litterae procuratorum*, which is another modification of the *lex Hadriana de agris rudibus*[[184]](#footnote-184). This shows that the *coloni* could appeal to both texts when pleading for justice. The *lex Hadriana* was applied in large parts of the *tractus Karthaginiensis*. In a recent publication, I have postulated that this regulation was conceived for lands found in hilly landscapes, watered enough for the cultivation of cereals grapes and, of course, olives. This also applies to other fiscal districts in Africa[[185]](#footnote-185). On the other hand, the modification of the *lex* was valid only in specific estates within the aforementioned lands; the *sermo procuratorum* was in use in the imperial estates of a restricted region close to city of *Thugga*: the *regio Thuggensis*. Similarly, the *litterae procuratorum*mentioned in SK were most likely in use only in the large *saltus Burunitanus*[[186]](#footnote-186).

## Types of crops and intervention of imperial administration under the Antonines

The first thing to observe is that under Hadrian a new perspective arose concerning the intervention of the Fiscus in the imperial estates. This is evident already from the name *lex Hadriana*,as well as the initial rhetorical lines of the *sermo procuratorum*, celebrating the *humanitas* of the emperor[[187]](#footnote-187). But this new perspective can also be observed in the substantial features of Hadrian’s legislation. If we take a look at the crops mentioned in the preceding regulation, we find in the document contained in HM a consuetudinary list of crops with shares that have to be given, ending with honey at the beginning of the second side[[188]](#footnote-188). Later in the text, we find the list of crops that are exempted from contributions during some years (HM, face II, l. 20 – face III, l. 12). These regulations reflect either the habits of sowing in *Villa Magna Variana*, or some new grants, but they do not express any explicit intention on behalf of the Fiscus or any other big landowner.

By contrast, the initial lines of Hadrian’s legislation (*lex Hadriana* and *sermo*) which mention the crops, directly address the *coloni*; *quisque uolet…exerceat* in the former, and *Caesar… excoli iubet* in the latter.

*HH (lex Hadriana) side 1, l. 3-7: [Qua]ecumq[ue parte]s agrorum Caesaris Nostri, aut non[du]ṃ excụ[lt|ae sun]t aut ante X̅ annos desieruṇ[t exco]li, eas | [qu]ịsq(ue) uolet oleis pomisq(ue) cons[erer]ẹ ọmnị | [de]ṇique modo exerceat.*

AJ, side 3, l. 3-8; LD, side 2, l. 12-19; AW side 1, l. 13-17 and side 2, l. 1-2. (*sermo procuratorum*): *Caesar Noster … omnes partes agrorum quae tam oleis aut uineis[[189]](#footnote-189) quam frumentis aptae sunt excoli iubet.*

This marks a context different from that of the *lex Manciana* and a brand-new way of attracting the *coloni* to the imperial estates[[190]](#footnote-190). However, there is another important difference, this time between the *lex Hadriana* and the *sermo*. The former, as a general regulation encouraging the installation of *coloni* on the unused imperial lands of e.g. *tractus Karthaginiensis* or the whole of Africa Proconsularis, sounds like an invitation (*quisque uolet*). As such, it highlights the cultivation of olive and fruit trees in a general non-compulsory way, as may be inferred from the ending *omni denique modo*. The *sermo*, on the other hand, is considerably more precise concerning the crops (olive trees, vines, and cereals) and orders (*iubet*) rather than invites their cultivation. It is well known that the *sermo procuratorum* is a modification of the *lex Hadriana*[[191]](#footnote-191). Now, the comparison of the former with the first lines of the latter allows us to analyse in what direction this modification went. Whereas the *lex* offers a certain freedom for the types of crops cultivated and an invitation for the installation of the *coloni*, the *sermo* is more precise concerning the crops and commands the land to be sown.

Regarding the crops, Mariette De Vos argued for a direct relation between the apparent absence of the mention of vines in LD and AW versions of the *sermo procuratorum* and the supposed microclimate of these two spots in ancient times which, in her opinion, would have been unsuitable for cultivating grapevines[[192]](#footnote-192). However, in the case of AW, there is a significant lacuna in this part of the text which made it impossible to know with certainty whether grapevines were mentioned or not. The recent textual reconstruction of the three inscriptions, in fact, suggests the presence of the word *uineae*,so grapevines in AW. On the other hand, the case of LD is probably an omission by mistake[[193]](#footnote-193).

What can we say of the underlying mechanisms which made modifications of the *leges* such as the *sermo procuratorum* possible? Until now, we only knew about the letters exchanged between procurators on the subject of the *sermo*.The two *procuratores* of the *tractus Karthaginiensis*, working under the so-called ‘dual equestrian-freedman procuratorial system’[[194]](#footnote-194), dispatched letters to the procurators of lower rank, in charge of the smaller *regiones*, ordering the publication of a whole dossier of documents and, principally, of the *sermo*[[195]](#footnote-195). However, a new edition of LD has brought into light a document written prior to these letters[[196]](#footnote-196). This document seems to be related not to the mere exchange of letters but to the actual creation of the *sermo procuratorum*:

## Transcription of the first document of Lella Drebblia (side 1, l. 4-13):

3 missing lines. *[---] [...] [---] | [....] ++ VM∙BI [..] +++ [.......] | [...] +++++ A +++ VR +++ ṾEEP + [..] | [..] +ianum [et] Siluạ[nu] (uacat)m ∙ proc|[ur(atores) A]ụ[g(usti)] Ṇ̂(ostri) adiutores[sq]ụẹ [e]orum | [De]iphob[us]+ Quod ad eas par(te)s | [sal]ṭus Ḷammiani et Domitian[i | quae Thu]sdritano iunctae sunt ạ| [..]Ṇ[---]VṂ Priscuṃ +++Ỵ+Ṇ+| [---adiut]ỌṚẸ+ṾẸ eorum ∙ H ∙ E ∙ Ọ [.]*

The document is very fragmentary, and many words could only be read using 3D modelling. Lines 7 to 9 and 12 to 13 of the text, mention the position and names of the procurators and their *adiutores* in the 7th to 9th lines and later in the 12th and 13th. Between these mentions there are three lines containing geographical indications: “those parts of the Lammianus and Domitianus estates which are connected to the Thusdritanus estate”. This precise geographical mention also appears in the *sermo procuratorum* (see text in bold letters in the Appendix). In this regulation, we can find before this mention, another geographical indication: “those rented parts of the Blandianus and the Vdensis estates”. In fact, each of these indications is mentioned twice in the *sermo*, and thus appear to be central to this regulation, to the point that they seem to be the very reason for the enactment of the *sermo*. It is important to stress that, each time, Blandianus and Vdensis estates are mentioned first, followed by those of Lamianus and Domitianus.

Coming back to the first document of LD, how should we understand this geographical specification between two groups of individuals? The clue is probably in the words *Quod ad* appearing just before *eas partes saltus Lammiani et Domitiani*, followed by the *procuratores* and the *adiutores*. Thisis the beginning of a sentence which has a missing verb *attinet*, *pertinet* or *expectat* at the end, but it can also be a sentence built without a verb. In any case, I interpret the entire sentence as follows: “What concerns those parts of the Lamian and Domitian estates, which are connected to the Thusdritan, Priscus and Dyonisus and their *adiutores*[[197]](#footnote-197) (will be (or have been) in charge)”. Furthermore, in my opinion, the text deals with the imperial administrators who have been in the field in order to establish the parts of the land and the rules regarding the shares and exemptions in each part of the different estates. Therefore, if we consider the order in which these geographical mentions appear in the *sermo*, namely, the Blandianus and Vdensis estates always coming first, and considering all the missing text at the beginning of this document, it is very tempting to interpret an analogous sequence for the lines 3 to 7, concerning the rented *centuriae* of the Blandianus and Vdensis estates, for which …ianus and Silvanus, (line 7) would be the responsible administrators.

This interpretation, of course, remains open[[198]](#footnote-198) but the mention of imperial procurators and *adiutores* twice in the text concerning very specific parts of estates which are also mentioned in the *sermo procuratorum* is something that certainly merits an explanation. It seems highly probable to me that the text deals here with the inspection of lands for the conception of the rules written down in the *sermo procuratorum*; more specifically, the assignment by the Fiscus of responsibilities concerning specific estates or parts of the estates. These responsibilities concern the adaptation of the agricultural and economic choices made by the Fiscus in the frame-regulation of the *lex Hadriana* in order to suit the reality of specific estates. Hence, the first LD document, which is very fragmentary but was most likely inscribed on other inscriptions, is the key to understanding the procedure followed by the Fiscus in order to intervene, in a legislative way, at the lowest level, that is to say, with regards to the crops and the shares of very limited parts of the land which constituted the imperial estates.

If this interpretation is correct, it seems to provide an answer to the question of how the imperial administration operated when adapting the provisions of the *lex Hadriana* to particular lands, and by what means it managed to reach such a level of detail. On the other hand, the content of this first LD document, dealing with *procuratores* (in plural) at the regional level, seems to present a contradiction with the traditional view concerning the *procuratores regionis* in the *tractus Karthaginiensis*, namely as Jerzy Kolendo assumes, that there was only one procurator for each smaller *regio*, and that, at least in the *tractus* *Karthaginiensis*, there were no *procuratores saltus*[[199]](#footnote-199).

In fact, even if the basis of Kolendo’s theory is very solid, it assumes a system that is perhaps more rigid than it was in reality. He considers, correctly in my opinion, that in the letters of Marinus and Doryphorus to Primigenius and of Verridius Bassus and Ianuarius to Martialis in the AJ dossier[[200]](#footnote-200) we are dealing with the two couples of *procuratores* of the *tractus Karthaginiensis*. Each of these couples send letters to a single procurator of the smaller *regio*. What does not seem to be right is Kolendo’s statement that there was no other personal administration under the *procuratores regionis* among the staff of the imperial estates in the *tractus Karthaginiensis* and that the *coloni* dealt directly with the *conductores*[[201]](#footnote-201). This deduction is not based on any solid evidence.

Indeed, members of imperial administration were certainly present on the estates. This can be deduced by the publication of the three copies of the *sermo* by the imperial staff. For example, in Aïn Wassel, the freedman procurator Patroclus claims that he was the one who erected the *ara* bearing the *sermo*. Moreover, the very creation of the *sermo procuratorum* which needed an accurate inspection of the lands and the yields, proves the presence of imperial staff, and it is difficult to suppose that the Fiscus delegated this inspection to the *conductores*. Now, the first LD document in fact corroborates this interpretation by mentioning the members of the staff involved. If the activity of the imperial staff in the very *saltus* of the Bagradas valley begins with Hadrian or before him is difficult to prove, but the second option cannot be discarded considering the application of complex regulations as the older HM regulation in *Villa Magna Variana* and of the *lex Manciana* in the *saltus Neronianus*[[202]](#footnote-202)

It is too soon to propose a new hierarchical system operating under the *procuratores regionis* based on the first LD document, not only because it is the only such piece of evidence but also due to its fragmentary state. An exceptional situation is not impossible if we consider the particular richness of the imperial properties in the *regio Thuggensis*. Furthermore, opinions may differ on the exact interpretation of the details of the text. However, the reading of the crucial words for this interpretation (*procuratores*, *adiutores*, andparts of the estates) is undoubtedly correct. Therefore, from now on, it will have to be considered that lower-level staff related to the imperial estates does not end with the *procuratores regionis*, even in the *tractus Karthaginiensis*. We do not know if these members, lower in rank, had permanent or only occasional duties on the imperial estates but it seems that procurators, other than *procuratores regionis*, and their *adiutores* were operative there.

The Fiscus made use of them when adapting general legislative texts, such as the *lex Hadriana*, to local contexts in order to implement its economic choices in a specific area. These lower officials would thus be involved in the preliminary stages of the conception of regional regulations. These regulations, as we have observed, are more restrictive and thus closer to an order or command, as opposed to the *lex* which displays more general guidelines and is formulated in inviting rather than compelling terms. Said in New Institutional Economics terms, regional regulations as the *sermo procuratorum* (and maybe the *epistulae procuratorum*) seem to restrict the decision management allocated to the *coloni* in the *lex Hadriana* for the sake of the profitability of the estates.

Therefore, this paper has firstly shown the flexibility of the imperial regulation on landed estates: how open the normative framework can be in order to encourage the land to be cultivated, and how this can be modified in order to suit the lands distinctive features and, at the same time, address the economic needs of the Fiscus and the empire. Secondly, a hypothesis has been formulated on how the adaptations of frame regulations could have been forged at the ground level, by which certain members of the imperial administration had precise (even if still undetermined) duties on specific estates.

## Appendix: *sermo procuratorum* (Aïn Jammala, sides 3 and 4; Lella Drebblia, sides 2, 3 and 4; Aïn Wassel, *passim*)

*Sermo procuratorum Imperatoris Caesaris Traiani Hadriani.*

*Quia Caesar Noster, pro infatigabili cura sua per quam adsidue pro humanis utilitatibus excubat, omnes partes agrorum quae tam oleis aut uineis quam frumentis aptae sunt excoli iubet.*

*Idcirco permissu prouidentiae eius potestas fit omnibus etiam eas partes occupandi quae* ***in centuris elocatis saltus Blandiani et Vdensis et in illis partibus sunt quae ex saltu Lamiano et Domitiano iunctae Thusdritano sunt*** *nec a conductoribus exercentur.*

*Iisque qui occupauerint possidendi ac fruendi heredique suo relinquendi id ius datur quod est lege Hadriana comprehensum de rudibus agris et iis qui per decem annos continuos inculti sunt.*

***Nec ex Blandiano et Vdensi saltu*** *maiores partes fructuum exigentur a possessoribus quam quartas. Exinde qua cetera omnia per iussa Caesaris Nostri magis augeri quam ullo modo dimminui sinis. Si quis tamen ea loca neglecta a conductoribus occupauerit, quae rigari solent, tertias partes fructuum dabit.* ***De his quoque regionibus quae ex Lamiano et Domitiano saltu iunctae Thusdritano sunt****, tantundem dabit.*

*De oleis quas quisque in scrobibus posuerit aut oleastris inseruerit captorum fructuum nulla decem proximis annis exigetur. Sed nec de pomis septem annis proximis nec alia poma in diuisionem umquam cadent quam quae uenibunt a possessoribus. Quas partes aridas fructuum quisque debebit dare eas proximo quinquennio ei dabit in cuius conductione agrum occupauerit. Post id tempus, rationi Caesaris Nostri (?) e lege relocandi dabit.*

**Translation**

Speech of the procurators of the emperor Caesar Hadrian Augustus.

Because our Caesar in keeping with his tireless care, because of which he is assiduously vigilant for the interest of humankind, orders all parts of the fields that are suited for both olives or vines as well as cereals to be brought under cultivation.

Therefore, by the permission of his providence shall everyone have the authority to occupy even those parts which are **in the leased-out centuries of the Blandian and Udensis estates and in those parts which have been joined to the Thusdritan estate from the Lamian and the Domitian estates**, and are not being worked by the lessees.

To those who have occupied them that right of possession and enjoyment and bequest to one’s heir is given, which is included in the law of Hadrian concerning vacant lands and those which have not been cultivated for 10 consecutive years.

Nor will any possessor **from the Blandian and Udensis estates** be requested more than one-fourth share of the crops after that, insofar as you allow everything else (the cultivated land?) to be increased rather than decreased in any way in accordance with the orders of our Caesar. If nevertheless anyone will have occupied those places neglected by the lessees, but which are customarily irrigated, he will give one-third shares of his crops. **Also, from those regions which have been joined to the Thusdritan estate from the Lamian and the Domitian estate**, he will give [the same amount].

From the olives which each person will have placed in holes or will have grafted onto wild olives, no share of the collected crops will be exacted during the next 10 years; nor will the share of the fruits exacted during the next 7 years, nor will any fruit fall into the division other than those that will be put up for sale by the possessors. Whatever dry shares of crops each person will be obliged to give, he will give them for the next 5 years to that person in the course of whose lease he will have occupied the field, after that time [he will give them] to the account of our Caesar [-?-] in accordance with the law of reletting.

# The Effectiveness of the Early Roman Law of Obligations for BankersByPhilip Kay

“Law is almost inevitably seen as increasing efficiency; but few institutions have only beneficial effects”.[[203]](#footnote-203)

This paper takes a critical look at the Roman law of obligations as it affected bankers and their clients between about 310 and 190 BCE (a period to which I shall refer, for convenience, as ‘the long third century’).[[204]](#footnote-204) In particular, it examines the extent to which, given the importance of judicial security in the financial world, Roman civil law during this period provided practical and effective mechanisms for bankers and their depositors to make contractual agreements with each other and to seek legal remedies when monies were not repaid.

It is clear that the provision of credit had been taking place in Rome since at least the early years of the republic. The first secession of the plebs in 494 BCE is attributed to a reaction against the harsh measures used by creditors and Rome’s earliest legal code, the Twelve Tables, covered several debt-related issues. Thereafter, the problem of debt is a leitmotif running through Livy’s descriptions of civil discord in the early and middle republic. The earliest date given by an ancient author for the presence in Rome of *argentariae* (‘banks’ in classical Latin) is for 310 BCE by Livy and he also, together with Varro and Pliny the Elder, points to their presence there at various points during the third century.[[205]](#footnote-205) There are some problems with the notion that deposit bankers were operating in Rome this early (and it is beyond the scope of this paper to deal with them here[[206]](#footnote-206)), but the surviving plays of Plautus, written in the two decades after 205 BCE, present a monetised world in which *argentarii*, professional deposit bankers, are active and in which the use of banking terminology suggests that deposit banking was already well established as part of everyday Roman life. These *argentarii* accept deposits from their clients, make payments for them, and lend out the pooled money at interest. This is the kind of institution which the fourth-century Athenian orator, Demosthenes, defined as “a business operation producing risk-laden revenues from other people’s money”.[[207]](#footnote-207) It may be thought unlikely that these banks appeared out of the blue during the war against Hannibal, or in its immediate aftermath.

Between the Roman bank and the modern bank, there are of course striking differences—in technology and in the size and scope of their operations. The businesses of the Roman *argentarii* were unincorporated. They were not registered with, or regulated by, a state authority except, from time to time, over the rate of interest they charged. They went out of business if they made imprudent loans, as there was no central bank to bail them out. There are a few rulings in Justinian’s *Digest* which mention bankers or banking, but it is clear that Rome never had a banking law as such. A Roman banker, therefore, was a private individual who was legally in the same position as any other Roman citizen and would have been subject to the same law of obligations and litigation procedures.

There is, however, an important requirement if deposit banking is to flourish. In the modern world, a state-sponsored legal framework that supports a system of contract law and provides a judicial procedure for the recovery of an unpaid debt or deposit is vital to bankers and their depositors. But why should judicial security have been important in mid-republican Rome? As we shall see, other forms of legal security based on collateral and personal guarantees were available and no doubt enforcement of a debt by violence too, if all else failed.[[208]](#footnote-208) Polybius, contrasting the untrustworthiness of the Greeks, believed that the Romans were unusually honest because of their *deisidaimonia* (fear of the gods) and goes on to say that in Rome “men having the handling of a great amount of money do what is right because of the trust pledged by their oath”.[[209]](#footnote-209) And indeed it is entirely plausible that a member of the Roman elite would not have wanted to have their *dignitas* impaired through a breach of *fides* (their ‘credit’) or, worse still, to have risked the very serious consequence of *infamia* through failing to repay a loan or to pay up under a personal guarantee.[[210]](#footnote-210) Legal actions, however, are needed not for transactions that go well, but for those that go wrong. In fact, the plays of Plautus, even allowing for large doses of comic exaggeration, suggest that Roman depositors may occasionally have faced the problem of recovering their money from unscrupulous bankers:

Are you surprised that I wouldn’t trust you to do the same to me as some bankers do? If you entrust them with anything, they are out of the forum faster than a hare from its cage door at the games.[[211]](#footnote-211)

So, forms of legal procedure and contract law that were practically effective were no less vital in third-century BCE Rome than they are today. An enforceable contract providing judicial security would have given Roman bankers and their depositors enhanced confidence that they would get their money back from a delinquent borrower or bank. In turn, this enhanced confidence could have stimulated more banking activity.

## Sources

But pinning down the precise modalities of Roman legal procedure and the law of obligations in the long third century is difficult because of the limited source material that has survived. With the exception of Polybius’ military and diplomatic history of the First Punic War, the literary evidence for Roman history during much of the third century is fragmentary. Our knowledge of the period is particularly hampered by the loss of the full text of Livy’s second decade which covered a period from 293 BCE, when his first decade ends, to 218 BCE, when his third decade begins. For these seventy-five years, covered by Livy’s lost second decade, the domestic social, economic and legal history of third century Rome is virtually a complete blank.[[212]](#footnote-212) This is an important consideration and we shall return to it later. The closest contemporary legal sources for the long third century are a few fragments of the Twelve Tables, dating according to tradition from 450 BCE but only transmitted by considerably later authors in quotations and paraphrases, and Plautus’ comedies which are helpfully studded with relevant banking and legal references.[[213]](#footnote-213) Much later evidence includes Gaius’ *Institutes*, a didactic work for students of Roman law written in the second century CE. Gaius is particularly important because he believed he should investigate the origins of the classical law of his own day;[[214]](#footnote-214) and we may, in consequence, be reasonably confident that, for example, the wording of the archaic legal formulas that he provides in his *Institutes* bears some resemblance to the original versions.

In terms of modern scholarship, the study of Roman law has been dominated since the nineteenth century by the dogmatic Romanist tradition. As Cairns and du Plessis have put it: “most scholars of Roman law . . . have still tended to treat their material as an ahistorical given, only to be investigated and expounded dogmatically”.[[215]](#footnote-215) This is particularly true of scholars of the “classical period” of Roman law for whom the extensive surviving opinions of jurists of the second century and first half of the third century CE, which are redacted in the *Digest*,provide a large and fertile hunting ground. With a few notable exceptions,[[216]](#footnote-216) Romanists have expended little effort on trying to understand the shape and structure of the poorly documented “archaic period” of Roman law (the period from the age of the kings to roughly the middle of the second century BCE), particularly in relation to the law of obligations. As we shall see, the reality of archaic law was in many respects different from classical law.

Livy describes the Twelve Tables as the source of all public and private law.[[217]](#footnote-217) But the surviving fragments contain almost no criminal law and no public law and are largely concerned with the private sphere. The main areas of Roman life covered by the fragments that have survived are family, wills, succession and rules concerning *tutela* (*XII tab.* 4-5.11.1), property and farming, including issues involving magic (*XII tab.* 6.1 - 8.6), delict (*XII tab.* 8.9 - 9.3, 12.1-2) and funerals (*XII tab.* 10.1-9). Each provision was itself a *lex* and is usually in the form of a terse injunction or prohibition, expressed as a future imperative clause with a conditional clause that defines the situation. There is an emphasis on procedure, such as getting a defendant to court and exacting judgements and punishments (*XII tab.* 1-3.12.3) and, with the exception of a couple of references to a *hostis*, the archaic term for a foreigner, the Twelve Tables give every sign of being laws for an agrarian community which has limited contact with the outside world.[[218]](#footnote-218) It is, however, clear that debt was an important area. The Twelve Tables capped the rate of interest (*XII tab.* 8.7), laid out rules for personal guarantors (*XII tab.* 1.4; 1.10, 3.3), regulated punishments for defaulting debtors (*XII tab.* 3. 5-7), and defined procedures for the execution of judgement by creditors (*XII tab.* 3.1-4). *Nexum,* or debt-bondage, was already in existence by the time of the Twelve Tables (*XII tab.* 1. 5; 6.1) and remained so until it was effectively abolished by a *lex Poetilia* of 326 or 313 BCE.[[219]](#footnote-219) That the Twelve Tables were still the cornerstone of Roman civil law (*ius civile*) a quarter of a millennium after their promulgation can be inferred from the mention by Pomponius’ epitomator of a legal work by Sextus Aelius Paetus (*cos*. 198 BCE).[[220]](#footnote-220) Known as the *Tripertita*, it contained the law of the Twelve Tables, an interpretive commentary, and the legal formulas for procedure, the so-called *legis actiones* (actions of law). The work wasapparently considered to be “the cradle of the law”. So, the Twelve Tables probably remained fundamental to the operative civil law throughout the long third century. Having said that, it is likely that trials based on praetorian formulas, in particular ones relating to agency, sale, and leasing, began to take place from the third century BCE onwards, even though it was not until the passing of the shadowy *lex Aebutia* (in what is usually assumed to have been in the second half of the second century BCE) that all such praetorian actions were permitted to have civil effects.[[221]](#footnote-221)

## The structure of archaic Roman law and the notion of obligation

Under classical Roman law, for an agreement concerning an economic transaction to be legally effective, it had to fall within the framework of some particular, recognised contractual type. If it did not, then no action would be available and the matter could not come to court. In his *Institutes*, Gaius set out a scheme of the four types (*genera*) of contract that were recognised in the classical law, differentiated according to the way they arose:

And first, let us examine those [obligations] which arise from contract. Of these there are four different types: for an obligation is contracted either by [the delivery of] an asset, by [speaking specific] words, by writing, or by consent.[[222]](#footnote-222)

Within this scheme of ‘typicality’, it was the actions of the contracting parties, their formulaic spoken phrases, their written words, or their consent in good faith, and not the concept of agreement, that rendered a contract valid. But it was only from the early first century BCE, when the jurist Q. Mucius Scaevola (*cos*. 95) began to classify obligations, that this system evolved and there is no evidence to suggest that legally enforceable obligations were grouped into such a scheme of contractual types during the long third century.[[223]](#footnote-223) Rather, in archaic law, certain commercial transactions, which involved some kind of future performance by one of the parties, received legal protection because the need to compensate any detriment was regarded as an *obligatio*; and we can see the centrality of this notion of obligation (one which was of course highly relevant to debt and banking) in the wording of the procedural formulas used during this period.[[224]](#footnote-224) To these formulas we now turn.

From at least the time of the Twelve Tables, ordinary civil litigation took place in two stages. In the first, *in iure*, stage, a magistrate presided over the plaintiff’s attempt to seek redress against the defendant. The specific grievance of the plaintiff was unacknowledged and he could use only one of a highly ritualised set of ready-made, verbally fixed, oral formulas – the *legis actiones* - within which any legal claim had to be framed.[[225]](#footnote-225) Pomponius’ epitomator in the *Digest* states that “the knowledge of interpreting the Twelve Tables as well as the *legis actiones* were in the hands of the college of the *pontifices* (priests) and it was determined each year which *pontifex* should superintend private cases”.[[226]](#footnote-226) This pontifical authority over private law had presumably originated in a perceived connection between the interpretation of divine law (*fas*) and of secular law (*ius*). The *pontifex* revealed the secular law (*iudicare*), as he did the will of the gods.[[227]](#footnote-227) Because the formulas of the *legis actiones* had become rigidly fixed under the *pontifices*, the parties had to enunciate the ritual words precisely and one wrong word would invalidate a person’s case.[[228]](#footnote-228) The procedure *per legis actiones* did not allow for complex defences. Either there was an unfulfilled obligation arising from a transaction which required remedy, or there was not.

Gaius’ *Institutes* describe five kinds (*modi*) of *legis actio* which had been used by “our ancestors (*veteres*)” before “numerous actions were introduced by the praetor’s edict”.[[229]](#footnote-229) Three of these were procedures for beginning an action at the *in iure* stage which, if approved by the magistrate, enabled the plaintiff to seek redress in the second stage of the trial. These were the *legis actio per sacramentum in personam* (henceforth referred to as the *sacramentum*), the *legis actio per iudicis arbitrive postulationem* (the *iudicis postulatio*) and the *legis actio per condictionem* (the *condictio*). The two other kinds (the *legis actio per manus iniectionem* and the *legis actio per pignoris capionem*) were highly prescribed methods of execution which allowed the plaintiff to seek redress against, respectively, a convicted debtor and the convicted debtor’s property.

At the centre of the procedural formulas was the notion of obligation. For example, *iudicis postulatio* was used in the case of a claim based on a *sponsio* (the archaic form of stipulation) and, in the language quoted by Gaius, the plaintiff simply claimed that there was an obligation arising out of the particular *sponsio* under which the defendant “ought to give” something (*dare oportere*):

The plaintiff used to say: “Based on your *sponsio*, I declare that you ought to give me ten thousand sesterces. I demand that you affirm or deny this”. His opponent used to say that he had no such duty. The plaintiff then used to say: “Since you deny it, I demand that you, Praetor, appoint a judge or an arbiter”.[[230]](#footnote-230)

If, after the exchange of such formulaic statements by the plaintiff and the defendant, the magistrate approved the plaintiff's application to proceed against the defendant, the lawsuit moved to the second stage, which was a trial before a lay judge (*apud iudicem* or *apud arbitrum*). This was the stage at which witnesses and evidence were presented and a judgement given. There was no formal appeal process against the final judgement.[[231]](#footnote-231)

Legal procedure is therefore the key to grasping the central concept of obligation that underlay those commercial transactions which were protected by the archaic *ius civile*. For these transactions, remedies were available to a plaintiff who could successfully claim that a defendant “ought to give or do” a certain thing (*dare facere oportere*).

## *Mancipium*, *sponsio*, and *mutui datio*

There is, however, an additional consideration. In the archaic law, certain commercial transactions could be legally effective only if they were created by specific ritual acts. Originally, Rome’s legal system probably consisted, in the main, of unwritten law (*ius*) based on custom (*mos* or *consuetudo*).[[232]](#footnote-232) At some point, before they were documented in the Twelve Tables, a small group of these ritualised acts developed which were capable of creating obligations that we would recognise as commercial agreements or contracts.[[233]](#footnote-233) In common with much archaic law, the dating of the appearance of these acts is notoriously difficult, not least because later Roman jurists were generally uninterested in dates. The formality of the acts probably reflected the need to preserve the memory of the transaction in a community that was not literate, on the basis that, the more ritualised the act, the easier it was for witnesses to remember.

One of these acts was the solemn legal procedure of conveyance by *mancipium* (later termed *mancipatio*) through the ritual of ‘bronze and scales’ (*per aes et libram*). The act was mentioned in the Twelve Tables, but by the time we hear about it in our later legal sources, it is an ossified procedure that is declining in importance (it is not mentioned in the *Digest*). Yet originally it was the method of legal conveyance under the *ius civile* of something that was adjudged valuable (a *res mancipi*) and a procedure performed in widely different contexts. Reflecting the agrarian character of early Rome, *res mancipi* comprised an exclusive list of land in Italy, slaves, beasts of burden and draught animals (including oxen, horses, mules and donkeys), and rustic servitudes (rights over pathways and water courses).[[234]](#footnote-234) *Mancipium* consisted of the weighing of bronze, agreed as the price for the acquiring of power over such a *res mancipi* or a person, performed in the presence of at least five witnesses and of a man holding the scales (*libripens*).[[235]](#footnote-235) The archaic formula that was spoken during the ceremony is given by Varro and Festus.[[236]](#footnote-236) By using the utterances (*nuncupationes*) also pronounced during the ceremony, the parties could clarify the specific purpose of the act.[[237]](#footnote-237) As a result, *mancipium* could grant legal value to transactions which the classical law would define as ‘contracts’.[[238]](#footnote-238) For example, the ability to take collateral is important to a banker, since it gives the lender added protection and a different means of recovering the principal of a loan if the borrower is ultimately unable to repay it. *Nexum* is mentioned in the Twelve Tables but, after its effective abolition by the *lex Poetilia*, there was only one form of “real” security available to a banker. *Fiducia* was the actual making over of full ownership of a *res mancipi* to a creditor by *mancipium*. The creditor undertook to convey the property back to the debtor on repayment of the debt. Itgave huge protection to the creditor, but the debtor lost the use of the item while the debt was owed.

*Sponsio*, the original form of stipulation, was another ancient act that was already well developed before the time of the Twelve Tables.[[239]](#footnote-239) By it, any agreement could be made actionable by reducing it to the form of an oral formal promise in answer to an oral formal question.[[240]](#footnote-240) In order to make the agreement, the promisee asked: “*spondesne*?” (“Do you promise X?”), and the promisor immediately replied: “*spondeo*” (“I promise”), using the same verb, with no delay between the question and answer (the reply did not have to repeat everything in the question).[[241]](#footnote-241) It was a procedure not unlike the exchange of vows in the Christian marriage ceremony: “Do you take this man to be your lawfully wedded husband?”, “I do”.[[242]](#footnote-242) *Sponsio* thus created a duty of conduct – an obligation to perform a future action on the part of the promisor only, but requiring the participation of the promisee to make it valid. A failure to perform (for example, a failure to pay the agreed interest) was viewed as a detriment which ought to be compensated. Acts of stipulation are very common in our legal, literary and documentary sources and there are several examples of its use in the plays of Plautus, for example in his *Pseudolus*: “‘Will you give two hundred genuine gold coins of Philip?’ ‘I shall give’”.[[243]](#footnote-243) Elizabeth Meyer has argued that acts of stipulation were recorded on *tabulae* (wax tablets) from an early date, but she herself admits that this is a controversial point.[[244]](#footnote-244) There is in fact no mention in any of our sources for the long third century of such an act being recorded, just as there is no evidence of witnesses being necessary for the validity of the act.

*Sponsio* could be usednot only to promise a conduct but also to create a personal guarantee, through an accessory promise, and the effect was to make the debtor and the surety (the *sponsor*, if a Roman citizen, or the *fidepromissor*, if a *peregrinus* under a *stipulatio*) equally liable for the debt.[[245]](#footnote-245) In other words, as Fiori puts it, “a *sponsio* could oblige the promisor not only to give a thing (*dare*) or to perform an activity (*facere*) but also to act as a guarantor (*praestare*, to act as a *praes*)”.[[246]](#footnote-246) It had the advantage from the debtor’s point of view that, if he could persuade a patron or a friend to guarantee his debt, he did not have to lose the ownership and the use of a *res mancipi*, as he would under *fiducia*. It is hardly surprising, therefore, that personal security grew in importance during the middle and late republic, at least judging by the amount of legislation on the subject. We know of seventeen *leges* (statutes) during the four hundred years after the Twelve Tables that dealt with matters of private law and five of them concerned personal security for debts.[[247]](#footnote-247) *Sponsio* was, in some ways, the most flexible form of Roman obligation, but it did have some very significant drawbacks. Firstly, under the *iudicis postulatio* for example, the judge did not have any discretion to give effect to informal, ancillary agreements between the parties that had not been covered in the original stipulation or to allow a plea such as a mistake or duress. As a result, a borrower could be condemned only for as much as he had promised to return to the lender, the test being what the debtor “ought to give” (*dare oportere*). Secondly, *sponsio* was an oral agreement which brought with it a number of attendant risks. It was not suited to recording a complex situation or variations from the norm. In other words, it did not have the advantages that a written contract would have brought to the speedy resolution of disputes. It could not, for instance, act as a reference source for details nor, at the most basic level, could it furnish the evidentiary proof that an arrangement had in fact been made. The third drawback, and in many ways the one that was most relevant for a state that was rapidly expanding, was that both participants had to be present. They could not be *absentes*.[[248]](#footnote-248)

Though not mentioned in the surviving fragments of the Twelve Tables and not created by a specific ritual act, so far as we know, the giving of a loan, *mutui datio*, which generated an obligation for its return, probably had a long prehistory before we hear of it.[[249]](#footnote-249) *Mutuum* may originally have been actionable by the *sacramentum* before it became actionable under the later *condictio* (discussed in detail below) but we do not know. *Mutuum* was the loan of a fungible, “such as money, wine, oil, grain, bronze, silver, and gold”.[[250]](#footnote-250) It is often translated in modern scholarship as “loan for use” or “loan for consumption”, because ownership of the things lent was transferred. Fungibility meant, for example in a loan of money, that the debtor was obligated to restore not the actual coins lent but coins of the same quality and quantity. This is confirmed by the *condictio* whose wording, as reported by Gaius, shows that it is against the unjustified retention of something which the debtor ought to give (*dare oportere*) to the plaintiff.[[251]](#footnote-251) As the obligation was simply to return the exact sum lent,no claim for interest could arise from the *mutuum* itself, and it seems originally to have been an arrangement employed primarily between friends.[[252]](#footnote-252) In fact, Alan Watson believed that its origin could have been as a neighbourly loan of seed corn;[[253]](#footnote-253) but an equally plausible explanation is that it addressed the unjustified retention of a loan of money from a patron to his client.[[254]](#footnote-254) *Mutuum* appears frequently in Plautus and Terence as a noun or adjective;[[255]](#footnote-255) and in Plautus’ *Asinaria*, a clear distinction is made between *pecuniae mutuae*, an interest-free loan from a friend, and *pecuniae faenore sumptae*, money borrowed at interest:

I'll beg, I'll entreat each friend as I see him; both good and bad am I determined to approach and hassle. But if I can't borrow [the money] by way of *mutuum*, I can definitely get it at interest (*faenore*).[[256]](#footnote-256)

In effect, *faenus* in this passage is a metonym for the combination of *mutuum* and *stipulatio*, as any agreement for interest would have had to have been promised by a separate ancillary *stipulatio*. By the first century CE, *mutuum* and its cognates, combined with a *stipulatio*, had become the standard hybrid loan contract that we find recorded in some of the earliest surviving documents of practice, the tablets of the Sulpicii.[[257]](#footnote-257) This raises the question of why the parties would not just have entered into a stipulation rather than relying in any way on a *mutuum*, since *mutuum* on its own would have been useless in a situation in which one might wish to add conditions to a contract, such as repayment in good coin or with interest. The explanation must be that the important feature of the *mutuum* in financial transactions was precisely that it concerned the loan of a fungible, not a single object, and so a borrower did not need to repay the precise coins lent.[[258]](#footnote-258)

By about 300 BCE, therefore, there were probably only three acts that were directly relevant to a banker: the oral *sponsio* (which could be used both to arrange interest and to create a personal guarantee in the form of an accessory promise), *mancipium* for arranging the oldest form of real security, *fiducia*, and *mutui datio* for a loan. *Sponsio* and *mutuum* were particularly useful for a banker or depositor because both generated unilateral obligations and so created a duty in only one of the parties: the obligation of the borrower to return a debt. *Depositum*, mentioned in the Twelve Tables, was probably irrelevant, since this was an act involving the interest-free transfer of a non-fungible object or objects for safe-keeping, and not for use.[[259]](#footnote-259) This meant that, during the long third century BCE and after, an interest-bearing bank deposit was probably regarded legally not as *depositum*, but as a loan to the bank (*mutuum*), with interest arranged separately by stipulation under a *sponsio*. We see this in the Sulpicii tablets where the verb *depono* and its cognates appear only in connection with the placing of security for safe-keeping,[[260]](#footnote-260) while what we would term “deposits” were contracted as if they were loans to the proprietors of the bank.[[261]](#footnote-261) In fact, a contract covering an interest-bearing deposit, whereby the bank took and used the money but returned the equivalent sum and not the actual coins, is explicitly attested only in late legal sources.[[262]](#footnote-262) It was spuriously termed *depositum irregulare* (“irregular deposit”)by late medieval scholars, which is a designation not found in the ancient literature or documents of practice.

## The *condictio*

At the beginning of the long third century, it is likely that there were only two procedural *legis actiones* available which corresponded to *mancipium*, *sponsio*, and the *mutui datio* (if, as seems likely, this act was legally recognised by then). First, there was the general residuary process of the *sacramentum* which dated from before the Twelve Tables. Originally, it probably involved both parties swearing oaths but, at some point, these oaths were replaced by the placing of monetary stakes or wagers. Secondly, there was the *iudicis postulatio* which, according to Gaius, could be used only in cases prescribed by statute, as it was in the case of *sponsio*. It is the only procedural action that we know was mentioned in the Twelve Tables and it may have been introduced by them.[[263]](#footnote-263) On the basis of Gaius’ description, the *iudicis postulatio* was a faster and simpler procedure than the *sacramentum*, because monetary stakes were not required, as they were under the *sacramentum*, and a judge was nominated immediately, rather than after a thirty-day delay.

Although the circumstances in which it happened are cloudy, both the official calendar of days, the *fasti*, when legal actions could and could not be brought, and the wording of the *legis actiones* were published by the curule aedile of 304 BCE, Gnaeus Flavius, a former scribe of the censor of 312 BCE, Appius Claudius Caecus.[[264]](#footnote-264) The book containing the legal actions became known as the *Ius Civile Flavianum*. Pomponius’ epitomator records a rather implausible story that Appius Claudius Caecus himself wrote a book about the *actiones de usurpationibus* (actions concerning interruptions of possession) but goes on to say that he was followed by a “*successio prudentium*” who commented on the law. In effect, these secular jurisconsults inherited the interpretative role of the *pontifices*, though two at least of the first *prudentes* that Pomponius’ epitomator mentions, P. Sempronius Sophus (*cos*. 304 BCE) and Tiberius Coruncanius (*cos*. 280 BCE) were in fact themselves *pontifices*, perhaps a hint that the abolition of the priestly monopoly was not as straightforward as Pomponius implied. Coruncanius is significant not only because he was the first plebeian *pontifex maximus* (between 255 and 252 BCE) but also because, according to Pomponius’ epitomator, he was the first to make public professions of his juristic opinions (*primus profiteri coepit*).[[265]](#footnote-265)

These legal changes were contemporaneous with a number of developments in the Roman economy, some of which were also associated with the censor Appius Claudius Caecus. This was the period during which Rome began construction of its first aqueducts, the *Aqua Appia* in 312 BCE and the *Aqua Anio Vetus* in 272 BCE. The latter had an extraordinarily high capacity, estimated at 2.4 times that of the *Aqua Appia*, and seemingly obviated the need to build another aqueduct for another 127 years.[[266]](#footnote-266) The first long-distance road, the *Via Appia* into Campanian territory, was started in 312 BCE. There is evidence as well for the expansion of Roman trade at around this time in the form of the black-slip pottery vessels from the “atelier des petites estampilles”, produced at workshops in Rome and southern Etruria. These had a wide distribution both throughout Italy and along the coasts of the western Mediterranean.[[267]](#footnote-267) The end of the fourth century also saw the production of Rome’s first coins, a development which Seth Bernard connects with the growth of a new mercantilist tendency amongst certain Roman aristocrats associated with Appius Claudius Caecus.[[268]](#footnote-268) Against this background, therefore, it is tempting to relate the introduction of a third procedural action, particularly one that was relevant to credit and banking, to this period of economic change.

This new action, the *condictio*, made the procedure of suing for an unpaid debt more straightforward, at least within the constraints of the procedure *per legis actiones*. Gaius tells us that the *condictio* was introduced by a *lex Silia* for the recovery of a definite sum of money (*certa pecunia*) and by a *lex Calpurnia* for a definite thing (*certa res*).[[269]](#footnote-269) It is usually held that the *lex Silia* was earlier than the *lex Calpurnia* on the basis that otherwise there would be no need for a law specifically covering a definite amount of money. Given that the dates of these laws are unknown, it is a reasonable supposition that the *lex Silia* was introduced during the period covered by Livy’s lost decade, which is also the period during which it is often assumed that another *lex Silia*, concerning weights and measures, passed into law.[[270]](#footnote-270) Certainly the *lex Silia* *de condictione* is no later than the end of the third century, because a *terminus ante quem* for its passing is provided by a passage from Plautus’ *Rudens*, and possibly too from other passages in his plays.[[271]](#footnote-271) Gaius says that he does not know why the *condictio* was introduced, because the *sacramentum* and the *iudicis postulatio* were already available.[[272]](#footnote-272) But the *condictio* appears to have been a kind of blanket action covering all forms of debt obligation. It would have provided a simpler means of enforcing a claim for a specific sum of money, under whatever legally enforceable obligation it arose, unaffected by the restriction imposed on the *iudicis postulatio* that it could be used only in those cases authorised by statute.[[273]](#footnote-273) This is confirmed by Cicero’s *pro Roscio Comoedo*, a speech which is concerned with the *actio certae creditae pecuniae*. This action is generally accepted to be another name for the *condictio*, or at least a version of it in the formulary procedure introduced by the praetor’s edict, and a passage from the *pro Roscio Comoedo* makes clear that it provided a remedy in respect of three transactions: *pecunia data*, *pecunia expensa lata*, and *pecunia stipulata*, which corresponded respectively to *mutuum*,the *obligatio litteris* (also known as the ‘contract *litteris*’ or the ‘literal contract’) and stipulation.[[274]](#footnote-274)

## Banking records and the *obligatio litteris*

The acts under the *ius civile* which we have so far considered were oral or performative in form. And yet, at some point during the middle republic, the *ius civile* developed a dispositive written agreement in which the act of writing created the obligation, as distinct from providing evidence of it.[[275]](#footnote-275) This was the *obligatio litteris* and it was particularly useful for a professional banker and his clients. This agreement is sometimes described as obscure by modern scholars, but it becomes more comprehensible if we approach it in the context of bankers’ records and cashless transactions.

It seems reasonable to assume that, in Rome, bankers started keeping written records as soon as they began operating there. How otherwise would a banker have remembered twenty, fifty, one hundred or more transactions?[[276]](#footnote-276) The plays of Plautus mention the recording of financial transactions on a number of occasions. Characters draw up their *ratiunculae* (accounts) on *tabulae* (wax tablets). For example, in the *Curculio*, the deceitful banker Lyco (who, significantly, plays a major role in the play) says at one point: “I seem to be blessed. I’ve drawn up an account to work out how much money would be for me and how much would be debt”.[[277]](#footnote-277) Another example comes in the prologue of the *Truculentus*. Here there is a clear reference to interest-bearing money (*aera usuraria*) being recorded in a banker’s *tabulae* as both assets (*expensa* – i.e., ‘sums paid out’, so loans) and liabilities (*accepta –* i.e., ‘amounts received’, so deposits).[[278]](#footnote-278) Three centuries or so later, by the second century CE at the latest, formal record-keeping by bankers was held to be an especially important responsibility and almost all of chapter 13 of book 2 of the *Digest* is taken up with extracts relating to the legal obligation of the *argentarius*, in the public interest, to maintain complete and accurate accounts (*rationes*). Furthermore, these accounts should contain details of all transactions, be dated “with the day and the consul”, and had to be disclosed in court.[[279]](#footnote-279) This is very similar to what we find in fourth-century BCE Athens, where all banking transactions were entered on bank records (*grammata*) which could be produced for examination or as evidence in court. Demosthenes describes a formulaic approach to the format of records and record-keeping which was designed to help bankers with accurate accounting.[[280]](#footnote-280) At Rome, a development of such record-keeping was the cashless movement of money, when money deposited with a banker could be transferred by a written entry in the banker’s records. The result was that large amounts of coin did not have to be (literally) carted around. The earliest evidence we have of this comes from Plautus’ *Asinaria* where a character talks about “writing *nummos* (coins)”.[[281]](#footnote-281) This kind of cashless transfer also seems to have taken place in an episode described by Polybius. In the late 160s BCE, Scipio Aemilianus decided to pay off fifty talents, an enormous sum, which was the balance of the dowries owed to his adoptive aunts. The money was on deposit with a banker (*trapezites*), who was instructed by Scipio to make a transfer of the money (*diagraphe*, literally a ‘writing through’) to each of the husbands of the aunts.[[282]](#footnote-282) As Harris has pointed out, given that fifty talents in silver denarii would have weighed 1.2 tonnes, it seems highly unlikely that the banker counted out this sum in coin and transported it through the streets of Rome.[[283]](#footnote-283) What the banker must have done was to make entries in his ledger, transferring the money into the husbands’ accounts.[[284]](#footnote-284) It was this kind of cashless transfer that probably gave rise to the *obligatio litteris*.

The *obligatio litteris* had fallen out of use by the sixth century CE and therefore did not appear in the *Digest*.[[285]](#footnote-285) So the only explanation that we have of the procedure is to be found in Gaius’ *Institutes* which refers to the transfer, in a ledger, of a debt obligation from one debtor to another. Gaius distinguishes two forms of this arrangement of which the second, the ‘*a persona in personam*’ form, is relevant to banking:[[286]](#footnote-286)

*A persona in personam transscriptio fit, ueluti si id, quod mihi Titius debet, tibi id expensum tulero, id est si Titius te pro se delegauerit mihi.*

A transfer from a person to a person comes about, for instance, if I shall have entered in my ledger, as paid out to you, the amount that Titius owes to me; that is to say as if Titius shall have delegated you for himself to me).[[287]](#footnote-287)

The economic effect of this form of the *obligatio litteris* was to novate an existing monetary obligation from one debtor to another and, as a development of the cashless transfer, the *obligatio litteris* brought a number of benefits. Its main value, as Gaius tells us, was that a transfer, a *transscriptio*, could be made *cum absente*, with an absent party (for example, by letter), overcoming the need for presence required for both stipulation and *mutuum*.[[288]](#footnote-288) In a world in which, previously, both parties had been required to be present, this was a radical change.

An example will illustrate what Gaius describes. A banker in Rome has lent one thousand sesterces to Titius who lives in Nola. Titius then sells a rotary mill for one thousand sesterces to Negidius who lives in Capua. So Negidius owes Titius one thousand sesterces and Titius owes the same amount to the banker. Payment can be effected, from Negidius to Titius, by Titius writing to the banker and asking him to make two entries in his ledger. The first is for the banker to enter as paid out to Negidius one thousand sesterces, and the second is for the banker to enter his loan to Titius of one thousand sesterces as having been repaid. That is to say (to use Gaius’ words), “as if Titius shall have delegated Negidius for himself to me [the banker]”. The result is that Titius no longer owes one thousand sesterces to the banker. His client, Negidius, does. From Titius’ point of view, he has repaid the loan to the banker and neither Titius nor Negidius have had to travel to Rome to see the banker in person. As described by Gaius, therefore, the *obligatio litteris* was a way of exchanging one debtor for another in the absence of the parties, so allowing banking or business to take place at a distance. This could not have been achieved by a *sponsio*, which required the presence of both parties. If litigation became necessary, only the ledger needed to be produced because the obligation was the ledger entry itself and, in court, the *condictio* provided protection, as Cicero (*Pro* *Roscio* *Comoedo* 13-15) confirms.[[289]](#footnote-289) By the first century, we can see from Cicero’s correspondence in particular that long-distance transfers of money were a regular issue for the Roman elite.[[290]](#footnote-290)

The Latin term for the effect of the *obligatio litteris* procedure was *delegatio*, as we can see from the passage of Gaius quoted above.[[291]](#footnote-291) It is reflected in Cicero’s letters, but in fact the earliest contemporary mention of delegation is by Cato the Elder in his *De Agricultura*, written perhaps in the 160s or 150s BCE: “Until he pays, makes good, or delegates the money, let the herds and slaves, which are there, be held in pledge”*.*[[292]](#footnote-292)Cato goes on to say that, if there is a dispute about these matters, “judgement should take place at Rome”, suggesting that this passage is concerned with legal rights. There also seems to be an example of the *obligatio litteris* in Livy’s description of the events leading up to the passing of a *lex Sempronia* in 193 BCE.[[293]](#footnote-293) Livy reports that “many laws on interest” were evaded by Roman lenders transferring loans to *socii* (allies) who were not subject to these laws.[[294]](#footnote-294) In describing these transfers, Livy uses the phrase *nomina transcriberent* (literally, they wrote the account entries across) which echoes Gaius’ language in his description of the *obligatio litteris* procedure at *Institutiones* 3.130, quoted above, and suggests that *transscriptiones* *a persona in personam* were used to make cashless transfers of money.[[295]](#footnote-295) However, some legal scholars have raised doubts about this being a reference to the *obligatio litteris* procedure.[[296]](#footnote-296) In the first place, the passage envisages the substitution of creditors rather than debtors and Gaius, in his account, could be interpreted as saying that the *obligatio litteris* procedure consisted of a change in the debtor only. It is true that Gaius does not explicitly mention the possibility of a change in the creditor, but much depends on whether one understands the phrase *veluti si* at *Institutiones* 3.130 as giving one example of the possible options for the precise form of the classical contract or as stating that this is the only option. We incline to the former view and, in any case, Cicero’s letters provide considerable evidence that, by the late republic, a common method of, for example, paying for large property purchases was by delivering *nomina*, which were debts owed to the purchaser of the property by a third party.[[297]](#footnote-297) This first-century form of payment involved the disposal of a loan by the original lender to another person who then became the new creditor (i.e., the substitution of a creditor rather than of a debtor). A second problem is that Gaius tells us that, in settlement of a long-running legal disagreement, the Emperor Nerva had ruled that a *peregrinus* could not be the creditor or the debtor in the *obligatio litteris*,and yet the Livian episode envisages a transfer to peregrine allies.[[298]](#footnote-298) However, Cicero in his *de Officiis* describes an episode in the early first century in which a Roman *eques*, C. Canius, decides he wants to buy a property at Syracuse and a banker, named Pythius, “makes the account entries [and so] completes the purchase”.[[299]](#footnote-299) This seems to be another example of the *obligatio litteris* procedure, this time in its ‘*a re in personam*’ form (a purchase settled by account entries), and Cicero’s onomastic usage is obvious: C. Canius was a Roman citizen, but the Greek name clearly indicates that Pythius was a *peregrinus*. We saw earlier that Gaius had an interest in archaic law but, in this section of the *Institutes*, he is undoubtedly presenting a dogmatic account of the *obligatio litteris* procedure under classical law.

So the literary evidence suggests that the *obligatio litteris* was in use in the early second century, while its *stricti iuris* nature (confirmed by *Pro* *Roscio* *Comoedo* 13-15) implies that it was probably earlier than this, dating back to the *legis actio* system and so to the third century BCE.[[300]](#footnote-300) There is a reasonable probability, therefore, that the *obligatio litteris* was given legal effectiveness, at least in its *a persona in personam* form (the more useful one for bankers), by a *lex Silia de condictione* in the third century BCE.

## Athenian commercial contract law

Athenian commercial contract law provides a useful comparator to all this, because evidence for its language and formulation comes mainly from the body of forensic oratory between 400 and 320 BCE and is, therefore, only a generation or so before the beginning of the period we are discussing. In fourth-century Athenian law, there is a juridically simple conceptualisation of commercial legal obligations. In particular, we find an absence of legal prescription, the use of everyday rather than technical language, and a written rather than an oral or performative form. The common action taken to effect a remedy for breach of contract seems to have been a simple *dike blabes*, or action for damages. These features differ radically from the Roman approach.

No juristic definition of either contract or agreement is ever given in the surviving Athenian speeches, and we have no extant Athenian books of law, but the underlying philosophy appears to be that stated in a passage from Hyperides: “whatever one party agrees with another is to have authority”.[[301]](#footnote-301) As Brown says, this statement contains three implicit principles: “firstly, that the making of agreements is permitted under the law; secondly, that those private agreements are binding under the law; and, thirdly, that the terms or contents may be decided by the parties concerned”.[[302]](#footnote-302) This lack of prescription gave considerable flexibility to the contracting parties, since they were free to include whatever conditions they wished, and to describe them by using whatever vocabulary, terminology or phrasing they felt appropriate. The written contract for a maritime loan, recorded in Demosthenes 35, *Against Lakritos*, lays out its terms in unexceptional, non-technical language.[[303]](#footnote-303) In fact, the earliest known, written, commercial contract from Athens dates from 393 BCE. It appears in Isokrates’ speech, *Trapezitikos*, and appropriately enough concerns the amount of money that a client held on deposit with a banker.[[304]](#footnote-304) By about 350 BCE, dispositive written commercial contracts were the norm. A law was passed which provided that a case about a maritime loan could be brought to court only when there was a written contract.[[305]](#footnote-305) This is hardly surprising as, by that stage, the terms and conditions of maritime loans had become so complex and long that an oral method of recording them would have been hopelessly inadequate.[[306]](#footnote-306) For example, the contract in Demosthenes 35 contains a series of clauses which, firstly, itemise the normal voyage (involving amount loaned, details of the preferred route, and the interest payable on the loan), and then lays out the details of an alternative, more risky sailing-date together with an appropriately increased interest rate. The contract goes on to specify that the goods to be carried must be lien-free and follows this with numerous clauses covering all possible situations that may arise during the voyage and prior to repayment of the loan.[[307]](#footnote-307)

The main reason why writing was so useful in a complex transaction of this kind was that it was able to store information over time and so make memory more reliable. Confirmation of a transaction rested no longer on the longevity of eye-witnesses but on the retention of the document itself. It also hardly needs saying that the ability to document such a complex transaction is light-years away from the oral *sponsio* and the performative *mutuum* procedures found at Rome during the long third century. It is not until the middle of the first century BCE that we find the occasional passage cropping up in the works of Cicero suggesting that a written record (*cautio*) of an oral stipulation had been kept and such records appear to have acquired increasingly probative force over the centuries.[[308]](#footnote-308)

## Conclusion

The rigidly formulaic *legis actio* system and the acts of *sponsio*, *mancipium* and *mutui datio*, in their requirement for physical presence, reflected the parochial world in which they were developed. They catered to a face-to-face society, not to a world in which bankers and businessmen were dealing with each other at a distance, and they relied on the oral transmission of memory. Despite these shortcomings, certain agreements that contained some kind of future performance did receive legal protection in the long third century BCE because the need to compensate any detriment was seen as an obligation. These agreements provided judicial security for bankers and their clients, at least those who were Roman citizens, though their practical effectiveness was impaired by their unsuitability for complex transactions. Bank ledgers were recorded in writing from an early date but, so far, we have no evidence for the written recording of banking contracts before the Sulpicii tablets of the first century CE. Nevertheless, the legal recognition of the*obligatio litteris*, probablyin the third century BCE, was a significant development for bankers and their clients. It helped the increasing number of Roman citizens who were dispersing throughout Rome’s expanding empire to move money at a distance.

Other forms of obligation did not achieve legal recognition until later. For example, what are known in the classical law as the consensual contracts of sale, hire, and partnership, in which the relevant obligations arose from good faith (*oportere ex fide bona*), appeared only when the praetor started to grant protection *per formulas* to claims that were not covered by the existing *ius civile*, probably from the end of the third century onwards, while other contracts, such as *mandatum*, *commodatum*, *pignus* and *hypotheca*, came later on in the second century.[[309]](#footnote-309) The gradual move to the formulary system did of course provide more flexibility in litigation. But Roman bankers, so far as we know, never developed the endorsable cheque, the bill of exchange, or the letter of credit, perhaps in part because of their legal system’s ambivalent attitude towards written documents.

# Tax Farming as a Financial Enteprise in the Late Roman Republic and the Question of the *Partes*ByA.J.B. Sirks

Wealth in the Roman empire depended in the first place on the commercial exploitation of land. The state in turn depended on this wealth through taxation. Contrary to the later empire, the Roman republic and early empire contracted out the taxation of land (like several other public activities) to financial enterprises, the *societates publicanorum*. Tax farmers had to form a financial aggregate in order to comply with the requirements to form a tax farming company. These basically implied that they had to secure, somehow, the tax revenues of a province for five years, an enormous sum requiring numerous investors and good management. The *publicani* were profit oriented. The temptation to squeeze the tax payers was great, all the more since the provinces were considered conquered lands. Thus, the tax farming companies must have had considerable financial and economic weight, not only because of the amount of capital needed but also to maintain the oppression of the tax payers that went hand in hand with their operations. In addition to this, they acted as bankers. How did the legal system of Roman law regulate these financial activities? How, in particular, could participation in such an enterprise function as an investment? Was it a negotiable investment as has been suggested? To answer these questions, we need to enter into the fine points of the law on partnerships.

## Adaptation of the law to new circumstances

First a note about how the Roman legal system could structure and steer economic life. Was it merely a discursive and normative framework of which the rules could only be enforced if the parties in a conflict freely accepted the judgment of the court or arbiter, whether or not under social pressure?[[310]](#footnote-310) Roman law certainly was a discursive and normative framework, but to determine human actions it also functioned, within social and commercial interactions, with the sanction of a condemnation before a public court. Law in antiquity as such was almost always the outcome of long accepted practice. In Rome legal rules existed that changed (or supported changes in) the institutional framework that shaped economic developments but these were usually modifications of or additions to the praetorian edict, or a new interpretation of existing law devised by legal scholars to adapt it to new economic developments.[[311]](#footnote-311) Statute law was rarely used for this. (A notable exception was the lex Aquilia on wrongful damage.) Statutes were more often used to enforce a social convention no longer followed but still considered important, particularly for groups in society that fulfilled a reference role.[[312]](#footnote-312) Sumptuary laws or Augustus’ marriage laws, for example, tried to steer but their purport was to make the senatorial class in particular return to the ways of old and behave as they should.

## The *societas* as economic cooperation and enterprise

An example of the way law evolved continuously out of older forms, adapting to new economic demands, is a contract very closely connected with commerce and the economic aspects of Roman life: *societas*. It was most likely developed out of the *societas ercto non cito* (the community of partners in an undivided inheritance) and accommodated to the commercial demands of the 2nd century BCE. *Societas* was a consensual contract that allowed for the inclusion of economic arrangements. An example is the division of profit and loss amongst members of a *societas*. In the 1rst century BCE Q. Mucius Scaevola held that this could only be for fixed parts irrespectively of each partner’s investment (as was the case with the *societas ercto non cito)*, whereas Servius Sulpicius allowed for a differentiation, one partner taking more profit and less loss, depending on the value of his contribution, for example travelling for the partnership.[[313]](#footnote-313) Such a proportionality according to each partner’s investment was of course more in line with the contemporaneous commercial views and Servius’ view won the day. The authorities, i.e., the praetors, allowed for this. Henceforth all kinds of arrangements on this division were allowed as long as the *societas* *leonina* was avoided, an arrangement whereby a partner only shared in the losses made by the *societas*, not the gains.[[314]](#footnote-314) The *societas* was a very flexible contract and, being designed for commercial enterprises, was also used for investments with inventive applications as we see for the early Principate. Thus, for instance, Ulpianus commented on a *societas* contract that combined labour and investment arrangements, where “the value of his partnership is the disguise of his work and art”.[[315]](#footnote-315) Slaves could and did participate in partnerships and invest their *peculium* in an enterprise (e.g. in shipping companies, *Dig.* 14.1.1.4).[[316]](#footnote-316) Due to the adjecticial *actio de peculio* their owners were shielded against unlimited liability: their liability was limited to the value of the *peculium*. A slave could enter a partnership without previous approval and could not leave it on the mere wish of his master (*Dig.* 17.2.18), presumably to shield the *societas* for surprises. We may assume that such joining would be within the sphere of the slave’s work. Was it possible that such a slave, participating in a partnership and continuing to do so, be sold and thus make his new owner indirectly participant in the partnership? If this had been accepted, we would have seen the birth of the semi-anonymous company with shares consisting of living persons, viz. slaves. But that was not the case. Sale of the slave dissolved the existing partnership and a new partnership was assumed to arise with the buyer as partner.[[317]](#footnote-317) This implied that all special clauses of the previous partnership had similarly dissolved and that the new partnership followed the standard rules, which may not have been to the liking of the other partners.[[318]](#footnote-318) Moreover, the buyer of the slave assumed liability for actions deriving from of the previous partnership (as his seller had), while in addition he became liable based on the new partnership. On top of this common property, if present, would have to be divided.

## The other side of a *societas*: an aggregate of capital

Apart from the *societas* *omnium bonorum*, where all present and future acquisitions of the partners became common property, a *societas* would only have common property if and in so far as that was agreed upon in the partnership agreement. We may think of the accumulation of capital for a single trip to Delos to purchase slaves and sell these later on, or to contract the levying of tax (tribute or customs).[[319]](#footnote-319) A partner could sell his share in the common property if this was not excluded by contract (*Dig.* 17.2.16.1). Common property of a *societas* would be owned by all *socii* and they would form a co-property, a *communio*.[[320]](#footnote-320) What could such common property be? Leaving aside the *societates omnium bonorum* and having the economically more usual *societas* *unius rei* in mind (i.e., focused on a single commercial enterprise, a *negotiatio*), apart from slave trading partnerships which put all their capital into merchandise,[[321]](#footnote-321) it would usually be working capital, like a ship, a herd, slaves who had learned a profession, and of course money. Money could be used to trade, for instance to buy and sell commodities, as in *Dig.* 14.3.3 where a slave is authorised to deal in oil and borrow money. In *Dig.* 14.1.1.15–14.1.3, partners exploit a ship, evidently using the contributed capital to trade. And of course, capital was required for contracting the levy of taxes. Apart from the payment of revenues, periodically or after the conclusion of a contract or project, shares would be paid out at the dissolution of the partnership. The *bona* would comprise the assets plus gains and losses and the final accounts would show whether the partners had made a profit or not on their investment. Partners who had only contributed labour, would know whether their efforts were rewarded.

## Transfer of a share in the capital of the *societas*

But a partner did not have to wait for that. He could, in principle, sell his share in the *res communes* at all times. As co-owner he could alienate his share as *pars pro indiviso*, give it in usufruct, or pledge it to boost his credit.[[322]](#footnote-322) Of course as long as the *communion* last it was an ideal share, a claim which would materialise only when the *societas* ended. But buying or receiving a part in the common property did not mean that one became a partner; for that an additional agreement was required.[[323]](#footnote-323) *Socii* could make various agreements that constrained the principle of freedom to alienate *partes*. They could agree that the sale of shares or the division of common property before a certain moment was not possible unless there was a good reason (*Dig.* 17.2.14 and 16.1; which implies that otherwise dividing or selling was possible). Or the partners could agree that one could sell but that the buyer could not claim division before the moment that the seller would have had that right (*Dig.* 17.2.16.1; an exception against such a buyer would be granted).[[324]](#footnote-324) Such restrictions are understandable when it concerns working capital (see above). They would prevent the co-property to be dissolved with fatal consequences for an ongoing enterprise. Fleckner amply mentioned this possibility.[[325]](#footnote-325) He considers it dangerous since buyers would not be bound by the partnership contract and creditors might collect their claims while the buyers (being non-*socii*) were not liable for the debts of the partnership. I cannot agree with this. A partner who sells his part in the *communio* remains partner and remains liable. His financial position is as good or bad as before since he exchanged his part for money. It might even be better since he now disposes of cash.[[326]](#footnote-326)It is clear that if a partner sold his part or a fraction of it, he could not remain in the co-property for his former share,[[327]](#footnote-327) but he nonetheless remained in the partnership.[[328]](#footnote-328) A buyer might be liable for his share in the co-property, but for reasons beyond the partnership.[[329]](#footnote-329) Besides, as Fleckner himself says, alienation or division during the time of the contract could be excluded.

## A dualistic economic institution and two kinds of participants

Yet selling, if not to another *socius* as in the Lex Vispasca,[[330]](#footnote-330) meant that non-*socii* got a stake in the common property, but not in the enterprise as such. From that moment on the *societas* had to reckon with two kinds of people who participated in the common property: *socii* and non-*socii*. Everything brought into it was subject to the *actio communi dividundo*, which in its division of the *communio* included all obligations incurred during the partnership.[[331]](#footnote-331) A partner could claim this with the *actio pro socio*, but this action was directed at the partnership as such and it would automatically imply the dissolution of the partnership and, inherently, the division of the *communio*. With the *actio communi dividundo* any co-owner could claim division of the common property, provided of course this had not been excluded in the *societas* agreement. The *communi dividundo* would as said before consider next to property all claims and debts.[[332]](#footnote-332) Both actions concurred, but a partner could still raise the *pro socio* after the *communi dividundo*.[[333]](#footnote-333) One may ask: what did the *actio pro socio* then still serve? Well, for example, to sue a partner for deceit, bad faith, damages, the appointment of a manager, or the transfer of a claim. But regarding the final settlement of the enterprise both actions led to the same result. In that respect there was no difference between a *socius* and a participant in the *communio*.

Consequently, since portions were expressed in fractions, purchasers of a *pars pro indiviso* would enjoy also eventual increases. A share in the undivided capital is the same as what a partner in the end receives. Hence too the prohibition for the buyer to claim division prematurely. In the case of a public contract, there would be no fear for a premature division since the *societas* could not be dissolved during the contractual period.

In short, next to the *socii* there could be people who were involved in a *societas*, not as partners but as co-owners of the working capital and, in the end, of the resulting capital with gains and losses. They could buy from a partner a share for its value or, depending on the prospects of the enterprise, at a discount or at a higher price. In that way such a share could be speculative. Could it also be the other way around, that somebody added to the capital without becoming a partner? No, that would have been a loan to the partnership.[[334]](#footnote-334) Another question: how would a partner transfer his portion? The Digest texts simply assume it is possible, but the anonymous author of a fifth-century legal treatise states that specific methods should be applied: the *mancipatio* for *res mancipi*, *in iure cessio* for other things.[[335]](#footnote-335) However, there is no reason why this would be the case, certainly for the republic and first two centuries of the Principate. The *in iure cessio* would certainly not suffice in all cases. Meissel is of this opinion, both for the *societas* *omnium bonorum* as for other kinds of *societas*.[[336]](#footnote-336)

## A similar dual layer with tax farming companies

Does this dual structure also apply to the partnerships of tax farmers?[[337]](#footnote-337) Such a partnership was concluded when the tax collection of a province was for offer, usually for the period of five years. A *redemptor* (or *manceps*) would make an offer for a group of partners. These needed capital since there would always be a time lag between the payments they had to make to the *aerarium* and the collection of taxes: there would be delays in tax paying, whether involuntary or agreed upon, and not all taxes could be collected in full (the arrears, *reliqua*). Deals with tax payers to pay later or elsewhere were possible which meant that the *societas* needed capital to bridge this delay.[[338]](#footnote-338) It implies that the tax farming *societas* had a net of paying stations over the provinces with some kind of accounting which allowed the consolidation of debts and payments. As we know from Cicero, private persons used this for money transfers and deposits.[[339]](#footnote-339) It also needed personnel, often slaves, to do the work (the *familia publicanorum*).[[340]](#footnote-340) Thus these *societates* needed large amounts of capital, up to the amount of five years of taxes of their province.[[341]](#footnote-341) On top of this they needed securities, whether consisting of people who offered real estate or personal securities, viz. that they could comply with the contract over five years. The Roman state required securities already when the offer was made, i.e. before the contract was concluded . Tax-farming companies evidently succeeded in this, but they certainly did not get these securities for free. We do not know whether *socii* could bring in money themselves for five years but it is more than likely that they needed capital from third parties, and their sureties in turn will also have wanted certainty on this, lest they would later be addressed to pay up.

From several texts it appears there were *socii* and there were people, not *socii*, who held *partes*. The latter were called *participes* (Anon., *In or. Verr.* ad 1.55.143) or *adfines* (Liv. 43.16.2)/ These *partes* are assumed to have been transferable. In the Digest the word *pars* is also used for a share in co-ownership.[[342]](#footnote-342) It may therefore refer to a share in common property.

As to the *partes*, Cicero relates that Vatinius forced Caesar and the *publicani* to give him *partes*. Vatinius did not pay for the *partes* he took, but he reimbursed the *publicani* by lowering the contract sum, thus, in the end, acquired his *partes* at the cost of the state (Cic. *Vatin*. 12.29).[[343]](#footnote-343) Postumus gave his friends advantages like *partes*, the opportunity to enrich themselves, and to increase their credit (Cic. *Rab. Post*. 2.4).[[344]](#footnote-344) But that does not necessarily mean they did not have to invest. Postumus may have given them a chance to make a profit. Cicero calls the *partes* acquired by Vatinius *carissimae*, very valuable. That might refer to the use they had for Vatinius, but in the context of Cicero’s text it means rather that their value could go up and down, in this case apparently up, their value was high. *Adfinis* means literally ‘bordering’, ‘by marriage connected’.[[345]](#footnote-345) In this context it indicates that a person is involved in the entire business, but is not a *socius*. That would fit somebody who participates in the common property without being a *socius*.

A *pars* cannot have been a loan to the *societas*. It was not impossible to transfer a loan (a mandate to claim the loan combined with a *procuratio in rem suam* would do) but cumbersome. A loan might be valuable if repayment was certain. But Cicero’s mention of *carissimae* suggests a value, more than the original investment, and that a loan as such could not be.

Fleckner suggests for the *partes* that they concerned ‘Unterbeteiligungen’, whatever these may have been.[[346]](#footnote-346) This may explain why the *partes* were valuable. But what should we understand by ‘Unterbeteiligungen’?[[347]](#footnote-347) Neither does it explain the Vatinius text for how can we connect this with ‘Unterbeteiligungen’? Meissel merely suggests that *pars* refers to a ‘Kapitalbeteiligung’ without the position of a *socius*. But he does not specify the legal condition of this.[[348]](#footnote-348)

If we apply the information of *Dig.* 17.2.14 and 16.1 to the above cases, the explanation for Vatinius’ case could be that in the contract for a *societas publicanorum* the partners granted him a portion of the capital in exchange for his labour, which consisted here, in his office as quaestor or praetor, in lowering the sum for which the contract was granted. There is no need to presume a transfer of *partes*. The same may have been the case with Postumus. As for transfer, if one wants to keep to this, it is possible that *socii* enrolled for large portions in the required common capital, forming a *communio*, and then split their portions into smaller parts, *partes*,[[349]](#footnote-349) selling and transferring these to other people who consequently were called *participes* (Anon., *In or. Verr.* ad 1.55.143: *qui certam habet partem*), thus spreading the investment. The *participes* shared in the end result for a defined share, as would the *socii* who held a share, both in the common capital and in the revenues of the contract. The *partes* may have been advantageous if the prospects of the enterprise were good: as with modern shares, the final payout might be higher than the price paid. Such shares in the common capital could safely be alienated as part of the property of the holder. There would be no danger that somebody might raise the *actio communi dividundo* because the public contract fixed the duration at five years (*Dig.* 17.2.52.9pr).[[350]](#footnote-350) They could be large or small, and would provide for many people an opportunity to buy. It would also explain why problems with tax farmers led to a fall in credit as reported in Cic. *Manil.* 7.19:[[351]](#footnote-351) a *pars* would in such a case fall in value and by that the credit of its owner. And if one wants to read *eripuerisne* in Cic. *Vat.* 12.29 as referring to a transfer, it explains why Caesar and the tax farmers could issue *partes* to Vatinius. If it were merely participations in the common capital, then there was no need to adapt the partnership contract, they simply transferred a *pars* or a portions of a *pars*. Similarly, Postumus may have cut slices for his friends from his own large portion when he set up a *societas*, enabling them to make good profit after five years.

Quite a number of scholars have interpreted these *partes* as transferable shares in the *societas*.[[352]](#footnote-352) Almost inevitably this is connected with the assumption of a stock market.[[353]](#footnote-353) Fleckner has taken the trouble to re-examine the literary and legal sources. He concludes that both assumptions are not borne out by the texts.[[354]](#footnote-354) As he writes, once the idea of bearer shares in a *societas* is accepted, the conclusion that there must have been a trading market follows almost by necessity. But were these bearer sharers? There is no need to repeat Fleckner’s extensive treatment of the literary and legal texts here. But should he have had to do this? Is it not rather so that when authors suggest something like transferable shares or partnerships in a *societas publicanorum*, it is their academic obligation to check first whether such a thing fits into the existing law, sparing by that their fellow researchers the trouble of disproving what has not been proved? If they had done this, it would have appeared that it did not fit at all. We saw that the participating slave, who might have come closest to a transferable share, be it a share subject to death and so dissolving the *societas*, was rejected. That text dates from the end of the 2nd century CE, about two-and-a-half centuries after Cicero, which makes it very unlikely that a more liberal view had reigned in the late republic. Moreover, the partners in a *societas publicanorum* could not leave it during the period of five years that the tax contract lasted. If they died, the partnership continued and their heirs were by law liable as if they were partners.[[355]](#footnote-355) So what would there have been regarding the *societas* as economic actor to transfer? There were no negotiable instruments like the modern shares which are negotiable because they are bearer shares, nor were there shares in name. It is not that the Romans could not adapt the law to their needs. I have argued elsewhere that chirographs became negotiable instruments and easily transferable and consequently do not exclude a trade in such instruments. But that was facilitated because chirographs were contained in transferable objects (tablets, papyrus) and contained only acknowledgments of debt, not property shares or shares in a company. Such an extended use moreover—facilitating banking and the transfer of large sums of money—came about only during the second century CE, long after the high days of the *societates publicanorum*.[[356]](#footnote-356) Hence already a perusal of the private law on partnership should have warned for such speculations if not prohibited these. Public law on the *societates publicanorum* only changed the minimum that was necessary to safeguard public interests. Transfer of shares was not part of that. In that perspective the idea of bearer shares and a stock-market should not have arisen.

Fleckner deals with the legal texts, showing they do not indicate any transferability of shares. However, he does not discuss the underlying *communio bonorum* of the *societas* and the ideal shares which could be alienated.[[357]](#footnote-357) He discusses *Dig.* 17.2.63.8 to suggest the passive participation of the heir in a *societas publicanorum* is a case of his being a *particeps* or of ‘Unterbeteiligung’.[[358]](#footnote-358) I would rather underline that the text says that unlike in a common societas (where the death of the *de cuius* ends the partnership *ipso iure*) in the case of a *societas vectigalium* the heir, although he is not a partner, is *qua* heir entitled to the further gains and liable to the further losses,. This is the effect of the *societas* as part of a *redemptura*. It implies the heir is and remains co-owner of the common capital and as such participates in gains and losses until its closing. Considering not the *societas* but the underlying *communio bonorum* would make this text fit the analysis of the dual structure as set out above. Participating with capital in a new *societas* was certainly possible, being granted a portion in it without having to pay for it (as was likely the case with Vatinius) was possible too. *Societas* contracts were very flexible as long as it did not become a *societas leonina*. Whether *participes* in turn alienated their proprietary portions, however, we do not know. Theoretically it was possible. It seems such divisions normally occurred when a company was established. After that, however, the fortunate holders (one evidently needed connections to get a share) kept to their shares

## Conclusion

The mention of *partes* with regard to *societates publicanorum* has led to various hypotheses about its exact meaning. Their transferability seems certain, although the sources do not explicitly suggest that. Many authors have merely accepted the existence without entering into the legal construction and fitting it into the existing legal framework, yet here one cannot escape that necessity. What previous authors did not or did not sufficiently pay attention to is the difference between the *actio pro socio* and the *actio communi dividundo*, that is, the two structural layers in the enterprise: the level of the *societas* and the level of the *communio*. In legal jargon: the contractual and the proprietary aspects, and with it the economic importance and role of the common working capital.[[359]](#footnote-359) What did not help is that in the legal handbooks the first is basically treated under *societas* and the second particularly under inheritances. But a *societas* would often be a *communio* too. A portion in the *res communes* represented the economic outcome of a partnership, was separated from it since it could be claimed with the *actio communi dividundo*, and might imply also profit on the invested price, depending on the outcome of the enterprise. Economically it was precisely what a modern shareholder has, who usually is, in practice,[[360]](#footnote-360) a mere holder of capital and a co-proprietor of the enterprise while the management and investments are left to the staff. And if we look closely: what was, looking from the outside, the difference between a *particeps* and a *socius* who had invested capital but left everything to a manager? Nothing, and it is no surprise that texts mix up the *actio pro socio* and the *actio communi dividundo*. It only made a difference with active partners (who still could sue for compliance with the partnership contract). Hence there is no need to look amongst ‘Unterbeteiligten’ for transfer of interests.[[361]](#footnote-361)

This is a hypothesis, based on the few Digest texts on partnership relevant for the present question. It is a hypothesis which at least has the great advantage of explaining the references to participations in *societates publicanorum* which could be obtained or transferred. It fits the sources on *partes* and from the point of the Roman law it is possible and probable.

# Goods, Law and Trade. Material Evidence for Lease and Hire contracts(*Locatio Conductio*) and a Grain Sample Recorded in *CIL* 4.9591Emilia Mataix Ferrándiz\*

*Locatio conductio* was one of the commonest contracts used for shipping in which the risks of the trip were distributed among different actors. It constituted a consensual contract, by means of which one of the parties (the *locator*) undertook, in exchange for a price, to grant to the other party (the *conductor*) the use of something for a certain time (*LC rei*), or to carry out specific tasks (*LC operarum*), or to provide a specific service (*LC operis*). The contract followed a unitary general legal scheme which the parties adapted to their specific needs by agreements that would later have an impact on the preparation of the corresponding procedural defence. Unfortunately, no material example of this contract in Latin (there are some examples preserved in Greek papyri) has survived. It needs to be reconstructed, therefore, through legal and archaeological sources. In this paper, I will focus on the grain sample attested in *CIL* 4.9591, which provides information about freight contracts in commercial practice. This paper first aims to clarify some details of the epigraphic apparatus of this object. Secondly, it will contrast what legal texts establish about the formation and features of lease and hire contracts with the practical sphere of commerce evidenced by this unique document.

## Letting and hiring *(locatio conductio)* in the sources of Justinian’s Digest

Essentially, *locatio conductio* (hereafter, *LC*) in Roman law constituted a contract based on the payment of a price for the lease of a thing, a service, or a person’s labour.[[362]](#footnote-362) The contract belonged to the sphere of *ius gentium*, rather than *ius civile*, meaning that both citizens and non-citizens could make use of it.[[363]](#footnote-363) It was established by mere consent (*consensus*). Contrary to modern law consent was not an abstract legal concept in the Roman law of obligations.[[364]](#footnote-364) In modern law consent occurs when a person voluntarily agrees to the terms of an agreement. It is a general element in contractual law and provides validity to an agreement formalised between parties regardless of whether it is expressly mentioned or merely implied. Instead, in the Roman case, *consensus* applied only to essential aspects of *some* contracts,[[365]](#footnote-365) in the case of *LC* the object of the lease (goods, a service, or someone’s labour), the price,[[366]](#footnote-366) and the terms of the contract. The contract was agreed with one of these aims as its objective (*id quod actum est*). Consent on these would be the aspect considered by a judge to evaluate the circumstances of the agreement in case of controversy.[[367]](#footnote-367) Although Roman law did not require that consensual contracts should be formalised in writing,[[368]](#footnote-368) recording (some of) the clauses was advisable given the complexity of many commercial transactions. In addition, consensual obligations could have been formalised by agreement,[[369]](#footnote-369) but to be solved *re*, by transferring an object.[[370]](#footnote-370)

In the case of lease agreements for shipping, Roman legal sources allow us to reconstruct some of the recurring elements in the lease of ships and cargo space.[[371]](#footnote-371) Among the essential features that we find are the identification of the ship-owner,[[372]](#footnote-372) the carrier (or shipper),[[373]](#footnote-373) the customer,[[374]](#footnote-374) the ship,[[375]](#footnote-375) and its capacity.[[376]](#footnote-376) The contract, furthermore, sometimes indicates the price when the parties had made specific agreements in that respect.[[377]](#footnote-377) None of the features mentioned in literary texts or on material sources (mainly amphorae) relate to maritime insurances, for which it is difficult to find a parallel in Roman law.[[378]](#footnote-378) Some texts from Justinian’s Digest refer to elements such as conditions that the shipper had to respect when handling a specific cargo or managing hazardous situations such as transhipping,[[379]](#footnote-379) which are evidently invisible in inscriptions or on archaeological materials (such as amphorae). In the end, these elements depend on the proper management of the ship and choice of crew as precautions that the carrier should have considered in order to assure the safety of the venture.[[380]](#footnote-380) Other elements, such as provisions of what to do in case of jettison, are described in some of the Digest texts,[[381]](#footnote-381) but were probably implicit in the parties’ agreement and also depended on the choice of crew and their technical knowledge.[[382]](#footnote-382)

Fiori’s publication on *LC* analyses several texts, concluding with the idea that within the scope of this contract we can differentiate four business models used by Roman jurists to frame contracts. He bases his argument on agreements to lease an entire ship or part of the cargo-space on a ship, and on two varieties of contracts to ship goods, one implying performance of the task without taking the result into account, and another imposing the attainment of a certain result or the performance of certain practices.[[383]](#footnote-383) This distinction establishes different types of responsibility assumed by each of the parties to the contract. Among Fiori´s models, *conductio navis* implies the lease of an empty ship.[[384]](#footnote-384) *Locatio mercium vehendarum* on the other hand entails the ‘lease’ of the service to transport a cargo, underlining that the ship and its crew are hired for one or more specific trips. Finally, there is the labour contract between the entrepreneur and the sailors (*locatio operarum*). The contribution of the shipmaster and his crew does not consist merely of the simple provision of a certain number of working days, but comprises a coordinated and jointly conceived activity (*opus*). Nevertheless, while in the case of *locatio mercium vehendarum* the shippers assume the obligation of a result (delivering the cargo to its destination), in the *locatio operarum* they merely assume the obligation to perform the given task in a certain way (‘obligation de moyens’). [[385]](#footnote-385) None of these conditions was required for the *conductio navis*. However, in both the *locatio mercium vehendarum* and the *locatio operarum,* the actors acted with complete autonomy and were not obliged to use a specific ship.

The next section will test the validity and usefulness of Fiori’s models by analysing the text on a sample-jar found in a house in Pompeii. I will show that it challenges Fiori’s models and offers a more accurate picture of trade practices.

## The epigraphic *apparatus* of the sample registered in *CIL* 4.9591

The object (figs. 1-4) contained a sample of a cargo of grain destined for Ostia in the second half of the first century CE.[[386]](#footnote-386) The small container, which resembles other known types,[[387]](#footnote-387) has two handles and a height of 26 cm. It was discovered on May 30, 1941 in the *atrium* of the house of Epidius Primus in Pompeii (I. 8. 14).[[388]](#footnote-388) The last part of the inscription (*Rustico ab [---]* (‘to Rusticus from […]’, fig. 4),[[389]](#footnote-389) written by a different hand and in different ink, is clearly separated from the rest. This caused some scholars to consider whether the sample arrived in Pompeii to be tested by the customer, while the grain cargo itself remained in one of the many warehouses of Ostia[[390]](#footnote-390) or whether the sample-jar was found in Pompeii because it had been reused for other purposes.[[391]](#footnote-391) Mr. D. Djaoui (Musée Départemental de l’Arles Antique) notes that mentions in the dative case on amphorae normally relate to important subjects (e.g. *Procurator Augusti*).[[392]](#footnote-392) Rusticus on the contrary is a disarmingly banal name. However, this is not an amphora but a jar or small ‘amphoretta’. This type of pot rarely has painted inscriptions but there are exceptions for commercial samples and for product labels (e.g. *oliva fracta*, *sardinae*, or *cepa*).[[393]](#footnote-393) Such pots were often sold to seafarers but they were not important enough for their name to be added in the dative case. Accordingly, there is no example with such a name addition attested. More likely, therefore, this part of the inscription on the jar is linked with the rest of the text, indicating a later (re)purchase of the cargo of which the jar contained a sample.

There are still many doubtful points concerning this Rusticus, but, linking the text from the sample-jar with a recently discovered inscription from Pompeii may shed a new light on the role of this grain shipment. The inscription is a funerary *elogium* of a benefactor at Pompeii, found outside the Stabian gate.[[394]](#footnote-394) Among other life events lines 2-6 describe a gladiatorial spectacle that the deceased held on the occasion of his assumption of the *toga virilis,* which coincided with a shortage of grain. This moved him to buy an unspecified large amount of grain and sell it to the people at a heavily subsidised price. In addition, he also sold bread at similarly low rates. He continued his support and fed the population of Pompeii during four years. Calculations indicate that there was a huge amount of grain needed for this charitable purpose. Possibly our sample-jar was part of one of the cargoes devoted to that aim.[[395]](#footnote-395)

The sample-jar has been studied in different publications.[[396]](#footnote-396) This paper deals mostly with the inscriptions written by hands #1 and #2, because these lines reflect the elements of the *LC* referred to in the previous section.[[397]](#footnote-397) The text with a translation runs as follows:[[398]](#footnote-398)

|  |
| --- |
| [Hand #1] (on the shoulder and upper part of the sample-jar) |
| *Ante exemplar/ tr(itici) m(odiorum) XVCC/ in n(ave) cumba amp(horarum) MDC de tutela Iovis et/ Iuno(nis) parasemi Victoria P(ubli) Pompili/ Saturi. Mag(ister) M(arcus) Lartidius (****5)*** *Vitalis domo Clupeis* | Sample sent with the cargo of 15.200 modii of grain/ transported inside a *cumba*-ship (with a) capacity of 1600 amphorae, under the protection of Jupiter and Juno under the sign of Victory, (owned by) P. Pompilius Saturus, managed by M. Lartidius Vitalis, citizen of Clupea. |
| [Hand #2] (on the belly, lower part, the same side as Hand #1) |
| *Vect(ura) Ostis a(ccepta?)[[399]](#footnote-399) IIC sol(ven)do* | Shipping fee agreed (for payment) at Ostia, two percent payment[[400]](#footnote-400) due |
| [Hand #3] (on the belly, immediately to the right of line 1 of Hand #2 (vect(ura) … sol(ven)do, added later) |
| *gratis m(odios) CC* | 200 modii (are) free of charge |
| [Hand #2] (under and together with line 1 of the same Hand (vect(ura) … sol(vend)o)) |
| *S(olutio) F(acta) PR(idie) idus Octobr(es)* | *Solutio* performed the day before the ides of October |
| [Hand #4] (on the shoulder, on the opposite side of Hand#1) |
| *Rustico ab [---]* | to Rustico from […] |

**<INSERT MATAIX\_FIG. 1 HERE>**

Fig. 1. *CIL* 4.9591. Full image of the grain sample. Image reproduced with permission from the Sovraintendenza Archeologica di Pompeii (n.inv. 7352)

**<INSERT MATAIX\_FIG. 2 HERE>**

Fig. 2. Registration detail: front supra. Image reproduced with permission from the Sovraintendenza archeologica di Pompeii (n.inv. 7352)

**<INSERT MATAIX\_FIG. 3 HERE>**

Fig. 3. Registration detail: front infra. Image reproduced with permission from the Sovraintendenza archeologica di Pompeii (n.inv. 7352)

**<INSERT MATAIX\_FIG. 4 HERE>**

Fig. 4. Registration detail: verso. Image reproduced with permission from the Sovraintendenza archeologica di Pompeii (n.inv. 7352)

The first part of the inscription, *ante exemplar*, refers to the sample-jar itself, identifying it as ‘a sample’ (*exemplar*, in Greek, *deigma*).[[401]](#footnote-401) The wordis also found on another jar from Pompeii without the adjective *ante* (fig. 5).[[402]](#footnote-402) *Ante* is rarely used as an adjective.[[403]](#footnote-403) In the case of the sample-jar from the house of Epidius Primus, it could simply be an individual feature of the *amanuensis*. Using samples was a common practice in the transport of large quantities of products, since they allowed those concerned to check the quality of the product once the cargo arrived at the destination and prevent adulteration before delivery to the recipient.[[404]](#footnote-404) The practice was common for grain transports in Egypt, where they are referred to as *deigma*,[[405]](#footnote-405) thought it also occurred for other types of goods.[[406]](#footnote-406)

**<INSERT MATAIX\_FIG. 5 HERE>**

Fig. 5. Detail of a jar fragment: front. Image reproduced with permission from the Sovraintendenza archeologica di Pompeii (n.inv. 12316)

The following line (*Tr(itici) m(odiorum)* (15,200) refers to the cargo of grain that the sample belonged to, using *modii* as a measuring unit.[[407]](#footnote-407) It is clearly connected with the following line (*In n(ave) cumba amp(horarum) MDC de tutela Iovis et*), in which the ship is identified as a *cumba,*[[408]](#footnote-408)with its capacity indicated in amphorae, something also described in other texts,[[409]](#footnote-409) what underlines that the first element considered when loading a ship was volume, even if weight was also important.[[410]](#footnote-410)

The line (*Iuno(nis) parasemi Victoria P(ubli) Pompili*) indicates that the ship is under the tutelage of Jupiter and Juno, its protective deities, and bears the name-device of Victory.[[411]](#footnote-411) The identification of the ship implies that the tasks assigned to the shipper will be performed with this specific vessel.[[412]](#footnote-412) In addition, it allows registering the entrusted cargo to the carrier,[[413]](#footnote-413) in order to identify the origin of the ship when entering the port, and to recognise the ship and its owner in case of dispute.[[414]](#footnote-414) The inscription continues with the identification of the ship-owner (*Publi Pompili Saturi*), as is also common in other sources, even though shipowners did not always operate the vessels themselves.[[415]](#footnote-415). Another small jar from Pompeii (CIL 4.5894) similarly gives the name of the ship and its owner (fig. 6).

The capacity of the ship according to the sample-jar was (at least) 15,200 *modii*, about 105 tons. This implies a large ship meant for long-distance trade, which given its size could have docked at Ostia or Puteoli, but not Pompeii since its port at the mouth of the river Sarnus was uncapable to host this sort of vessel.[[416]](#footnote-416)

**<INSERT MATAIX\_FIG. 6 HERE>**

Fig. 6. *CIL* 4.5894 M.TE XENIIARTRITATI/ IN NAVE CN.SENTI (H) OMERI/ TI [BERI?] CLAUDI [++++] ORPH/ VECT(URA)[[417]](#footnote-417)

The next line (*Mag(ister) M(arcus) Lartidius Vitalis domo Clupeis*) indicates the name of the ship’s captain (*magister navis*), who had his official address in Clupea (present Tunisia).[[418]](#footnote-418) The identification of the shipper implies his responsibility to perform the duties for which he was hired.[[419]](#footnote-419)

The next two lines (*Vect(ura) Ostis a[ccepta] IIC (duobus centesimis) sol(ven)do/* *S(olutio) F(acta) PR(idie) idus Octobr(es))* written by a second hand, constitute the most important part of the text, since they refer to the fulfilment of the obligation through payment. I propose to read *a(ccepta)*, referring to the completion of that obligation by payment at Ostia. Andreau *et al.*[[420]](#footnote-420) propose ‘Prix agréé du transport à partir d’Ostie’, but this seems an imaginative reading to justify their later hypothesis of this abbreviation, since it literally refers to a payment made at Ostia. The mention *vectura* also appears in *CIL* 4.5894 (fig.6). The parties could determine the place where an obligation needs to be fulfilled beforehand, but in the case of a lack of consent the jurists proposed some criteria to solve this issue.[[421]](#footnote-421) For example, goods sold in bulk, such as grain, had to be delivered where they could be claimed.[[422]](#footnote-422) From this requirement, one can understand the importance of quoting Ostia as a locative, being the place where the payment for the transport of the cargo is to be made.[[423]](#footnote-423) Classical Roman law never came to accept contracts for the transport of goods in bulk, but clearly not because such trade did not take place, since there are many examples both in the legal texts and documents, and in shipwrecks found in the Mediterranean.[[424]](#footnote-424) This restrictive approach was probably because *LC* imposed a specificity on the object.[[425]](#footnote-425) In practice, large quantities of goods could easily be transported as long as they were identified at least as a mass on board a ship, or where they could be claimed.[[426]](#footnote-426)

Another element to be considered is whether the transport cost was paid in advance in Ostia, as in a case referred to by Ulpian in the Digest, before the grain was transported to Pompeii.[[427]](#footnote-427) According to this text, the transport fee (*vectura*) was due only if the cargo reached its destination. This implies an obligation of result, a practice previously mentioned also in a text of Labeo[[428]](#footnote-428) and another of Scaevola.[[429]](#footnote-429) This could be an argument to indicate that this sample was meant to arrive at Ostia, and it would have got to Pompeii through another contract.[[430]](#footnote-430)

The next element, written by a third hand, is the gerundive *solvendo*, literally ‘to discharge from an obligation’.[[431]](#footnote-431) Here we are entering the field of the evolution of *solutio* in the sense of ‘to release from an obligation’ to the understanding of the *solutio* as payment.[[432]](#footnote-432) In general, *solutio* refers to the completion of an obligation,[[433]](#footnote-433) with the implication that what is due[[434]](#footnote-434) must be fulfilled as provided by the contract. This is expressed by Pomponius: *Prout quidque contractum est, ita et solvi debet: ut, cum re contraxerimus, re solvi debet*.[[435]](#footnote-435) This text, however, also indicates an element of flexibility in discharging obligations since it allows for payment or delivery without specific formalities.[[436]](#footnote-436) Therefore, in the case of the sample-jar from the house of Epidius Primus, the contract would be deemed perfect (meaning that it is completely valid) by paying the agreed price for the *vectura*, as may be observed also in the fragmentary inscription *CIL* 4.5894 (fig. 6), and many other sources.[[437]](#footnote-437)

The next part of this line, reading *Gratis M(odios) CC (duocentos)* seems to have been inscribed by yet another hand, since the stroke of the calamus is thicker, the ink is darker and appears slightly oriented to the right of the rest of the inscription (fig. 3, top right). Reading the inscription as *duocentos* would imply a reduction of 1.3% on the indicated price, while if we read 1200 (MCC) it would be a reduction of 7.9%,[[438]](#footnote-438) which seems a bit too much. Thus, the development of the abbreviation M as *modii* seems logical, as this is the volume unit generally used to measure grain.[[439]](#footnote-439) The fact that the discount is inscribed on the sample-jar indicates that the parties probably wanted to record this detail together with the manifestation of the payment of the *vectura*, so that the amount paid is clear. Concerning the justification for the discount, if we consider the sailing season following Vegetius, the ides of October indicated in the inscription may seem as quite late in the year for a grain shipment.[[440]](#footnote-440) Thus, the later date may justify the discount: the shipment was necessary but the grain arrived out of the normal sailing season, therefore a discount was granted on the tax payment.[[441]](#footnote-441) However, several sources indicate that there was an all-year-round shipping of grain towards Italy.[[442]](#footnote-442) So, in sum, the reason why there was a discount on these 200 *modii* is unclear and needs further work, that I will develop in future research.

One of the few lines for which I suggest a correction to the critical edition proposed by Andreau, Rossi and Tchernia is *S(olutio) F(acta) PR(idie) idus Octobr(es).*[[443]](#footnote-443) While they propose to expand *SF* as *Sine Fraude*, I prefer Della Corte’s interpretation as *Solutio Facta*.[[444]](#footnote-444) Leaving aside that one of the source-references is mistaken,[[445]](#footnote-445) the sources relate to the manumission of slaves[[446]](#footnote-446) or the criminalisation of adultery.[[447]](#footnote-447) In addition, other sources that use S*ine Fraude* in the Digest, always refer to proceedings,[[448]](#footnote-448) manumissions,[[449]](#footnote-449) inheritances,[[450]](#footnote-450) or legal transactions[[451]](#footnote-451) of a non-consensual nature, contrary to the case at hand (a *LC*). On the other hand, the sources mentioning *solutio* always refer to the discharge of an obligation by payment,[[452]](#footnote-452) which in this case is manifest from the explicit mention of the term *soluendo*.[[453]](#footnote-453) *S(olutio) F(acta)* is in the past tense. That would mean that the *solutio* was already accomplished and therefore the contract had ended when these lines were written, which would make sense and indicate that the obligation was accomplished by this payment.[[454]](#footnote-454)

The day of the payment (the day before the ides of October) may indicate the actual day when the fee was paid rather than the final date before which payment was due. However, many sources of the Digest refer to *negotia* being concluded before the ides or the kalends of a month, so perhaps it was common to establish these chronological details in legal contexts.[[455]](#footnote-455) We find this also in one of the Dacian tablets found in the gold mines near Alburnus Maior. It refers to a contract for the hire of labour.[[456]](#footnote-456) The mention of the payment date underlines the importance of this act to provide validity to the contract, considering the consensual nature that characterises lease and hire contracts. Since Roman jurists were more concerned with specific remedies than with abstract rights, they did not consider *consensus* to be the unifying element of the different kinds of contracts. *Consensus* created and formalised specific agreements, but the mandatory scheme of the contract (i.e., the object it attained) was what implied its existence and legal effects.[[457]](#footnote-457) Therefore, the contract category feeds on and acquires its doctrinal legitimacy not from the voluntary agreement between the parties but from other factors, such as the type of contract, with all the particularities that this entailed.[[458]](#footnote-458)

Although the text inscribed on this sample-jar does not constitute a contract *per se*, it constitutes a document summarising several features of a *LC,* and, therefore, potentially provides proof of an agreement carried out.[[459]](#footnote-459) However, when comparing the inscription with the models indicated by Fiori, it appears to reflect a contract combining two of his models. [[460]](#footnote-460) First, bearing in mind the amounts inscribed on the jar and the capacity of the ship, it seems to have been loaded with just a single cargo.[[461]](#footnote-461) This could indicate that it was a contract to lease an entire ship, but since the navigation was carried out presumably by people unrelated to the merchant owning the cargo, as witnessed by the mention of the ship’s owner and the captain, it seems that the text on the sample-jar reflects the elements of a contract for the transport of goods. The identification of the ship referring to many of its specific features, again suggests a *conductio navis*, implying that the transport would be carried out on that specific ship (and no other).[[462]](#footnote-462) The mention of the *vectura*, together with *solvendo* and *solutio* seems to refer to an obligation of result, corresponding to the fulfilment of the obligation of payment implied in the contract. The latter coincides with the *locatio mercium vehendarum,* implying the need of a result but not the use of a specific ship. Therefore, in this inscription we find elements corresponding to two different contractual models according to Fiori. This would not be the first case in which the circumstances of a contract differ from the models.[[463]](#footnote-463) Through their texts, the jurists established the principles of how to act in various cases. Developing models through them was useful, but there were several possibilities arising from daily practices.

## *CIL* 4.9591 and the procedure of tasting (*probatio)*

The sample-jar of the house of Epidius Primus can easily be connected to the *probatio* of products for sale, since the main purpose of such samples was to provide potential buyers with the opportunity to check the quality of the product. However, in this case the connection takes us further. Bearing in mind the different meanings of the term *probatio,*[[464]](#footnote-464)I will focus on the possible role of the recipient as evidence in the case of contract enforcement.

**<INSERT MATAIX\_FIG. 7 HERE>**

Fig 7. Fresco with judicial scene from the Caseggiato d’Ercole, a market building at Ostia, dating to the second century CE (C. Pavolini, *Ostia: Guide archeologiche Laterza* (Roma 1983), 197, fig. 4.1)

There were by and large two possible scenarios for conflict resolution: a formal tribunal presided over by official functionaries; or a proceduredecided by the contracting parties themselves to solve the case bilaterally or by arbitration.[[465]](#footnote-465) We do not know very much about arbitration in the Roman period. A fresco from Ostia (fig.7) could depict one of these scenes, since it shows two people discussing matters around an amphora (perhaps a Dressel 20) in front of a figure who may be identified as a judge or an *arbitrator* and who is placed in an upper position from the litigants. This painting comes from a building called the Cassegiatto d’Ercole, dating to the second century CE, which may indicate that the person surveying the dispute was not a magistrate but a private citizen in charge of arbitrating the case. The latter ties in with the discussion about the connection between public and private spaces of justice,[[466]](#footnote-466) a perceivable issue in the Ostian fresco, where a dispute appears to be depicted in a private building.

Another issue here is whether there were specific designated spaces for commercial trials in the Roman world;[[467]](#footnote-467) a question not yet answered by the textual and material sources we have. The sources indicate that travelling merchants could be sued where they had their domicile.[[468]](#footnote-468) However, a merchant could also be sued and defend himself in the location where he had his business. This is probably the reason why we find many of them joining provincial associations, or *conventus civium romanorum*.[[469]](#footnote-469)

In the period of the sample-jar (first century BCE – first century CE), the *cognitio extra ordinem* would be the only procedure available in the provinces where the judicial role would be in the hand of the provincial magistrates. Indeed, we do not know much about commercial trials, whether they were referred to a market authority like the curule aediles (for Rome), other local magistrates,[[470]](#footnote-470) or the *praefectus annonae* in the case of affairs linked with state distribution.[[471]](#footnote-471) Another element playing a role would be to be known by locals to gain credibility in a trial, as claimed by Ascyltos in Petronius’ Satyricon.[[472]](#footnote-472) The presence of local agents in the different Mediterranean ports presumably helped merchants with this issue.[[473]](#footnote-473)

Even though it does not follow the formalities that we might find in other documents witnessing *emptio venditio* (sale contract)[[474]](#footnote-474) or *LC,*[[475]](#footnote-475) the summary of the transaction recorded on the sample-jar resembles receipts and other documents attesting accounting practices associated with a transaction.[[476]](#footnote-476) Such documents comprised, for instance, lists of goods or acknowledgments of receipts of a cargo, not including elements identifying the ship or its crew.[[477]](#footnote-477) This leads me back to the issue of goods sold in bulk, which in the case of legal disputes needed to be unambiguously identified.[[478]](#footnote-478) This was made possible by inscribed sample-jars, such as the one from the house of Epidius Primus. They represented the cargo, allowed the identification of the ship, its owner and captain, and proved the transport contract (the *locatio*) between the owner of the cargo and the shipper. All this is highly useful information that could have served as evidence in the case of private arbitration or negotiations leading to a bilateral resolution.

Estimating the importance of the sample-jar in a formal lawsuit, however, is more complicated. What sort of evidence was admitted in a formal trial? Quintilian’s rigorous list[[479]](#footnote-479) includes excerpts from bank accounts for use in a civil trial, implying that these documents were accepted as official, but this is not the case for the inscription on the sample-jar which as we mentioned before does not even resemble an accounting list. However, several fragments in the Digest title 22.4, ‘On the credibility of instruments and their loss’ (*De fide instrumentorum et amissione eorum*), indicate that informal texts and even objects could nevertheless be considered among the *instrumenta* if relevant to the case.[[480]](#footnote-480) A fragment from Gaius explicitly confirms that for consensual contracts, like *locatio* in this case, no formal documents were required.[[481]](#footnote-481) Another text of Scaevola, referring to what was probably a dispute in a province since it was brought before a governor, particularly highlights the importance of unsealed documents (*rationes*) as evidence.[[482]](#footnote-482) It is true that nothing is said explicitly about the use of artefacts such as sample-jars as evidence, and that most of the texts dealing with civil lawsuits are preoccupied with the use of false documents or documents not produced in an officially specified form.[[483]](#footnote-483)

However, some of the texts do focus on commercial issues. Terpstra argues that the lists of witnesses included in sale documents made these contracts ‘publicly embedded’, and reinforced the official sense of the document provided by their Roman legal framework.[[484]](#footnote-484) This implies that our sample-jar, even if useful for bilateral disputes or private arbitration, would not have stood up in court, as it did not follow the formal requirements to achieve a degree of trustworthiness provided by these Roman. However, the sale documents quoted by Terpstra refer to sales of slaves or real property, both *res mancipi*, which according to Roman law required a special formal procedure to transfer ownership*.*[[485]](#footnote-485)Arguably, the value and specific features of these ‘goods’ justified that the parties to the contract included the guarantee of the witnesses in the documents. A similar situation may be observed in the case of the sale contract with double *stipulatio* included in the slave sale of *TPSulp*. 42-44. However, there are two contracts of lease of labour among the Dacian tablets from Alburnus Maior.[[486]](#footnote-486) Two extra names are added under the text, which appear to be witnesses to the agreement but the way they are recorded is formally very different from the long witness lists used in other tablets, such as the Pompeian ones. It seems that these were not ‘closed and sealed’ tablets but merely ‘sealed’. Thus, perhaps in this case the witnesses acted merely to provide that ‘public embeddedness’ needed in case of enforcement.

For an *LC* to transport moveable goods, as it is the case of the sample-jar, it was the mere act of handling these goods after having provided consent for the transportation that constituted the contract (*ex consensu*).[[487]](#footnote-487) The sample-jar with its inscription could then itself have served to witness the contract. Some Egyptian papyri provide evidence for transport contracts,[[488]](#footnote-488) but—as mentioned previously—not many formal documents, whether a tablet or a similar artefact, have so far been found concerning a *locatio* in Italy or a western province.[[489]](#footnote-489) As an exception, we can find the Bloomberg tablet 45, documenting an (unfortunately fragmentary) agreement to transport ‘food’ (*penes*) from Verulamium to London.[[490]](#footnote-490) Bearing in mind that transport contracts were consensual and did not need to be expressed in writing, this tablet provides hard evidence that on some occasions the parties preferred to register their contracts in writing, probably to use them as proof in case something went wrong. Perhaps the fact that this document is a wax tablet and not a simple jar better qualified it to be used as proof in a trial.

In sum, even if the role of the sample-jar from the house of Epidius Primus is still not completely clear, I believe that the imperfect conditions in which long distance trade had to be managed induced merchants to devise their own ways of enforcing contracts and dealing with disputes. As part of a customary practice and a pragmatic activity, trade relied partly on impersonal systems of trust to underpin commercial relations when the institutional framework was inefficient.[[491]](#footnote-491) Performing certain established procedures (e.g. tasting) and using certain identified material objects (e.g. samples) in trade underpinned impersonal systems of trust. This helped to make trading practices intelligible to people from different sociolegal backgrounds, even in the absence of enforceable contracts.[[492]](#footnote-492) Therefore, despite the fact that this jar could not qualify as being a formal legal document *per se,* it witnesses the details of a transaction and it could have been helpful for the parties involved in this commercial activity.

## Conclusions

This chapter aimed to improve our conception of *LC,* by contextualising the inscribed sample-jar found in the house of Epidius Primus as material evidence of an agreement that could be used in dispute resolution. The study of its inscription shows that it displayed elements corresponding to two ‘models’ of this contract. Given the flexible nature of *LC*, the remedies provided by Roman law were sometimes insufficient to cover all the circumstances of the different maritime transport events. We must understand that jurists established principles to act in various cases, and that developing models through them is useful, but we must also consider the possibilities that arise from daily business practice.

Concerning the role of merchandise as evidencing transactions, I argued that these artefacts played an important role in documenting commercial transactions and in private dispute resolution between the parties involved. Reading the Digest, we can appreciate that Roman law provided sophisticated solutions for daily commercial issues. However, trade in the Roman empire developed under conditions of imperfect public enforcement of private contracts. The Roman authorities did not use their policing power to enforce private contracts made under the rules of their own legal system. Thus, a big part of jurisdiction needed to rely on non-imperial institutions, such as custom or impersonal but private systems of trust, which appear to be essential for the resolution of disputes. In that sense, the next question we need to ask ourselves will perhaps be what constitutes law in a specific context, especially in the case of Roman trade, being a context characterized for its pragmatic and customary performances. In that sense, could this sort of artefacts represent law as being practised by the actors in trade? Law cannot be treated purely as an intellectual system, a game to be played by jurists whose aim is to produce a perfectly harmonious structure of rules. It is something that operates on a practical level in society, and has to be understood as such. Then, when we lay down the discourse of the practice of the law, we can realize that at one time there may be a number of possible rules, or formulations of rules, competing with each other.

# Creating and Linking Socio-economic and Legal Frames – Cicero’s *Pro Quinctio*BySven Günther

Until only recently, Cicero was judged to be an “outsider” to Roman law, a mere advocate mainly using his rhetorical skills rather than any profound legal argumentation. However, in the course of the “cultural turn”, the discourse and practice of law in a broader framework of “legal culture” has also clearly altered our view on Cicero and his legal knowledge.[[493]](#footnote-493)Notwithstanding the new emphasis on the importance of legal practice for creating the late Roman republican “law system”, the question as to how the communication between the orator Cicero and his audience functioned remains a crucial one. As our main source for the legal practice of the late republic, his speeches are the basis of any discussion about a common Roman “legal culture” and about how it was shaped through the various layers of law (e.g., *leges*, *plebiscita*, *SCa*, and *ius honorarium*, but also *ius civile*, *ius gentium*, and *ius naturale*) forming and conceptualising *ius* at that time, and procedure and communication between the different parties involved in cases. This paper will address this research question by looking at Cicero’s earliest extant speech, the *Pro Quinctio*. Therein, the legal performance of the parties as well as their presentation by Cicero, Quinctius’ advocate, play a decisive role, and reveal important details as to how controversial business affairs were framed, and finally settled, by law of procedure, particularly the praetorian edict and its formulas. However, it will be further shown that these legal frames in economic affairs were only one part of the story: socio-political, socio-economic, and moral frames were added by Cicero at weak “legal” points, thus forming a net of sub-frames underneath the main legal frame, in order to convince the audience, particularly the judge(s), of his client’s rights.

The question as to why I employ the terms “frames” and “framing” throughout the paper for phenomena that have often been called “concepts”, “institutions”, or “morale” is easy to answer. By using the frame-analysis model deriving from sociology, communication studies, and psychology, foremost the work of Erving Goffman, Charles J. Fillmore, and Marvin Minsky, I address the communication between an author/orator and the targeted audience via the work (the only part nowadays extant). I assess the respective text not as a fixed, but rather as a flexible and mutually interdependent negotiation process and permanently renewed discourse about experiences and expectations based on shared frames linking both sides. However, those frames and the single elements of which they consist (which can also be termed frames, but function as sub-frames in that very context) might be moulded and (on account of their disparate attributes) be related in various ways through the different slots which they offer.[[494]](#footnote-494) To make a long (theoretical) story short for the purpose of this present paper, an orator like Cicero can reach and influence his audience much better if he anchors his discourse/speech in pre-existing frames of experience and expectation with respect to various conceptual layers, such as legal notions, principles of juristic exegesis, feelings of justice, socially accepted behaviour, or shared moral views and related emotions. Additionally, within the procedure of a specific case, such as *in iure* (i.e., the drawing up and framing of the concrete procedural *formula* in accordance with the praetor’s edict), the parties involved also conferred over every detail to be included in the *formula* because every single word could become useful, and decisive, for the argumentation later on *apud iudicem*.[[495]](#footnote-495) In this way, legal terms and wordings form a “strong” and complex frame within a network of inter-related frames, and automatically direct the parties to link their respective argumentation to it.[[496]](#footnote-496)

However, this complexity of ancient law did not mean that modifications and changes to the frames used were impossible. Not only so-called institutions such as *mos maiorum* or *amicitia*, but even “legal” terms like *ius* or *iniuria* were not fixed conceptions, but rather open concepts that could be informed with situational content of the sort that would not break the basic framework of the respective term. It was exactly the art of the orator to adjust these frames to his argument while at the same time to remain within the main conceptual lines which determined the success or failure of a speech, here Cicero’s *Pro Quinctio*.[[497]](#footnote-497)

## The background: Quinctius and Naevius – a never-ending partnership

In his earliest extant speech held in the autumn of 81 BCE, Cicero defends Publius Quinctius in a *sponsio* in which he must prove that his opponent, Sextus Naevius, had not taken (full) possession of his client’s property, mainly in Gaul, in accordance with the edict of the praetor Burrienus in 83 BCE, for the required period of thirty days. This pre-judgment became a necessary step within a complex case beginning as a conflict about the dissolution of a business partnership (a *societas*)in Gaul which Naevius had together with Quinctius, who had inherited it from his brother Gaius in c. 85 BCE. After much back and forth, especially in the form of *vadimonia saepe dilata* (Cic. *Quinct*. 5.22; 14.46), the dispute seemed to have been settled by auction (Cic. *Quinct*. 6.23). Yet, during the absence of Quinctius who inspected the estate in Gaul, Naevius called another meeting, a new *vadimonium* which Quinctius missed due to his travel while Naevius let his absence be attested by witnesses. Shortly afterwards, he approached the then-praetor Burrienus and received the *missio in possessionem* of Quinctius’ property. Consequently, Naevius took possession of Quinctius’ property in Rome, where he was opposed by Sextus Alfenus, procurator of Quinctius and simultaneously *familiaris* and *propinquus* of Naevius, while Quinctius was thrown out of a common property in Gaul by slaves of the *societas*. Meanwhile, with the help of a plebeian tribune, Alfenus achieved a new *vadimonium* appointment with the promise of Quinctius being present. This *vadimonium* appointment was not enforced by Naevius for one and a half years until the time of Sulla’s proscriptions in 81 BCE. During these Alfenus was murdered. His property was auctioned off and acquired by Naevius, who called Quinctius his partner at that moment. However, already in March 81 BCE while Alfenus was still alive, Naevius had summoned Quinctius before the then-praetor Gnaeus Dolabella. This is the first situation which we shall examine in detail.

## The drawing up of the formula: disguising the failed negotiation

Cicero describes the meeting of Quinctius and Naevius at the praetor as follows (Cic. *Quinct*. 8.30–31)[[498]](#footnote-498):

*Venit Romam Quinctius, uadimonium sistit. Iste homo acerrimus, bonorum possessor expulsor ereptor, annum et sex menses nihil petit; quiescit; condicionibus hunc quoad potest producit; a Cn. Dolabella denique praetore postulat ut sibi Quinctius iudicatum solui satis det ex formula quod ab eo petat quoniam eius*[[499]](#footnote-499) *ex edicto praetoris bona dies xxx possessa sint. Non recusabat Quinctius quin ita satis dare iuberet si bona possessa essent ex edicto. Decernit quam aequum nihil dico: unum hoc dico, nouum, et hoc ipsum tacuisse mallem, quoniam utrumque quiuis intellegere potuisset. Iubet P. Quinctium sponsionem cum Sex. Naeuio facere si bona sua ex edicto P. Burrieni praetoris dies xxx possessa non essent. Recusabant qui aderant tum Quinctio; demonstrabant de re iudicium fieri oportere, ut aut uterque inter se aut neuter satis daret; non necesse esse famam alterius in iudicium uenire. (31) Clamabat porro ipse Quinctius sese idcirco nolle satis dare ne uideretur iudicasse bona sua ex edicto possessa esse; sponsionem porro si istius modi faceret, se (id quod nunc euenit) de capite suo priore loco causam esse dicturum. Dolabella, quem ad modum solent homines nobiles seu recte seu perperam facere coeperunt (ita in utroque excellunt ut nemo nostro loco natus assequi possit), iniuriam facere fortissime perseuerat: aut satis dare aut sponsionem iubet facere, et interea recusantes nostros aduocatos acerrime submoueri.*

Quinctius returns to Rome, and appears to his bail. This Naevius, a most violent fellow, who had taken possession of the property, had driven Quinctius out and robbed him of it, for eighteen months made no claim, kept quiet, amused Quinctius as long as he could with proposals for coming to terms, and finally applied to the praetor Gnaeus Dolabella that Quinctius should give him security for payment of the judgement according to the formula: IN THAT HE IS CLAIMING FROM ONE BECAUSE HIS[[500]](#footnote-500) GOODS HAVE BEEN POSSESSED FOR THIRTY DAYS ACCORDING TO THE PRAETOR’S EDICT. Quinctius did not object to an order being made that he should give security, if his goods had really been possessed in accordance with the edict.[[501]](#footnote-501) The praetor gave a decision – how far equitable, I say nothing about that; I only say this, that it was an innovation, and I should have preferred to remain silent upon this point, since anyone could understand it, regarded from either point of view – and ordered Quinctius to enter into an engagement with Naevius on the question: WHETHER HIS GOODS HAD NOT BEEN POSSESSED FOR THIRTY DAYS according to the edict of Publius Burrienus the praetor. Quinctius’s supporters demurred; they pointed out that the trial ought to deal with the real question, so that either both parties or neither of them should give security; that there was no need for the reputation of either being put on trial. (31) Further, Quinctius himself emphatically declared that his reason for being unwilling to give security was to avoid the appearance of himself thereby giving a verdict that his goods had been possessed in accordance with the edict; moreover, if he made an “engagement” of the kind asked for, he would be obliged to plead first in a matter affecting his civil rights, as has happened to-day. Following the practice of members of the nobility, who, when once they have begun to carry out some plan, whether right or wrong, show such superiority in its execution that is beyond the reach of one in our humble position, Dolabella most manfully persevered in acting wrongfully; he ordered that either security must be given or an engagement entered into, and in the meantime caused our advocates who protested to be forcibly removed from the court.

Of course, Cicero first attacks Quinctius’ opponent Naevius by pointing out his morally questionable behaviour due to his actions against Quinctius in the years before, and due to his delaying the judicial procedure for a year and a half (*Iste homo acerrimus, bonorum possessor expulsor ereptor, annum et sex menses nihil petit; quiescit; condicionibus hunc quoad potest producit*). However, Cicero then turns to the legal aspect, the negotiations about drawing up the formula at the praetor. Modern researchers of law have intensively discussed the actual formula written in the manuscripts, and have tried to explain (or conjecture) the wording of the text. While this is worthwhile for the reconstruction of the praetorian edict and the legal development in the late Roman republic,[[502]](#footnote-502) it is important for our perspective on the frames rather to look at the structuring of the whole passage by Cicero.

Naevius proposes that Quinctius shall perform the *satisdatio iudicatum solvi*, that is to offer in form of a *stipulatio*, specifically a *cautio*, to pay the debt if he lost case, secured by a personal guaranty by a *sponsor* (surety). The exact wording (*ex formula*) follows; however, it remains debated as to whether those are the words of Naevius whom Cicero mocks, or, at least partly, of the edict.[[503]](#footnote-503) Now, Quinctius reacted by repeatedly proposing (*non recusabat*; imperfect!) his alternative wording *quin ita satis dare iuberet si bona possessa essent ex edicto*. In fact, he refuses the wording of Naevius already assuming the legal possession of Quinctius’ goods by him, and instead insists several times to include a condition (i.e., “if his goods had been possessed (by Naevius) according to the edict”) that would first have to be proven by Naevius, and thus would totally change the course of action.[[504]](#footnote-504) This struggle over the correct wording and the correct exception (*exceptio*) which finds approval by the praetor,[[505]](#footnote-505) in order to turn the case in one’s own favour is already emphasised in Cicero’s earliest extant work, *De Inventione*, written shortly before the case against Quinctius (Cic. *Inv*. 2.19.57–58):[[506]](#footnote-506)

*Nam et praetoris exceptionibus multae excluduntur actiones et ita ius civile habemus constitutum, ut causa cadat is, qui non quemadmodum oportet egerit. (58) Quare in iure plerumque versantur. Ibi enim et exceptiones postulantur et agendi potestas datur et omnis conceptio privatorum iudiciorum constituitur.*

For many actions are excluded by the *exceptiones* (counter-pleas) granted by the praetor, and the provisions of our civil law are such that one who does not bring his action in the proper form loses his suit (58) Therefore such questions generally are disposed of *in iure* (before the praetor). For it is there that exceptions are requested and right of action is granted, and the complete formula for the guidance of the trial of private (or civil) actions is drawn up.

So, the response by Quinctius is not just a manner of friendly refusal (as the words of Cicero using a litotes (*non recusabat*) might suggest), but rather the repeated attempt to alter the formula with which Quinctius as the defendant would have better chances in the following procedural step *apud iudicem*. However, the praetor Dolabella approves neither wording but draws up a formula that should start a different procedural step: a *sponsio praeiudicalis*, a preliminary procedure in which both parties must argue over the possession of Quinctius’s property according to the following words: *si bona sua ex edicto P. Burrieni praetoris dies xxx possessa non essent*. From Cicero’s harsh moral judgment about this act of the praetor (*decernit* *quam aequum nihil dico: unum hoc dico, nouum*) as well as from the repeated reaction of Quinctius’ attendants (*recusabant / demonstrabant*), it becomes clear that this decision was not the result which Quinctius expected: with this wording, he would be in the necessity to prove that Naevius had not possessed his property for thirty days according to the praetor Burrienus’ edict.[[507]](#footnote-507) Platschek has convincingly argued that this proposal by the praetor took the fact, i.e., that Naevius possessed property of Quinctius, into account but was actually a kind of compromise. So, the *novum* Cicero attacks here was an exception granted by the praetor to Quinctius, and not the unfavourable distribution of the party roles which is so heavily criticised by Quinctius, his attendants and Cicero.[[508]](#footnote-508) Hence, the party roles remained, in fact, unchanged compared with the *satisdatio* proposal of Naevius since the praetor only allowed for the *sponsio praeiudicalis*, and it can be supposed that Naevius’ position was stronger at that very moment in front of Dolabella than that of Quinctius. However, the praetor tried to find a possible frame in which Quinctius could somehow obtain the chance to successfully refute the condition before risking all in the *satisdatio iudicatum solvi* and totally losing his face, reputation, and the case.

From the perspective of framing, one can observe here at least seven levels:

1. Naevius’ attempt to formulate the case in his favour with the *satisdatio* formula as he was in a stronger position than Quinctius;
2. Quinctius’ attempt to frame it with the *exceptio* which would have brought him into a better starting position *apud iudicem*.
3. Dolabella’s compromise with the newly formulated condition in a new procedural format, where he had to respect the strong position of Naevius, but also offered a possibility for Quinctius to further negotiate, save face or even to refute the condition.
4. The attempt(s) (imperfect) of Quinctius’ attendants to convince the praetor of re-formulating the *satisdatio* in an equal way.
5. The attempt(s) (imperfect again) of Quinctius to explain his refusal of the *satisdatio* and the problems he had with the *sponsio praeiudicalis* proposed by the praetor.
6. The decisive either-or-proposal of the praetor whereupon Quinctius chooses the *sponsio praeiudicalis* as the better solution for him (*id quod nunc euenit*),
and finally
7. Cicero’s framing by narrating the whole process into his intended direction.

The last is now the most interesting, as it shows us how Cicero works, and what he cannot alter. For, he can neither change the actual process that has already happened, nor the compromise proposed by the praetor; he must follow these legal frames, and is also not allowed to lie about the legal content. What he can do, however, is to select the sub-elements connected with the strong and momentarily dominant legal frames (here: the *satisdatio*-proposal of Naevius and the *sponsio praeiudicalis* formula proposed by the praetor) and to link them with social and moral judgments. Indeed, he does precisely so. He (1) embeds Naevius’ proposal in a moral characterisation of Quinctius’ opponent (see above), and maybe (depending on the (non-)legal language used by Naevius) even mocks his wording.[[509]](#footnote-509) He then (2) depicts Quinctius as being not unwilling if the exception is granted which would, in fact, have totally changed the case (the latter naturally left unspoken by Cicero). The compromise proposed by the praetor Dolabella is (3) not described as being an improvement of Quinctius’ quite weak position, but rather as unfavourable: the term *aequum*, which in combination with *quam … nihil dico* alleges the deficit of a correct balance so vital in Roman legal thinking in this dynamic equilibrium,[[510]](#footnote-510) is applied to a situation where, in fact, there is no balance since Quinctius is in a weaker position. This, of course, must be concealed by the advocate; with its clearly negative connotation in politico-legal terminology,[[511]](#footnote-511) the term *novum* is also used, and could be even agreed upon by both parties (*non aequum* could even have been used by Naevius, who might have felt disappointed in having to give in to the compromise). Here, however, Cicero uses the term to present something as negative for Quinctius, which, in fact, was not, and thus attempts to dominate the discourse by means of it. By keeping silent about further details (*et hoc ipsum tacuisse mallem, quoniam utrumque quiuis intellegere potuisset*), he stresses the negative effect for his defendant. More likely, however, he refrains from further elaboration as he would then have to admit the favourable position which the *novum* brought to his party. (4) Both reactions from Quinctius’ side mix legal arguments with socio-moral frames as they allege that the legal formula is not *de re*, but *de fama*, and even *de capite* of Quinctius, two highly political terms for the Roman elite.[[512]](#footnote-512) Finally (5), Dolabella is attacked by linking his final decision to his group membership, the *nobiles* with their stubborn, inflexible behaviour (*Dolabella, quem ad modum solent homines nobiles …coeperunt … perseverat*; note the intentional change of plural and singular to align Dolabella and his group, the *nobiles*), and thus, at least here, is depicted as socially harmful (*iniuriam*); finally, by acting *acerrime* while removing Quinctius’ attendants, Dolabella is somehow equated with Naevius and his behaviour at the beginning of the passage (*acerrimus*) so as to depict him as totally partial. With this, Cicero especially targets the judging audience, the then-praetor C. Aquilius Gallus and his *consilium*.[[513]](#footnote-513) Aquilius was one of the most famous jurists of his time, though not belonging to the *nobilitas* in the sense of long senatorial and consular tradition of his family, and (most importantly) someone with a clear idea of what belongs to a legal frame and what not, should we believe the bon mot in Cicero’s *Topica*.[[514]](#footnote-514)

Although he cannot leave the legal frame with its strong authority deriving from a common public understanding of the importance of the rule of law as well as the *potestas* of the magistrate, the praetor, Cicero tries to soften and undermine it at its allegedly weak elements: that the frame already decides about the party roles, and is thus a mirror of the power relations between the parties involved; and that it is drawn up by a person with other controversial political, social, and moral frames, and contrary to his role as (at least for jurists) desirable objective and “pure” legal institution for framing the case.

## Cicero’s use of the legal frame

One can now observe exactly this strategy of attacking the weak elements of the legal frame throughout the whole speech. He does it in three steps, as he points out after the narration of the case, in the *partitio* (Cic. *Quinct*. 10.36):

*Negamus te bona P. Quincti, Sex. Naevi, possedisse ex edicto praetoris. In eo sponsio facta est. Ostendam primum causam non fuisse cur a praetore postulares ut bona P. Quincti possideres, deinde ex edicto te possidere non potuisse, postremo non possedisse. Quaeso, C. Aquili uosque qui estis in consilio, ut quid pollicitus sim diligenter memoriae mandetis; etenim rem facilius totam accipietis, si haec memineritis, et me facile vestra existimatione revocabitis, si extra hos cancellos egredi conabor quos mihi ipse circumdedi. Nego fuisse causam cur postularet, nego ex edicto possidere potuisse, nego possedisse. Haec tria cum docuero, peroraro.*

We deny, Sextus Naevius, that you have taken possession of the goods of Publius Quinctius in accordance with the praetor’s edict. That is the question in regard to which the “engagement” was made. I will first prove that you had no grounds for applying to the praetor to authorize you to take possession of the goods; next, that you could not have taken possession of them in accordance with the edict; lastly, that you did not possess them at all. I beg you, Aquilius, and you his assessors, carefully to commit to memory the promise I have made; for, if you bear these points in mind, you will find it easier to understand the whole matter, and, as to myself, you will, by your influence, easily call me back, if I endeavour to pass beyond these barriers by which I have voluntarily confined myself. I deny that Naevius had any grounds for his application; I deny that he could have taken possession of the goods in accordance with the edict; I deny that he did take possession of them at all. When I have proved these three assertions, I will conclude.

Important here is Cicero’s remark: “if I endeavour to pass beyond these barriers by which I have voluntarily confined myself” (*si extra hos cancellos egredi conabor quos mihi ipse circumdedi*). In fact, these are not his voluntarily chosen boundaries, but rather the legal frame and the expectation that the judging audience requires from him to link his argument to legal points. His free decision is only that he targets the three points which he mentions throughout his speech. However, he naturally applies the same strategy in each part (the third part on the question as to whether Naevius did take possession of Quinctius’ property at all, is, however, lost, but can be partly reconstructed through the peroration):[[515]](#footnote-515) legal arguments are connected with socio-economic and moral judgments about Naevius and Quinctius, in favour of the latter.

Without having the possibility to examine the whole speech here in detail, I nonetheless argue that one can observe a similar arrangement of arguments by Cicero as in the narration about the drafting of the formula for the process. Targeting the judges, particularly Aquilius, he first of all intentionally uses juristic interpretation principles (unlike in many other cases, for instance, in *Pro Cluentio*, wherein he rarely argues with mere legal terminology, but foremost uses socio-moral language[[516]](#footnote-516)), and brings in socio-economic and moral elements through the backdoor by pointing to the unevenness of both former juridical decisions and persons involved.

One example suffices to show Cicero’s strategy. In attacking Naevius’ taking possession of Quinctius’ property, he alleges that Naevius did so against the praetorian edict.[[517]](#footnote-517) For this reason, he quotes from the edict, and, in our passage here, connects this skilfully with his own insertions directing the audience towards a strict juristic interpretation of the mere wording (Cic. *Quinct*. 27.84):

*Omnia sunt, C. Aquili, eius modi quivis ut perspicere possit in hac causa improbitatem et gratiam cum inopia et ueritate contendere. Praetor te quem ad modum possidere iussit? Opinor, ex edicto. Sponsio quae in verba facta est? SI EX EDICTO PRAETORIS BONA P. QVINCTI POSSESSA NON SVNT. Redeamus ad edictum. Id quidem quem ad modum iubet possidere? Numquid est causae, C. Aquili, quin, si longe aliter possedit quam praetor edixit, iste ex edicto non possederit, ego sponsione vicerim? Nihil, opinor. Cognoscamus edictum. QVI EX EDICTO MEO IN POSSESSIONEM VENERINT. De te loquitur, Naevi, quem ad modum tu putas; ais enim te ex edicto venisse; tibi quid facias definit, te instituit, tibi praecepta dat. EOS ITA VIDETVR IN POSSESSIONE ESSE OPORTERE. Quo modo? QVOD IBIDEM RECTE CVSTODIRE POTERVNT, ID IBIDEM CVSTODIANT; QVOD NON POTERVNT, ID AVFERRE ET ABDVCERE LICEBIT. Quid tum? DOMINVM, inquit, INVITVM DETRVDERE NON PLACET. Eum ipsum qui fraudandi causa latitet, eum ipsum quem iudicio nemo defenderit, eum ipsum qui cum omnibus creditoribus suis male agat, invitum de praedio detrudi vetat.*

All these facts, Gaius Aquilius, are of such a kind that anyone can clearly see that in this cause rascality and influence are contending against helplessness and integrity. How did the praetor order you to take possession? According to his edict, I suppose. In what terms was the “wager” or “engagement” drawn up? IF THE GOODS OF PUBLIUS QUINCTIUS HAVE NOT BEEN TAKEN POSSESSION OF ACCORDING TO THE PRAETOR’S EDICT. To return to the edict. In what manner does it order possession to be taken? If Naevius took possession in quite a different way from what the praetor ordered, can it be disputed that he did not take possession according to the edict, and that I have won the wager? Certainly not, I imagine. Let us examine the edict. THOSE WHO HAVE ENTERED INTO POSSESSION ACCORDING TO MY EDICT. He is speaking of you, Naevius, according to your idea, for you say that you entered into possession according to the edict, which defines what you are to do, and gives you instructions and directions. IT PLEASES US THAT THEY SHOULD BE IN POSSESSION IN THE MANNER FOLLOWING. In what manner? WHAT THEY CAN SAFELY GUARD UPON THE SPOT LET THEM GUARD THERE; WHAT THEY CANNOT, IT SHALL BE LAWFUL TO CARRY OFF AND DRIVE AWAY. What next? TO EJECT THE OWNER AGAINST HIS WILL DOES NOT PLEASE US. Even the man who keeps out of the way with fraudulent intent, even the man whom nobody has defended in his trial, even the man who acts with bad faith towards all his creditors, cannot be ejected from his property against his will.

Firstly, by addressing the praetor and judge C. Aquilius in the vocative, Cicero ascribes two different moral categories to the opposing parties, *improbitas* and *gratia* to that of Naevius, Quinctius holding *inopia* and *veritas*. Then, he changes the focus and talks directly to Naevius, although he certainly still arouses the attention of Aquilius with *praetor te*. Starting from the wording of the *sponsio*, he then proposes the frame, i.e., that he will win the case if the possession was taken by Naevius *longe aliter* than the edict orders. He strongly emphasises that Naevius must strictly follow the procedure of taking possession as described in the edict (*definit … instituit … praecepta dat*), then he goes through the edict, from which he quotes certain formulae and gives short comments. The first two edict-phrases are each bridged by two short questions (*quo modo? … quid tum?*); only the third on the prohibition of violent ejection of the owner receives a strong commentary. Here, he applies a very narrow legal interpretation of the phrase according to the exact wording, for which he argues that any owner, even a fraudulent one, is not allowed to be ejected against his will. With this, he clearly targets Aquilius and the other legal experts; at least the former argued in this way according to Cicero (Cic. *Top*. 51; see above, n. 22), and so we can suppose that he also favoured such an interpretation of the edict words. To strengthen his argumentation, he even provides a (fictional) quote of the ordering praetor in the following (Cic. *Quinct*. 27.85):

*Profiscenti tibi in possessionem praetor ipse, Sex. Naevi, palam dicit: “Ita possideto, ut tecum simul possideat Quinctius, ita possideto, ut Quinctio vis ne afferatur.”*

When you set out to take possession, Sextus Naevius, the praetor himself openly told you: “You may take possession in such manner that Quinctius may have possession with you at the same time; you may take possession in such a manner that no violence be offered to Quinctius.”

Here, the difference between *possideto* (two times used for Naevius) and *possideat* (for Quinctius) is important as it implies that Naevius is allowed to take the possession while Quinctius is also the (legal) *possessor*, and, even then, according to Cicero’s own words, the legal owner (Cic. *Quinct*. 27.85, continued from above):[[518]](#footnote-518)

*… Quid ? Tu id quem ad modum obseruas? Mitto illud dicere, eum, qui non latitarit, cui Romae domus, uxor, liberi, procurator esset, eum, qui tibi uadimonium non deseruisset; haec omnia omitto; illud dico, dominum expulsum esse de praedio, domino a familia sua manus allatas anto suos Lares familiares; …*

Well? how have you observed this order? I say nothing about his being a man who did not keep out of the way, who had a house, a wife, children, and an agent in Rome, who had not forfeited his recognizances – I say nothing about all this; I only say that the owner was ejected from his estate, that hands were laid on the owner by his own slaves in the presence of his household gods. …

This skilfully designed passage demonstrates once again how Cicero combines both the legal sub-frames and their respective slots which the *missio in possessionem* offer according to the edict and his socio-economic and moral insinuations together. While Quinctius is the one who is not even acting as a *dominus* or with any legally or morally questionable behaviour (as described shortly before), but rather a willing and cooperative person with regard to any legal procedure, Naevius uses violence to eject him from his own(ed) property, even upturning the normally irreversible master-slave(s)-relation which ends in the violation of the *lares familiares*, and is thus also harming the religious core of the family.

This focus on the legal aspects which only secondarily links socio-economic and moral judgments is also very present in the summary of the argumentation (Cic. *Quinct*. 29.88–90), wherein Cicero mainly repeats his legal arguments and ascribes the current situation to the violence, injustice and unevenness of judgment having occurred against his client (§90: *(Naevium)* *nihil aliud egisse neque nunc agere nisi uti per vim, per iniuriam, per iniquitatem iudici totum agrum, qui communis est, suum facere possit* / “… that he (sc. Naevius) had, and has, no other object than to enable himself to secure the whole estate (which belongs in common to both), as his own personal property by violence, injustice, and unfair legal procedure”).

Hence, it is now the task and duty of the judges to straighten out justice once more. In the last part of the speech, we experience Cicero as we know him from many other speeches. Here, he draws a picture of the innocent, frugal, and good citizen Quinctius and the greedy, violent, and anti-social Naevius who uses his influence, networks and even law and magistrates concerned with juridical matters for his own end. With this behaviour, Naevius is, of course, only a mirror of the evils that have spread in the society like an infection, while Quinctius, and Aquilius (with his assessors), are the last men standing against the fall of the whole Roman society. Thus, bereft of protection of both private and public, he has only one refuge left: Aquilius, his fellow assessors, and their decision (Cic. *Quinct*. 30.91–31.99)

## Conclusion

Frames and framing are two sides of one coin. Frames help structure our ideas, experiences, and expectations and make us take part in the world, society, and any social interaction. However, they also frame the direction into which we can think, and thus frames become structures that are used in any communication process (consciously or unconsciously) by all sides involved. With regard to forensic oratory, we notice how orators target their respective audience by linking to their (imagined) frames with the attempt to anchor their goals at the slots they regard as manipulable. Cicero was a skilful master in doing so, and *Pro Quinctio* is a representative example. The struggle between his client Quinctius and the opponent Naevius over the protracted dissolution of the business partnership centred on the legal core. At certain moments, both parties tried to “frame” the case in their own favour as both clearly understood the importance and strength of the legal framework in Roman society.[[519]](#footnote-519) However, the dynamic negotiation process in front of judicial magistrates as third parties was gradually coming to favour Naevius, especially after the *missio in possessionem* by the praetor Burrienus and the failed negotiation of Quinctius in front of the praetor Dolabella who “framed” a *sponsio praeiudicalis* anew, perhaps to find somehow a final possibility for a compromise between the two parties. Interestingly, in these passages, Cicero clearly follows the strong framework provided by the legal procedure(s), and argues only on a secondary level with common rhetorical *topoi* by contrasting the socio-economic status and morality of the two parties. I have sought to demonstrate that this was due to targeting the specific audience, the judging jurists C. Aquilius Gallus and his fellow assessors whom he thought to convince of his legal interpretation according to the strict sense of the word. That he could do this in a different way became evident in the last part of the speech, wherein Cicero quite typically constructed the world as he viewed it: with Naevius, his supporters, and the pre-judging magistrates as examples of the morally declining society, and he, his client, and, of course, the current judges on the good side of the *res publica* that could only be saved by a brave, and hence just decision, going beyond the mere legal framework.

# The *Pretium in Numerata Pecunia* Controversy and the Jewish Debate over the Acquisition of MovablesByMerav Haklai

## Introduction

During the second and third centuries CE Roman jurists extensively debated the question of whether or not a sale was contracted if no money was involved. Simultaneously, Jewish legal authorities were debating the relationship in sale transactions between coins and other goods on the one hand, and various monetary instruments on the other. Both Roman law and Jewish legal sources preserve debates on procedural aspects of sale that eventually affected the way transactions were carried out. In both traditions, legal practicalities affected the juristic definitions that attributed transactions to specific categories of sale. In each tradition, the outcome of these debates had crucial implications for the real-life conduct of sale transactions, as it determined the legal aid available in the event of a dispute. This paper uncovers certain communalities between the two legal traditions and argues, further, that these were created by a shared conceptual approach; that is, by an understanding that money is a unique phenomenon requiring special attendance. As such, money highlights conceptual classifications, and in so doing, it enables individual items of sale to be differentiated and thereby, it enables a proper operation of a valid legal procedure.

## Roman Law

One of the most innovative contributions of Roman jurisprudence is the formation of consensual contracts, which enables the creation of obligations based on nothing more than agreement between the parties. It is mere consent, rather than any procedural formalities, that gives such contracts their legal force. This novel development originated at an unknown point during late archaic Rome, perhaps in the course of the third century BCE. Out of the four Roman consensual contracts – *emptio venditio* (sale), *locatio conductio* (lease or hire), *mandatum* (mandate or agency), and *societas* (partnership) – *emptio venditio*, the Roman contract of sale, was allegedly the earliest.[[520]](#footnote-520) By the turn of the second century BCE, *emptio venditio* had emerged as a contract enforceable solely on the basis of agreement between buyer and seller.[[521]](#footnote-521) It created bilateral obligations between the parties, who were reciprocally liable to one another;[[522]](#footnote-522) and was conditioned neither by conveyance,[[523]](#footnote-523) nor by any transfer of earnest money.[[524]](#footnote-524) This novelty detached the moment a sale was concluded from that of delivery, which, in turn, potentially enabled sale on credit to become an integral feature of the Roman economic landscape.[[525]](#footnote-525)

In order for a Roman contract of sale to be valid, the parties had to agree on two issues: the object sold, *merx*; and its price, *pretium*. The former, *merx*, could be “anything which one may have, possess, or sue for”.[[526]](#footnote-526) The latter, *pretium*, was subject to certain restrictions. First, it had to be *certum*, “definite”,[[527]](#footnote-527) meaning that the contract either stated a final figure or described the conditions that led to one.[[528]](#footnote-528) Second, it had to be *verum*, “real”, i.e., not symbolic.[[529]](#footnote-529) Third, in later period – although probably not before the end of the third century CE, introduced at the earliest by Diocletian – a price also had to be *iustum*, “just”.[[530]](#footnote-530) This requirement is known in the scholarship as the doctrine of *laesio enormis* and raises many interesting questions that are beyond the scope of the current discussion.[[531]](#footnote-531) Fourth, and this is the requirement that interests us here, the price had to be constituted in monetary terms, that is *in numerata pecunia*.

For several decades, the issue of *pretium in numerata pecunia* stood at the heart of one of the most celebrated controversies between the two schools of Classical Roman Law: The Proculians and the Sabinians. Since the first century CE, the intellectual life of Roman jurists was dominated by a division into these two schools of thought, whose legal rulings differed in a long list of controversies.[[532]](#footnote-532) The reasons for the emergence of two distinct schools, as well as the nature of the division between them, has been the subject of many scholarly debates and it, too, is beyond the scope of the present discussion.[[533]](#footnote-533) What concerns us here are the specifics of the *pretium in numerata pecunia* controversy. The school controversy regarding the pecuniary nature of a purchase-price is known mainly due to a single paragraph contained in Gaius’ *Institutiones* (3.141) and to two fragments of Paul’s *Ad Edictum*, which are preserved in Justinian’s *Digest* (18.1.1.1 and 19.4.1.pr). All three texts are cited here in full, starting with Gaius’ *Institutiones*, which reads:

Likewise, the price must be in money. There is, however, much question whether the price can consist of other things, for example, whether a slave, or a toga, or a piece of land can serve as a price for another thing. Our teachers think that the price can also consist of another thing. Hence, they commonly think that by bartering things a contract of sale is concluded and that this is the most ancient form of sale. And by way of argument they bring forward the Greek poet Homer, who has said somewhere: “Thence the long-haired Achaeans procured wine, some in exchange for bronze, others in exchange for gleaming steel, some for hides and others for the live cattle, and some for slaves” and so on. The authorities of the other school disagree and hold that bartering things is one thing and that sale is another. Otherwise, when things are exchanged one cannot determine which thing is considered as having been sold and which as having been given by way of price. But, on the other hand, it seems absurd that both things are considered as sold and as given by way of price at the same time. Caelius Sabinus, however, has said that, if I have given to you, who offers a thing for sale – e.g., a piece of land – a slave by way of price, then the piece of land is considered as having been sold and the slave as having been given by way of price in order to acquire the piece of land.[[534]](#footnote-534)

According to Gaius, the controversy revolved around the question of whether or not a purchase price had to consist of money, as the Proculians claimed (*diversae scholae auctores*); or, whether it could potentially consist of other things, such as a slave, a toga, or a piece of land, as maintained by the Sabinians (*nostri praeceptores*). The Sabinians contended that barter (*permutatio*) was a *species* of sale (*emptio venditio*), in fact, “the most ancient form of sale”. The Proculians, on the other hand, took the view that *permutatio* and *emptio venditio* were independent legal procedures, because in *permutatio* it was impossible to discern between the item being sold (*merx*) and the price received for it (*pretium*). Gaius also mentions a *media sententia* offered in the second-half of the first century CE by Caelius Sabinus; who claimed that the order in which the exchange took place determined which party offered the goods (*merx*) and which party offered the purchase price (*pretium*). Hence, it also determined which party was able to invoke the remedy of *actio venditi* and which party could invoke that of the *actio empti*. The moderate view offered by Caelius Sabinus confirms that procedures were often applied inconsistently, a fact that often required the juristic authorities to intervene, in order to determine which legal procedure was the correct one to apply.

The excerpts from Paul’s commentary on the Praetor’s Edict, written approximately one generation after Gaius’ text, elaborate on the Proculian line of argument and lend support to the hypothesis that, by the early third century, the controversy was decided in favour of the Proculian stance. *Dig.* 18.1.1.1 (Paul. 33 *ad ed*.) reads:

And today it is a matter for doubt whether one can talk of sale when no money passes, as when I give an outer garment to receive a tunic; Sabinus and Cassius hold such an exchange to be a sale, but Nerva and Proculus maintain that it is barter, not sale. Sabinus invokes as authority Homer who, in the lines which follow, relates that the army of the Greeks bought wine with copper, iron, and slaves: “Then the longhaired Achaeans bought themselves wine, some with copper, others with splendorous iron, ox-hides, oxen themselves, or slaves.” These lines, however, suggest barter not purchase, as also do the following: “And now Jupiter, son of Saturn, so deranged the mind of Glaucus that he exchanged his armour with Diomedes, son of Tydeus.” Sabinus would have found more support for his view in what this poet says elsewhere: “They bought with their possessions.” Still the view of Nerva and Proculus is the sounder one; for it is one thing to sell, another to buy; one person again is vendor and the other, purchaser; and, in the same way, the price is one thing, the object of sale, another; but, in exchange, one cannot discern which party is vendor and which, purchaser.[[535]](#footnote-535)

From this excerpt, it appears that the relevant question was simply whether or not a sale occurred – hence, the remedy of the *actiones empti et venditi* was instituted – whenever no money (here, specifically, coinage, *nummi*) was involved. Paul sides with the Proculian view, arguing that *emptio venditio* requires a clear distinction to be made between buyer and seller, which can only be achieved via a clear distinction, in turn, between the goods (*merx*) and the purchase price (*pretium*), a task impossible in barter (*permutatio*). The incentive for distinguishing *merx* from *pretium* was due to a procedural requirement to determine which party was permitted to use the remedy of the *actio empti* and which that of the *actio venditi*. However, the final part of the excerpt gives the impression that the controversy turned on the issue of distinguishing barter (*permutatio*) from sale (*emptio venditio*). Thus, a procedural requirement of Roman law gave rise to a conceptual distinction between barter and sale, a distinction that became the “bread and butter” of Roman commercial thought and indeed, of modern thought on the subject.

Another excerpt from Paul’s commentary on the Praetor’s Edict that explains that the need to distinguish sale from barter was necessitated not only by a need to establish who was entitled to invoke the remedies of the *actiones empti et venditi*, but also by further formalities intrinsic to Roman jurisprudence. *Dig.* 19.4.1.pr (32 *ad ed*.), reads:

Just as selling is distinct from buying and the buyer from the seller, so too the price is distinct from merchandise. But in barter it is impossible to distinguish who is buyer and who is seller, their duties being very different. The buyer is liable on sale if he does not make the recipient the owner of the money, whereas the seller need only obligate himself in the event of an eviction, deliver the possession, and remain free of bad faith, and thus he owes nothing if there is no eviction from the object. But in barter, if both things are price, then they must become the property of each party, and if merchandise, then they need not become the property either. But since there should be both an object and a price, [barter] cannot [be sale and purchase, for there is no way] of knowing which thing is merchandise and which price, nor does common sense allow that one and the same thing be both the object sold and the price of purchase.[[536]](#footnote-536)

From this excerpt it follows that, because in *emptio venditio* each party was bound under a different set of obligations (*multumque differunt praestationes*), a clear distinction between buyer and seller was called for. While the former (the buyer) was obliged to transfer ownership over the purchase price agreed,[[537]](#footnote-537) the latter (the seller) was not obliged to transfer ownership over the *merx*, as it was not always the case that the seller was the owner.[[538]](#footnote-538) To transfer ownership, a separate legal act of formal conveyance was required: *Mancipatio* in the case of *res mancipi*,[[539]](#footnote-539) and *traditio* in the case of *res nec mancipi*.[[540]](#footnote-540) Thus, a need to distinguish the buyer from the seller was not derived solely from the question of who was entitled to invoke which remedy. The consequences of all these scenarios, though, are the same: it was crucial to differentiate between *merx* (merchandise) and *pretium* (purchase price), in order for the *emptio venditio* to be able to function correctly. Whenever such a differentiation was impossible, Roman jurisprudence faced a real difficulty in accommodating the formalities of *emptio veditio* with any accuracy. Eventually, Roman jurists simply preferred to view such transactions as something else, as *permutatio*. In so doing, they helped to create a clearer distinction, a dichotomy in fact, between barter and sale.

The difference of opinion between the two schools concerning the pecuniary nature of a purchase price continued throughout the second century and perhaps also into the third. However, by the second half of the third century, legal opinion at the imperial court was promoting the Proculian stance, and before the end of the third century the controversy had been finally decided in favour of the Proculian view.[[541]](#footnote-541) *Emptio venditio* was recognised as a completely separate transaction from *permutatio*, whereas the method used to distinguish between the two required the existence of a purchase price (*pretium*) formulated *in numerata pecunia*, i.e., “in counted money”. Thus, the debate concerning the nature of *pretium* was neither purely theoretical nor a case of *interpretatio doctrinalis*. Any requirement that a purchase price should be defined in monetary terms had crucial implications for both juristic procedures and the legal aid provided to each of the parties involved; and hence, also, to the conduct of sale transactions in general. At the end of the debate, the triumphal Proculian stance dictated that a contract of sale (*emptio venditio*) should be contracted by means of an agreement over two issues, merchandise (*merx*) and purchase price (*pretium*); and also, that the latter should be stated in monetary terms (*in numerata pecunia*). This controversy between the two schools was not initiated by a theoretical enquiry into the nature of *emptio venditio*, nor that of *pretium*; rather, procedural aspects of Roman law were the engine behind these continuous juristic debates. The resolution of the controversy came with a firm establishment of a conceptual dichotomy between barter and sale. The two were contrasted to one another, with the use of money and the definition of *pretium* as having a pecuniary component forming the boundary between *emptio venditio* and *permutatio*.[[542]](#footnote-542) Taken as a whole, the significance of this conceptual framework extended far beyond the sphere of Roman jurisprudence, as is demonstrated below, with an example taken from Jewish legal sources.

## Jewish Law

On the face of it, the question of *pretium in numerata pecunia* has no place in a discussion on the contracting of a sale, as expounded in Jewish legal sources. Both the notion of a sale and the legal measures for making an act of sale are completely different in terms of structure, internal logic, and practical procedures within the Jewish legal tradition, when compared with Roman law. In Jewish law, contracts of sale fall under a larger category of *dinei mamonot*, literally “property laws”; which is a category that does not fully coincide with that in Roman *ius civile*. A central notion in Jewish property law (*dinei mamonot*) is the legal term *qinyan*. This derives from the root *q-n-h* (ק-נ-ה), which means “to acquire”, “to buy”, “to obtain”, or “to get hold of”. *Qinyan* generally stands for “possessions” or “property”, but can mean also “a formal mode of acquiring or conveying property or creating an obligation”, as well as “ownership” and “contract”.[[543]](#footnote-543) The same word enfolds all of these meanings, as do the verbs deriving from it in Hebrew. However, in contrast to Roman law, *qinyan* is not restricted to property law and can be applied to other areas of life. Thus, for example, it is used in the legal formulation applicable to Jewish marriages, where a woman is “acquired” by her husband.[[544]](#footnote-544)

In Jewish law, a valid contract of sale required the consent of both parties and a *modus acquirendi*, which was termed by later Jewish legal authorities as *ma‘aseh qinyan*, “a deed of acquisition”, a phrase not used by talmudic sages.[[545]](#footnote-545) Practically, it meant that, in order to contract a sale, some act needed to be performed to render the transaction binding. This was contrary to Roman law, where sale was a consensual contract. Valid deeds of acquisition varied depending on the details of the transaction, the prevailing custom, and the opinion of different sages. Procedural diversity was intrinsic to the creation of sale transactions in Jewish law, with its roots reaching back to Biblical law.[[546]](#footnote-546) Unlike Roman law, in Jewish law there were many valid *modi acquirendi*. There was no Praetorian Edict that demanded a rigidness of formulae, no strict procedural need to differentiate the seller from the buyer, and, hence, no strict division between sale and barter. In fact, it may even be said that, in Jewish law, barter was a species of sale, with one Jewish *modus acquirendi* being called *qinyan* *ḥalifin* (קניין חליפין), literally “acquisition by barter”; whereby it too was divided into multiple categories, which depended on the practical procedures involved .[[547]](#footnote-547)

Here, we will address one type of acquisition method called Acquisition by Pulling or Drawing (*qinyan meshikhah*). Acquisition by Drawing could be applied to movables and, to follow Menaḥem Elon, was “a mode of acquisition created by an enactment pursuant to which ownership is not acquired upon payment of the purchase money … but is acquired only when actual possession is taken”.[[548]](#footnote-548) Leaving aside the question of whether or not Acquisition by Drawing was in fact a result of the sages’ “enactment”, the doctrine of Acquisition by Drawing requires the actual transfer of the item sold, rather than that of the payment for it. Taking physical possession of the item sold renders the transaction officially complete.

Regulations regarding Acquisition by Drawing appear in the *Mishnah*, which is a redaction of Jewish oral traditions and dicta (*halakhot*) from the late pharisaic period (c. 536 BCE – 70 CE), although probably not predating the first century BCE, and also from the tannaicperiod (c. 10 – 220 CE). It was collated by Jewish sages living in the Roman province of Syria Palaestina in the second and early third centuries CE; and, according to tradition, was concluded by Rabbi Judah the Patriarch (who died c. 220 CE).[[549]](#footnote-549) The paragraph relevant to our discussion of Acquisition by Drawing appears in order *Neziqin*, tractate *Bava* *Metzi’a* 4:1 of the *Mishnah*, and is further elaborated in the *Mishnah’s* commentaries in the *Palestinian* and *Babylonian Talmuds*; the former may have been compiled by the fourth century and the latter perhaps by the sixth or even the seventh centuries.[[550]](#footnote-550) I will begin by citing the three texts in full:

The *Mishnah* reads:

Silver acquires gold but gold does not acquire silver. Brass acquires silver but silver does not acquire brass. Bad coins acquire good ones but good ones do not acquire bad ones. A blank acquires a coin but coin does not acquire a blank. Movables acquire coins but coins do not acquire movables. This is the rule: all movables acquire one another.[[551]](#footnote-551)

The *Palestinian Talmud* elaborates on this mishnaic excerpt as follows:

This is a summary of the matter: Anything worth less than the other acquires the other. Rebbi Ḥiyya bar Ashi said, who stated this? Rebbi Simeon ben Rebbi {=Judah the Patriarch}. His father told him, change your opinion and state the following: “Gold acquires silver.” He told him, I do not change my opinion since when your faculties were unimpaired, you instructed me to state: “Silver acquires gold.” The word of Rebbi implies that gold is like produce. The Mishnah implies that silver is like produce. [Rebbi Ḥiyya’s baraita implies that gold is like produce, but his word implies that silver is like produce, as the following:] The elder Rebbi Ḥiyya’s daughter lent denars to Rav {=Abba Arikha, her cousin}. She came and asked her father, who told her: Take from him good and full weight denars. Do we learn from Rebbi Ḥiyya’s daughter? Rebbi Idi said, also Abba, Samuel’s father, asked before Rebbi: May one lend denars against denars? He answered him, it is permitted. Rebbi Jacob bar Aḥa said, also Rebbi Joḥanan and Rebbi Simeon ben Laqish both instruct: It is permitted to lend denars against denars. Qerat against qerat is permitted, lekan against lekan is forbidden.[[552]](#footnote-552)

The text of the *Babylonian Talmud* regarding this *halakha* reads:

1. (*Mishnah*) Gold acquires silver, but silver does not acquire gold; copper acquires silver, but silver does not acquire copper. Disused coins acquire current ones, but current coins do not acquire disused coins. Unminted metal acquires minted metal, but minted metal does not acquire unminted metal. Movable property acquires coined money, but coined money does not acquire movable property. Movable property acquires other movable property. [[553]](#footnote-553)
2. (*Gemara*): Rabbi[[554]](#footnote-554) taught his son R. Simeon: Gold acquires silver. Said he to him: Master, in your youth you did teach us, Silver acquires gold; now, advanced in age, you reverse it and teach, Gold acquires silver. Now, how did he reason in his youth, and how did he reason in his old age? In his youth he reasoned: Since gold is more valuable, it ranks as money; whilst silver, which is of lesser value, is regarded as produce: hence [the delivery of] produce effects a title to the money. But at a later age he reasoned: silver [coin] [44b] is current, it ranks as money; whilst gold, which is not current, is accounted as produce, and so the produce effects a title to the money.[[555]](#footnote-555)
3. R. Ashi said: Reason supports the opinion held in his youth, since it [the Mishnah] teaches: Copper acquires silver. Now, should you agree that silver ranks as produce vis à vis gold, it is well: hence it states: Copper acquires silver, to show that though it is accounted as produce in relation to gold, it ranks as money in respect to copper; but should you maintain that silver ranks as money in respect of gold, then [the question arises:] If in relation to gold, which is more valuable, you say that it ranks as money, it is necessary [to say so] in relation to copper, seeing that it is both more valuable and also current? It is necessary: I might have thought that the [copper] coins, where they do circulate, have greater currency than silver: therefore, we are taught that since there is a place where they have no circulation, they rank as produce.[[556]](#footnote-556)
4. Now, R. Ḥiyya too regards gold [coin] as money. For Rab[[557]](#footnote-557) once borrowed [gold] denarii from R. Ḥiyya’s daughter. Subsequently, denarii having appreciated, he went before R. Ḥiyya. “Go and repay her current and full-weight coin”, he ordered. Now, if you agree that gold ranks as money, it is well. But should you maintain that it is produce, it is the equivalent of [borrowing] a *se’ah* for a *se’ah* [to be repaid later], which is forbidden? [That does not prove it, for] Rab himself possessed [gold] denarii [when he incurred the debt], and that being so, it is just as though he had said to her, “Lend me until my son comes”, or “until I find the key”.[[558]](#footnote-558)

These texts have attracted the interest of scholars due to the relationship that they describe between different metals and also between metal and coinage. Scholars have often focused on interpreting the mishnaic excerpt and its talmudic commentaries in the context of late second and early third-century numismatic evidence and third-century coin debasement.[[559]](#footnote-559) Here, however, the focus is on the legal institutionalisation at the background of the sages’ deliberations. The discussion centres on the legal problem at issue, as well as on the type of categorisation that created the need for the ruling in the first place.

As the commentaries in both *Talmuds* show quite clearly, Rabbi Judah the Patriarch gave this tannaic ruling in the late second century CE.[[560]](#footnote-560) The first thing that strikes the reader, however, is the difference in the mishnaic text. Here, a brief clarification is needed: manuscripts that hold only the *Mishnah* carry the text cited here (see note 32 above). In the manuscripts of both the *Palestinian* and the *Babylonian talmuds* the mishnaic text is only sometimes quoted. However, the full text of the *Mishnah* only appears in manuscripts that contain the *Babylonian Talmud*, whereas, strictly speaking, manuscripts of the *Palestinian Talmud* originally did not contain the full text of the *Mishnah* (although subsequently, the mishnaic text, as it appears in manuscripts that contain the *Mishnah* alone, was added to European manuscripts of the *Palestinian Talmud*).[[561]](#footnote-561) While manuscripts that contain only the *Mishnah* stipulate that “Silver acquires gold but gold does not acquire silver”, manuscripts that hold the *Babylonian Talmud* and also contain the full text of the *Mishnah* have it the other way around: namely, they stipulate that “Gold acquires silver but silver does not acquire gold”. The *halakhah* of the *Palestinian Talmud* and the *gemara* of the *Babylonian Talmud* indicate that both such rulings were given by Rabbi Judah the Patriarch, and that from the end of the second century and throughout the third century, there was a lively debate as to which ruling should be followed. The sages cited in both *Talmuds* were familiar with both versions of Rabbi Judah’s ruling and debated which one of them was his last and hence, which of his views was the authoritative one. As historians, we of course would like to know not only which view was regarded as more authoritative, but also which one predated the other. In fact, the latter question was answered more than forty years ago, when Daniel Sperber argued convincingly that the original text of this ruling was the one carried in the manuscripts that contain only the *Mishnah* (i.e., “Silver acquires gold”). This ruling was then subsequently replaced during the third century with the one from the manuscripts that contain both the *Mishnah* and the *Babylonian Talmud* (i.e., “Gold acquires silver”).[[562]](#footnote-562)

Of interest for the present discussion are not the faculties of specific objects, nor their order of hierarchy. Rather, it is the conceptual structure that formulated the legal discussions carried on between the sages in other words, the legal problem at issue. The *Mishnah*, as preserved in manuscripts that contain the mishnaic text only, presents a consistent order of hierarchy, which is explained quite straightforwardly in its *halakhah*, i.e., in the *Palestinian Talmud*: this explanation is that “Anything worth less than the other acquires the other”. The purpose of the mishnaic legal discussion was to regulate Acquisition by Drawing through the setting of clear rules as to when the drawing of an item actually finalized an act of sale and when it did not. In each of the pairs of items described – gold/silver, silver/brass, bad coins/good coins, blank/coin, movables/coins – only the drawing of one item qualified as a valid *modus acquirendi*. The consistency of scale offered in the mishnaic text is explained logically in the *Palestinian Talmud*. Thus, in the *Palestinian* *Talmud,* the legal problem to be decided is one of a definition of the item sold. In the terminology of Roman law, the juristic discussion carried on in this context concerned the definition of *merx*.

The *Babylonian Talmud*, however, in its citation of the mishnaic text, preferred a statement that was described as Rabbi Judah the Patriarch’s later ruling. According to this, “Gold acquires silver” and thus, the commentary offered in the *Babylonian Talmud* was unable to emulate the simplicity of reason offered in the *Palestinian* *Talmud*. The sages of the former were compelled to seek creative justifications for their ruling and came up with various solutions. One argument presented in this context is that Rabbi Judah’s change of heart was affected by a change in the preferred currency in use;[[563]](#footnote-563) whereas a second line of reasoning emphasises the relative value of the items in question.[[564]](#footnote-564) Some scholars have taken this as evidence for third-century coin debasement.[[565]](#footnote-565) A third argument links the mishnaic discussion in *Bava* *Metzi’a* 4:1 with a topic well debated in Jewish jurisprudence; namely, that of “produce”, literally “fruits” (*pera*, פירא, in the Aramaic text of the *Babylonian Talmud*). Since in the subsequent paragraph of this tractate, in *Bava* *Metzi’a* 4:2, a dichotomy is presented between “produce” (literally “fruits”) and “money” (literally “coins”), the commentators of the *Babylonian Talmud* saw fit to insert these particular categories in their analysis of *Bava* *Metzi’a* 4:1. All of these later explanations arise from a need to accommodate the later ruling “Gold acquires silver” as the original text of the *Mishnah*. Yet, their ingenuity does not contradict the claim that the original legal problem at hand was one of definition of the item forming the subject of the transaction – the *merx*, to use Roman legal terminology – the drawing of which finalized an act of sale under Jewish law.

This point gains further support in the last two statements of the mishnaic ruling (*Bava* *Metzi’a* 4:1), as it appears in the text of both the *Mishnah* and the *Babylonian* *Talmud*. The first is that “Movables acquire coins but coins do not acquire movables”. Here, a clear dichotomy arises between movables and coins. Only the drawing of the former qualifies as the valid implementation of Acquisition by Drawing, from which the parties would be unable to retract. Payment in coinage, even when augmented by consent, is not a valid acquisition method. Hence, no sale comes into being (yet) and both parties would be free to renounce the transaction. The dichotomy between movables and coinage echoes contemporary Roman legal discussions, in which a sale (*emptio venditio*) was contracted by an agreement over the *merx* and the *pretium*; with the triumphal Proculian stance ruling that *pretium* must be stated *in numerata pecunia*, i.e., in coins or in money. In the mishnaic text, however, coins, which represent money, are alienated from all other items and receive special treatment.

This is further emphasised in the concluding statement of the mishnaic paragraph, which reads “All movables acquire one another”.[[566]](#footnote-566) From this statement, it follows that, when both parties offer movables, the drawing of any of them by either party operates to finalize the sale, in a manner similar to the Roman *permutatio*. Thus, it can be deduced that the objects discussed earlier in the paragraph were not categorised as movables. These include: gold; silver; brass or copper; bad, disused, or cancelled coins (*ma‘ot hara‘ot*); valid or current coins ([*ma‘ot*] *hayafot*); uncoined or unminted metal (i.e., blanks) (*aseman*); and coined metal (*matbe‘a*). I would argue that none of these items are categorised as movables because of their potential capacity to act as monetary instruments. In fact, they do not create the same reciprocal relationships as movables. Instead, only the drawing of one of these qualifies as an act of acquisition, while the drawing of the other does not; just as with movables and coins, in the penultimate statement of this paragraph. Since all of these items could potentially function as monetary instruments, it was unclear whether or not their drawing had actually finalized an act of sale. Hence, it was necessary to establish a relationship between them. This is exactly the aim of the sages’ ruling. In other words, the legal problem that gave rise to this mishnaic ruling was how to approach Acquisition by Drawing (*qinyan meshikhah*) in a situation where both parties offered items that had the potential to serve as monetary instruments.

The subtext of the sages’ discussion is, in my view, the dichotomy between money and *merx*. Its logic is as follows: all items sold that can be acquired by drawing are either movables or monetary instruments. When both parties offer movables, the drawing of movables by either party finalizes the sale. When one party offers movables whereas the other offers money, only the drawing of the movables finalizes the sale. Difficulties arise when both parties offer items that are capable of functioning as monetary instruments. The mishnaic ruling confronts the uncertainty associated with this type of scenario by offering consistent regulations as to governing which items should be classified as “movables” and which as “money”. It determines which item is the one, the drawing of which finalized an act of sale and which does not.

Such a formulation of the legal problem at hand by the Jewish sages arose precisely at the same time when Roman jurists were resolving the *pretium in numerata pecunia* controversy. Both legal traditions, each following its own methodology and its own internal logic, discuss the juristic uncertainties that arise from an identical conceptual approach; namely, a clear distinction between money and the items which may manifest it on the one hand, and all other goods on the other. The Jewish legal debates can be understood properly only when contextualised in terms of the consequences arising from the Roman *pretium in numerata pecunia* controversy. This differentiated the merchandise (*merx*) from the purchase price (*pretium*), based on the presence of money (*numerata pecunia* or *nummi*). The assumption underlying this differentiation was that money has special attributes enabling it always to elicit the distinction between *pretium* and *merx*. Similarly, the notion that “movables” are the opposite of “money” or “coins” is fully integrated within the conceptual framework accepted by the Jewish sages; and even though they debated the particular classifications of different items, the legitimacy and validity of the dichotomous categorisation (“movables”/ “money”) was never doubted. The reason for this was that such an approach was derived from the prevailing conceptual *status quo* just mentioned and that, insofar as this is the case, it had a major impact on the economic reality prevailing at the time.

## Conclusions

The first part of this paper summarises the famous controversy between the two schools of Roman law regarding the pecuniary nature of a purchase price in contracts of sale. This school controversy was not brought into being by an intention to determine the nature of sale contracts; rather, it arose because of the imperatives of Roman jurisprudence itself. In the three Roman legal texts cited above, and especially in the excerpts from Paul’s commentary on the Praetor’s Edict, discussions revolve around the issue of which legal remedy should be used, i.e., which *actio* can be applied in a given situation. When this controversy was finally resolved, however, it gave rise to certain long-lasting conceptual and jurisprudential consequences. I argue that the resolution of the controversy in favour of the Proculian stance, which stipulated that *pretium in numerata pecunia* was a prerequisite for *emptio venditio* as a way of differentiating it from *permutatio*, established the distinction between sale and barter on a firm and durable footing. That distinction, in turn, was backed up by an unspoken, yet even fiercer, dichotomy between money and all other items.

The second part of this paper demonstrates that this dichotomy transcended the limits of Roman law. It examines a discussion in Jewish legal sources during the Roman period regarding sale transactions contracted via a *modus acquirendi* called Acquisition by Drawing. The ruling preserved in the *Mishnah*, tractate *Bava* *Metzi’a* 4:1, and elaborated in its commentaries in the *Palestinian* and *Babylonian Talmuds*, I argue, was initiated by a rudimentary though tacit dichotomy, which contrasted money and all other items. The classification of money as a separate phenomenon requiring special attention was the main factor behind the Jewish sages’ ruling that, in Acquisition by Drawing, the drawing of money did not qualify as a valid *modus acquirendi*. A practical problem arose when both sides of a transaction offered items that were each capable of functioning as monetary instruments. The solution offered in *Bava* *Metzi’a* 4:1, was to set clear rules regarding which items should be classified as money and which should be classified as movables. Thus, the same pattern of thought, which eventually favoured the Proculian stance in the *pretium in numerata pecunia* controversy and saw money as a special phenomenon permitting a clear separation between *pretium* and *merx*, also dictated the preferences, and indeed, the rulings of the Jewish sages.

In conclusion, the legal procedures needed to bring about a valid act of sale have a completely different structure, internal logic, and practical modalities in the Jewish legal tradition when compared with Roman law. Even so, an examination of the juristic debates that took place in both legal traditions throws up some surprising similarities: in both, the decisions arrived at were shaped by a similar duality and a greater “notional *status quo*”, which differentiated money from all other items. Money was perceived as a unique phenomenon requiring special attention as well as a kind of divider between the purchase price (*pretium*) and the goods (*merx*). This conceptual framework, which treated money as an exceptional category, affected the conduct of sale transactions due to its influence on the relevant legal procedures and formalities. Moreover, it regulated simultaneously the behaviour of the economic actors and the economic reality at large.

Here, some clarification is needed regarding the issue of co-existing systems of law. The legal practicalities regulating economic activity resulted from the interrelations between a variety of different legal traditions operating within the Roman empire. The present paper focused on juristic debates that were taking place in both the Roman and the Jewish legal traditions during the same period, namely, the late second and early third centuries CE. This simultaneity by itself, however, is not enough to substantiate the claim that the debates of the Jewish sages were influenced by Roman law. Considerable differences between the two legal traditions regarding the conclusion of sale transactions support the claim that, communalities here detected do not mean that local law was in some way subjected to Roman law; nor do they derive from any adaptation, whether mandatory or voluntary, of local law to the principles of Roman jurisprudence. Rather, such communalities were created by a common conceptual framework: namely, the perception of money as a unique phenomenon quite distinct from all other items. It is this theoretical common denominator that drove the corresponding debates in both legal traditions. As such, it reflects a collective mind-set that structured both the economic understanding and the day-to-day reality of the inhabitants of the Roman empire.

Finally, I believe that the explanation offered here is in force regardless of the extent to which communalities between Roman and Jewish law regarding the role of money in sale transactions were affected by the introduction of the famous *Constitutio Antoniniana*.[[567]](#footnote-567) How Caracalla’s general grant of citizenship affected the relationship between the Roman empire’s co-existing systems of law is a topic (yet again) currently under debate by scholars.[[568]](#footnote-568) Inclusion of the reflections presented here within a wider discussion on the aftermath of the *Constitutio Antoniniana* would require significant further research. Thus, that particular topic exceeds the limits of this paper and in any event, would need to take into consideration the special attention Jewish law received in later Roman legal sources.[[569]](#footnote-569)

# Reliance in the Face of Death. Considerations on Roman Economy and *Fideicommissa* By Ulrike Babusiaux[[570]](#footnote-570)\*

Inheritances and legacies were a major source of income in ancient Rome. In fact, the economic relevance of the law of succession was not limited to the rather static and once in a lifetime takeover of the father’s property. Rather, acquisition due to death took place permanently and by virtue of the social interdependencies of the Roman upper class and their clientele.[[571]](#footnote-571) Roman inheritance law was thus an important factor for acquiring ownership and accumulating wealth. This function becomes apparent in the topical complaint in Latin literature about *captatores* (“legacy hunters”) who obtain the favour of a rich and childless man in order to be considered in his will.[[572]](#footnote-572)

So far, the law of succession has been rather neglected in the discussion of the legal framework for the economic development of the Roman empire.[[573]](#footnote-573) This omission is astonishing in view of the quantitative and qualitative significance of inheritance law in the Justinian tradition. This disregard can be partly explained by the technical complexity of Roman inheritance law rules.[[574]](#footnote-574) The difficulties stem from the fact that the Roman law of succession is drawn from various, sometimes contradictory, legal sources. This multitude is the result of sequential historical “layers of law” that overlap to form – as Fritz Schulz aptly observed – “a labyrinthine law”.[[575]](#footnote-575) In fact, starting from the traditional *ius civile* of the city-state of Rome, the *praetor* as judicial magistrate of the Roman republic developed a complementary regime of legal remedies for and against heirs, before the constitutions of the Roman emperors added further aspects and arguments to the existing layers of the republican law.[[576]](#footnote-576) Under the empire, all these strata or layers coexisted and it was up to the deciding institution or jurist to combine, adapt or balance the different prescriptions for the specific legal question of a case.

From a historical point of view, these legal divergences may be used for the analysis of social, political, and economic change. In fact, due to the importance of the law of inheritance for Roman society, changes within the law of succession might indicate transformations occurring in society, politics and economy.[[577]](#footnote-577) Augustus, who allowed the enforcement of non-formal fideicommissa (“trusts”) before imperial courts, initiated the most fundamental change of the law of succession.[[578]](#footnote-578) This innovation stood in clear contradiction to the traditional civil (*ius civile*) and praetorian law (*ius praetorium*), both of which prescribed formal words in a ritually established will in order to institute an heir or to defer a bequest. It can be seen as a typical feature of the Janus-headed character of the Principate that the testamentary system of republican origin was not abrogated by the *princeps* but continued to coexist alongside the imperial innovation of *fideicommissa*.[[579]](#footnote-579)

Although formal wills were never abolished, it is equally clear that the permanent competition with informal *fideicommissa* gradually blurred the severity of the traditional law for wills. Whereas the political implications of the Augustan reform have often been studied,[[580]](#footnote-580) their economic impact and background have rarely been examined. It seems worthwhile, therefore, to analyse the main differences between *fideicommissa* and formal wills in order to determine the possible economic implications of this reform. For this purpose, I will first provide an overview of the main substantial differences between “trusts” and formal testaments (I), and then compare the procedural specificities of both (II). The last part of the paper will try to correlate the enforceability of *fideicommissa* with the economic development of imperial Rome (III).

## I. Differences between the traditional law of wills and *fideicommissa*

A study of the essential differences between testamentary law in *ius civile* and *ius praetorium* on the one hand and the imperial *fideicommissa* on the other hand must begin with the *Institutiones* of Gaius (around 160 CE).[[581]](#footnote-581) In fact, Gaius’ work gives a faithful account of the Roman imperial law, whereas the Justinianic sources deliberately equate formal bequests (*legata*) and *fideicommissa*.[[582]](#footnote-582) Despite the omissions and simplifications due to its didactic intention, Gaius shows that the differences between the two kinds of testamentary disposition were subject to change.[[583]](#footnote-583)

### The catalogue of differences according to Gaius

With regard to pecuniary *fideicommissa*,[[584]](#footnote-584) Gaius mentions the following essential differences in comparison to traditional wills. A *fideicommissum* allows appointing a temporary heir, that is, to request the formally instituted heir to pass over the inheritance to the beneficiary of a *fideicommissum.*[[585]](#footnote-585) Moreover, a trust may be given in favour of persons incapable of receiving under civil law.[[586]](#footnote-586) In addition, *fideicommissa* offer the possibility of leaving an object that was not owned by the deceased, which implies the obligation of the appointed person to acquire the property.[[587]](#footnote-587)

In contrast to legacies, *fideicommissa* can be suspended until the time of death of the heir.[[588]](#footnote-588) In the case of a universal *fideicommissum* it is thus permitted to institute a provisional heir according to *ius civile* and a final “heir” via *fideicommissum.*[[589]](#footnote-589) In the same way, it is possible to charge not only an heir (as in the case of the legacy) but also any other person who has received an advantage from the will. Hence, there can be beneficiaries of *fideicommissa* at the expense of heirs, legatees and (primary) *fideicommissarii*.[[590]](#footnote-590) Furthermore, *fideicommissa* can be imposed on an intestate successor, that is, even without an actual and valid will.[[591]](#footnote-591) Finally, they can be requested in an informal supplement to a will (codicil) without requiring formal confirmation,[[592]](#footnote-592) and they can be written in Greek, whereas bequests under Roman civil law were only effective if written in Latin.[[593]](#footnote-593) This by no means exhaustive list shows – as Gaius himself observes – that the scope of *fideicommissa* is in many respects wider than that of legacies.[[594]](#footnote-594) This assessment proves even more significant if we consider the main characteristics of a traditional Roman will.

### Main characteristics of a traditional will in Roman civil law

Wills under *ius civile* and *ius praetorium* were formal acts, subject to specific external and internal formal requirements. For the evolved *ius civile* this included the performance of a *mancipatio* through which the testator made the written will public (*nuncupatio*) and thereby valid.[[595]](#footnote-595) *Ius praetorium* still required the written act and corresponding seals of the witnesses.[[596]](#footnote-596) Also the internal formal requirements imposed limitations.[[597]](#footnote-597) Some of the most important were the following: The testator had to be legally capable of making a will; he had to be a Roman citizen, free from his father’s power (*sui iuris*) and of age; women, in addition, needed the consent of their guardian.[[598]](#footnote-598) Both the appointment of heirs and the attribution of bequests had to be carried out in predefined words and they had to be phrased as orders.[[599]](#footnote-599) Thus, the heir had to be instructed to be heir (*heres esto* = ‘shall be heir’).[[600]](#footnote-600) The same is true for bequests that required different wordings, depending on the intended effects. Moreover, bequests were only valid if the appointment of an heir (*institutio heredis*) was in force,[[601]](#footnote-601) as the institution of an heir constituted the very essence of the testament (*caput testamenti*).[[602]](#footnote-602) The testator could appoint substitutional heirs in the event that the first heir decided not to take up the inheritance or died before the opening of the will[[603]](#footnote-603); he also could appoint a replacement heir for underage children in case they died before the age of majority.[[604]](#footnote-604)

In principle, the testator was free to appoint family members or even so-called “strangers” (*extranei*) as heirs, that is, persons from outside the family. However, the will was only valid if sons in his power (*filii familias*) had been disinherited or appointed as heirs by name, i.e., individually; other descendants could be disinherited in a blanket manner (*inter ceteros*) but still needed to be considered in the father’s or grandfather’s testament.[[605]](#footnote-605) The *pater familias* also had to disinherit children born after his death (*postumi*) if he did not want to risk the invalidity of the will at the birth of the posthumous offspring.[[606]](#footnote-606) The praetorian law extended these rules to emancipated children.[[607]](#footnote-607)

Other limitations derived from the unwritten rules of the Roman law of succession. One important principle was the strict separation of testamentary succession and intestate succession.[[608]](#footnote-608) It meant that if at least one testamentary heir was willing to take up the inheritance, the law of intestacy could not apply.[[609]](#footnote-609) According to another basic rule, universal succession could not be limited in time.[[610]](#footnote-610) Therefore, a temporal division of the inheritance into a provisional and a final succession (“Vor- und Nacherbfolge”) was impossible under civil and praetorian law. Furthermore, due to the strong rituality of the Roman civil law, the revocation of the will required establishing a new one.[[611]](#footnote-611) Even if the testator burned the deed or erased the disposition, the civil testament validated by *mancipatio* remained in force.[[612]](#footnote-612) Furthermore, penal legacies were invalid[[613]](#footnote-613) and the testator could not leave bequests to unspecified persons.[[614]](#footnote-614)

These peculiarities show that civil and praetorian law regarded wills as a means of structuring family succession.[[615]](#footnote-615) They pushed the testator to decide whom of his children he wanted to appoint as heir(s) and whom of them he wanted to exclude from the estate. Due to the ritual and the solemn form of the will, the planning was designed to be permanent and difficult to change. The rules for posthumous childrenand the possibility of appointing a substitute heir allowed to react to births and deaths but could only prevent the will from being invalid if the testator had considered all eventualities. In the event of the testament’s invalidity, intestacy law gave full right to family succession.[[616]](#footnote-616) All this indicates that the will was one way to organise the family’s estate, but that family would get the estate in any event.[[617]](#footnote-617) Testamentary formalities thus intended to guide the testator’s planning and to preserve the interests of all (namely male) family members.

### Reliance as the core of fideicommissa

The reason for the disparate configuration of *fideicommissa* lies in their origin outside the legal sphere. In fact, *fideicommissa* sanction the legitimate expectations that the deceased invested in his heir or any other person who profited from the inheritance. In this respect, *fideicommissa* form a kind of pact between the testator and the “trustee”. On one side, the deceased leaves the inheritance or part of it to the trustee on the other side, who promises to pass it over entirely or partially to a third person, the beneficiary.[[618]](#footnote-618) Thus, *fidei committere* is “to hand over to somebody’s trustfulness”.

*Fides* in the sense of unilateral faith, reliance, trust, and confidence applies to other relations that are characterised by a one-sided position of power where the strong party is bound by its loyalty (*fides*) to the weak. Illustrations of this unilateral reliance (*fides*) are the *deditio in fidem* of a vanquished foe to his Roman victor, the *fides patroni* of the manumitting slave-owner for his former slave (*libertus*) and the *fides tutoris* expected from the guardian for minors.[[619]](#footnote-619) In all these situations, *fides* derives from an effective bearing of power over a person or a piece of property. The same idea applies to *fideicommissa*, since the trust was only valid if the trustee had actually acquired from the estate.[[620]](#footnote-620) This also explains why intestate heirs who had benefited from the inheritance had also to comply with *fideicommissa*.[[621]](#footnote-621)

These considerations show that *fideicommissa* added a new dimension to the Roman law of succession. In contrast to the *ius civile* and *ius praetorium*, the imperial law did not defend the interests of the family but focussed on the invested trust (*fides*) and the testator’s volition.[[622]](#footnote-622) This new scope also explains the innovations within the judicial enforcement of *fideicommissa*, the *cognitio extra ordinem*.

## II. Innovations in procedure within the *cognitio extra ordinem* for *fideicommissa*

In his account of the various deviations from the traditional testamentary law, Gaius also deals with the procedural rules for *fideicommissa*:

*praeterea legata per formulam petimus; fideicommissa vero Romae quidem apud consulem vel apud eum praetorem, qui praecipue de fideicommissis ius dicit, persequimur, in provinciis vero apud praesidem provinciae. (*Gai. 2.278*)*

Further, we sue for legacies by formula, but claim trust gifts at Rome before a consul or the praetor having special jurisdiction over trusts, in the provinces before the provincial governor. (Translation by De Zulueta [1946]).

He states that in contrast to formal bequests, *fideicommissa* are neither enforced in the formulary procedure (*agere per formulas*) nor before the ordinary *praetor*. Rather, the imperial “trust law” is in the hands of the *consul* and the specialised *praetor fideicommissarius*, an imperial servant.[[623]](#footnote-623) This special jurisdiction follows its own standards for proceedings[[624]](#footnote-624) and is therefore “out of the ordinary” (*extra ordinem*).[[625]](#footnote-625) The simplest exception from existing procedural rules refers to the judicial vacations that do not apply to *fideicommissa*. Thus, claims for informal “trusts” can be filed at any time, whereas bequests are restricted to court days.[[626]](#footnote-626) Further differences concern the scope of the action. While beneficiaries of *fideicommissa* get interests and fruits from the time of death (of the trustor), legatees only acquire accessory rights in the case of delay (*mora*).[[627]](#footnote-627) In contrast to formal bequests that cannot be recovered if paid erroneously, *fideicommissa* fulfilled in error can be reclaimed.[[628]](#footnote-628)

The brief account of Gaius does not allow us to grasp the procedural divergences between formal testaments and the *cognitio extra ordinem* on account of *fideicommissa*. Scholarship has filled this lacuna with general considerations on the differences between the formulary procedure orchestrated by the ordinary *praetor* and the *cognitio extra ordinem* overseen by an imperial official.[[629]](#footnote-629) In this comparison, *cognitio extra ordinem* has received a very poor evaluation. Since *agere per formulas* continues to be praised as the well-ordered procedure of the free republican Roman citizen, *cognitio* *extra ordinem* is discredited as a manifestation of the imperial officer’s recklessness and nearly uncontrolled discretion.

A more nuanced view seems appropriate. First, one should not overestimate the differences between the two procedures, since the *formulae* were in place for the *cognitio* as well. Second, the sentence of the imperial officer in the *cognitio* *extra ordinem* intends to give effect to the testator’s intention and, thus, has to meet the standards of reasonable interpretation.[[630]](#footnote-630) Finally, this interpretation has to follow legal precedence decided by the *imperator* himself and must be in harmony with essential values, such as *pietas* (piety), *verecundia* (modesty) and *benevolentia* (goodwill).[[631]](#footnote-631) In sum, all innovations of the *cognitio extra ordinem* for *fideicommissa* can be seen as manifestations of these standards.

### Condemnatio in ipsam rem and adiudicatio

The first and foremost innovation of *cognitio extra ordinem* is the power of the imperial court to condemn the trustee to restitution in kind (*condemnatio in ipsam rem*).[[632]](#footnote-632) In fact, the traditional formulary procedure is characterised by the limited power of condemnation of the *iudex privatus*. According to the *formula*, he can either condemn or acquit, and the condemnation is limited to compensation for loss of value. This is even true in a suit for protection of property (*rei vindicatio*), where the judge will not be able to force the defendant to surrender the object to the claimant. Instead, the defendant will be condemned to paying the sum the court considers to be equivalent to the value of the object (*condemnatio* *pecuniaria*),[[633]](#footnote-633) which means that he can keep it if he chooses to pay.[[634]](#footnote-634)

The shift from the pecuniary condemnation to the *condemnatio in ipsam rem* under the *cognitio extra ordinem* for *fideicommissa* can be justified by the full respect of the testator’s trust and volition. The request of the deceased addressed to the trustee can be understood as an instruction for the apportioning of the estate.[[635]](#footnote-635) In fact, whenever courts decide on the division of an inheritance, they consider the testator’s wishes. Under the formulary procedure, the court can divide the estate by means of a so-called *adiudicatio*, i.e., a special part of the *formula*. Since *fideicommissa* do not need particular wording to be valid, it seems to be consequential that the court enforcing them does not need any formal authorisation to put them into force. The parallel between *fideicommissum* and *adiudicatio* is also visible in Roman legal writing, since the Roman jurists use instructions for the apportioning of an estate as a basis for *fideicommissa.*[[636]](#footnote-636) Hence, the testator’s volition to distribute his estate in a certain manner among his heirs is interpreted as *fideicommissum* for one co-heir that can be enforced in the procedure of the *cognitio extra ordinem* against all the others. Therefore, the availability of restitution in kind for *fideicommissa* is not completely new, but represents a modification of existing procedural rules in line with the informal character of *fideicommissa* and the greater power of the judicial officer involved in the procedure.

### Fideicommissa and third parties

Another specificity of *fideicommissa* is their effect against third parties. The most striking example of this effect *erga omnes* is the *fideicommissum familiae relictum* that entails the bequest of an estate in favour of all family members of the deceased[[637]](#footnote-637):

*Dig.* 31.69.1 Pap. 19 *quaest*.[[638]](#footnote-638)

*Praedium, quod nomine familiae relinquitur, si non voluntaria facta sit alienatio, sed bona heredis veneant, tamdiu emptor retinere debet, quamdiu debitor haberet bonis non venditis, post mortem eius non habiturus quod exter heres praestare cogetur.*

A plot of land that has been left within the family may, in the event of the heir’s goods being disposed of under a forced sale, be retained by the buyer for as long as the debtor would have had them if the goods had not been sold. After his death he will not retain what an outside heir would be compelled to give. (Translation: Brown 1985)[[639]](#footnote-639)

The testator left a *fideicommissum* to his family over a plot of land. Apparently, the heir has accepted the inheritance and would, thus, has to fulfil the *fideicommissum.* Before the heir can fulfil the request, his property, including the inherited land, is sold in an insolvency procedure (*venditio bonorum*).[[640]](#footnote-640) This forced sale aims at finding a buyer (*bonorum emptor*) who is ready to take over the estate and the debts accumulated by the holder of the assets. In his bid, the buyer will specify the price he is willing to pay for the take-over of the assets, and this price will determine the quota the creditors can expect to get instead of full satisfaction.[[641]](#footnote-641)

In principle, the *fideicommissum* is also a debt of the heir. However, according to this fragment, the beneficiaries of the *fideicommissum* *familiae relictum* are in a privileged position in comparison with other creditors. As the jurist explains, the *bonorum emptor* can only keep the property bound by the *fideicommissum* as long as the trustee (*fiduciarius*) could have kept it. If the heir dies, the obligation flowing from the *fideicommissum* to leave the property to the family is thus transferred onto the *bonorum emptor*. This effect of the “trust” is reminiscent of a preferential right on liquidation that normally derives from a property or another real right giving a privileged access to the object under sale.[[642]](#footnote-642) The reason why the plot of land reserved for the family is not part of the heir’s assets is that the land is considered as pledged for the family. Even though this privilege does not apply if there is fraudulent intention against creditors or the fisc, it stands out in comparison to legatees of a *legatum per damnationem*[[643]](#footnote-643) who are simple creditors.[[644]](#footnote-644) The justification for this “real effect” of the *fideicommissum familiae relictum* seems to derive from the testator’s wishes to leave the land to the family.

### Résumé of the changes in the civil procedure of the cognitio

Summing up the main differences between the *agere per formulas* for legacies and the *cognitio* *extra ordinem* applicable to *fideicommissa*, it could be said that the *fideicommissa* enjoy procedural privileges which reflect their formlessness. However, it would be an exaggeration to consider the *cognitio extra ordinem* as pure discretion of the imperial official; both the execution in kind and the effect against third parties can be explained as analogies and extensions of existing rules and principles.[[645]](#footnote-645)

Since the law of *fideicommissa* and the correlative *cognitio extra ordinem* thus certainly stand up to rationality, we may ask if they meet new economic needs.

## III. Economic implications of the change in Roman testamentary law

When investigating economic implications of Roman law, the modern perspective of benefit maximization or efficiency must be set aside.[[646]](#footnote-646) A less anachronistic approach consists in analysing law as part of the institutional framework which also covers cultural beliefs[[647]](#footnote-647) and values that shape the law.[[648]](#footnote-648) This perspective takes into account the statements of Roman jurists who express economic insights in terms and categories of morals and ethics, such as *aequitas* or *fides*.[[649]](#footnote-649) However, a reliable assessment of the economic aspects of these concepts needs corroboration by other sources. Since Augustus’ life and example are of relevance for the enforcement of *fideicommissa*, Suetonius’ biography on Augustus is a valuable complementary source in this respect.

A first step in this analysis is to look at the framework of testamentary law, i.e., the paradigm that was partially overcome by allowing *cognitio extra ordinem* for *fideicommissa*.

### The Roman will as a manifestation of citizenship

Even if the proverbial ‘horror of intestacy’ might be a misleading exaggeration, Roman citizens are expected and called upon to make a (formal) will.[[650]](#footnote-650) These public expectations exist due to the eminently political function of the Roman testament. Thus, the will is considered as the final expression of the testator’s mind, which reveals his true opinions about the persons who took part in his lifetime.[[651]](#footnote-651) Therefore, the opening of the will is a public act of high importance for the family, friends, and enemies of the deceased. A telling example is Augustus’ reading of Marc Antony’s will in the Senate. Marc Antony appointing Cleopatra and her children as his heirs was the irrefutable evidence that he had lost his Roman identity.[[652]](#footnote-652) Through his will, he sealed his fate and his eventual downfall as ‘traitor to the Roman people’.

The close connection between testamentary law and citizenship is also reflected in the fact that the drawing up of wills is regarded as a social duty, not a natural right.[[653]](#footnote-653) In all legal sources, testamentary freedom is traced back to the law of the Twelve Tables, a legal enactment of the early republic (around 450 BCE).[[654]](#footnote-654) Initially, the power to make testaments (*testamenti factio*) is only conferred on free male citizens that are *sui iuris*, hence no longer under their father’s authority but *patres familias* themselves. Similarly, the capacity to obtain an inheritance through wills is, at its origin, confined to Roman citizens, male and female (even if women could not obtain the same amount as men).[[655]](#footnote-655) The imperial Roman jurists refer to these limitations of (active and passive) *testamenti factio* as public law (*ius publicum*), meaning that it cannot be changed on private initiative.[[656]](#footnote-656)

The social role of the will is twofold. On the one hand, testamentary inheritances and legacies provide maintenance to family members not privileged by the agnatic system, especially the testator’s wife.[[657]](#footnote-657). On the other hand, bequests fulfil a political function, a dimension that is illustrated by Suetonius’ characterisation of Augustus’ concept of friendship:[[658]](#footnote-658)

*Exegit et ipse in vicem ab amicis benivolentiam mutuam, tam a defunctis quam a vivis. Nam quamvis minime appeteret hereditates, ut qui numquam ex ignoti testamento capere quicquam sustinuerit, amicorum tamen suprema iudicia morosissime pensitavit, neque dolore dissimulato, si parcius aut citra honorem verborum, neque gaudio, si grate pieque quis se prosecutus fuisset* (…). (Suet. *Aug*. 66.4)

He required from his friends their good will in return, as much from the dead as from the living. For, although he was far from seeking to be made people’s heir and would never accept anything left to him in the will of someone he did not know, the final judgements of his friends he scrutinized with the greatest of care, nor was his regret feigned if his treatment was too mean or unaccompanied by compliments, nor his joy, if he was acknowledged with gratitude and affection. (…) (Translation by Edwards [2000]).

Because of their *amicitia*, Augustus expects to receive a benefaction (*benivolentia*) from his friends. As Suetonius points out, this does not mean a morally reprehensible *captatio* but a legitimate expectation to be honoured in his friends’ wills. A legacy exceeding symbolic value[[659]](#footnote-659) is an expression of amicable affection[[660]](#footnote-660) and serves to acquire wealth from outside the family.[[661]](#footnote-661) Thus, bequests serve to maintain the socio-political network of friendships and clientele in order to reciprocate the support provided and thus leave the successor in favourable conditions.[[662]](#footnote-662)

The legal enforcement of *fideicommissa* must have changed some of the existing structures and expectations.

### Fides and fideicommissa

The origin of the judicial enforcement of *fideicommissa* is only mentioned in passing, both in Gaius’ and Justinian’s *Institutiones*. Gaius mentions the previously existing possibility of considering non-Romans in *fideicommissa,* which in his time had been abolished by a *senatus consultum.*[[663]](#footnote-663) In this context, he observes *et fere haec fuit origo fideicommissorum* (“indeed, this was probably the origin of trusts”). Therefore, Gaius seems to state that *fideicommissa* were designed to overcome the strict concept of *testamenti factio* linked to Roman citizenship.[[664]](#footnote-664) Since *fides* is known to apply to both Romans and peregrines and has its first apparitions in Roman treaties with other city-states,[[665]](#footnote-665) Gaius’ explanation is in line with the all-embracing character of *fides*, also referred to as *ius gentium*, a law applicable to all mankind.[[666]](#footnote-666)

In contrast, Justinian mentions the wish of many testators to leave inheritances or bequests to persons who could not acquire from a formal will.[[667]](#footnote-667) He explains that testators left “trusts” to a person who could acquire with the request to give to those who could not acquire through the formal testament. For Justinian, *fides* is not an instrument to overcome the limitations of citizenship but an ethical foundation of *fideicommissa.*[[668]](#footnote-668) In fact, according to his account, *fideicommissa* were morally binding thanks to the *pudor* (“honour”) of the trustee.

The concept of *pudor* covers “displeasure with oneself, vulnerability, just criticism and social loss”.[[669]](#footnote-669) Due to the structure of the Roman society, *pudor* was exclusively reserved for the adult elite male[[670]](#footnote-670) and was assorted according to the social rank: “the more exposed you were to *pudor*, the more embedded in the community you were, the more complete and multi-faceted was your social identity”.[[671]](#footnote-671) In Justinian’s account, Augustus’ reform was necessary to re-establish ethical behaviour, which is why claims were at first only accepted in very objectionable cases. Justinian’s Institutes name three motives for the imperial intervention: 1) *gratia personarum motus* (“moved by the esteem for the persons”); 2) *quia per ipsius salutem rogatus quis diceretur* (“because it was contended that somebody had been asked for his (Augustus’) salvation”); and 3) *ob insignem quorundam perfidiam* (“because of somebody’s outstanding perfidy”).[[672]](#footnote-672)

The first case concerns particularly respected persons who do not comply with the *fideicommissum* despite their high social status and *pudor.*[[673]](#footnote-673) The second situation refers to the frequent practice of vowing to the emperor’s welfare.[[674]](#footnote-674) Since the emperor’s salvation is involved, the *princeps* cannot ignore the non-fulfilment by the heir, even if the vow does not entail a legal but a moral obligation. The third motive is the reproach against the trustee for having blatantly breached the trust invested by the testator. Theophilus’ paraphrasis of the Justinian *Institutiones* cites as an example of perfidy a case of a rich man who had been asked to pass over property to poor and very young children, or to the aged parents of the deceased, and had then broken his word.[[675]](#footnote-675) Non-compliance with the promise to surrender the inheritance to a person in need constitutes an evident breach of *fides* and must be punished.[[676]](#footnote-676)

The comparison of Justinian’s and Gaius’ report about the origin of *fideicommissa* shows that both seem to agree on the importance of *fideicommissa* for handing over inheritances or bequests to persons unable to receive in a formal will. However, whereas Justinian concentrates on the ethical function of the *fideicommissa* within the Roman society, Gaius stresses the importance of *fideicommissa* when giving to non-Romans. These differences arise due to the reduced importance of citizenship in Justinian’s time. However, there is no contradiction between the two narratives. First, both aspects – the integration of peregrines and the elementary moral appeal – cover different aspects of the Roman concept of *fides*. In fact, the Roman jurists consider the law applicable to both Romans and non-Romans (*ius gentium*) in line with elementary and hence universal justice.[[677]](#footnote-677) Second, Justinian’s account does not exclude the extension of *fideicommissa* to peregrines put forward by Gaius. Justinian’s ethical emphasis is simply a generalisation of the more acute report given by Gaius.[[678]](#footnote-678) In fact, the Justinianic interpretation only stresses the importance of *fides* as a legal correlate of the moral and societal concept of *pudor*,[[679]](#footnote-679) whereas Gaius looks at the legal function of *fides*, that is, the application to non-Romans as well.

### On the economic implications of fideicommissa and cognitio extra ordinem

If the opening of Roman inheritance law for non-Romans and the control of unethical behaviour can be seen as motives for the enforceability of *fideicommissa* since the Augustan times, one can – if law is regarded as an institutional framework for the economy – question the corresponding developments in the Roman economy of the Principate.

On the one hand, the possibility of giving to persons unable to receive in a formal will might have a link to the expansion of the Roman empire, which Augustus promoted and institutionalised. On the other hand, it might relate to social distortions in Rome. Both phenomena can be explained by the need for men within the Roman provincial administration, since the Roman elite was frequently obliged to leave the city of Rome for extensive periods. In this respect, Justinian mentions that additions to formal wills via confirmed codicils were allowed because of the long *peregrinationes*, i.e., travelling activities, mainly for the fulfilment of public duties.[[680]](#footnote-680) Being abroad made testamentary dispositions more complicated. In this respect, the accuracy of testamentary planning presupposed the availability of current information on the family’s well-being and on the political activity of friends and enemies. While staying in a faraway province, the testator did not always know what was going on in Rome and he could not be sure about how up to date his information was. Despite the steady improvement of the *cursus publicum*, news did not travel rapidly.[[681]](#footnote-681) It could therefore happen that the testator died without knowing or upon learning too late that important changes had occurred at home. *Fideicommissa* that could be established, even orally, on the deathbed could help in these situations and seem to have been used quite frequently for short-term modifications of estate planning.[[682]](#footnote-682)

Not only could the situation in Rome be handled flexibly via *fideicommissa;* the informal “trusts” were also very useful in the provinces and could help to fulfil the administrative duties properly. In fact, the Roman administration in the provinces operated according to proven principles of *amicitia* and *clientela.*[[683]](#footnote-683) Despite bringing their own staff and men, the provincial governors had to connect with certain locals, which implied distinguishing them from others. Such connections, in turn, created legitimate expectations to be honoured in the governor’s and his staff’s wills. Since the limitations of *testamenti factio* did not allow giving to peregrines, *fideicommissa* were – until the interdiction imposed by Hadrian – a way to fulfil the amical duties between Romans and local elites.

Finally, also the protection of minors, needy or weak persons by universal *fideicommissa*, can be explained by the geographical extension of the Roman empire. As can be shown for the province of Egypt thanks to the rich documentary evidence, Roman courts and governors were confronted with testamentary practices that were very different from Roman civil law.[[684]](#footnote-684) To name just one example, one might think of the property division by the parents, typical for testaments from Egypt. These divisions cannot be apprehended by the Roman concept of universal succession, but they can be interpreted as mutual *fideicommissa* for and against the other children of the dividing parent.[[685]](#footnote-685) Thus, the enforcement of *fideicommissa* offered a useful tool that allowed a Roman understanding or interpretation of the autochthone legal traditions. These tools made it possible to balance the claim of having jurisdictional power over the non-Roman territory and the idea of the formal testament reserved for Roman citizens.[[686]](#footnote-686) Traces of this inner struggle can also be seen in legal writings collected in the Justinianic law books,[[687]](#footnote-687) although most allusions to citizenship and peregrine law have been eliminated since they were no longer of interest after 212 CE.

If the enforceability of *fideicommissa* is in line with the shift of paradigm from a city-state to an empire, one can also try to correlate the transformation observed in the procedural respect, namely the change from *condemnatio pecuniaria* to *condemnatio in ipsam rem* with the political and economic development. On this topic, scholars have presented two almost contradictory theories. The more common opinion assumes that the *condemnatio in ipsam rem* is a backlash against growing inflation under the Principate,[[688]](#footnote-688) even though its event and extent are still under discussion.[[689]](#footnote-689) A minority opinion has advocated the thesis that the abandonment of *condemnatio pecuniaria* was rather the result of a clearer differentiation between natural and monetary economy,[[690]](#footnote-690) which only became possible when sufficient liquidity was available for private individuals through the increased minting of coins in the imperial time.[[691]](#footnote-691)

When considering legal theories, generalisations, and direct derivations from economic or social development must be met with scepticism due to the autonomy of the legal discourse.[[692]](#footnote-692) However, it could be worth looking at an aspect that has been stressed in ancient historical research but not yet fully acknowledged by legal historians. Indeed, Peter Fibinger Bang has underlined the variability and volatility of prices on local markets, which leads him to characterise the Roman economy as a ‘bazaar’:

“(…) the bazaar is distinguished by high uncertainty of information and relative unpredictability of supply and demand. This makes the prices of commodities in the bazaar fairly volatile. As a consequence, the integration of markets is often low and fragile; (…). Considerable fragmentation of markets prevails.”[[693]](#footnote-693)

The model of the bazaar fits perfectly into the strategies which can be observed in Roman contract law and that is characterised by personal relations between friends and clientele.[[694]](#footnote-694) Moreover, this analysis can also be fruitful for the understanding of Roman *fideicommissa*. If they were enforced to allow wills in favour of non-Romans and reaction to unforeseen situations due to the testator’s absence from home, the specificities of *cognitio extra ordinem* could be explained by the economic requirements of the unintegrated imperial market. As can be proven by texts from the Digest, a problem that occurred frequently was the geographical separation between a beneficiary of a *fideicommissum* living in Rome and a trustee living in the province; it was also possible that the inheritance was mostly located in the province, but both heir and beneficiary of the *fideicommissum* were in Rome. In these cases, the Roman jurists do not only discuss questions of territorial jurisdiction. Rather, they also deliberated on where to fulfil the *fideicommissum* and whether the trustee could deduct debts accumulated in another province.[[695]](#footnote-695)

Since the *condemnatio pecuniaria* is an estimation of values, it assumes a certain comparability of living conditions which certainly existed in the city-state of the republic. In contrast, the *condemnatio in ipsam rem* associated with the *cognitio extra ordinem* is to be regarded as an adequate mechanism in a situation of segmented markets and locally different prices.[[696]](#footnote-696) In this respect, the restitution in kind does not only guarantee a very faithful execution of the testator’s volition, but also allows the trustee to free himself from his obligation by simply surrendering the object of the *fideicommissum*. Through the execution in kind it is ensured that the trustee will not suffer losses beyond the object itself and will not have to pay for the additional value if the prices of goods rise due to new economic conditions or differ from one province to another.[[697]](#footnote-697)

These considerations show that the geographical divergences were of high relevance for the parties. Due to the unintegrated markets of the Roman empire, geographical distortions did not only lead to costs and questions of risk for the transport, but also implied differences in the estimation of an estate or of single objects from the inheritance. With regard to commercial goods and mobiles, the amount of the delivery and the reliability of supply certainly influenced the price; for plots of land and other immobile objects, the amount of available money, that is metal and coins in the market, had a direct effect on their valuation.

The contemporary awareness of these interrelations is visible in Suetonius’ report on the impact of imperial booty on the value of land:

*(…). Nam et invecta urbi Alexandrino triumpho regia gaza tantam copiam nummariae rei effecit, ut faenore deminuto plurimum agrorum pretiis accesserit, et postea, quotiens ex damnatorum bonis pecunia superflueret, usum eius gratuitum iis, qui cavere in duplum possent, ad certum tempus indulsit*. (Suet. *Aug*. 41.1)

For when the regal treasures were brought to the city in the Alexandrian triumph, he made ready money so plentiful that interest rates fell and land values greatly increased, and afterwards, whenever there was a surplus from the property of those who had been condemned, he loaned it without interest for fixed periods to those who could give security for double the sum. (Translation by Edwards [2000])[[698]](#footnote-698)

According to Suetonius, Augustus used the captured treasures to mint coins, which made interest rates fall and land values rise. The historian’s observation shows that he was aware of the correlation between land prices and available money. Against this background, the procedural specialities of *fideicommissa* are not only an expression of faithful compliance with the testator's will; rather, they also correspond to the economic situation of the empire. Since the value of objects, including land, can vary greatly both in time and place, it is consistent to charge the beneficiary, rather than the burdened party, with the risk of change in value. This is precisely what happens when the condemnation from a *fideicommissum* is not for a sum of money but for restitution in kind.

## IV. General Résumé

An examination of the special features of *fideicommissa* shows that inheritance law, as a central area of Roman property law, is of particular interest for the analysis of the Roman economy. Just as in contract and commercial law, the typical structures of the clientele economy and the economy of friendship can also be found in the law of succession. The uncovering of these structures in inheritance law reveals that the testamentary dispositions must necessarily be considered in the analysis of economic activities. At the same time, the examination of the correlations between the law of *fideicommissa* and the economic reality allows us to speculate about the motives that led to this fundamental change within the Roman law of testaments in the imperial era. Thus, it can be said that the introduction of the enforceability of *fideicommissa* by Augustus should by no means be regarded as a coincidence but must be interpreted as an answer to meet the needs of the expanding *imperium*.

# Roman Citizens in the Legal Economy of a Greek *Polis*.The Case of Private Donations to Public Bodies ByLina Girdvainyte

## Introduction

In this paper, I explore the phenomenon of private donations to public bodies – in other words, money or property donated by private individuals for the benefit of their places of origin or residence – attested in mainland Greece of the Roman period. While occasionally treated within their social, cultural, and religious context, such transactions have received considerably less attention from the legal and economic points of view, which forms the basis of my discussion.

Attested in the Greek world since the early Hellenistic period, funds acquired in this way contributed substantially to the income of the Greek *poleis*, either by covering a specific public expense, or by generating regular income over the years upon investment of capital and accumulation of interest. The practice continues to be observed in the imperial period, particularly over the first and the second centuries CE, and may be taken to indicate an increasing dependence of the Greek communities’ economic stability on private benefactions. Ranging, in purpose, from more personal to entirely public concerns, transfers of funds or property from private individuals to civic institutions, recorded on a number of public and funerary monuments, often prescribed specific use of the revenues accrued and were accompanied by penalty clauses which were to come into effect in the event of non-compliance.

What follows is focused primarily on these conditions and clauses attached to private donations to public bodies, some even modifying local rules of legal standing. After a brief introduction into the source material, I investigate the underlying mechanisms which allowed for the imposition of highly variable conditions and penalty clauses, and ask whether the latter should be seen as purely dissuasive or, instead, as reflecting local socio-economic and legal realities. I then discuss the implications of the occasional involvement of Roman provincial and central authorities in authorising or confirming such transfers of funds between public bodies and private individuals, the vast majority of whom were Roman citizens of local origin.

I demonstrate, first, how these transactions reflect the continuation of a Hellenistic practice under Rome, and highlight how individual agency and private concerns could influence and shape provincial legal practice. In a similar vein, I argue that occasional resort of either the beneficiaries or the donors themselves to Roman authorities with a view to secure these transactions is indicative of a desire for an additional layer of protection rather than a movement toward Roman law.

## Private donations to public bodies and the problem of misappropriation

With its possible roots in Pharaonic Egypt, the practice of private individuals donating money or property for the benefit of their communities, normally prescribing a specific use of the revenues accrued, is found in the Greek sources since at least the fourth century BCE.[[699]](#footnote-699) The practice remains widely attested throughout the Roman empire, including its Western provinces, and has modern parallels in both the civil and common law systems, as well as the Islamic law.[[700]](#footnote-700) As legal transactions, closely tied with social practice – euergetism, or munificence – and intended to convey a clear economic benefit, these documents make a particularly interesting case study for the broader topic of law and economic performance in the Roman world.

The two volumes of Berhard Laum’s *Stiftungen in der griechischen und römischen Antike*, though by now outdated, still provide a good general idea of the geographic and temporal distribution of documentary sources recording the practice in the ‘Graeco-Roman’ world.[[701]](#footnote-701) In 1950s, Eberhard F. Bruck articulated a hypothesis that the Hellenistic donations of the sort provided a model for the Roman ones, as he wrote of the *Nachahmung*, or the imitation of the Greek practice in the West.[[702]](#footnote-702) The phenomenon has also been discussed on a handful of occasions in relation to Romanlaw, often stressing its ‘vulgar nature’ and the lack of interest in it on behalf of the Roman jurists.[[703]](#footnote-703) More importantly, Edward Harris recently pointed out the danger of the anachronistic use of the term ‘foundation’ (Ger. *Stiftung*) to refer to private donations to public bodies in the Greek sources: though still prevalent in modern scholarship, the term is misleading in that such transfers of funds or property did not result in the creation of an institution with a legal personality of its own.[[704]](#footnote-704) Instead of relying on modern legal terminology, such transactions should be treated and referred to as what they really were: donations or gifts with strings attached, often but not exclusively enacted in the context of a donor’s will.[[705]](#footnote-705)

Among the common features of these transactions, as alerted to in the introduction, were the prescription of the specific use of the funds or the revenues accrued, and the provisions for the protection of funds against neglect or misappropriation by the civic authorities, normally followed by the so-called entrenchment clauses prohibiting any changes to the mutually agreed terms.[[706]](#footnote-706) Pliny’s letter to his fellow townsman Caninius in Comum is often quoted as an example of the lack of trust that potential donors could have in the representatives of their beneficiary communities: “If you give money to a community, it may be squandered; if you give land, it may be neglected as other public lands”.[[707]](#footnote-707) This demonstrates sufficiently that, in Pliny’s day, no universal security system existed to protect such transfers of money and/or land from private individuals to civic communities, which may explain the ubiquity of entrenchment clauses as well as variability of penalties.

As regards the latter, a common issue with epigraphic sources of the sort is their summary nature. Though spelling out a fine or some other form of punishment, most penalty clauses lack any specification with regards to the enforcing authority. Similarly, it is not always clear whether the penalty was to be imposed as a result of court action or an authoritative decision of one or more civic institutions. Even in cases where the authority exacting a fine isspecified, we cannot be entirely sure if this was done summarily or after some form of judicial proceedings whereby the guilty party was condemned.[[708]](#footnote-708)

If we choose to think of penalty clauses on public inscriptions as serving a primarily dissuasive purpose, the omission of the exact legal procedure would be less surprising: specification of the consequencesof whatever legal process may be applied (e.g. monetary fine, ἀτιμία, ἀσέβεια) could be considered sufficient to discourage breach of contract, misappropriation of funds, violation of tombs, and so on. On the other hand, it is important to keep in mind that penalties in the form of monetary fines or confiscation of property constituted a form of income for the communities too, so the provisions for their exaction should have been made sufficiently clear.

When it comes to private donations to public bodies, however, a rather peculiar problem arises. Namely, in cases where the primary beneficiary of such a donation is a community, represented by its civic institutions, can this same community also be the beneficiary of a fine payable upon non-compliance with the agreed terms? Intuitively, this does not seem right. If civic institutions, who were the primary recipients of funds in such transactions, were also the prime suspect of misappropriation of those funds, what measures were there to prevent it? To see what kind of solutions benefactors would come up with in practice, we should turn to documentary sources.

## Epigraphic evidence

One of the most detailed documents concerning a gift of money to a community is preserved on an inscription from Gytheion in Lakonia, dating to 42 CE, which records the transfer of 8,000 *denarii* to the *polis*, enacted by a woman named Phaenia Aromation.[[709]](#footnote-709) The document prescribes that the capital ought to be let out by the archons and the *synedroi* of the *polis* upon “adequate real securities” (a standard procedure also in the Hellenistic period), and that the interest accrued upon these loans should be used toward the perpetual supply of oil to the gymnasium and the city, to be enjoyed by “the citizens of Gytheion and the foreigners”.[[710]](#footnote-710) Among further conditions of her donation, we find an explicit prescription that slaves be also allowed to enter the gymnasium and anoint themselves on particular days of the year, undisturbed by civic or gymnasium officials.[[711]](#footnote-711) While perfectly in line with Phaenia’s self-portrayal as a major civic benefactress, this condition could have hardly been received with enthusiasm by the *polis*’ officials, since slaves were normally excluded from the Greek gymnasia.[[712]](#footnote-712) Phaenia’s donation was thus explicitly intended to benefit the entirety of the city’s population, including non-citizens and even slaves. The management of her donation was entrusted entirely to the *polis*’ institutions, and the annual interest collected on the loans contracted from her fund was payable directly into the public treasury. With this in mind, the provisions concerning non-compliance with the terms of Phaenia’s donation become particularly interesting.

Among the potential offences envisaged, the donor’s first and seemingly main concern was the possible neglect of her beneficence: “no one should dare, either in a private capacity or publicly, to neglect my donation”, she insisted. More specifically, such an offence is anticipated precisely on the part of the archons and/or the *synedroi* by way of mismanaging “the eternal supply of oil”, failing to receive adequate real securities when initiating the loans, or otherwise failing to remain “within the terms of [her] donation”. In order to keep the civic authorities in check or, *verbatim*, “to avoid the *polis* receiving the reputation of negligence”, the document introduces a clause of voluntary prosecution, namely, “anyone who wishes of the Greeks or the Romans will be able to prosecute the *polis* for neglect before the *demos* of the Gytheatai”.[[713]](#footnote-713)

By spelling out the terms of the procedure allowing Romans resident in Gytheion to bring a public action against the *polis*, Phaenia or, rather, her legal aid provided against any legal constraints related to possession of local citizenship. We know from other epigraphic sources that a sizeable Roman citizen community existed in Lakonia in the Augustan period, certainly including Gytheion.[[714]](#footnote-714) A similar clause of voluntary prosecution with regards to mismanagement of (sacred) funds is also found in an earlier document from the same *polis*, namely, the so-called *lex sacra* of 15 CE,[[715]](#footnote-715) thus attesting to the active part that could be accorded to all members of a provincial society in the legal life of their community, particularly, in matters related to public benefit.

The exact procedure by which an indictment was to take place is further described in Phaenia’s inscription as follows: the archons were to receive a formal denunciation (ἐπανγελία), and the prosecutor (κατήγορος) had to submit a written indictment (ἀντίγραφον) with a time limit to the *synedroi*.[[716]](#footnote-716) The tricky part here is, of course, the fact that those receiving and processing the indictment – namely, the archons and the *synedroi* – would, presumably, occupy the same offices as those against whom the indictment had been initiated in the first place. In this sense, the role accorded to the assembly in the prescribed procedure (ll. 27-28) reveals not only continuous relevance of this political organ in local administration of justice in the imperial period, but also suggests that the assembly could be seen as providing a check on other civic institutions, namely, the council and chief civic officials.[[717]](#footnote-717)

The clause that follows the prosecution procedure, in fact, anticipates the possibility that the indictment may not be accepted by the *synedroi* at all: “if they do not process it, [something] shall be cut out ...”.[[718]](#footnote-718) At this point, the inscription contains an unfortunate lacuna, but Kaja Harter-Uibopuu has convincingly suggested that ἐκκολλήσαντω here may be referring to the removal of the record of Phaenia’s donation from the city’s public records.[[719]](#footnote-719) This seems to agree with the following provision: namely, the transferral of Phaenia’s donation from Gytheion to Sparta, save the award of 2,000 *denarii* which would be given to the successful prosecutor.[[720]](#footnote-720) In other words, in the event that the city’s mismanagement of Phaenia’s donation was proven in due process or, indeed, if civic officials refused to comply with the procedure prescribed – perhaps, overall, a more realistic scenario – her donation was to be removed from Gytheion and transferred to another city, presumably, under the same conditions. If the Spartans, too, were proven to neglect or otherwise misuse the money, the donation had to be transferred yet again, only this time no longer to a community, but to the (priests of) the Dea Augusta, or the recently deified Livia.[[721]](#footnote-721) While we may struggle to see how the transfer of Phaenia’s locally-managed donation from Gytheion to Sparta would have been enforced in practice, it is safe to assume that the prohibitive clauses themselves were often considered enough to deter the beneficiary from ever wanting to find out.[[722]](#footnote-722)

Interestingly, a clause prescribing the transfer of funds to another community in the event of non-compliance is found on several later inscriptions from the western part of the empire. For instance, a donation by a centurion of 7,500 *denarii* to the colony of Barcino in Spain, to be used toward financing boxing events and provision of oil, provided for the transfer of money to Tarraco in the case of non-compliance with the terms of his donation.[[723]](#footnote-723) Comparably, 750 *denarii* left by an individual to the *vicani* of Minnodunum in Germany, whose interest was to go toward the expenses of a local gymnasium, was to be transferred to the *incolae* of Aventicum in the case of mismanagement by Minnodunum.[[724]](#footnote-724) These examples suggest a Hellenistic influence not only in the form of these donations, but also their purpose, related to athletic activities.

Coming back to the case of Gytheion: crucially, the conditions of Phaenia’s donation can be seen as modifying local rules of legal standing not once, but twice. First, by granting slaves, traditionally barred from entering gymnasia in the Greek *poleis*, access to the facilities twice a year for three consecutive days at a time. Then, by explicitly allowing non-citizens to bring a public suit against the *polis*. This latter condition likely developed in direct response to the Roman presence in the region, which significantly contributed to the juridical heterogeneity of local communities. Two inscriptions recording private donations to public bodies from different periods in time may serve as an illustration: while a second century BCE inscription from Aigiale on Amorgos makes clear that the prosecutor had to be a local citizen, a first century CE donation from Ephesos specifies that “anyone who wishes, whether citizen or stranger” was invited to bring a legal claim against non-compliant archons.[[725]](#footnote-725)

Though likely borne out of the donors’ own personal concerns and her wish to cover all bases, prescriptions regarding the penal procedure in cases of non-compliance had to be sanctioned by civic authorities. Namely, upon the city’s official acceptance of Phaenia’s donation, a decree would have been passed by the *synedroi* and the assembly. This way, the stipulation concerning the penal procedure would acquire full legal force, albeit limited to this specific transaction. Note, in this context, that the terms agreed upon between the private benefactor and the public beneficiary in the donation deed from Aigiale, mentioned above, were explicitly treated and registered as civic law.[[726]](#footnote-726)

Regardless of Phaenia’s apparent possession of Roman citizenship, it is imperative to stress once again that the provisions for penal jurisdiction specified in her donation are entirely local. No Roman authorities are mentioned anywhere in the text, and the only clue to Phaenia’s possible anticipation of a potentially Roman jurisdictional framework is her acting with the authorisation of a legal guardian (ll. 60-61: διὰ φροντιστοῦ καὶ κυρίου Πο[πλίου] | [Ὀφελλίου Κρίσπο]υ).[[727]](#footnote-727) The same expression is found in a roughly contemporaneous sacred manumission record from Delphi, where a certain Donata acts through her legal guardian whose nomenclature suggests a non-Roman status.[[728]](#footnote-728) Since the Hellenistic period documents from Delphi record women performing sacred manumissions without their legal guardians,[[729]](#footnote-729) and the practice was not regulated by Roman law following the creation of the *provincia* *Achaia*, it is plausible that Roman procedural guidelines were followed by some – particularly, by those recently enfranchised – as an additional precaution rather than a formal requirement.

Some evidence of private donations to public bodies come from civic decrees rather than donation deeds. An early first century CE inscription records a decree passed by the *boule* and the assembly of Thasos, officially accepting the testamentary donation of land by Marcus Varinius Rebilus (l. 7: τὴν δὲ τῶν [ἀγ]ρῶν δωρεὰν).[[730]](#footnote-730) Similarly to monetary gifts of the sort, this one-off donation was made in perpetuity, non-alienable, and intended to accrue annual revenue to the *polis* by means of leasing out the land. Among inalienability clauses, we find a prohibition against pledging or selling the land either in full, or in part.[[731]](#footnote-731) This is followed by a specification of punitive measures: anyone who makes a motion (εἰσήγησις) regarding this donation, either orally or in writing, and who puts it to vote or records it in the civic archives will be liable to a fine of 20,000 staters payable to the temples of the *Sebastoi*, receive ἀτιμία upon himself and his γένος, and be charged with ἀσέβεια εἰς τοὺς Σεβαστούς.[[732]](#footnote-732)

Here, too, the potential culprits envisaged would appear to be the civic officials: the same ones who were entrusted with the management of the gifted land and its revenues. It is hardly surprising, then, to find a religious entity named as the beneficiary of the fine exacted upon non-compliance with the terms of the donation. Furthermore, as noted by Julien Fournier in his commentary of the inscription, evoking the charge of impiety against the imperial family can also be seen as a shortcut for making this a case for Roman jurisdiction, in case the civic courts of Thasos proved inefficient.[[733]](#footnote-733) Crucially, this document demonstrates that private donations to public bodies in the Roman period had to be formally accepted by the civic institutions, just as they did in the preceding centuries. The act of voting a public decree in the assembly and/or the city council is precisely what gave the conditions attached to these donations, as well as the penal procedure prescribed, legal force. In this sense, Roman period documents demonstrate considerable continuity with the earlier Hellenistic practice.[[734]](#footnote-734)

The extent of the involvement of civic institutions arguably depended on the nature of the donation, as well as its perceived economic viability. To put differently, significant monetary or otherwise gifts intended to generate annual revenue for the recipient communities, would normally be accepted by more public means, and contain more clearly spelled out procedural guidelines. Comparably, those of lesser public interest and driven by largely private concerns such as personal commemoration, were less likely to impose strict conditions and procedures – or, perhaps more so, the public bodies were less likely to ratify them.

For instance, a testamentary donation by Marcus Vettius Philon, dating to 95 CE, was accepted by the decree of the council of Derriopoi (l. 3:δόγματος ἀναγραφή), without the apparent involvement of the *demos*.[[735]](#footnote-735) In accepting the money, the council confirmed the specific terms attached, namely, that the interest accrued from letting the capital out would be used towards an annual commemorative celebration and a public banquet in honour of the donor’s patron, and no other purpose.[[736]](#footnote-736) Another donation of 1,000 *denarii* made to the same community in Macedonia by Lucius Aelius Agrestianus in 192/3 CE, prescribed the use of the interest accrued toward the donor’s personal commemoration involving sacrifices and public banquets, and stipulated that, in the event of non-compliance, the capital was to be transferred to his heirs and their descendants.[[737]](#footnote-737) Presumably, a public decree of the city council would have followed as well, thus authorising the acquisition and the use of the funds.

It is interesting to observe, particularly with regards to testamentary donations, that the vast majority of donors bear Roman *gentilicia*, sometimes alongside Greek *cognomina*. The phrases such as κατὰ διαθήκην or ἐκ διαθήκης closely resemble the Latin *per testamentum* or *ex testamento*, thus suggesting the influence of Roman private law vocabulary.[[738]](#footnote-738) In theory, Roman citizens had to bequeath their property following the strict procedural rules of the Roman *ius civile*. Furthermore, juristic and literary sources relate that Roman citizens were not able to bequeath their property to peregrine communities until Nerva, or to peregrine individuals until Antoninus Pius.[[739]](#footnote-739)

The various legal hindrances in Roman law related to bequests of Roman citizens to peregrines or, in this case, peregrine communities, are relevant here in terms of the availability of legal remedies (or the lack thereof), and might explain why some Roman citizens in the provinces chose to initiate donations to their communities within local legal frameworks, as was the case with Phaenia in Gytheion.[[740]](#footnote-740) Another question, as ever, is that of strict observation of Roman legal prescripts in the provinces. In one of his letters, Pliny mentions an inheritance left by his fellow townsman Calvisius Rufus directly to the town of Comum and, as such, legally invalid: “It is beyond question that a community cannot be appointed heir nor take share of an inheritance before the distribution of the estate”.[[741]](#footnote-741) Nonetheless, Pliny then weighs the man’s wishes against the prescripts of the law, and concludes that “the wishes of the deceased seem worthy of more consideration than the letter of the law”.[[742]](#footnote-742) This suggests, at the very least, that invalid (from a Roman law point of view) transfers of property continued to be initiated even in Italy, regardless of the strict provisions of the *ius civile*. If such was the situation in Italy, it is even less surprising to find similar instances in the provincial context. Compare, in this sense, an extract from Paulus in the *Digest*, which makes clear that the cases where Roman citizens residing in the provinces failed to adhere to certain Roman law regulations, even when these regulations were beneficial to them, were fairly common.[[743]](#footnote-743)

Entrusting one’s heirs with transferring money or property to a community was one of the ways to circumvent that community’s inability to claim bequests.[[744]](#footnote-744) *Fideicommissa* must therefore provide an explanation for at least some of the testamentary donations claimed by peregrine communities in the provinces: for instance, Pliny’s communication to Trajan regarding the estate of one Iulius Largus which the latter had asked Pliny to transfer to two communities in Bithynia-Pontus on his behalf did not receive so much as a frown from the emperor.[[745]](#footnote-745) The bequest of Anthestia Fusca in Styberra, Macedonia, providing for restoration of a temple and statues, in addition to 5,000 *denarii* left to the city’s council, is likely an epigraphic attestation of just that, as the execution of her bequest is explicitly undertaken by her heirs.[[746]](#footnote-746)

## Declarations of protection by Roman authorities

Some second century CE donations to public bodies include an expression of support by Roman provincial or central authorities, which led to some scholars arguing for a gradual shift of the practice toward Roman jurisdiction or, as James H. Oliver put it, toward “the protection of Roman Public Law”.[[747]](#footnote-747)

A fragmentary inscription from mid-second century CE Gytheion, for instance, records proconsular confirmation of a monetary donation to the *polis* made by Tiberius Claudius Atticus.[[748]](#footnote-748) It would appear that, upon being offered the money, the civic authorities of Gytheion sent an embassy to Hadrian and requested that the funds be protected by a special declaration. The emperor communicated his positive response to the governor of Achaia, who then issued an edict (διάταγμα, l. 15) declaring the protection and inviolability of the terms of Atticus’ gift. A similar declaration is also found in the record of the donation to the Eleusinian sanctuary by a Roman senator from Crete.[[749]](#footnote-749) The declaration, nonetheless, goes on to confirm the jurisdiction of local religious authorities – the hierophant and the *dadouchos* – over the management as well as the protection of funds.[[750]](#footnote-750)

On the other side of the same coin we find cases of donors themselves approaching Roman authorities in order to obtain an additional level of support for their benefactions. A well-known inscription of 104 CE records a dossier of documents related to the benefactions of the equestrian Gaius Vibius Salutaris to the city of Ephesos.[[751]](#footnote-751) Within the dossier, we find Salutaris’ proposal to the civic authorities of Ephesos, the latter’s ratification of the terms of his donation, and two letters written by a proconsul and a propraetorian legate. The motivation section of the city’s decree accepting and thus ratifying Salutaris’ donation deed (ll. 73-83) reveals that the benefactor himself prompted both the city’s authorities and the two representatives of Roman power to confirm the terms of his donation. That said, the provisions for the administration of funds as well as the prosecution of cases of non-compliance seem to once again be entrusted entirely to local authorities. Essentially, the main purpose of Roman declarations here was to confirm the terms that had already been agreed upon between the donor and the civic authorities of Ephesos, and urge the latter to respect and adhere to the donor’s wishes.

In terms of penalty clauses, what we find more often in the case of epigraphically-attested declarations of support by Roman authorities is the emergence of the imperial *fiscus* among the beneficiaries of the fines exacted in the event of non-compliance. In the Eleusinian case, for instance, the penalty prescribed was vindication of property twice the value of the original donation to the *fiscus*, while in the case of Salutaris at Ephesos, the fine was split between the *fiscus* and the temple of Artemis. The extent to which this was an administrative innovation cannot be easily assessed. Overall, epigraphic references to fines confiscated to the *fiscus* often lack uniformity: e.g. some fines attached to funerary violations or sacred manumissions include the *fiscus*, while others do not. As such, they may be more indicative of spontaneous private action than any provincial or central regulations.[[752]](#footnote-752)

In other words, in the context of private donations to public bodies, the threat of vindication of money or property to the imperial *fiscus*, as an extra-civic institution, could well have been agreed upon between the donor and the recipient community before any resort to Roman authorities took place. Think, in this sense, of the donation of 50,000 *denarii* to the Lycian *koinon* by the famous Opramoas, confirmed by an imperial legate of Lycia and Pamphylia in the following words (ll. 66-70): “I therefore render inviolable his gift which is now being published, that it be forever forbidden to endanger or alter the sum, and that the gift remains subject to the other rules which he chose and announced”.[[753]](#footnote-753) That we find both beneficiary communities and donors themselves occasionally seeking the support of provincial or central authorities need not warrant an official requirement or even regular practice.[[754]](#footnote-754) Instead, the expression of support by Roman authorities of transfers of funds or property between private individuals and public bodies should be understood as providing an additional layer of protection: for the donors, against misappropriation or diversion of funds by those left in charge of their management, and for the cities, against any issues related to Roman private law, e.g. the heirs’ attempts to retrieve the funds by claiming invalid testament.[[755]](#footnote-755)

## Conclusion

Overall, what emerges from this brief discussion is the remarkable flexibility of financial transactions between private individuals as donors and civic or public bodies as beneficiaries, and the accommodating nature of local legal frameworks in matters related to their public revenues. In this sense, the epigraphic evidence for the Roman period demonstrates considerable continuity with the earlier Hellenistic practice.[[756]](#footnote-756)

Closely tied with social practices, namely, euergetism or munificence, these transfers of funds and/or property were, nonetheless, legal transactions, intended to convey a clear economic benefit, even if highly variable conditions attached to them tend to reflect the donors’ personal concerns more than evocation of a particular legal framework. Indeed, the majority of legal actors attested in these documents are Roman citizens of local origin, and the practice illustrates how they could successfully negotiate their way between the local and the Roman legal frameworks in matters relating to transmission of property.

The penalty clauses are far from standardised or fossilised too: while some donation deeds prescribed hefty fines payable to sanctuaries or the imperial *fiscus*, others provided for transfer of funds to a new beneficiary or the donor’s heirs. Others yet, tried to engage the entire beneficiary community in protecting the terms of the donation by introducing clauses of voluntary prosecution. Publication of donation deeds together with all their terms and conditions can also be seen as an additional means to ensure compliance: Phaenia, for instance, prescribed that one of the three copies of her benefaction be set up at the gymnasium, where the oil purchased from the interest accrued on her gift would be primarily used.[[757]](#footnote-757) Should this variability be taken to mean that local justice no longer worked and people were forced to resort to methods of ‘self-help’?

Any such donations to public bodies, including those containing a declaration of support and protection by Roman authorities, had to be formally accepted by local civic institutions. The official acceptance of private funds as a new source of public revenue is precisely what gave the terms attached to these transactions legal force, even when those terms could be seen as modifying local rules of legal standing, e.g. by granting slaves access to gymnasia or allowing non-citizens to bring public suits against the *polis*. Individual agency and personal concerns may thus be seen as influencing provincial legal development in a sphere where the legal and the social realms were considerably intertwined. In short, these documents are better understood as recording the *making* of law rather than strict imposition or application of a particular legal framework with its procedural regulations.

Proposals of financial gifts by private individuals to their places of residence continued to be put before local citizen assemblies well into the third century CE: an inscription from Orkistos, dating to 237 CE, records a bequest of one Varius Aurelius Marcus, which was ratified by the “assembly of all people” ([ἐκ]κλησίας ἀχθείσης πανδήμου προ[κα]|[θ]εζομένης … ἔδοξε τῷ Ὀρκιστηνῶν δ[ήμῳ]).[[758]](#footnote-758) The involvement of the entire civic body in accepting and ratifying the terms of private benefactions, thus, continued to be perceived as creating a stronger obligation on behalf of the civic authorities to uphold the terms of such donations.

# Banking, Credit and Loans in the Novels of the Emperor JustinianByP.A.V. Sarris

The ‘Novels’ or ‘New Laws’ of the Emperor Justinian, issued after the promulgation of the second recension of the *Codex* in 534, provide an unusually rich vein of evidence for the historian interested in the relationship between law and economic performance in the Roman world.[[759]](#footnote-759) For this body of material preserves what is often unique information concerning the economic factors that helped to shape imperial legislation at the end of antiquity, as well as revealing how the imperial authorities responded to certain specific economic challenges and shocks.

On one level, the historical significance of these laws is a function of their format, in that the Novels, unlike the constitutions contained in the *Codex*, typically preserve their original introductory prefaces, setting out at least the official version of the circumstances that had generated each specific law: in particular, they reveal the anxieties of the imperial government and the concerns of petitioners.[[760]](#footnote-760) As a result, the Novels and associated texts preserve fascinating incidental details that reflect, amongst other things, the relationship between economic interests and imperial legislation, as well as the broader sophistication of the late antique economy, and also cast fascinating light on the economic constraints that arguably curtailed the emperor’s non-economic legal agenda. This aspect emerges with particular clarity, as we shall see, with respect to the emperor’s post-codificatory legislation on loans, credit, and bankers, and was heightened by the fact that much of this legislation was issued during a period of sustained fiscal pressure and demographic decline, to which Justinian was obliged to respond.

Justinian’s post-codificatory legislation taken as whole, can be seen to have been driven by two over-riding principles. The first was the emperor’s determination to confront and confound those who challenged the authority of the government at a local level, above all by withholding the crucial tax-revenues upon which the East Roman state depended. The early sixth century had witnessed the revival of warfare on a massive scale between the eastern Roman empire and its great superpower rival, the Sasanian empire of Persia. Given that, even in periods of peace, it has been estimated that the Roman army received somewhere in the region of one half to two-thirds of all tax revenues accruing to the Roman state, the revival of warfare can only have placed mounting financial pressure on the Roman government. Justinian sought to address this by overhauling provincial administration and cracking down on tax-evasion.[[761]](#footnote-761) It is instructive, for example, that the period of Justinian’s main legislative focus on provincial and fiscal reform as reflected in the Novels (c.534-9) witnessed a parallel programme of internal reform in the Sasanian empire of Persia, where the *Shah* Khusro I sought to upgrade the Sasanian empire’s fiscal machinery, presumably in response to broadly similar pressures.[[762]](#footnote-762) The first driving principle, therefore, was largely fiscal and administrative, informed by objective financial and military circumstances.

A perceived shortfall in imperial tax-revenues would then be further exacerbated in the 540s, when the empire found itself struck by a major outbreak of bubonic plague, a cataclysm which seems to have led to a significant economic shock that threatened to further destabilize the empire.[[763]](#footnote-763) So rampant was this disease (which first struck the empire, via the Red Sea, *c.*541) that it is now known, on the basis of the ancient DNA evidence, to have rapidly reached as far afield as rural Anglo-Saxon England (although it may have reached there from a route other than the Mediterranean).[[764]](#footnote-764) Consequently, in Iust. *Nov.* 122, dating from 544, the emperor was obliged to crack down on attempts by agricultural workers and artisans to take advantage of localized labour shortages caused by the plague to dramatically increase their rates of pay and remuneration.[[765]](#footnote-765) This edict, it should be noted, applied to the empire as a whole, and not (as some have recently sought to assert) just to the city of Constantinople.[[766]](#footnote-766) That same year, in Iust. *Nov.* 120, the emperor legislated to seek to prevent tenants from negotiating excessively reduced rents on plots of ecclesiastically-owned land that they farmed, whilst permitting the Church, for the first time, to lease out land on a perpetual ‘emphyteutic’ basis, so as to ensure or encourage its continued and continuous cultivation in circumstances where it might otherwise have been abandoned.[[767]](#footnote-767) Justinian also relaxed his hitherto stringent prohibition on the alienation of ecclesiastical property, so as to enable the Church to pay taxes owed to the state (a measure to which we shall return below).[[768]](#footnote-768) It is probably no coincidence that around this time Justinian also chose to issue a series of ‘light-weight’ *solidi*, reducing the gold content of the imperial coinage by as much as 17% (from twenty-four *siliquae* of gold to twenty), thereby enabling the government to stretch increasingly constrained revenues ever further, perhaps by making payments to state officials and others primarily in this debased coin.[[769]](#footnote-769) If (to use a currently highly fashionable word), the imperial government and landowning institutions demonstrated considerable ‘resilience’ in the face of the plague, it was, to a considerable extent, through sustained administrative and legal measures such as these, as well as by means of a concerted ‘seigneurial reaction’ on the part of landowners more generally, as they sought to drive back and contain the demands of their tenants and employees.[[770]](#footnote-770)

The second great guiding principle, however, was moral rather than fiscal. Even Justinian’s fiercest critics were obliged to admit that Justinian was a devout and dogmatic Christian, who was determined to press ahead with the more full-blown Christianization of late Roman society.[[771]](#footnote-771) As a result, Justinian’s reign would witness not just the agenda, but increasingly the tone and language of Christian homiletic literature, and of the more hard-line Christian moralists such as the fourth-century Cappadocian Fathers, increasingly shaping and determining imperial law. This was particularly evident with respect to sexual and marital morality.[[772]](#footnote-772) Seemingly in response to plague and other natural cataclysms, including earthquakes, for example, in Iust. *Nov.* 77, Justinian instituted the concerted persecution of men deemed guilty of ‘acts of very grave licentiousness, and behaviour contrary to nature itself.’[[773]](#footnote-773)

Across the *Digest,* *Codex* and the Novels*,* what we essentially see is the Emperor Justinian engaged in a concerted programme to effectively re-cast the Roman empire and finally transform it into what historians today would think of as a ‘Confessional State’. For, crucially, Justinian sought to transform the Roman empire into a state that was officially Orthodox and Christian, not only in its ideology and official pronouncements, but also in terms of its interactions with it subjects, progressively advancing the rights of those of the emperor’s subjects who upheld the imperially sanctioned definition of the Christian faith, whilst curtailing and applying steady downward pressure on the rights of religious and other minorities regarded as outsiders in what Justinian described in an important law of 536 (Iust. *Nov.* 45) as the ‘Orthodox Republic’ (*orthodoxos politeia*).[[774]](#footnote-774) Under Justinian, one’s rights at civil law were increasingly determined by one’s officially reckoned degree of religious conformity. As a result, deliberate efforts were made to marginalize the heterodox and to treat heretics, Jews, Samaritans, and pagans as a sort of undifferentiated mass of second-class citizens, increasingly burdened with obligations rather than bearing rights. Consequently, one might have imagined Justinian’s moralizing agenda to have had implications in the economic sphere, especially for members of those professional groups of whose activities the emperor disapproved.

Foremost amongst these were pimps. As Kyle Harper, amongst others, has noted, Constantinople in the early sixth century was home to a thriving flesh trade, with pimps traversing the countryside, the imperial legislation records, to lure girls into prostitution by promising them food and fancy clothes, and binding them by means of what appeared to be legitimate contracts of employment or forms of debt bondage, familiar from modern-day trafficking arrangements.[[775]](#footnote-775) In a major imperial intervention, however, in Iust. *Nov.* 14 of 535 CE, brothels would be banned throughout the Roman empire.[[776]](#footnote-776)

Second came those were involved in the supply of eunuchs. As the late Keith Hopkins emphasized, slave eunuchs had become an increasingly common feature of life in the later Roman empire, and especially at the imperial court. Indeed, certain court functions had come to be reserved for eunuchs.[[777]](#footnote-777) Castration, however, had come to be regarded with considerable disapproval by the imperial Church, and here, as elsewhere, Justinian’s legislation reveals growing ecclesiastical influence. Accordingly, in 558 (Iust. *Nov.* 142), Justinian issued a blanket ban on castration, threatening castrators with a sentence of hard labour for life in the quarries of Gypsus in Egypt –a sentence that effectively amounted to a death penalty. All slaves who had suffered castration in the preceding ten years (including on medical grounds), Justinian declared, were to be automatically granted their liberty – a rare example in Justinianic law of an imperially sanctioned retrospective application of legislation.[[778]](#footnote-778)

It is striking, however, that pimps and castrators are pretty much the only professional groups expressly targeted *per se* in Justinian’s extant Novels, despite the fact that the moralizing agenda of late antique homiletic literature, and especially of the writings of the Cappadocian Fathers and others, had subjected a much broader swathe of the Roman economy and society to searing criticism. Foremost amongst those criticized in the Patristic literature, for example, were moneylenders and those deemed guilty of usury, whose activities were arguably increasingly foregrounded in the context of the rapidly re-monetizing late antique economy.[[779]](#footnote-779)

Certainly, there is every sign that the late antique Mediterranean was a world awash with speculators of all sorts – including those who made money through lending money. We should note, for example, the ‘commodity fetishism’ evident on the part of late Roman merchants described in the Emperor Diocletian’s *Edict on Maximum Prices*, where they are described as fixated upon increasing their profits not only year on year, ‘but almost by the hour and by the minute’. The emperor goes on to refer to such merchants as ‘buyers and sellers whose practice it is to visit ports and foreign provinces’, ‘making a calculation of places, transportation, and the entire business at the time of sale.’[[780]](#footnote-780) Such men operated in an economic system, moreover, in which the imperial government understood that there existed a ‘market price’ for goods and services, which was frequently differentiated from the official price. Thus, we find references in imperial legislation to selling prices on the open market (*in foro rerum venalium*).[[781]](#footnote-781) Indeed, in the Age of Justinian, even money was understood to have a market price: as the *Digest* declares: ‘We know how the prices of things vary from one city and region to another, especially of wine, oil, and corn. Even in the case of money, though it is supposed to have one and the same purchasing power everywhere, yet it can be quite easily raised and at low interest in some places, but with difficulty and steep interest at others.’[[782]](#footnote-782)

Yet, in marked contrast to the picture that would emerge in the Christian Latin West, or the Early Islamic East, and the criticism implicit in the Biblical example of Christ driving the money lenders from the Temple, Justinianic legislation would show comparatively little interest in usury and, when it did deal with banking and credit arrangements, tended to adopt a relatively technocratic and morally neutral tone, balancing both rhetorically and practically, the interests of both creditors and debtors.[[783]](#footnote-783) As a result, the Christian Orthodox world of Byzantium would in fact be the region of the ‘Abrahamic’ Medieval world least concerned, at an official level, with issues of usury.

Justinian did introduce significant legislation on loans and on the banking profession. But, more often than not, on closer inspection, such legislation tended to be permissive rather than restrictive. For what would appear to be the first time in Roman law, for example, Justinian had introduced a maximum permitted rate of interest on maritime loans. In the *Codex* (4.32.26.2, of 528 CE) he had set the cap at 12% *per* *annum*, before further reforming the regulation of maritime loans in a law of 540 (Iust. *Nov.* 106), increasing the rate of interest from 12% to 12.5%, whilst changing the basis on which interest was calculated from being *per annum* to *per* journey (a law which would have greatly benefited lenders at the expense of borrowers).[[784]](#footnote-784) That same law, however, which reveals much of the sophistication of maritime credit arrangements in contemporary Constantinople, would suggest that what Justinian was primarily engaged in, in this constitution, was attempting to set down in written form what he understood to be the long-established customary arrangements common amongst the maritime financiers of Constantinople, just as, in the RhodianSeaLawonJettison (contained in the *Digest*), he had codified the customary laws of the sea.[[785]](#footnote-785) The emperor believed this, because that was what his financier petitioners (named as Petrus and Eulogetus) had sworn to him on oath.[[786]](#footnote-786) Interestingly, this law would be rescinded within a matter of months, plausibly because it had transpired that Petrus and Eulogetus had, in fact, been lying to Justinian in an unscrupulous effort to gain advantage, sparking off a series of protests and counter-petitions (presumably from those who were obliged to take out such loans), to which Justinian responded with alacrity.[[787]](#footnote-787)

The fine detail of *Iust. Nov.* 106 (dating from 540) is of considerable interest for anyone interested in the precocity of financial instruments at the end of antiquity. For the constitution reveals that the existence of two types of maritime loan: a straightforward loan to be repaid with 12.5% interest; and an agreement whereby the creditors were allowed to transport goods of their own on the vessel, with the ship-owner covering taxes and tallage, and then receive repayment for the loan at a rate of 10%. The latter is interesting, in that it casts light on the nature of ‘partnership agreements’ between merchants and financiers current in sixth-century Constantinople, such as may well have been historically antecedent and related to later forms of medieval partnership contract such as the Italian *commenda*, and its contemporaneous Arabic and Jewish analogues.[[788]](#footnote-788)

Likewise, in 535, the emperor had legislated on loans made to farmers. Unscrupulous creditors, including military officials, the law records (Iust. *Nov.* 32), had taken advantage of a recent famine in the Balkans to provide peasant farmers with grain and money on forfeiture of their smallholdings, obliging Justinian to intervene.[[789]](#footnote-789) This law was interpreted by contemporary commentators (such as the *antecessor* Julian, Athanasius of Emesa, and the Egyptian legal scholar Theodore of Hermoupolis), as introducing a prohibition on creditors taking the land of a farmer as surety for a loan.[[790]](#footnote-790) But all the law actuallystated was that creditors could not hold on to any land pledged by way of security oncetheloanhadbeenrepaid. That they should have even countenanced doing so is a remarkable sign of the confidence of such creditors amid the troubled circumstances of the time.

The one significant reform that Justinian introduced (or re-introduced) with respect to usury (although, alas, the original law is only referred to, rather than surviving in a free-standing form), is the principle known as *ne plus duplum*, meaning that the maximum amount of interest repayable on any loan could not exceed the size of the principal debt: that is to say, that a debtor could not be forced to repay more than twice what he had initially borrowed. This principle, of *ne plus duplum*, informs a series of judgments given by the emperor preserved in the Novels and associated texts.[[791]](#footnote-791) A highly suggestive law of uncertain date, however, records how a coterie of financiers in the city of Aphrodisias in Asia Minor sought to turn this law to their advantage.[[792]](#footnote-792) According to this constitution, the city council of Aphrodisias had entrusted the town’s liquid assets to a group of local potentates holding the office of *zygostatai* who effectively operated as fund managers (albeit of a distinctly late antique variety). The latter invested the city council’s money, guaranteeing the council a share of the annual proceeds. Once, however, the city council had received back twice its original investment, the *zygostatai* had asserted that under the emperor’s recent legislation, the city’s original fund, which they had been managing, now belonged to them. Justinian, who was determined to maintain the cohesion of city councils across the empire, was obliged to engage in a remarkable (and not entirely convincing) display of creative jurisprudence to unpick the legal logic of the fund managers’ case, eventually deciding that the civic funds had not been lent to the fund managers; but rather, that they had effectively been ‘renting them’ off the city council, and thus could make no claim to ownership. The law thus casts fascinating incidental light on an aspect of early Byzantine economic life otherwise almost entirely invisible in our other sources.

It is significant that when dealing with the Guild of Bankers in Constantinople (which, according to the *Digest*, possessed legal personality), Justinian was willing to be considerably more responsive.[[793]](#footnote-793) Justinian defines the bankers (known as *argentarii* or *argyropratai*) in his *Edict* 9 as those whose ‘livelihood consists in lending, borrowing, acting as guarantors for others and making interest payments.’[[794]](#footnote-794) It is true that the emperor by no means granted the bankers everything that they asked for: in Iust. *Nov.* 136, for example (dating from 535) he rejected the bankers’ request that they be permitted to take recourse against a debtor’s principle guarantor before having exhausted recourse to the debtor himself.[[795]](#footnote-795) Likewise, he initially rejected the bankers’ request that they should be granted a ‘general hypothec’ over the property of those to whom they gave credit. Justinian also rejected the bankers’ plea not to be constrained in future contracts by the principle of *ne plus duplum*. However, the emperor can be seen to have made a number of significant concessions to the Bankers’ Guild, especially in the immediate aftermath of the first advent of the bubonic plague, which evidently did much to disrupt credit and finance arrangements. In an important law dating from 542, for example, which the emperor describes as having been drafted in the context of ‘the encircling presence of death’, Justinian sought to make it easier for bankers to bring actions against the heirs and other beneficiaries of deceased debtors, and allowed greater credence to be given in legal proceedings to credit notes and loan agreements that had not been subject to public registration and authentication.[[796]](#footnote-796) The emperor also finally conceded to the bankers’ request for a general hypothec over the property of the debtor (that is to say, the bankers could claim security from the entire estate or any part thereof), which he had refused them just seven years earlier.[[797]](#footnote-797)

In particular, in this law, Justinian granted members of the Bankers’ Guild fast-tracked access to a special court presided over by two of the empire’s highest justices: the Urban Prefect of Constantinople and the Count of the Sacred Largesses (who, at that time, was the former banker Peter Barsymes).[[798]](#footnote-798) Justinian had already granted members of the Bankers’ Guild a right to ‘trace’ (as English Common Lawyers would describe it) and take possession of property bought with money they had lent to a defaulting client – a right not generally afforded to other creditors.[[799]](#footnote-799) Elsewhere, as already noted, the emperor relaxed the otherwise stringent prohibition on the alienation of ecclesiastical property in circumstances where the managers of ecclesiastical estates were unable to repay the Church’s creditors, amongst whom such *argentarii* are likely to have been prominent.[[800]](#footnote-800)

Why, we might reasonably ask, was Justinian so comparatively indulgent in the banking community? Why, with respect to usury, were he and his regime so relatively unmoved by the moral injunctions of the Church? It is unlikely to have been for want of encouragement: indeed, in *Edict* 9, Justinian expressly refers to petitioners who had approached him requesting ‘not to pay either principal or interest at all on financial transactions.’[[801]](#footnote-801) He rejected their claims at the same time as rejecting those made by bankers that interest payments should not be reckoned against the principal. Here it is worth pausing for a moment on Justinian’s relaxation of the rules on the alienation of ecclesiastical property: for these rules were specifically relaxed with a view to circumstances in which the managers of ecclesiastical property had been obliged to take out loans inordertopaytaxestotheimperialgovernment. Again, as already suggested, it may be significant that the law was issued at a time of plague, when fiscal pressures on the state are likely to have been at their most intense. For as this, and other laws contained in the Novels reveal, even in less troubled times, loans and credit arrangements were vital to the lubrication of the fiscal machinery of the Roman state, by enabling often cash-strapped taxpayers to meet the government’s demands.[[802]](#footnote-802) It was with good reason that, in Iust. *Nov.* 136, Justinian went out of his way to recognize what he termed the ‘valuable service to the common good’ that bankers provided.[[803]](#footnote-803) Likewise, in *Edict* 9, he declared that the bankers ‘safeguarded the common good’ through their ‘hard work.’[[804]](#footnote-804)

The laws further reveal that such credit relations were periodically relied upon by debtors from the lowest to the highest ranks of Byzantine society; from the famished peasantry of Thrace in *Iust. Nov.* 32, to the aristocratic ‘well born folk’, as Justinian describes them in *Edict* 7, who took out loans through intermediaries so as to avoid the social stigma associated with being seen to be in debt.[[805]](#footnote-805) Indeed, *Iust. Nov.* 136 records that it was common for well-connected fathers to take out loans from bankers to purchase governmental office for their sons (offices which the bankers could then force them to sell if not repaid).[[806]](#footnote-806) It would also appear to have been common, the law reveals, for the dowries of wealthy aristocratic ladies to be administered by their husbands, but deposited with bankers.[[807]](#footnote-807) Such dowries, in the form of cash and jewellery, could be worth up to one quarter of the value of a paternal estate, with Iust. *Nov.* 22 describing dowries worth in the region of 7,200 *solidi*.[[808]](#footnote-808) The ubiquity of financial instruments in late antique Constantinople is perhaps best conveyed by the fact that, according to the *Book of Ceremonies* of Constantine VII, in the year 457, as part of the ceremonial associated with his accession to the throne, the emperor Leo I was presented with a credit note or a cheque (*pittakion*) for 3,000 lbs weight of silver by the Senate and Urban Prefect of Constantinople.[[809]](#footnote-809) That cheque, of course, may well have actually been underwritten not by the Senate, but rather by the Bankers’ Guild.

But who were these bankers? Many of them, the laws reveal, were clearly members of the imperial service elite, who, like Peter Barsymes, combined banking interests with careers in the civil service. Thus, in both Justinian’s legislation and the documentary sources, such bankers are accorded senatorial rank of both the higher and middling grades (*illustris* in the legislation, *spectabilis* in the papyri).[[810]](#footnote-810) This helps to make sense of the episode recorded in the writings of John Lydus, where he describes how the emperor Anastasius intervened to write off the debts owed by one Constantinopolitan senator to another*—* ‘a non-cancellable contract in gold *specie* amounting to a thousand pounds of gold.’[[811]](#footnote-811) Likewise, in Iust. *Edict* 9, Justinian confirmed that professional financiers who also chose to pursue a career in the imperial government were still to be allowed to continue to lend out money at the higher rates of interest that were only permitted to members of the banking community.[[812]](#footnote-812) The high social status of such bankers in the Justinianic era, we should note, stands in marked contrast to their relatively low social standing in earlier periods of imperial history. Clearly, the social status of the banking community had been transformed during the period of re-monetization (and localised shortages of coinage) that the empire had experienced across the period since the fourth century, which clearly dramatically enhanced their importance to society at large.[[813]](#footnote-813)

Aristocratic households, we should note, also stood behind many banking activities: bankers (*trapezitai*) were attached to the household of the Apion family in Oxyrhynchus, for example, where the papyri also reveal that, in the late sixth century, a female landowner by the name of Flavia Christodote was owed a full 61 lbs weight of gold by an Alexandrian banker against whom she threatened legal proceedings.[[814]](#footnote-814) The lady concerned is likely to have been lending to the banker, with a view to his then lending out the money at the higher rate which the law permitted him, from which she may have hoped to take an additional cut.[[815]](#footnote-815) Indeed, such a practice is alluded to in Iust. *Nov.* 136.[[816]](#footnote-816) All of this, perhaps, made the bankers not just too big to fail, but too big to fault, thus perhaps explaining the absence of moralizing rhetoric concerning them in the imperial legislation.

Faced with increasingly straightened financial circumstances, towards the end of his reign, we should note, Justinian would eventually feel compelled to exact a series of forced loans from the bankers of Constantinople which he then refused to repay, leading to a plot against him in which a number of bankers would be implicated.[[817]](#footnote-817) Justinian’s successor to the imperial throne, his nephew Justin II, by contrast, rapidly paid off these debts with the proceeds of the crown estates, the bankers having reminded him at his coronation, according to the court poet Corippus, of ‘how much benefit your treasury has from business. If our strength fails’, they asked, ‘where will the annual tributes for your resources come from? All that we do works on your behalf.’[[818]](#footnote-818) The bankers of Constantinople were thus, perhaps, to a certain extent insulated against the Emperor Justinian’s moralizing agenda by virtue of their centrality to the economic interests of the early Byzantine state and the early Byzantine elite (a centrality that would only appear to have been further enhanced by the initial dislocatory impact of the ‘Justinianic Plague’).

Much the same was also true, we should note, with respect to certain members of those religious groups of whom the emperor otherwise disapproved. A number of pertinent examples stand out from Justinian’s laws and associated texts: the Jewish population around the city of Tyre in the Lebanon, for example, are recorded to have played an important role in the imperial textile industry, and, in particular, in the imperial textile factories that oversaw the production of high-grade silk textiles. Such dress silks were established by Justinian as an imperial monopoly, and efforts were made to turn this industry into a significant source of revenue.[[819]](#footnote-819) Accordingly, in a revealing concession, in Iust. *Nov.* 139, Justinian exempted the Jews of Tyre from his recent legislation against endogamous marriage *(*Iust. *Nov.* 12 of 535 CE) which infringed upon their traditions and risked delegitimizing their marital unions.[[820]](#footnote-820)

A parallel concession was made to the peasantry of the militarily sensitive frontier territory of Osrhoene in Upper Mesopotamia, amongst whom traditions of endogamous marriage were also deeply embedded.[[821]](#footnote-821) In 551, Justinian restored to the Samaritans of Palestine their right to make wills and leave property to non-Christians, signalling that the earlier prohibition had never, in fact, been actively applied and could now be lifted in recognition of improved relations between the Samaritans and the local representatives of the imperial government.[[822]](#footnote-822) This measure would then, in turn, be reversed in the year 572 by Justinian’s successor Justin II (Iust. *Nov.* 144), who nevertheless included a significant *proviso*: ‘We are making an exception from the present law’, he declared, ‘for the agricultural workers who espouse Samaritan beliefs. This is not for their own sake, but for the upkeep of the estates on which they work, and by reason of the income of taxes and revenue from these estates to the public treasury; also, because their error is due to their rusticity.’[[823]](#footnote-823) Hence, even to Justinian, law was often a rhetorical weapon, to be applied and deployed when necessary, and to be carefully set aside when circumstances demanded. In relation to the economic sphere, in particular, the emperor can be seen to have proceeded with considerable caution, constrained for much of his reign by the empire’s increasingly precarious fiscal predicament. Even in the ‘Orthodox Republic’ of Justinian, therefore, when caught between the conflicting demands of Faith and Finance, Finance necessarily came first.

# Roman Law, Commercial Law and Levin Goldschmidt’s LegacyByStefania Gialdroni

## 1 Introduction

According to the call for the international workshop “Law and Economic Performance in the Roman World” (Brussels, December 2 : “[l]egal systems, most of all Roman law, provided the most comprehensive and powerful formal regulatory frameworks for economic transactions in the Roman empire”. The importance of Roman law, however, went far beyond: it provided the basis both of legal education and of the *ius commune* system in continental Europe long after the Fall of the Western Roman empire, throughout the Middle Ages and until the triumph of modern codifications.[[824]](#footnote-824) Despite the centrality of trade in ancient Rome,[[825]](#footnote-825) commercial law only started tentatively to attract the interest of legal scholars in the 16th century, when the ground-breaking *Tractatus de mercatura, seu mercatore* by Benvenuto Stracca was first published (1553).[[826]](#footnote-826) It took even longer for commercial law *history* to acquire the dignity of a specific field of study; that happened at the end of the 19th century,[[827]](#footnote-827) mainly thanks to the influence of Levin Goldschmidt (Danzig, 1829 – Bad Wilhelmshöhe, 1897) and his *Universalgeschichte des Handelsrechts* (1891), which was read and appreciated far beyond the boundaries of Germany.[[828]](#footnote-828)

After Goldschmidt, the history of commercial law has never again attracted so much attention. Presumably because the practice-oriented, often informal, equity based mercantile transactions and procedures tend (and tended) to beat back scholars engaged in more established fields of study such as civil law, canon law or even criminal law history. It is only recently, that something is slowly changing, as the inherent transdisciplinary nature of commercial law history – always at the edge of economic history and open to all kinds of issues related to social history in the widest sense (religion, language, travel, etc.) –, seems to fit contemporary legal historiography perfectly.[[829]](#footnote-829)

By analysing the work and legacy of Goldschmidt, this essay aims to establish when and why commercial law history became an autonomous field of study and to show the role played by Roman law int his process.

## 2 Life: How the “romanist in body and soul” became the “prince of commercial law scholars”

As the founder of the *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* (ZHR),[[830]](#footnote-830) the first chair of commercial law in Germany,[[831]](#footnote-831) and the author of that endless repository of information and ideas entitled *Universalgeschichte des Handelsrechts*, Goldschmidt was already defined the year he died (1897) as “il principe dei commercialisti moderni di ogni paese” by Ercole Vidari.[[832]](#footnote-832) He might have been identified as the prince of modern commercial law scholars but, like all law students in 19th century Germany, Goldschmidt was educated in the principles of Roman law; an imprint that remained throughout his life and profoundly influenced his work.

### 2.1 Looking for a place to stay

Although Goldschmidt is commonly recognized as the greatest authority in commercial law in 19th century Germany and maybe in the world,[[833]](#footnote-833) his career did not begin smoothly. Being a young scholar of Jewish origin in Prussia, he was obliged to make choices in order to overcome the obstacles that the state placed in his way.[[834]](#footnote-834) He first enrolled in the Medical Faculty[[835]](#footnote-835) until Prussia passed a law allowing Jewish people to access legal professions in public administration.[[836]](#footnote-836) Once that law was enacted, Goldschmidt decided to enrol at the Law Faculty in Berlin but then left Berlin for a period, to continue his education in Bonn and Heidelberg. When he came back, however, he was unable to complete his legal education there because the University of Berlin only granted the dual title of *Doctor juris utriusque* (i.e., in civil and canon law). This dual title entailed the right to access the ruling body of the Evangelical Church in Berlin (“Konsistorium”) and could for that reason not be granted to a Jew, even though Goldschmidt affirmed he would happily renounce the title of *Doctor juris canonici*, having no interest at all in joining the assembly. Fortunately, some German universities also granted the singular title of *Doctor juris civilis*, such as the University of Halle, where Goldschmidt finally received his degree *summa cum laude* with a dissertation on limited partnership[[837]](#footnote-837). A topic he would deepen over the following 40 years.

As he wrote in his 1851 dissertation, Goldschmidt was much influenced by two great scholars with whom he had the chance to study: Carl Joseph Anton Mittermaier for criminal law and Friedrich Ludwig Keller for civil (Roman) law.[[838]](#footnote-838) He considered Keller particularly as his master in the field of Roman Law. Although, being Swiss, Keller had not grown up in a country run by the tenets of Roman law, he nevertheless regarded it as the unequalled basis for both a scientific and practical legal education.[[839]](#footnote-839)

Immediately after receiving his degree, Goldschmidt started his training period as a lawyer in Danzig.[[840]](#footnote-840) When it became clear, however, that both a career as a judge and as a lawyer would have been very difficult, if not impossible, for a Jew,[[841]](#footnote-841) he instead concentrated on an academic career. This career too, however, proved hopeless in Prussia. So, in 1855, after submitting a work on sea loans in Roman Law,[[842]](#footnote-842) he received his postdoctoral qualification (“Habilitation”) from the University of Heidelberg (in the Grand-Duchy of Baden), where he became extraordinary professor (1860) and then full professor (1866). In Heidelberg he began to work on his two most famous projects:[[843]](#footnote-843) in 1858 he founded the aforementioned journal *Zeitschrift für Handelsrecht* and in 1864 the first part of the first book of his *Handbuch des Handelsrechts* was published.[[844]](#footnote-844) Clearly, commercial law was at the centre of Goldschmidt’s interests. The journal was a place for discussions on issues relating to legislation, jurisprudence and case studies.[[845]](#footnote-845) On the other hand, the “Handbook” aimed to be a systematic description of commercial law taking the new German Commercial Code at its centre and the universal history of commercial law as a background. Perhaps too difficult a goal to reach: the work remained uncompleted.

From the very beginning of his Heidelberg years, Goldschmidt invested a lot in teaching too. He gave lectures on Roman law, commercial law, Prussian law, “encyclopaedia” (a kind of introduction to law studies)[[846]](#footnote-846) and methodology. This period was a very happy one in Goldschmidt’s memories and it was probably not easy for him to leave Heidelberg. But he received an offer he could not refuse.

### 2.2 Back to Berlin

In 1869 the “Bundesoberhandelsgericht” (a high court of justice for commercial law) was established in the North German Confederation (“Norddeutscher Bund”).[[847]](#footnote-847) Goldschmidt had pleaded for the creation of such a tribunal for many years and, therefore, could not refuse the appointment as a judge on it. He, consequently, spent the following five years (1870-1875) in Leipzig,[[848]](#footnote-848) providing a major contribution to the development of commercial case law (“Rechtsprechung”) in Germany, as the president of the tribunal, Heinrich Eduard von Pape, affirmed when Goldschmidt left the office.[[849]](#footnote-849)

In 1875 the University of Berlin appointed Goldschmidt to the first chair of commercial law in Germany, a position that he held for the following 22 years, until his death in 1897. Coming back to Prussia as full professor had a special significance for him, as he considered Berlin his second homeland.[[850]](#footnote-850) In Berlin he taught public law, encyclopaedia, methodology and Roman law but the focus of his teaching activity was the course on commercial law (“Gesamte Handelsrecht“) to which he added, in 1881-82, a seminar devoted to practical and historical exercises (“Historischen und praktischen Übungen aus dem Gebiet des Handelsrechts”). In these seminars he had the opportunity to deepen issues in which he was interested, asking the students not to be passive, devoting much of his time and effort to correct their works. In a certain sense, the two courses seem to mirror his main publications: the course on “Gesamte Handelsrecht” corresponded to the *Handbuch*, which tended to be more dogmatic and systematic; the seminar corresponded to the “Zeitschrift”, the ideal place for new research and debates.

As his pupil Max Pappenheim clearly stated, the scholar and the teacher could not be separated: “Auch Goldschmidt den Lehrer können wir nicht denken ohne Goldschmidt den Gelehrten”.[[851]](#footnote-851) What is more interesting to us, though, is that Pappenheim also underlined that not only the starting point of Goldschmidt’s legal knowledge was Roman law (and it couldn’t be otherwise in that period) but that he remained a Romanist in “body and soul” for the rest of his life:

Goldschmidt hatte, wie das nach dem bisherigen Studiengang nicht anders sein konnte, seinen Ausgang von dem römischen Rechte genommen, und er ist sein Leben lang mit Leib und Seele Romanist geblieben.[[852]](#footnote-852)

According to Goldschmidt, Roman law was necessary for the education of all juristis and lawyers, even though research on contemporary law, and in particular on commercial law, could bring new developments and goals. He akcnowledged that new commercial law institutes, parting from the Roman law tradition, developed in the lively environment of the late medieval Mediterranean trade, particularly in the Italian city-states, and he recognized the importance of “German legal reasoning” (“germanisches Rechtsgedenken”) in the development of modern commercial law.[[853]](#footnote-853) Yet, nevertheless, Goldschmidt always strongly contested the opinion according to which Romans had no significant commercial activities and therefore no significant commercial law.[[854]](#footnote-854)

## 3 Work: The autonomy of commercial law

Goldschmidt devoted his entire life and work to promoting and improving commercial law as an autonomous field of study and legislation, separate from civil law. He played a leading role in the development of Germany’s own commercial law with the *Allgemeine Deutsche Wechselordnung* first and the *Allgemeines Deutsches Handelsgesetzbuch* (ADHGB) afterwards. According to scholars such as Guido Astuti,[[855]](#footnote-855) Goldschmidt prevented the unification of civil law and commercial law in Germany by demonstrating the autonomy of commercial law institutes across the centuries.

He masterpiece, the *Handbuch des Handelsrechts* remained uncompleted. Nevertheless, it provided new ideas and a significant number of sources, useful for future studies. Instead of completing the five volumes initially foreseen, Goldschmidt worked in fact very hard on the second and third editions of the first volume, changing both its structure and content. As a result, the three editions can almost be considered three different books. In 1891, Goldschmidt published the third and last edition of the *Handbuch*, consisting only of a completely revised version of volume 1, section 1, i.e., a thoroughly new version of the historical introduction to commercial law. In this *Universalgeschichte des Handelsrechts*, the idea of commercial law as a transnational set of rules was fully developed. According to Goldschmidt, the specific aim of the *Handbuch* was to provide a historical and scientific basis for the knowledge and development of a commercial law codification. To this aim, all sources were considered useful: from Roman Law to medieval statutes and customs, from legal science to modern codifications. Yet he never underestimated the importance of context(s). According to Goldschmidt, the history of commercial law has an inherent unity but it also demonstrates that laws change and adapt to local and practical needs:

[Rechtswissenshaft ist] eben doch nichts anderes als *civilis sapientia*, die praktische Philosophie der bürgerlichen Gesellschaft. Sie geht sicherlich nicht auf in der Interpretation der Texte, nicht auch nur in der Bildung der Rechtsbegriffe aus dem gegebenen Recht; ihre höchste Aufgabe ist, die richtige d.h. jeder Zeit und jeder Kulturlage entsprechende rechtliche Gestaltung des menschlichen Gemeinlebens zu finden und möglich sicher festzustellen.[[856]](#footnote-856)

He underlined the need to break free from doctrinal schemata to let any legal rule live in the context of real life, according to the Roman jurist Paulus’ “golden rule”: *non ex regula ius sumatur, sed ex iure quod est regula fiat.*[[857]](#footnote-857) Therefore, even though the *Handbuch* had a more dogmatic approach than most of his works, Goldschmidt always considered history and comparison. The latter was, in his opinion, a necessary and unavoidable consequence of historical research (especially in the field of commercial law).[[858]](#footnote-858) This is how he himself described the importance of history for codification in the preface to the 1864 edition of the *Handbuch:*

Vielmehr ist hier der Wissenschaft die nächste und wichtigste Aufgabe gestellt, die unvermeidlichen Nachteile dieser, wie jeder Codifikation, die formelle Losreißung des durch sie begründeten Rechtszustandes von der Vergangenheit, durch den Nachweis des geschichtlichen Zusammenhanges möglichst auszugleichen, und überall an die Vergangenheit anknüpfend, die Ergebnisse der bisherigen Wissenschaft für die Erkenntniß und Fortbildung des geltenden Rechts zu verwerthen.[[859]](#footnote-859)

Clearly, we are in an academic environment dominated by the German Historical School of Jurisprudence and by the omnipresent shadow of Friedrich Carl von Savigny. The importance of history for the understanding of contemporary law was at that time a kind of dogma in Germany and in many other countries in Europe. But the history of commercial law was still an unexplored field where Goldschmidt played the role of pioneer.[[860]](#footnote-860)

### 4 Legacy: The “brilliant creative force” of Roman commercial law

Scholars have been debating the problem of the existence of Roman commercial law for over a century.[[861]](#footnote-861) Those who deny it date the first development of commercial law to the Middle Ages, i.e., to the period of the intensification of Mediterranean trade and of the so-called “commercial revolution”.[[862]](#footnote-862) Goldschmidt is often considered the forefather of this historiographical approach.[[863]](#footnote-863) The problem, however, is to what extent this interpretation of Goldschmidt’s thought is correct.

Recent research has underlined the complexity of the identification of the idea of commercial law in the Roman world, due to the fact that Roman law adopted an objective perspective (focus on the act) rather than a subjective one (focus on the merchant), making it extremely difficult to identify the “acts of commerce” as they later came to be isolated in the Middle Ages and in the modern period. On the other hand, it seems undisputed today that the very development of Rome and its empire was linked to the development of trade in the Mediterranean. Thanks to the *pax romana,* the centralized political administration, the monetary system, the roads and, especially, free trade, Roman law as a whole received a strong boost from the activities associated with commerce, while the law relating to commercial enterprises developed on the basis of customs and praetor’s *edicta*. Between the 3rd century BCE and the 3rd century CE, Roman “commercial law” concentrated on the following issues: exchange and circulation of goods; shipping and land transport of goods and persons; artisan and industrial activities; speculative activity on urban real estates; different kinds of services provided by *stabularii, caupones, fullones, sarcinatores, libitinarii*. Roman jurists foresaw no limits to the number and kind of *negotiationes*, which was facilitated by the separation between a businessman’s personal assets and *peculia* entrusted to his slaves.

We do need to rememeber, however, that the two opposite points of view (Romans had no interest in commerce and commercial law vs. Romans developed commerce and therefore commercial law) were already being hotly debated at the end of the 19th century. In 1891, when Goldschmidt’s Goldschmidt’s *Universalgeschichte* was published, Gabriello Carnazza, professor of Roman Law at the Universities of Palermo and Catania, published his *Il diritto commerciale dei Romani*. In the preface he wrote:

Si sostiene da alcuni che il popolo romano fu esclusivamente un popolo conquistatore e che nessuna cura ebbe alle arti civili; si aggiunge che esso pel commercio, più che noncuranza ebbe disprezzo.

Si sostiene per converso da altri che il commercio di Roma può, senza tema di errare, essere paragonato a quello dei tempi moderni, tenuto conto, ben inteso, della schiavitù non più esistente e dei progressi recentissimi fatti dall’industria.[[864]](#footnote-864)

Carnazza’s aim was to demonstrate that Romans did take commercial law into account. And who better to quote in favour of such an opinion than Goldschmidt’s *Lex Rhodia und Agermanament* (1889);[[865]](#footnote-865) which he himself translated in 1890? Furthermore, he again referred to Goldschmidt when he wanted to emphasize that Rome had, also in commercial law, “una geniale forza creatrice”.[[866]](#footnote-866) Other scholars appeared to think similarly. According to Pappenheim, Goldschmidt always contested the (already) widespread opinion, that for Romans trade was not important: “Der weit verbreiteten Meinung, dass die Römer keinen erheblichen Handel besessen hätten, trat er schon früh und dann immer wieder mit Entschiedenheit entgegen”.[[867]](#footnote-867)

Goldschmidt was a Romanist and in no way is it possible to minimize his knowledge and understanding of Roman law. Therefore, we can agree with Antonio Guarino that denying the existence of Roman commercial law is a statement based on “preconcetti formalistici coniugati con una certa disinformazione storiografica romanistica”.[[868]](#footnote-868) And certainly Goldschmidt was not biased nor uninformed.

An emerging historiographical trend seems not only to place more and more stress upon the importance of commercial law in the Roman world but also to assume that the Roman empire “was very actively and self‐consciously involved” in trade,[[869]](#footnote-869) in the sense that Rome developed a specific economic policy.[[870]](#footnote-870) However, even the latest historiography, has to admit that Rome had no specific *body* of commercial law.[[871]](#footnote-871) It seems that it was only when commercial law started to be linked to the subject that merchants acquired self-consciousness and political strength. Perhaps a better understanding of Goldschmidt’s views would be to say that whilst he did not deny nor underestimate the importance of commercial law institutes in the Roman world, he preferred to locate a significant turning point for commercial law in the lively commercial environment of the medieval Italian city-states. If this is so, Goldschmidt’s point of view suddenly ceases to seem outdated.

### 4.1 The universality of commercial law

Goldschmidt’s aim was not to deny the existence of trade and trading rules in ancient Rome but rather to separate civil and commercial law, focusing on the moment in which this separation became evident, i.e., in the Middle Ages. According to his *Universalgeschichte*, in fact, commercial law is at the same time special (as it had been in practice separated from civil law for centuries, if not millennia), and universal (as most rules could—and can—be applied all over the world, like a modern *ius gentium*). The two perspectives seem to contradict each other but they don’t. In fact, they both serve the same purpose: to affirm the autonomy of commercial law.

This approach led to two practical consequences: the creation of commercial law codifications, separate from the civil law ones, in many European countries (which was Goldschmidt’s explicit aim) and the manipulation of the concept of *lex mercatoria* (which is a contemporary phenomenon that Goldschmidt could not foresee). Even though Goldschmidt did not usually use the expression *lex mercatoria* (but rather, very rarely, *ius mercatorum* or *mercatorium*), his “universal history” of commercial law became the basis for the following studies on what is usually called the “modern *lex mercatoria*”, beginning with Berthold Goldman and the French School in the 1960s.[[872]](#footnote-872) As a result, *lex mercatoria* is now often used as a dogmatic category, providing historical legitimacy to the supporters of corporate self-regulation. To demonstrate that merchants have “always” acted according to non-state rules, on the basis of customary laws, is in fact useful to make the existence of a system of rules not subjected to an external control more acceptable. Even though most legal historians today tend to deny the existence of a medieval (and modern) *lex mercatoria,*[[873]](#footnote-873) the “myth” of the existence of a body of customary laws uniformly and universally applied continues its journey across different fields of study.[[874]](#footnote-874)

### 4.2 The importance of economics for lawyers

Less studied, but no less important, is the weight that Goldschmidt bestowed upon economics, approached, as usual, in a historical and comparative perspective. This peculiar aspect has been quite recently deepened by Wolfgang Schön, in an article entitled “Recht und Ökonomie bei Levin Goldschmidt”.[[875]](#footnote-875) Goldschmidt was not the only one interested in economic history and comparison, writes Schön, as in the very same years Goldschmidt was developing his theories, Karl Marx developed the theory of historical materialism and the Historical School of Economics took its first steps. Schön recognizes, however, Goldschmidt’s very personal approach to the relationship between economics, history, and law.[[876]](#footnote-876) Already in the first issue of the ZHR, Goldschmidt affirmed that it was necessary to ask economic questions and in the following forty years many important works on economics were reviewed in the ZHR. A crucial chapter in his *Universalgeschichte* was devoted to the economy, entitled “Wirtschaftliche und rechtliche Grundprobleme”. The chapter on basic concepts (“Grundbegriffe”) in his *Handbuch* was also concerned with economic matters. His references were clearly Adam Smith on the economy and Friedrich Carl von Savigny for law.[[877]](#footnote-877)

Since the first decades of the 19th century, Savigny’s historical method began to influence other fields of study. The first one to explicitly apply Savigny’s approach in the field of economics was Wilhelm Roscher, who, in his *Grundriß zu Vorlesungen über die Staatswirtschaft nach geschichtlicher Methode* (1843), outlined the main features of the Historical School of Political Economy, later deepened in his *System der Volkswirtschaft* (1857) and further developed by Bruno Hildebrand, Karl Knies and Gustav Schmoller. We know that the works of the aforementioned scholars were considered of utmost importance by Goldschmidt, not only because he mentioned them in the footnotes of his “Handbook”, but also because many of the works were reviewed in the ZHR.

The German School was so concentrated on the importance of nation and cultural context that a harsh academic debate with the Austrian School,[[878]](#footnote-878) accused of taking a too “abstract” approach, ensued. According to Carl Menger, in fact, the German Historical School of Economics misunderstood Savigny’s message: history is important but the existence of general rules, valid at all times, could not be denied.[[879]](#footnote-879) Schön affirms that this was Goldschmidt’s opinion too and that this is particularly evident in the *Universalgeschichte*. Goldschmidt wanted to demonstrate that commercial law expresses a kind of people’s cooperation in world history (“weltgeschichtliche Zusammenarbeit”) rather than the characters of a single people or of a specific historical period.[[880]](#footnote-880) More specifically, Goldschmidt believed in an international, cosmopolitan commercial law that he defined as *jus gentium.*[[881]](#footnote-881) His belief in liberalism, though, was already outdated in 1891 as was his faith in a kind of international peaceful society of mankind. Goldschmidt believed that commercial unity was an essential step towards the political unification of Germany (which he strongly supported and welcomed), but his final goal was much broader and more ambitious.[[882]](#footnote-882) This transnational way of interpreting both economics and law, together with his liberal approach, can also be listed as one of Goldschmidt’s long-lasting legacies.

### 4. 3 A method and a school

As mentioned before, Goldschmidt was not only a great scholar but also an extraordinary “master”, in the sense that he shaped a method as well as an entire generation of scholars on the basis of the assumption that law cannot be separated from history and philosophy.[[883]](#footnote-883) Illustrious names such as Max Pappenheim, Georg Schaps, Paul Rehme, Wilhelm Silberschmidt and Philipp Heck were just some of those who followed him and his teachings. Goldschmidt was also the “Doktorvater” of a PhD student destined for an extraordinary career, whose interests can perhaps better be understood in the framework of Goldschmidt’s interdisciplinary approach. His name was Max Weber.

Weber wrote his dissertation, on which his first book *The History of Commercial Partnership in the Middle Ages* (1889) was based, under Goldschmidt’s supervision.[[884]](#footnote-884) This connection has been neglected for a long time, as Weber’s earliest works, belonging to the so called “lost decade”, have often been dismissed as immature productions. For our purposes, though, a brief reference to Weber’s relationship with his supervisor can help us shed light on the inspiration Goldschmidt provided for his scholars, inviting them to cross the traditional boundaries between different fields of study (law, history, economics) and expecting from them the same scientific rigor which characterized his own work. As Lutz Kaelber recently wrote:

The scope of Goldschmidt’s knowledge of the subject-matter was legendary, but he was also what one might call in his native German extremely *pingelig*, or obsessed with the accuracy of details to the point of pedantry.[[885]](#footnote-885)

He certainly expected a lot. For example, this is how Weber described his work with Goldschmidt to his cousin Emmy Baumgarten in 1887:

(…) I collected materials for a paper in Professor Goldschmidt’s seminar. I had to go through hundreds of Italian and Spanish collections of documents. I first had to learn those two languages to be proficient enough to reasonably understand books written in them. For Spanish this turned out to be rather time-consuming. Moreover, the stuff is mostly written in such dreadful older dialects that one has to wonder how people were able to understand such gibberish.[[886]](#footnote-886)

Despite the “pedantry”, Weber chose Goldschmidt as adviser for his dissertation, probably appreciating his zeal as well as his historical and comparative approach to the study of law. Goldschmidt’s *opus magnum* was defined “not only as a legal, but also a cultural and economic history”.[[887]](#footnote-887) On the other hand, Weber’s dissertation included not only legal but also ethical and religious issues that were destined to become the core of his future research towards the development of sociology as an independent field of study.

## 5 Conclusion

By focusing on the history of commercial law and therefore on the world of merchants and the importance of trade, Goldschmidt in some ways anticipated the revolutionary approach of the French “École des Annales”. The Annales School definitively abandoned the history of emperors and popes in favour of “une histoire plus large et plus humaine,” as Marc Bloch described it, when dedicating his *Apologie pour l’histoire* to his friend and colleague Lucien Febvre[[888]](#footnote-888). Goldschmidt’s interdisciplinary and comparative point of view can be seen as heralding one of the most important historiographical trends of the 20th century, of which the main feature was the openness of history to all social sciences (in the broadest definition possible): from geography to sociology, from psychology to economics.

With Bloch, Goldschmidt shared a Jewish origin. Both scholars, in different times and places, faced huge barriers to their life and work, notwithstanding their proven patriotism.[[889]](#footnote-889) This discrimination was also very clear to some of Goldschmidt’s contemporaries. Ercole Vidari, the chair of commercial law at the University of Pavia for 45 years, Senator of the Kingdom of Italy in 1904, member of the commission in charge of writing the new Italian Commercial Code of 1882, wrote:

Un uomo [Goldschmidt] che rese tali servigi agli studi (…) ha ben diritto a quell’ammirazione, a quella riverenza che tutto il mondo studioso volentieri gli tributa, e che solo, talvolta, fu turbata dalle intolleranze rabbiose dell’antisemitismo Tedesco. Come se la scienza non avesse per patria tutta l’umanità, senza distinzioni di razze![[890]](#footnote-890)

Like Vidari, more and more scholars recognized Goldschmidt’s influence in his own lifetime and in the years that followed. Goldschmidt’s direct influence on German legislation ended with the entering into force of the *Handelsgesetzbuch* (HGB) in 1900. His indirect legacies, however, are long-lasting:[[891]](#footnote-891) the importance of comparative law,[[892]](#footnote-892) comparative legal history[[893]](#footnote-893) and economics for lawyers; the idea that commercial law is somehow “universal” and that it is separate from civil law; the fundamental role of legal education; the belief in commercial law unity as the most powerful means of achieving political unity[[894]](#footnote-894) (a path followed in recent years in Europe where the European Economic Community acted as a prelude to the European Union). Finally, Goldschmidt’s influence cannot be denied when it comes to the success of his most illustrious pupils: Max Weber and Philipp Heck.[[895]](#footnote-895)

Although he was an innovator he never underestimated the importance of what he considered the basis of all law, namely Roman law; on the contrary. Before him, as Gerard Dilcher has pointed out, commercial law history in Germany was a topic studied by “Germanists”, like Georg Beseler and Otto Gierke, within the framework of private law scholarship, because most of the sources considered were medieval sources. Goldschmidt “freed” commercial law from this context,[[896]](#footnote-896) by stating that it had its roots in Roman law, even though it was in the Middle Ages that it began its march towards modernity[[897]](#footnote-897).

We have to thank the “pingelig” (or “fussy”) Goldschmidt that commercial law became a field of study (and in many countries, of legislation) autonomous from civil law; we have to thank him once more because the historical dimension of the new field is now taken seriously. “Dieses Dunkel muss endlich gelichtet werden!” wrote Goldschmidt in 1891, referring to the fact that a better understanding of commercial law history provides us with a clearer understanding of the aims and structure of commercial law in the present and in the future. Luckily for us (legal historians), some shadows remain and still need some light shone upon them as we head into the future.

1. See e.g. E. Lo Cascio, ‘The Roman Principate. The impact of the organization of the empire on production’, in E. Lo Cascio and D..W Rathbone (eds.), *Production and Public Powers in Antiquity*, (Cambridge 2000), 77–85); E. Lo Cascio, ‘The role of the state in the Roman economy. Making use of the New Institutional Economics’, in P.F. Bang and M. Ikeguchi (eds), *Ancient Economies, Modern Methodologies: Archaeology, Comparative History, Models and Institutions* (Bari 2006); A. Bresson, *La cité marchande* (Bordeaux 2000); A. Bresson, *L’ économie de la Grèce des cités (fin VIe-Ier siècle a.C). 1, : Les structures et la production* (Paris 2007); A. Bresson, *L’ économie de la Grèce des cités (fin VIe-Ier siècle a. C.). 2, : Les espaces de l’échange* (Paris 2008); now updated and translated as A. Bresson, *The Making of the Ancient Greek Economy: Institutions, Markets, and Growth in the City-States* (Princeton 2019); specifically legal systems: B.W. Frier and D.P. Kehoe, ‘Law and Economic Institutions’, in W. Scheidel, I. Morris, and R.P. Saller (eds.), *The Cambridge Economic History of the Greco-Roman World* (Cambridge ; New York 2007), 113–143; D.P. Kehoe, *Law and the rural economy in the Roman Empire* (Ann Arbor 2007); G. Dari-Mattiacci and D.P. Kehoe (eds.), *Roman law and economics. Volume I: Institutions and organisations. Volume II: Exchange, ownership, and disputes* (Oxford 2020). [↑](#footnote-ref-1)
2. Although probably not as extreme as previously believed, see Luuk de Ligt, ‘Law-making and economic change during the republic and early empire’, in Dari-Mattiacci and Kehoe 2020 op. cit. (n. 1), 85–108; and Kay in this volume. [↑](#footnote-ref-2)
3. A.T. Denzau and D.C. North, ‘Shared mental models: ideologies and institutions’, *Kyklos* 47 (1994), 3–31; K. Verboven, ‘Playing by whose rules? Institutional resilience, conflict and change in the Roman economy’, in K. Verboven (ed.), *Complexity Economics: Building a New Approach to Ancient Economic History*, (Basingstoke 2021), 21–51; study of the “players” is central to behavioural economics, cf. R. Weber and R. Dawes, ‘Behavioral economics’, in N. J. Smelser and R. Swedberg (eds.), *The Handbook of Economic Sociology* (Princeton 2005), 90–97; for a discussion see Verboven , ‘The knights who say NIE’, in P. Erdkamp and K. Verboven (eds.), *Structure and Performance in the Roman Economy. Models, Methods and Case Studies* (Brussel 2015), 41–47. [↑](#footnote-ref-3)
4. On economies as complex adaptive systems see E.D. Beinhocker, *The Origin of Wealth : Evolution, Complexity, and the Radical Remaking of Economics* (Boston Mass. 2006); W.B. Arthur, *Complexity and the Economy* (Oxford 2015); K. Verboven, ‘Introduction: finding a new approach to ancient proxy data’, in Verboven 2021, loc. cit. (n. 3), 1-18. [↑](#footnote-ref-4)
5. F. Braudel, *The Mediterranean and the Mediterranean World in the Age of Philip II* (New York 1972), I, 420‑421. [↑](#footnote-ref-5)
6. P. Erdkamp, ‘A starving mob has no respect. Urban markets and food riots in the Roman world, 100 BC–400 AD’, in L. de Blois and J. Rich (eds.), *The Transformation of Economic Life under the Roman Empire*, (Amsterdam 2002), 93–115. [↑](#footnote-ref-6)
7. W. V. Harris, ‘The late republic’, in Scheidel, Morris, and Saller 2007, op. cit. (n. 1), 519. [↑](#footnote-ref-7)
8. D. P. Kehoe, ‘Approaches to economic problems in the letters of Pliny the Younger. The question of risk in agriculture’, in *Aufstieg Und Niedergang Der Römischen Welt II 33.1* (Berlin 1989), 563–564; P.Erdkamp, *The Grain Market in the Roman Empire: A Social, Political and Economic Study* (Cambridge; New York 2005), 120‑134. [↑](#footnote-ref-8)
9. Harris, op. cit. (n. 7), 525; B. W. Frier and D. P. Kehoe, ‘Law and economic institutions’, in Scheidel, Morris and Saller, op. cit. (n. 1), 138. [↑](#footnote-ref-9)
10. See the contributions in this volume by González Bordas and Dalla Rosa. [↑](#footnote-ref-10)
11. See González Bordas in this volume. [↑](#footnote-ref-11)
12. Discussed in this volume by Girdvainyte. [↑](#footnote-ref-12)
13. See the contribution by Dalla Rosa. [↑](#footnote-ref-13)
14. See the contribution by Kehoe. [↑](#footnote-ref-14)
15. Erdkamp 2005, op. cit. (n. 8), 26–28. [↑](#footnote-ref-15)
16. B. Sirks, ‘The farmer, the landlord, and the law in the fifth century’, in R. W. Mathisen (ed.), *Law, Society and Authority in Late Antiquity* (Oxford 2001), 258. [↑](#footnote-ref-16)
17. Sse the contribution by Kehoe. [↑](#footnote-ref-17)
18. Kehoe in this volume. [↑](#footnote-ref-18)
19. Erdkamp 2002, op. cit. (n. 6). [↑](#footnote-ref-19)
20. A. Giardina, ‘The transition to late antiquity’, in Scheidel, Morris and Saller 2007, op. cit. (n. 1), 748; D. Kehoe, ‘Contract labor’, in *ibid.*, 119; Sirks 2001, op. cit. (n. 16), 261, 265. [↑](#footnote-ref-20)
21. See the contribution by Kehoe. [↑](#footnote-ref-21)
22. Giardina 2007, op. cit. (n. 20), 753. [↑](#footnote-ref-22)
23. See Günther in this volume on framing in Cicero’s *Pro Cluentio*. [↑](#footnote-ref-23)
24. R.G. Summers, ‘Roman justice and Apuleius’ *Metamorphoses*’, *Transactions and Proceedings of the American Philological Association* 101 (1970), 511–31; J. Harries, *Law and Crime in the Roman World* (Cambridge 2007), 121–123. [↑](#footnote-ref-24)
25. Sulp. Sev. *Epist. ad Salvium* 2-3; quoted from Sirks 2001, op. cit. (n. 16), 256. [↑](#footnote-ref-25)
26. Salv. *Gub*. 5.38; quoted from Sirks, 258. [↑](#footnote-ref-26)
27. Giardina 2007, op. cit. (n. 20), 761. [↑](#footnote-ref-27)
28. See the cases discussed by Harries 2007, op. cit. (n. 24), 38–40. [↑](#footnote-ref-28)
29. “The workings of law enforcement […] were, in some areas, largely a matter of chance.” J. Harries, *Law and Empire in Late Antiquity* (Cambridge 2004), 88–93, quote from p. 93. [↑](#footnote-ref-29)
30. Liv. 21.63; Cic. *Verr.* 5.45-46; the literature on this *lex Claudia* is vast, cf. H. Pavis d’Escurac, ‘Aristocratie sénatoriale et profits commerciaux’, *Ktèma* 2 (1977), 339–55; J. C. Domínguez Pérez, ‘La « Lex Claudia de Naue Senatorum » a la luz de la epigrafía latina sobre ánforas Greco-Itálicas arcaicas’, *Polis: Revista de Ideas y Formas Políticas de La Antigüedad Clásica* 17 (2005), 73–95. and there for further references. [↑](#footnote-ref-30)
31. Plut. *Cat. Mai.* 25.6; I. Shatzman, *Senatorial Wealth and Roman Politics* (Bruxelles 1975), 256–260; J. Rougé, ‘Prêt et société maritimes dans le monde romain’, in *The Seaborne Commerce of Ancient Rome. Studies in Archaeology and History* (Rome 1980), 292–293. [↑](#footnote-ref-31)
32. K. Verboven, *The Economy of Friends : Economic Aspects of « Amicitia » and Patronage in the Late Republic* (Bruxelles 2002), 227–274. See now also D. P. Kehoe, ‘Mandate and the management of business’, in G. Dari-Mattiacci and D. P. Kehoe (eds.), *Roman Law and Economics. Volume 1. Institutions and Organisations* (Oxford 2020), 307–337. [↑](#footnote-ref-32)
33. See now A. M. Fleckner, ‘Roman business associations’, in Dari-Mattiacci and Kehoe 2020, op. cit. (n. 32), 233–272. [↑](#footnote-ref-33)
34. Some have disputed this but see K. Verboven, ‘Capital markets and financial entrepreneurs in the Roman world’, in P. Erdkamp, K. Verboven, and A. Zuiderhoek (eds.), *Capital, Investment, and Innovation in the Roman World* (Oxford 2020), 381–416. [↑](#footnote-ref-34)
35. K. Verboven, ‘Currency, bullion and accounts. Monetary modes in the Roman world’, *RBN* 155 (2009), 91–124; K. Verboven, ‘Currency and credit in the first century AD Bay of Naples’, in M. Flohr and A. Wilson (eds.), *The Economy of Pompeii*, (Oxford 2017), 363–386; Verboven 2020, op. cit. (n. 34). [↑](#footnote-ref-35)
36. Fleckner 2020, op. cit. (n. 33); *Dig.* 3.1.14. [↑](#footnote-ref-36)
37. K. Verboven, ‘The structure of mercantile communities in the Roman world. How open were Roman trade networks ?’, in P. Arnaud and S. Keay (eds.), *Roman Port Societies. The Evidence of Inscriptions* (Cambridge 2020), 351–352. [↑](#footnote-ref-37)
38. On Roman account books and their purposes see R. M. Thilo, *Der Codex accepti et expensi im römischen Recht: ein Beitrag zur Lehre von der Litteralobligation* (Göttingen 1980); R. H. Macve, ‘Some glosses on Ste. Croix’s Greek and Roman accounting’, *History of Political Thought* 6 (1985), 233–264; G. Minaud, *La comptabilité à Rome: essai d’histoire économique sur la pensée comptable commerciale et privée dans le monde antique romain* (Lausanne 2005). [↑](#footnote-ref-38)
39. J.-M. Carrié, ‘Les associations professionnelles à l’époque tardive : entre « munus » et convivialité’, in J.‑M. Carrié and R. Lizzi Testa (eds.), *‘Humana sapit’: études d’antiquités tardive offertes à Lellia Cracco Rugini* (Turnhout 2002), 309–332. [↑](#footnote-ref-39)
40. See also K. Verboven, ‘Bankers’ guilds and the Roman monetary system’, in F. Stroobants and C. Lauwers (eds.), *Detur Dignissimo. Studies in Honour of Johan Van Heesch* (Brussels 2020), 417–436. [↑](#footnote-ref-40)
41. D. P. Kehoe, ‘Property rights over land and economic growth in the Roman Empire’, in P. Erdkamp, K. Verboven, A. Zuiderhoek (eds.), *Land and Natural Resources in the Roman Empire* (Oxford 2015), 88-106, and earlier ‘the state and production in the roman agrarian economy’, in A. Bowman, A. Wilson (eds.),*The Agricultural Economy: Production and Consumption* (Oxford 2013), 33-53. Translations from the Digest are my own; those from the Codex of Justinian are as in B. W. Frier (ed.), *The Codex of Justinian: A New Annotated Translation, with Parallel Latin and Greek Text*, 3 vols., (Cambridge 2016). [↑](#footnote-ref-41)
42. For the share of the emperor’s property compared to that of the senatorial order, see M. Maiuro, *Res Caesaris: Ricerche sulla proprietà imperiale nel Principato* (Bari 2012), 143-144. For the role of the state as an economic actor in the Roman empire, see E. Lo Cascio, ‘The early Roman empire. The state and the economy’, in W. Scheidel, I. Morris, and R. Saller (eds.), *The Cambridge Economic History of the Greco-Roman World* (Cambridge 2007), 619-647 at 622-625. [↑](#footnote-ref-42)
43. B. Ward-Perkins, ‘The cities’, in A. Cameron and P. Garnsey (eds.), *The Cambridge Ancient History*, *vol. XIII, The Late Empire, A.D. 337-425* (Cambridge, 1998)*,* 371-410, and earlier A. H. M. Jones, *The Later Roman Empire, 284-602.* vol. I (Norman, 1964), 712-766. [↑](#footnote-ref-43)
44. *Cod. Iust.* 4.49.13 (294): *Fructus post perfectum iure contractum emptoris spectare personam convenit, ad quem et functionum gravamen pertinet: venditorque pretium tantum ac, si moram intercessisse probetur, usuras officio iudicis exigere potest*. [It is generally accepted that, after a contract is lawfully completed, the fruits belong to the person of the buyer, to whom also the burden for public taxes belongs; the seller can only exact the purchase price through the office of a judge and, if it should be proved that a delay intervened, interest (as well)]. [↑](#footnote-ref-44)
45. *Cod. Iust.* 4.47.2: pr. *Rei annonariae emolumenta tractantes cognovimus hanc esse causam maxime reliquorum, quod nonnulli captantes aliquorum momentarias necessitates sub hac condicione fundos comparant, ut nec reliqua eorum fisco inferant et immunes eos possideant. 1. Ideoque placuit, ut, si quem constiterit huiusmodi habuisse contractum atque hac lege possessionem esse mercatum, tam pro solidis censibus fundi comparati quam pro reliquis universis eiusdem possessionis obnoxius teneatur, cum necesse sit eum qui comparat censum rei comparatae agnoscere, nec licere cuidam rem sine censu comparare vel vendere.* [pr. Investigating the payments to the *annona*, We have learned that it is especially a cause for arrears that some people, taking advantage of the momentary necessity of others, purchase farms under this condition that they not pay their arrears to the Treasury and that they possess them immune from taxation. 1. For that reason it has been decided that, if it is established that someone had such a contract and has purchased a property under this condition, he should be held liable both for the entire tax liability of the purchased farm and for the entire arrears for the same property, since it is necessary that the person who purchases assume the tax liability for the purchased property; nor is anyone permitted to purchase or sell property without its tax liability.] [↑](#footnote-ref-45)
46. See A. Jördens, *Statthalterliche Verwaltung in der römischen Kaiserzeit: Studien zum* praefectus Aegypti (Stuttgart 2009), 458-468. [↑](#footnote-ref-46)
47. The same principle was applied to lessees (*conductores*) who were also possessors of public land (*Cod. Iust.* 11.59.6, *Cod. Theod.* 10.3.4, Ravenna, 383). [↑](#footnote-ref-47)
48. *Cod. Iust.* 11.59.12: *Hac definitione sancimus nullum possessorem neque munificum praedium pro alienis debitis vel destitutione esse retinendum neque eorum praediorum depectione praegravari, quae ex isdem bonis quae retinentur nequaquam esse monstrantur, ne ullis praestigiis atque commentis exactio mutiletur*. [↑](#footnote-ref-48)
49. Discussed in Kehoe 2013, op. cit. (n. 1), 43. [↑](#footnote-ref-49)
50. I argue for this perspective in *Law and the Rural Economy in the Roman Empire* (Ann Arbor 2007),53-91. See now the papers of A. Dalla Rossa and H. González Bordas in this volume. [↑](#footnote-ref-50)
51. T. Hauken, *Petition and Response: An Epigraphic Study of Petitions to Roman Emperors 181–249* (Bergen 1998), 35-37, also discussed in Kehoe 2007, op. cit. (n. 10), 84-88. [↑](#footnote-ref-51)
52. T. Corsten, ‘Estates in Roman Asia Minor: The case of Kibyratis.’ In S. Mitchell, C. Katsari (eds.), *Patterns in the Economy of Roman Asia Minor* (Swansea 2005), 1-52, as well as S. Mitchell, *Anatolia: Land, Men, and Gods in Asia Minor. Vol. I, The Celts in Anatolia and the Impact of Roman Rule* (Oxford 1993), 163-164. [↑](#footnote-ref-52)
53. For the status of formerly Achaemenid land in Hellenistic land in Achaemenid Asia Minor, see R. Boehm, *City and Empire in the Age of the Successors* (Berkeley 2018), 115-120. For the development of estates in Roman Asia Minor, and the incorporation of villages within them, Mitchell 1993, op cit. (n.12), 143-164. [↑](#footnote-ref-53)
54. Discussed in detail in Kehoe 2007, op. cit. (n. 10), 135-148. [↑](#footnote-ref-54)
55. *Cod. Iust.* 4.65.16 (260): *Legem quidem conductionis servari oportet nec pensionum nomine amplius quam convenit reposci. Sin autem tempus, in quo locatus fundus fuerat, sit exactum et in eadem locatione conductor permanserit, tacito consensu eandem locationem una cum vinculo pignoris renovare videtur.* [The terms of the lease must be observed and nothing more should be demanded as rent than what has been agreed upon. But if the time in which the farm had been leased should be completed and the tenant has remained in the same lease, he is seen to renew the same lease, along with his pledge bond, by his tacit agreement (*tacito consensu*).] [↑](#footnote-ref-55)
56. *Cod. Iust.* 11.50.1: *Quisquis colonus plus a domino exigitur, quam ante consueverat et quam in anterioribus temporibus exactus est, adeat iudicem, cuius primum poterit habere praesentiam, et facinus comprobet, ut ille, qui convincitur amplius postulare, quam accipere consueverat, hoc facere in posterum prohibeatur, prius reddito quod superexactione perpetrata noscitur extorsisse.* [If a landowner exacts more from any tenant than what he was previously accustomed (to pay) and what was exacted from him in previous years, he should approach the judge whose audience he will first be able to gain, and he should prove the crime, so that the one who is convicted of demanding more than he had been accustomed to receive might be prohibited from doing this in the future, after first having returned what he is known to have extorted by perpetrating an excessive demand.] [↑](#footnote-ref-56)
57. M. Kaser, *Das römische Privatrecht* (Munich 1971, 2nd ed.), 424-425. D. Nörr, *Die Entstehung der longi temporis praescriptio: Studien zum Einfluß der Zeit im Recht und zur Rechtspolitik in der Kaiserzeit* (Köln – Opladen 1969), 74-79 attributes origins of this prescription to disorder in Egypt after the Antonine plague of 165, which may have caused disruption of record keeping and disputes over land. By contrast, E. Plisecka sees the prescription’s origins in longstanding Roman legal principles (‘The decision of Septimius Severus and Caracalla on *Longi Temporis Praescriptio* (BGU 267 and P.Strass. 22)’, in K. Czajkowski and B. Eckhardt (eds.), *Law in the Roman Provinces* (Oxford 2020), 65-83). [↑](#footnote-ref-57)
58. *Cod. Iust.* 7.36.1; the creditors would still have an *in personam* claim against the debtor. [↑](#footnote-ref-58)
59. This section summarizes the discussion in Kehoe 2007 op. cit. (n. 10), 135-138. [↑](#footnote-ref-59)
60. *Cod. Iust.* 7.30.1: *Qui ex conducto possidet, quamvis corporaliter teneat, non tamen sibi, sed domino rei creditur possidere. neque enim colono vel conductori praediorum longae possessionis praescriptio quaeritur.* [If someone holds possession under a lease, although he has physical control of the thing, he is thought to possess it not for himself but for its owner. Therefore a tenant farmer (*colonus*) or lessee of real properties (*conductor praediorum*) may not sue for prescriptive acquisition through long-term possession.] [↑](#footnote-ref-60)
61. *Cod. Iust.* 7.32.5 (290): *Cum nemo causam sibi possessionis mutare possit proponasque colonum nulla extrinsecus accedente causa ex colendi occasione ad iniquae venditionis vitium esse prolapsum, praeses provinciae inquisita fide veri dominii tui ius convelli non sinet*. [Since no one by himself can change the legal basis upon which he holds possession, and you state that your tenant (*colonus*), without any intervening title but through the mere occasion of his cultivation of the property, committed the wrongful act of selling it, the provincial governor, after inquiry into the true facts, will not permit you to be deprived of ownership of the property.] [↑](#footnote-ref-61)
62. *Cod. Iust.* 7.39.2.1 (365): *Nemo igitur, qui ad possessionem conductor accedit, diu alienas res tenendo ius sibi proprietatis usurpet, ne cogantur domini aut amittere quod locaverunt aut conductores utiles sibi fortassis excludere aut annis omnibus super dominio suo publice protestari*. [No one, therefore, who receives possession as tenant (*conductor*) may usurp the right of ownership by holding another’s property over a long time. Otherwise owners will be compelled either to lose what they had leased, or perhaps to evict tenants who are useful to them, or to publicly proclaim their ownership every year.] [↑](#footnote-ref-62)
63. H. Weßel, *Das Recht der Tablettes Albertini* (Berlin 2003). See also P. Tedesco, ‘The missing factor: economy and labor in late Roman Africa (400-600 CE)’, *Journal of Late Antiquity* 11 (2018), 396-431, at 419-424. [↑](#footnote-ref-63)
64. I discuss the binding of *coloni* in Kehoe 2007, op. cit. (n. 10), 163-191, with reference to other scholarship. [↑](#footnote-ref-64)
65. *Cod. Iust.* 11.48.2: *pr. Si quis praedium vendere voluerit vel donare, retinere sibi transferendos ad alia loca colonos privata pactione non possit. 1. Qui enim colonos utiles credunt, aut cum praediis eos tenere debent aut profutoros alii derelinquere, si ipsi sibi praedium prodesse desperant.* [If someone wishes to sell or donate a property, he shall not be able by a private agreement to retain the bound tenants (*coloni*) for himself so as to transfer them to other places. For those who believe that bound tenants are useful ought either to hold them along with the properties or leave them behind to benefit others, if they indeed lose hope that a property is useful to themselves.] [↑](#footnote-ref-65)
66. Discussed in Kehoe 2007, op. cit. (n. 10), 170-171. [↑](#footnote-ref-66)
67. R. Duncan-Jones, *The Economy of the Roman Empire* (Cambridge 1982, 2nd ed.), 288-319. [↑](#footnote-ref-67)
68. D. P. Kehoe, *Investment, Profit, and Tenancy: The Jurists and the Roman Agrarian Economy* (Ann Arbor 1997), 22-76; ‘Law, agency, and growth in the Roman Economy’, in P. J. Du Plessis (ed.), *New Frontiers: Law and Society in the Roman World* (Edinburgh 2013), 177-91; ‘Agency, tutorship, and the protection of pupils in Roman law’, in E. Lo Cascio, D. Mantovani (eds.), *Diritto romano e economia. Due modi di pensare e organizzare il mondo (nei primi tre secoli dell’Impero)* (Pavia 2018), 409-430. [↑](#footnote-ref-68)
69. Kehoe 1997, op.cit. (n. 28), 41-42. [↑](#footnote-ref-69)
70. R. P. Saller, *Patriarchy, Property and Death in the Roman Family* (Cambridge 1994), 189. [↑](#footnote-ref-70)
71. Discussed in Kehoe 2007, op. cit. (n. 10), 169-170.
 [↑](#footnote-ref-71)
72. Thus Papinian (*Dig.* 50.1.17.7, 1 *resp*.) emphasize that collecting taxes in not a *munus sordidum*, while Arcadius Charisius (*Dig.* 50.4.18.26, *lib. sing. de muner. civil.*) cites Modestinus on the liability of the *decaproti* and *ikosaproti* (special positions within a larger town council). [↑](#footnote-ref-72)
73. For legacies to towns, see D. Johnston, ‘Munificence and *municipia*: bequests to towns in classical Roman law’, *Journal of Roman Studies* 75 (1985), 101-125. [↑](#footnote-ref-73)
74. Scaev. *Dig.* 50.1.24 (2 *dig.*) refers to constitutions of the emperors, including the *divi fratres*, that people in arrears because of office-holding are not required to pay interest. This rule is also in Paul *Dig.* 50.1.21.1 (1 *resp*.). [↑](#footnote-ref-74)
75. *Cod. Iust.* 10.32.34.1: *Ille vero, qui immemor libertatis et generis infamissimam suscipiens vilitatem existimationem suam servili obsecundatione damnaverit, tradatur exsilio*. Cf. also *Cod. Iust.* 4.63.3 (Honorius and Theodosius II, 408 or 409), prohibiting people of higher rank from engaging in commerce: *Nobiliores natalibus et honorum luce conspicuos et patrimonio ditiores perniciosum urbibus mecimonium exercere prohibemus, ut inter plebeium et negotiatorem facilius sit emendi vendendique commercium.* [We prohibit those who are noble by birth, conspicuous by the splendor of their offices, and very wealthy by their patrimony from engaging in commerce pernicious to the cities, so that the market for buying and selling between the plebeian and the businessman be easier.] [↑](#footnote-ref-75)
76. See D. Rathbone, *Economic Rationalism and Rural Society in Third-century A.*D. *Egypt: The Heroninos Archive and the Appianus Estate* (Cambridge 1991), 59-60. [↑](#footnote-ref-76)
77. On the efforts of the late imperial government to maintain the role of councils in governing cities, see Jones, op. cit (n.3), 737-63, as well as J. Liebeschuetz , *Decline and Fall of the Roman City* (Oxford 2001), 104-136, and A. Lanadio, *Recherches sur les notables municipaux dans l’empire romain protobyzantin* (Paris 2002), 3-26, with bibliography. For broader discussion of the difficulties of maintain a curial class in Roman cities, see L. E. Tacoma, *Fragile Hierarchies: The Urban Elites of Third-Century Roman Egypt* (Leiden-Boston 2006). On the text of Callistratus, see T. A. J. McGinn, ‘*Cui bono*? the true beneficiaries of Roman private law’, in D.P. Kehoe, T. A. J. McGinn (eds.), *Ancient* *Law, Ancient Society* (Ann Arbor 2917), 150-153. [↑](#footnote-ref-77)
78. Some of the issues addressed here are also discussed in R. K. Fleck, F. A. Hanssen, and D. P. Kehoe, ‘What can the endogenous institutions literature tell us about ancient Rome?’, in G. Dari-Mattiacci, D. P. Kehoe (eds.), *Roman Law and Economics* (Oxford 2020), vol. 1, 13-46. [↑](#footnote-ref-78)
79. *Cod. Iust.* 10.32.26: *pr. Quidam ignaviae sectatores desertis civitatum muneribus captant solitudines ac secreta et specie religionis cum coetibus monazonton congregantur. 1. Hos igitur atque huiusmodi deprehensos erui latebris consulta praeceptione mandamus atque ad munia patriarum subeunda revocari, aut pro tenore nostrae sanctionis familiarum rerum carere illecebris, quas per eos censuimus vindicandas, qui publicarum essent subituri munera functionum.* [pr. Some followers of idleness, having abandoned the services (owed) to their cities, long for the deserts and out-of-the way places and, under the pretext of religion, join up with communities of monks. 1. Therefore, with a well considered injunction, We order that they and their like be caught and rooted out from their hiding places and be called back to undergo the services of their hometowns, or, in accordance with the provisions of Our sanction, that they be deprived of the enticements of their property, which We decree is to be claimed by those who would be about to undergo the services of public duties (*functiones*).] See Jones, op. cit. (n.3), 745-46 on the efforts of the late imperial emperors to regulate the entry of decurions into the clergy. [↑](#footnote-ref-79)
80. On this point, see in particular F. Lerouxel, ‘The βιβλιοθήκη ἐγκτήσεωνand transaction costs in the credit market of Roman Egypt (30 b.c.e. to ca. 170 c.e.)’, In D. P. Kehoe, D. M. Ratzan, and U. Yiftach (eds.), *Law and Transactions Costs in the Ancient Economy* (Ann Arbor, 2015), 162-184. [↑](#footnote-ref-80)
81. Maiuro 2012, op. cit. (n. 2), 38-117 discusses the growth of the property under the control of the Fiscus and the importance to imperial revenues of sales of *bona vacantia* and *caduca,* as well as the property of the condemned and numerous bequests to the emperor. At the same time, as a general policy the imperial government sought to pursue its claims in a lawful and predictable manner. For example, the Fiscus had to establish its claim to *bona vacantia* within four years (Call. *Dig.* 49.14.1.2, 1 *de iure fisci*; Papin. *Dig.* 44.3.10, 13 *resp*.); such a deadline protected the rights of good-faith possessors. See Kaser 1971, op. cit. (n. 17), 702-703. [↑](#footnote-ref-81)
82. *Cod. Iust.* 10.1.5: *pr. Prohibitum est cuiuscumque bona, qui fisco locum fecisse existimabitur capi prius, quam a nobis forma fuerit data. 1. Et ut omni improvisionis genere occursum sit Caesarianis, sancimus licere universis quorum interest obicere manus his, qui ad capienda bona alicuius venerint, qui succubuerit legibus, ut, etiamsi officiales ausi fuerint a tenore datae legis desistere, ipsis privatis resistentibus a facienda iniuria arceantur. 2. Tunc enim is, cuius interest bona alicuius non interpellari, officialibus volentibus ea capere debet adquiescere, cum litteris nostris cognoverit non ex arbitrio suo Caesarianos ad capiendas easdem venisse facultates, sed iustitiae vigorem id fieri statuisse.* [pr. It is prohibited that property of any person who was judged to have “made a place” for the Treasury (i.e., to be subject to seizure by the Treasury) be seized before a rule has been given by Us. 1. And in order that by every type of provision the *Caesariani* (officials of the Treasury) be resisted, We ordain that all who have an interest be permitted to interpose their hands against those who have come to seize the property of anyone who has submitted to the laws, so that, even if officials have dared to depart from the terms of the law that has been given, they might be prevented from committing an injustice by the resistance of private persons themselves. 2. For the person who has an interest that someone’s property not be disturbed should acquiesce in the officials’ wish to seize it at that time, when he has learned from Our letter that the *Caesariani* have not come to take the same property on their own judgment, but that the vigor of justice has established that this happen.] [↑](#footnote-ref-82)
83. See Kehoe 2013, op. cit. (n. 1), 35-43. [↑](#footnote-ref-83)
84. Many references to the emperor stopping at a certain place or city during a trip or a military campaign have been used to postulate the presence of imperial villas, particularly if attestations of members of the familia Caesaris are known in the same area. However, such deductions remain uncertain. On the issue, cf. M. Maiuro, *Res Caesaris: ricerche sulla proprietà imperiale nel principato* (Bari 2012), 160-161. [↑](#footnote-ref-84)
85. On the economic choices of Pliny the Younger concerning the exploitation of his estates, cf. D. P. Kehoe, ‘Allocation of risk and investment on the estates of Pliny the Younger’, *Chiron* (1988), 15–42; id., ‘Approaches to economic problems in the letters of Pliny the Younger: the question of risk in agriculture’, in H. Temporini and W. Haase (eds.), *Aufstieg und Niedergang der römischen Welt* (Berlin-New York 1989), 555-590; P.W. de Neeve, ‘A Roman landowner and his estates: Pliny the Younger’, *Athenaeum* 78 (1990), 363-402; D. P. Kehoe, ‘Investment in estates by upper-class landowners in early imperial Italy: the case of Pliny the Younger’, in H. Sancisi-Weerdenburg, H.C. Teitler and R.J. van der Spek (eds.), *De Agricultura: in Memoriam Pieter Willem de Neeve (1945-1990)* (Amsterdam 1993), 214-237; E. Lo Cascio, ‘L’economia dell’Italia romana nella testimonianza di Plinio’, in E. Lo Cascio (ed.), *Crescita e declino: studi di storia dell’economia romana* (Rome 2009), 115-135 (see also E. Lo Cascio, ‘Considerazioni sulla struttura e sulla dinamica dell’affitto agrario in età imperiale’, *ibid.*, 104-105). [↑](#footnote-ref-85)
86. A particularly telling example in this respect is the edict of Claudius giving Roman citizenship rights to the Anaunii and preserved in the so-called *Tabula Clesiana* (*CIL* 5.5050 = *ILS* 206). The text reveals that the inquiry by the imperial envoy Iulius Planta, besides cases of usurpation of the *civitas Romana*, had also discovered that many imperial *agri et saltus*, whose existence had been ignored by the imperial administration, had also been illegally occupied. How the emperor could be completely unaware of these properties in the Alpine region is difficult to explain. The properties had probably been acquired in the aftermath of the Augustan conquest of 15 BCE and, for some reasons, were not reported to the imperial archives in Rome. On the issue see D. Faoro, ‘Delatio fiscale e proprietà imperiale nella Tabula Clesiana: una rilettura’, *Cahiers du Centre Gustave-Glotz* 28 (2017), 177-196. On asymmetric information see P. Temin, *The Roman Market Economy* (Princeton 2012), 98-99. [↑](#footnote-ref-86)
87. See D. P. Kehoe, *Law and the Rural Economy in the Roman Empire* (Ann Arbor 2007), 34: “a transaction costs approach helps to explain the persistence of forms of land tenure that, from the point of view of neoclassical economics, might appear to be quite inefficient. But such tenure arrangements can be viewed as well suited to economic conditions in the Roman empire if the costs of shifting to another arrangement, including those of negotiation and enforcement, were prohibitive or introduced side effects that imposed costs that Roman society was unwilling to bear”. [↑](#footnote-ref-87)
88. There is a vast literature on agency theory, which developed particularly in relation to the spread of big corporations at the beginning of the 20th century, particularly with the work of A.A. Berle and Gardiner C. Means, *The Modern Corporation And Private Property* (New York 1933), which conveyed the idea that managers tend to be out of control agents. For an overview of the debate from a NIE perspective, see T. Eggertsson, *Economic Behavior and Institutions: Principles of Neoinstitutional Economics* (Cambridge 1990), 129-138. [↑](#footnote-ref-88)
89. K.J. Arrow, ‘The economics of agency’, in J.W. Pratt and R.J. Zeckhauser (eds.), *Principals and Agents: The Structure of Business* (Boston 1985). [↑](#footnote-ref-89)
90. M.C. Jensen and W.H. Meckling, ‘Theory of the firm. Managerial behavior, agency costs and ownership structure’, *Journal of Financial Economics* 3 (1976), 308. [↑](#footnote-ref-90)
91. E.G. Furubotn and R. Richter, *Institutions and Economic Theory: The Contribution of the New Institutional Economics* (Ann Arbor 2000), 165-168. “Normative agency” is the term attached to the mathematical approach to agency costs. [↑](#footnote-ref-91)
92. M.C. Jensen and W.H. Meckling 1976 op. cit. (n. 7), 310-311; E.F. Fama, ‘Agency problems and the theory of the firm’, *Journal of Political Economy* 88 (1980), 288-296; E.F. Fama and M.C. Jensen, ‘Separation of ownership and control’, *The Journal of Law & Economics* 26 (1983), 304-311. [↑](#footnote-ref-92)
93. Other scenarios are envisaged in Fama and Jensen 1983, op. cit (n. 9), 305-307. [↑](#footnote-ref-93)
94. Fama and Jensen 1983, op. cit. (n. 9), 302-304. [↑](#footnote-ref-94)
95. Fama and Jensen 1983, op. cit. (n. 9), 307-311. [↑](#footnote-ref-95)
96. Two main aspects are normally mentioned: the system of incentives given to tenants in order to keep them on the estate and to preserve their resources, and the accessibility of the court system. On the first aspect, see D. P. Kehoe, *Investment, Profit, and Tenancy: The Jurists and the Roman Agrarian Economy* (Ann Arbor 1997), 181-236; id. 2007, op. cit. (n. 4), 53-91; E. Lo Cascio, ‘La proprietà della terra, i precettori dei prodotti e della rendita’, in E. Lo Cascio (ed.), *Crescita e declino: studi di storia dell’economia romana* (Rome 2009), 45-66; D. Vera, ‘Strutture agrarie e strutture patrimoniali nella tarda antichità: l’aristocrazia romana fra agricoltura e commercio’, in S. Roda (ed.), *La parte migliore del genere umano. Aristocrazie, potere e ideologia nell’Occidente tardoantico. Antologia di storia tardoantica* (Turin 1996), 165-224. On the second, see C. Ando, *Imperial Ideology and Provincial Loyalty in the Roman Empire* (Berkeley 2000), 76-130; Kehoe 2007, op. cit. (n. 4), 131-161; Temin 2012, op., cit (n. 3), 104-107. [↑](#footnote-ref-96)
97. Cic. 2 *Verr.* 3.14-15: *voluerunt eos* (*scil.* the Sicilians) *in suis rebus ipsos interesse, eorumque animos non modo lege nova sed ne nomine quidem legis novo commoveri. Itaque decumas lege Hieronica semper vendundas censuerunt, ut iis iucundior esset muneris illius functio, si eius regis qui Siculis carissimus fuit non solum instituta commutato imperio, verum etiam nomen maneret*. [↑](#footnote-ref-97)
98. E. Lo Cascio, ‘La struttura fiscale dell’impero romano’, *Il princeps e il suo impero: studi di storia amministrativa e finanziaria romana* (Bari 2000), 182-184; J. France, ‘Deux questions sur la fiscalité provinciale d’après Cicéron (Cic. 2 *Verr*. 3.12)’, *Finances publiques, intérêts privés dans le monde romain : choix d’écrits* (Bordeaux 2017), 381-391. [↑](#footnote-ref-98)
99. The extension of the *lex Hieronica* to the western part of Sicily was probably made easier by the fact that analogous forms of taxation had already been imposed there by the Carthaginians, even if we have no sources confirming this, as argued by A. Pinzone, *Provincia Sicilia: ricerche di storia della Sicilia romana da Gaio Flaminio a Gregorio Magno* (Catania 1999), 4 and Lo Cascio 2000, op. cit. (n. 15), 180-181. [↑](#footnote-ref-99)
100. Lo Cascio 2000, op. cit. (n. 15), 184-189. See also the useful considerations on the terminology of fiscal contribution of J. France, ‘*Tributum* et *stipendium*. La politique fiscale de l’empereur romain’, *Finances publiques, intérêts privés dans le monde romain : choix d’écrits* (Bordeaux 2017), 439-452. The generalization of *census* operations in the provinces was probably the most important factor allowing for a gradual shift toward a more uniform imposition based on the estimation of the value of land. The role of Augustus has been crucial in this respect, as argued recently by B. Le Teuff, ‘Les recensements augustéens, aux origines de l’Empire’, *Pallas* 96 (2014), 75-90 and J. France, *Tribut. Une histoire fiscal de la conquête romaine* (Paris 2021), 360-369. [↑](#footnote-ref-100)
101. D. J. Crawford, ‘Imperial estates’, in M. Finley (ed.), *Studies in Roman Property* (Cambridge 1976), 44-45; E. Lo Cascio, ‘The imperial property and its development’, in P. Erdkamp, K. Verboven and A. Zuiderhoek (eds.), *Ownership and Exploitation of Land and Natural Resources in the Roman World* (Oxford 2015), 64-65. [↑](#footnote-ref-101)
102. A wellknown example is the *conductor* of the *fundus Aufidianus* in Africa, who could restore the productivity of a neglected estate planting olives, vines and realizing other important improvements. See *AE* 1975, 883 and J. Peyras, ‘Le Fundus Aufidianus : étude d’un grand domaine romain de la région de Mateur (Tunisie du Nord)’, *Antiquités africaines* 9 (1975), 181-222; D. P. Kehoe, *The Economics of Agriculture on Roman Imperial Estates in North Africa* (Göttingen 1988), 230-232; J. Carlsen, *Land and Labour: Studies in Roman Social and Economic History* (Rome 2013), 220-221. [↑](#footnote-ref-102)
103. This topic is particularly debated among historians of late Antiquity, for which see Vera 1992, op. cit (n. 13) and id., ‘Questioni di storia agraria tardoromana: schiavi, coloni, villae’, *Antiquité Tardive* 20 (2012), 115-122. For the high imperial period, diverging interpretations about the economic attitude of senators have been formulated in the context of the analysis of Pliny’s letters (see bibliography above n. 2). [↑](#footnote-ref-103)
104. For analogous considerations about imperial properties, see Maiuro 2012, op. cit. (n. 1), 108. In this paper, I will consider the evidence related to the use of agents on imperial landed estates only, leaving aside workshops, mines and quarries. These production units present similarities in the use of agents, but also some specific characters linked to their economic nature and to the destination of their produce. [↑](#footnote-ref-104)
105. On the *ratio privata*, see recently M. Maiuro, ‘La creazione della *ratio priuata*: un’ipotesi di lavoro’, in S. Segenni and M. Faraguna (eds.), *Forme e modalità di gestione amministrativa nel mondo greco e romano: terra, cave, miniere* (Milan 2020), 309-329. On the *ousiakos logos* see G.M. Parassoglou, *Imperial Estates in Roman Egypt* (Amsterdam 1978), 28-29, but also Y. Broux, ‘The ousiakos logos, the procurator usiacus, and ousiake ge: was it Vespasian, Domitian or Hadrian?’, *Archiv fur Papyrusforschung und verwandte Gebiete* (forthcoming). On the African *tractus* see M. Christol, ‘Les subdivisions de l’administration domaniale et financière en Afrique romaine: des limites de la procuratèle d’Hadrumète à celles de la province de Byzacène’, in Claude Lepelley et Xavier Dupuis (ed.), *Frontières et limites géographiques de l’Afrique du Nord antique: hommage à Pierre Salama: actes de la table ronde réunie à Paris les 2 et 3 mai 1997* (Paris 1999), 71-87. On the patrimonial district of Phrygia, see A. Dalla Rosa, ‘From exploitation to integration: imperial quarries, estates and freedmen, and the integration of Rural Phrygia’, *Studi ellenistici* 30 (2016), 305-330. [↑](#footnote-ref-105)
106. A hint to the existence of such optimizations can be also found in Maiuro 2012, op. cit. (n. 1), 108: “Non si peccherebbe tuttavia di iper-modernismo se si pensasse che, per quanto rudimentali e non fondate su dati verificabili come per gli stati moderni, considerazioni circa l’opportunità o meno e sul quanto spendere capitale umano e risorse amministrative nel governo e gestione della massa patrimoniale, possano e forse debbano essere state fatte”. [↑](#footnote-ref-106)
107. See J. Carlsen, *Vilici and Roman Estate Managers until AD 284* (Rome 1995), 109-119; Maiuro 2012, op. cit (n. 1), 170; 184-185; 345. [↑](#footnote-ref-107)
108. Carlsen 1995, op. cit. (n. 24), 103-109. [↑](#footnote-ref-108)
109. P. Baldacci, ‘Alcuni aspetti dei commerci nei territori cisalpini’, *Atti del Centro Studi e Documentazione sull’Italia Romana* 1 (1967-1968), 34. For the complete series of the Clymenus stamps, see C. Zaccaria, ‘Le anfore con bolli di Vespasiano dalle fornaci di Fasana (Istria): nota a margine di un’inedita coppia di bolli da Aquileia,’ in V. Revilla Calvo, A. Aguilera, L. Pons Pujol and M. García Sánchez (eds.), *Ex Baetica Romam: homenaje a José Remesal Rodríguez* (Barcelona 2020), 538-539. [↑](#footnote-ref-109)
110. F. Tassaux, R. Matijašić and V. Kovačić, *Loron (Croatie) : un grand centre de production d’amphores à huile istriennes Ier - IVe s. p.C.* (Bordeaux 2001), 125. [↑](#footnote-ref-110)
111. F. Tassaux, ‘Les propriétés impériales en Istrie d’Auguste à Constance II,’ in D. Pupillo (ed.), *Le proprietà imperiali nell’Italia romana* (Florence 2007), 54-55. [↑](#footnote-ref-111)
112. *AE* 1983, 425 (M. Aurelius Iustus); 1995, 553 (Allius). Both inscriptions have been found on the site of an ancient villa at Dobrika/Val Madonna on the main island of Briuni. [↑](#footnote-ref-112)
113. Maiuro 2012 op. cit. (n. 1), 185; G. Camodeca, ‘Sulle proprietà imperiali in Campania’, in D. Pupillo (ed.), *Le proprietà imperiali nell’Italia romana : economia, produzione, amministrazione* (Florence 2007), 143-167. [↑](#footnote-ref-113)
114. Maiuro’s reasoning starts from the acknowledgment that, for motives still unknown to us, freeborn tenants only rarely indicate their status as *coloni* or *conductores*. Their presence on imperial estates is therefore less visible than that of the *familia Caesaris.* Hence the tentative interpretation of our documentation: the lower number of attested imperial slaves and freedmen could mean that unfree managers and farmers were gradually substituted by freeborn ones. The question of the possible overrepresentation of slaves and freedmen in our epigraphic documentation is still debated: H. Mouritsen, ‘Freedmen and decurions: epitaphs and social history in imperial Italy’, *Journal of Roman Studies* 95 (2005), 38-63 accepts the idea, while K. Verboven, ‘The freedman economy of Roman Italy’, in S. Bell and T.R. Ramsby (eds.), *Free at Last! The Impact of Freed Slaves on the Roman Empire* (London 2011), 88-109 considers the documentation more or less representative of the actual proportion. [↑](#footnote-ref-114)
115. Even if we can certainly define the *vilicus* as an agent, we must not forget that he is also an asset belonging to the owner and that, in case of sale of the estate, he is often sold with it. [↑](#footnote-ref-115)
116. Fama and Jensen 1983, op. cit. (n. 9), 305-306. [↑](#footnote-ref-116)
117. Anecdotes on opportunistic *vilici* are relatively frequent in late antique sources. See Vera 1996, op. cit. (n. 13), 215. [↑](#footnote-ref-117)
118. *CIL* 6.30983. These *praedia* are normally placed in the Testaccio area, not far from the *horrea Galbana*, also belonging to the emperor. See L. Richardson, *A New Topographical Dictionary of Ancient Rome* (Baltimore 1992), 321. [↑](#footnote-ref-118)
119. *CIL* 14.4570. On this inscription, see F. Van Haeperen, ‘Ostia. Lieu de culte des *praedia Rusticeliana* (localisation incertaine)’, in *Fana, templa, delubra. Corpus dei luoghi di culto dell’Italia antica (FTD) - 6 : Regio I: Ostie, Porto* (Paris 2019). A funerary altar from Luceria (*CIL* 9.888 = *AE* 1990, 200) mentions a certain Ti. Statorius Geminus, freeborn *colonus* of a *fundus Paccianus*. The inscription is set up by his wife Numisia and his son Capriolus, both imperial slaves. The union between a freeborn tenant and an imperial slave could be easily explained if we assume that the *fundus Paccianus* was an imperial estate where a certain number of members of the *familia Caesaris* was present with managerial and, perhaps, farming duties. See M. Silvestrini, ‘Note di epigrafia apula,’ *La Puglia in età repubblicana. Atti del I convegno di studi sulla Puglia romana, Mesagne 20-22 marzo 1986* (Galatina 1988), 181-189. [↑](#footnote-ref-119)
120. *InscrIt* 10.1.592 = *AE* 1906, 100b. The second tablet is incomplete, but contains the same names of the first one. [↑](#footnote-ref-120)
121. P.W. de Neeve, *Colonus: Private Farm-Tenancy in Roman Italy During the Republic and the Early Principate* (Amsterdam 1984), 165-167. P. Rosafio, ‘Slaves and *coloni* in the villa system’, J. Carlsen, P. Ørsted and J.E., Skydsgaard (eds.), *Landuse in the Roman Empire* (Rome 1994), 145-158. [↑](#footnote-ref-121)
122. Possible candidates are Flavius Alcimus, Ulpius Eutyches, Aelius Asclepiades. An Ulpius Sextianus was maybe a former slave inherited from one member of the senatorial family of the Sextii, perhaps T. Sextius Lateranus (cos. 94) or T. Sextius Africanus (cos. 112). The numerous Claudii mentioned in the inscription are difficult to interpret as descendants of imperial freedmen, since the estate had become imperial property after the extinction of the Claudian dynasty. [↑](#footnote-ref-122)
123. On the *servi quasi coloni*, see G. Giliberti, *Servus quasi colonus: forme non tradizionali di organizzazione del lavoro nella società romana* (Naples 1988); W. Scheidel, ‘Sklaven und Freigelassene als Pächter und ihre ökonomische Funktion in der römischen Landwirtschaft (Colonus-Studien III)’, H. Sancisi-Weerdenburg, H.C. Teitler and R.J. van der Spek (eds.), *De agricultura: in memoriam Pieter Willem de Neeve (1945-1990)* (Amsterdam 1993), 182-196. [↑](#footnote-ref-123)
124. A rescript of Gordian III cited in *Cod. Iust.* 4.14.5 mentions a slave-tenant that could use his *peculium* to buy his liberty. [↑](#footnote-ref-124)
125. Despite the poor status of our sources, Scheidel 1993, op. cit. (n. 40), 191-196 argues that the number of *coloni* of libertine status must have been significant and highlights the many possible advantages of the transformation of former slaves-farmers into freedmen-tenants. [↑](#footnote-ref-125)
126. Fama and Jensen 1983, op. cit. (n. 9), 307-309. [↑](#footnote-ref-126)
127. On this dossier, see in general J. Kolendo, *Le colonat en Afrique sous le Haut-Empire* (Paris 1996); Kehoe 1988, op. cit. (n. 19); see also, more concisely, Kehoe 2007, op. cit. (n. 4), 56-62 and C. Schubert, ‘Die kaiserliche Agrargesetzgebung in Nordafrika von Trajan bis Justinian’, *Zeitschrift für Papyrologie und Epigraphik* 167 (2008), 251-275; R. Biundo, ‘I conductores dei saltus africani: conflitti sociali e economici nella gestione della proprietà imperiale’, M. Maiuro, G.D. Merola, M. De Nardis and G. Soricelli (eds.), *Uomini, istituzioni, mercati. Studi di storia per Elio Lo Cascio* (Bari 2019), 237-244. [↑](#footnote-ref-127)
128. *CIL* 8.25902. On *subseciva* see also González Bordas in this volume. [↑](#footnote-ref-128)
129. See the specification *ad exemplum legis Mancianae* at the beginning of the text. See Kehoe 1988 op. cit. (n. 19), 38. [↑](#footnote-ref-129)
130. As proposed by Kehoe 1988, op. cit. (n. 19), 127 and particularly n. 20 for the debate. The predilection by the *fiscus* of fixed payments even in tax-collection contracts concerning irregular incomes is now confirmed by the new custom law of the province of Lycia, for which see M. Maiuro, ‘Portorium Lyciae I. Fiscus Caesaris, lega licia e pubblicani nella lex di Andriake’, *Mediterraneo antico* 19 (2016), 269-270. See also F. Vittinghoff, ‘Portorium’, *Realencyclopädie der classischen Altertumswissenschaft* (Stuttgart 1953), 389-390 and P.A. Brunt, ‘Publicans in the Principate’, *Roman Imperial Themes* (Oxford 1990), 376-381. [↑](#footnote-ref-130)
131. Kehoe 1988, op. cit. (n. 19), 139. [↑](#footnote-ref-131)
132. As reminded by E. Lo Cascio, ‘Patrimonium, ratio privata, res privata’, *Il princeps e il suo impero: studi di storia amministrativa e finanziaria romana* (Bari 2000), 119 n. 62, the *coloni* did not sublet their plots from the *conductor,* as postulated by Mommsen and Schulten, but had a direct contractual relationship with the *fiscus*, as already proposed by M. I. Rostovtzeff, ‘Conductor’, *Dizionario epigrafico* II (Rome 1900), 257. Other aspects also differentiated the *conductores* from the classical *domini*: they could not decide which crops should be grown on the plots of the *coloni* as the *conductor* of the *fundus Aufidianus* could do (see above n. 19), nor could they decide to drastically reorganize how tools, animals and other resources could be pooled on the *saltus* as it happened on the land belonging to Aurelius Appianus in the Fayum in Egypt, for which see D. Rathbone, ‘Economic rationalism and the Heroninos archive’, *Topoi. Orient-Occident* 12 (2005), 261‑269; finally, they only had the right to reallocate abandoned plots, but cannot assign *subseciva* or open new plots on the *saltus*, which remained an exclusive right of the *fiscus*. [↑](#footnote-ref-132)
133. The petition of the *saltus Burunitanus* shows that other issues could relate the amount of days of free labour and the abusive augmentation of the share rent (*CIL* 8.14454). [↑](#footnote-ref-133)
134. Land in the Fayum seems to have been directly leased out to farmers, while large-scale *misthotai* are recorded for the Nile Valley. Apart from certain cases. like the μισθωτὴς ἀπὸ τῆς μητροπόλεως at Bakchias who has been compared to an African *conductor* by Crawford 1976, op. cit. (n. 18), 49-50, the large Egyptian lessees seem to have been extremely wealthy individuals residing in Alexandria, for which see G. Chalon, *L’édit de Tiberius Julius Alexander étude historique et exégétique* (Olten-Lousanne 1964), 104-105; J. Rowlandson, *Landowners and Tenants in Roman Egypt: The Social Relations of Agriculture in the Oxyrhynchite Nome* (Oxford 1996), 81. The control duties they could exercise on the estates was therefore quite different from that imposed on the *conductores* of the Bagradas Valley. The *misthotai* attested by inscriptions in Asia are often identified with large-scale *conductores*, but the term is more often used for tenant farmers, as shown by S. Mitchell, *Anatolia: Land, Men, and Gods in Asia Minor* (Oxford 1993), 164. As far as Italy is concerned, the existence larger-scale *conductores* is generally admitted, but their importance remains a matter of speculation; see L. Capogrossi Colognesi, ‘Grandi proprietari, contadini e coloni nell’Italia romana (I-III d.C.)’, A. Giardina (ed.), *Società romana e impero tardoantico. 1: Istituzioni, ceti, economie* (Bari 1986), 325-365; E. Lo Cascio, ‘La proprietà della terra, i precettori dei prodotti e della rendita’, *Crescita e declino: studi di storia dell’economia romana* (Rome 2009), 69; somewhat critical, Kehoe 1997, op. cit. (n. 13), 175-176. [↑](#footnote-ref-134)
135. De Neeve 1984, op. cit. (n. 38), 21. Apart from the agrarian inscriptions from Africa and the petitions from Asia, we possess a certain number of epigraphic mentions of the two terms in relation to the exploitation of imperial landed estates: dedications by associations or groups of *coloni* are frequently found in Mauretania (*CIL* 8.8425; 8702; *AE* 1896, 34; 1966, 592), but also in Istria (*AE* 1995, 553) and in Galatia (*SEG* 63.1202A = *AE* 2013, 1609a). Persons qualified as *coloni*: *CIL* 9.888 = *AE* 1990, 200; 1999, 537 = 2007, 431 (Apulia); *CIL* 5.396b; 8190 (Istria); *ILTun* 629 (Africa proconsularis). *Coloni* interpreted as oil producers on imperial amphora stamps from Baetica: *CIL* 15.2560; 2562.1; 2565; 2567.1; 2569-2570; 2572.1. *Conductores* of land plots: *AE* 1972, 758 (Transpadana, probably not concerning imperial estates); *ILAfr* 568 (Africa proconsularis). Μισθωταί of imperial estates: TAM 5(2).860 (Lydia); IGR 4.592 (Phrygia, fragmentary); *SEG* 47.1799-1800 (Lycia). [↑](#footnote-ref-135)
136. *CIL* 6.10233: *P(ublius) Aelius Chrestus et Cornelia Paula | hoc scalare adplicitum huic sepulc{h}ro | {quod} emerunt a fisco agente Agathonico | proc(uratore) Augustorum nostrorum quod habet | scriptura infra scripta | Gentiano et Basso cons(ulibus) VII Kal(endas) April(es) | Martialis Augg(ustorum) lib(ertus) prox(imus) tab(ulariorum) scripsi me | accepisse ab Ael(io) Chresto pro podismo stru|ctionis scalaris quod est via Ostiensi | parte laeva inter mil(iaria) I et II quod conductum | habet Sulpicianus ex bonis Aeliorum Onesi|mi et Fortis in praedi(i)s Amarantianis secun|dum renuntiationem mensor(um) pro are(a) pedes n(ummos) C.* “P. Aelius Chrestus and Cornelia Paula have bought from the fiscus the flight of stairs attached to this sepulchre. The procurator of our Augusti Agathonicus was acting (on behalf of the fiscus). The receipt is written here below. Under the consulate of Gentianus and Bassus, on the seventh day before the Calends of April, I, Martialis, freedman of the Augusti and chief archivist have registered that, according to the report of the surveyors, I have received a hundred sesterces for the measurement of the flight of stairs that lies on the left side of the via Ostiensis between the firs and the second mile, (on land) leased by Sulpicianus from the former properties of the Aelii Onesimus and Fortis in the Amarantian estate” (own translation). On the estate, see L. Spera, ‘Amarantiana praedia’, *Lexicon topographicum urbis Romae. Suburbium* (2002), 48-49. See also Maiuro 2012, op. cit. (n. 1), 79-80. It may also be possible that, as we have seen above, on the *praedia Amarantiana* also direct cultivation by imperial slaves and tenancy coexisted. [↑](#footnote-ref-136)
137. T. Hauken, *Petition and Response: An Epigraphic Study of Petitions to Roman Emperors, 181-249* (Bergen 1998), no. 3. [↑](#footnote-ref-137)
138. Hauken 1998, op. cit. (n. 54), 51 proposes to see rent payments in the term *apophorai* and free labour duties in *psephoi*, thus drawing a parallel with the regulation of Henchir Mettich. The association seems far from certain and it is more reasonable to translate *psephoi* with its common meaning of “accounts”. The *despotikai psephoi* would therefore simply refer to the *fiscus* (also referred to by the expression *despotikos logos*, l. 53) and allude to all other contractual obligations that the tenants had with the *fiscus*, which could or could not include free labour. [↑](#footnote-ref-138)
139. *SEG* 13.625 = 14.90 = 16.754. See Hauken 1998, op. cit. (n. 54), 50-51. [↑](#footnote-ref-139)
140. See in general P. Herrmann, *Hilferufe aus römischen Provinzen: ein Aspekt der Krise des römischen Reiches im 3. Jhdt. n. Chr.* (Göttingen 1990). On the specific case of Appadana, in which the petitioners did not complain about Roman officials, but about the actions of other villagers on the same imperial estate, see D. Feissel and J. Gascou, ‘Documents d’archives romains inédits du Moyen Euphrate (IIIe s. après J.-C.). 1, Les pétitions (P. Euphr. 1 à 5)’, *Journal des savants* (1995), 65-119. [↑](#footnote-ref-140)
141. The edict has been published by G.A. Souris and R. Haensch, ‘*RECAM* 3.112 (*SEG* 48.583): Abuse of Power by Members of the Roman Administration and the Imperial Reaction’, in R. Haensch (ed.), *Selbstdarstellung und Kommunikation. Die Veröffentlichung staatlicher Urkunden auf Stein und Bronze in der Römischen Welt* (Munich 2009), 349-365. [↑](#footnote-ref-141)
142. l. 38-39: “all that is ours is from the time of our forefathers subject to the most sacred fisc by the law of the estate”; l. 51-54: “we will become fugitives from your imperial estates where we were both born and raised and from the time of our ancestors as peasants have kept faith with the imperial account”. For the complex relation between imperial tenants and civic authorities, see A. Dalla Rosa, ‘imperial properties and civic territories: between economic interests and internal diplomacy’, in F. Luciani and E. Migliario (eds.), *Boundaries of Territories and Peoples in Roman Italy and Beyond* (Bari 2020), 105-120. [↑](#footnote-ref-142)
143. A link between a need for better productivity and the presence of larger-scale *conductores* is proposed by E. Lo Cascio, ‘Forme dell’economia imperiale’, in A. Momigliano and A. Schiavone (eds.), *Storia di Roma* (Torino 1991), 342-343. No such lessees can be identified in the inscriptions documenting the large private estates near Kibyra studied by T. Corsten, ‘Estates in Roman Asia Minor: the case of Kibyratis’, in S. Mitchell and C. Katsari (eds.), *Patterns in the Economy of Roman Asia Minor* (Swansea 2005), 1-51. For example, the large estate of the Ummidii was divided in three parts, each leased to a *misthotes*, but one single *epitropos* was in charge of the estate. [↑](#footnote-ref-143)
144. Pliny did not need to introduce any new personnel when he switched from a fixed rent to sharecropping on his estate of Tifernum Tiberinum; however, he already disposed of a dedicated *procurator*, of *actores* and other slaves that could deal with the additional workload. [↑](#footnote-ref-144)
145. Fama and Jensen 1983, op. cit. (n. 9), 308: “Since specific knowledge in complex organizations is diffused among agents, diffusion of decision management can reduce costs by delegating the initiation and implementation of decisions to the agents with relevant knowledge”. [↑](#footnote-ref-145)
146. On the difference between large-scale *conductores* and actual landowners see above n. 44. [↑](#footnote-ref-146)
147. Kehoe 1988, op. cit (n. 19), 144-145. [↑](#footnote-ref-147)
148. Tenants did not have had to directly sell their produce to consumers, recurring to professional middlemen instead. On the essential economic role of these often vituperated sellers, see M. Silver, ‘In dubious battle. An economic analysis of emperor Hadrian’s fish and olive oil Laws’, *Roman Legal Tradition* 7 (2011), 1-15. [↑](#footnote-ref-148)
149. Fama and Jensen 1983, op. cit. (n. 9), 308: “large open corporations, large professional partnerships, financial mutuals, and nonprofits, control the agency problems that result from separation of decision management from residual risk bearing by separating the management (initiation and implementation) and control (ratification and monitoring) of decisions.”. [↑](#footnote-ref-149)
150. Kehoe 1988, op. cit. (n. 19), 51-54. See also below. [↑](#footnote-ref-150)
151. Lo Cascio 1991, op. cit. (n. 60), 342-343; P. Erdkamp, *The Grain Market in the Roman Empire: A Social, Political and Economic Study* (Cambridge 2005), 31-32. [↑](#footnote-ref-151)
152. F. Jacques, ‘Propriétés impériales et cités en Numidie Méridionale’, *Cahiers du Centre Gustave Glotz* 3 (1992), 123-139. For other parts of North Africa, see also Kehoe 1988, op. cit. (n. 19), 126 n. 18. [↑](#footnote-ref-152)
153. Kehoe 1988, op. cit. (n. 19), 51-54. [↑](#footnote-ref-153)
154. The bulk of the property of the Domitii was passed over to Domitia Lucilla, the daughter of Tullus’ brother Lucanus. Plin. *Epist.* 8.18, in referring to Tullus’ testament, does not mention any legacy left to the emperor, but that does not pose any significant difficulty, since the text only speaks of the close family circle (daughter and grandchildren). The so-called epigraphically preserved “testament of Dasumius”, which is believed to contain the testament of Domitius Tullus, only mentions the attribution to Trajan of a legacy of precious metals, but the inscription remains fragmentary and the identification of the *testator* may also be questioned. On this exceptional document, see E. Champlin, *Final Judgments: Duty and Emotion in Roman Wills, 200 B.C.–A.D. 250* (Berkeley 1991), 125-126; F. Chausson, ‘Amitiés, haines et testaments à Nîmes, en Bétique et à Rome’, in F. Chausson (ed.), *Occidents Romains: Sénateurs, chevaliers, militaires, notables dans les provinces d’Occident (Espagnes, Gaules, Germanies, Bretagne)* (Paris 2009), 191–216; Maiuro 2012, op. cit. (n. 1), 53-54. We remain therefore in the dark in respect to the date of acquisition by the *fiscus* of one of the former properties of Mancia and it is not impossible that Nero had been recipient of legates already in Mancia’s testament. [↑](#footnote-ref-154)
155. A *Mancian(a)e cultor* is recorded in a Severan inscription from Jenan-ez-Zaytouna from south Tunisia (*ILTun* 629) and *culturae Mancianae* are still mentioned in the 5th century in the region south of Theveste by the Albertini tablets, for which see C. Courtois, *Tablettes Albertini. Actes privés de l’époque vandale* (Paris 1952) and González Bordas in this volume. [↑](#footnote-ref-155)
156. Kehoe 1988, op. cit. (n. 19), 190. [↑](#footnote-ref-156)
157. In the Ain-Jammala inscription (*CIL* 8.25934), the procurators of the *tractus* instruct a certain Martialis, most probably the local freedman procurator of the *regio Thuggensis* and not a *conductor*, to authorize the tenants to extend the cultivation to the new plots. See J. Kolendo, ‘La hiérarchie des procurateurs dans l’inscription d’Ain-el-Djemala’, *Revue des études anciennes* 46 (1968), 325; M. Christol, ‘Un aspect de l’administration impériale: le procurateur des mines de Vipasca’, *Pallas* 30 (1999), 237. [↑](#footnote-ref-157)
158. Another domain in which the issue of independent procuratorial initiative is unclear is the decision, after inheritance or confiscation of an estate, to sell it at auction or to incorporate it into the *patrimonium Caesaris*. For a fuller discussion, see Maiuro 2012, op. cit. (n. 1), 96-103. [↑](#footnote-ref-158)
159. *CIL* 8.25934, face I, l. 4-8: “to grant to us [those fields] which are in marshlands and forestlands to be set up with olive orchards and vineyards in accordance with the law of Mancia, under the terms of the Neronian estate neighboring us” (translation Kehoe). [↑](#footnote-ref-159)
160. See A. Chérif and H. González Bordas, ‘Henchir Hnich (région du Krib, Tunisie), la découverte de la lex Hadriana de agris rudibus et trois autres inscriptions’, *L’Africa romana XX* (2020), 217-221 and González Bordas in this volume. [↑](#footnote-ref-160)
161. H. González Bordas, ‘Un nouveau regard sur le dossier des grandes inscriptions agraires d’Afrique contenant le *sermo procuratorum*’, *Cahiers du centre Gustave Glotz* 28 (2017), 213-229. [↑](#footnote-ref-161)
162. One has to allow for the possibility that the *lex Hadriana* had been issued more or less at the same time when the *coloni* sent their petition. The new regulation would in that case have been too recent to be known by the tenants. I am not sure that we can deduce that the *lex Hadriana* had been enforced on the *saltus Neronianus* as postulated by Kehoe 1988, op. cit. (n. 19), 61. This *saltus* probably received a privilege similar to that attested by the Henchir Mettich inscription, which would better fit with the demand of the *coloni* of Ain-Jammala to extend the conditions of the *lex Manciana.* Similarly, O.D. Cordovana, ‘Contratti agrari e sfruttamento della terra in età imperiale’, in M. Maiuro, G.D. Merola, M. De Nardis and G. Soricelli (eds.), *Uomini, istituzioni, mercati. Studi di storia per Elio Lo Cascio* (Bari 2019), 277-278. [↑](#footnote-ref-162)
163. These instructions are much clearer after the publication of the inscription of Lella Drebblia, for which see H. González Bordas and J. France, ‘A new edition of the imperial regulation from the Lella Drebblia site near Dougga (*AE* 2001, 2083)’, *Journal of Roman Archaeology* 30 (2017), 426-427. However, none of the preserved epigraphic copies of the *sermo procuratorum* or of the *lex Hadriana* seem to have been produced in compliance of this order: most of them date to a later period and were erected as consequence of disputes with the *conductores.* The *sermo procuratorum* and/or the *lex Hadriana* were therefore probably published on *tabulae dealbatae* or other temporary supports. [↑](#footnote-ref-163)
164. The new reading has been possible thanks to the new edition of the Lella Drebblia inscription, for which see above n. 75. [↑](#footnote-ref-164)
165. Kehoe 1988, op. cit. (n. 19), 59: “From the olives which each person will have placed in holes or will have [grafted] onto wild olives, no share of the collected crops will be exacted during the next ten years; nor will any fruits fall into the division other than those that will be put up for sale by the possessors”. [↑](#footnote-ref-165)
166. D. P. Kehoe, ‘Lease regulations for imperial estates in North Africa, part II’, *Zeitschrift für Papyrologie und Epigraphik* 59 (1985), 169: “if a *colonus* began cultivating a field with grain in the third year of a *conductor*’s lease, he would pay his rent from this field to that same *conductor* for five years, including two years after the expiration of the *conductor*’s lease.” [↑](#footnote-ref-166)
167. Kehoe 1988, op. cit. (n. 19), 62-63. [↑](#footnote-ref-167)
168. The term *lex relocandi* is certainly not unrelated to the principle of the *relocatio tacita*, which helped translating long-term lease relationship in Roman legal terms. On the subject, see Kehoe 2007, op. cit. (n. 4), 125-128. [↑](#footnote-ref-168)
169. The literature on this topic is extremely large, dating back to the period of the first discoveries and into the 21st century. The most important contributions are: Th. Mommsen, ‘Decret des Commodus für den *saltus Burunitanus*’, *Hermes* (1880), 386-411 and ‘Nachtrag zu dem Decret des Commodus’, *ibid*., 478-480; N.D. Fustel de Coulanges, *Recherches sur quelques problèmes d’histoire* (Paris 1885), A. Schulten, ’Die *lex Manciana*, eine afrikanische Domänenordnung’, *Abhandlungen der königlichen Gesellschaft der Wissenschaften zu Göltingen, Phil. hist. Klasse, Neue Folge,* 2.3 (1897),3-51; J. Carcopino, ‘L’inscription d’Aïn-el-Djemala. Contribution à l’histoire des *saltus* africains et du colonat partiaire’, *Mélanges d’Archéologie et d’Histoire* 26 (1906), 365-481; A. Schulten ‘Die ‘Lex Hadriana de rudibus agris’ nach einer neuen Inschrift’, *Klio* 7 (1907), 188-212; M. Rostovtzeff, *Studien zur Geschichte des römischen Kolonates*, (Leipzig and Berlin 1910); C. Courtois, L. Leschi, C. Perrat, Ch. Saumagne, *Tablettes Albertini. Actes privés de l’époque vandale (fin du Ve siècle)* (Paris 1952); J. Kolendo, ‘La hiérarchie des procurateurs dans l’inscription d’Aïn-el-Djemala (*CIL* 8.25943)’, *Revue des Études Anciennes* 46 (1968), 319-329; D. Flach, ‘Inschriftenuntersuchungen zum römischen Kolonat in Nordafrika’, *Chiron* 8 (1978), 441-492; *id, ‘*Die Pachtbedingungen der Kolonen und die Verwaltung der kaiserlichen Güter in Nordafrika’, *ANRW*, 2.10.2 (1982), 427-473; D. P. Kehoe, *The Economics of Agriculture on Roman Imperial Estates in North Africa* (Göttingen 1988); J. Kolendo, *Le colonat en Afrique sous le Haut-Empire* (Besançon 1991); L. De Ligt, ‘Studies in legal and agrarian history I: the inscription from Henchir-Mettich and the *Lex Manciana*’, *Ancient Society* 29 (1998), 219-229. [↑](#footnote-ref-169)
170. *CIL* 8.10570; 14428; 14451; 26416; 23977; 25902; 25943 and *AE* 2001, 2083 respectively. [↑](#footnote-ref-170)
171. H. González Bordas and A. Chérif, ’Les grandes inscriptions agraires d’Afrique : nouvelles réflexions, nouvelle découverte’, *Séance du 26 octobre 2018 de l’Académie des Inscriptions et Belles-Lettres* (2018), 1423-1453; A. Chérif and H. González Bordas, ’Henchir Hnich (région du Krib, Tunisie) : la découverte de la première copie de la *lex Hadriana de agris rudibus* et de trois inscriptions funéraires inédites’, *Epigrafia e società. Atti del congresso internazionale L’Africa Romana XXI, 6-9 décembre 2018, Tunis* (Faenza 2020), 205-222. [↑](#footnote-ref-171)
172. D. Flach, op.cit. (n. 1), 441-492, particularly, 443. D. P. Kehoe op.cit. (n. 1), 38. L. De Ligt, op.cit. (n. 1), particularly, 228 and 239. [↑](#footnote-ref-172)
173. For a new interpretation of these inscriptions, see H. González Bordas, ‘Un nouveau regard sur le dossier des grandes inscriptions agraires d’Afrique contenant le *sermo procuratorum*’, *Cahiers du Centre Gustave Glotz* 28 (2017), 213-229. [↑](#footnote-ref-173)
174. On this point, see, primarily, D. P. Kehoe, ‘Private and imperial management of Roman estates in North Africa’, *Law and History Review* 2.2 (1984), 241-263. [↑](#footnote-ref-174)
175. Its first lines praise the *humanitas* of Hadrian in present tense. See Appendix. [↑](#footnote-ref-175)
176. For this system see Kehoe 1988, op.cit. (n. 1), and in this volume Dalla Rosa’s chapter. [↑](#footnote-ref-176)
177. AJ, side 2, l. 8-9. See González Bordas 2017, op.cit. (n. 5), 216, and ‘Géographie domaniale à l’ouest de la *pertica* de Carthage. Autour d’hypothèses récentes (et anciennes) sur le *saltus Neronianus*’, in S. Aounallah (ed). *La* pertica *des carthaginois, de la constitution au démembrement (Ier-IIIe siècle p.C*), (Tunis forthcoming). [↑](#footnote-ref-177)
178. A. Merlin, *Inscriptions latines de la Tunisie*, Paris (1944) (number628). [↑](#footnote-ref-178)
179. Courtois et al. op.cit. (n. 1). [↑](#footnote-ref-179)
180. On this point, see discussion and references in Flach op.cit.(n. 1), 455-456. [↑](#footnote-ref-180)
181. Chérif and González Bordas op.cit. (n. 1). [↑](#footnote-ref-181)
182. AJ, side III, l. 18-20; LD, side III, l. 10-14; AW, side II, l. 15-18, following Gonzalez Bordas op.cit. (n. 1), p. 214‑217. [↑](#footnote-ref-182)
183. See A. Chérif, Y. Peña Cervantes, H. González Bordas, E. Zarco Martinez, F. Teichner, F. Haddad, M. Bustamante, R. Smari, Fl. J. Hermann, D. U. Kiesow and J. J. Marmol Marco, ‘Archéologie des domaines impériaux. Recherches à Henchir Hnich (région du Krib, Tunisie), site de découverte de la *lex Hadriana de agris rudibus*’, *Mélanges de l’École française de Rome - Section Antiquité* 133.2 (2021), 457-486. [↑](#footnote-ref-183)
184. SK, side 3, l. 24-26: n(on) amplius praestare nos quam ex lege Hadriana et ex litter<i>s proc(uratorum) tuor(um) debemus. Contrary to the opinion of Jerzy Kolendo, op.cit. (n. 1), 52, who thought that the *lex Hadriana* mentioned in this passage is different from the *lex Hadriana de agris rudibus*. [↑](#footnote-ref-184)
185. H. González Bordas, ‘Alcune considerazioni sulla portata della lex Hadriana de agris rudibus’, in C. Soraci (ed.), *Fiscalità ed epigrafia nel mondo romano, Atti del convegno internazionale (Catania, 28-29 Giugno 2019)* (Rome 2020), 61-75. See also in this volume, Dalla Rosa’s chapter. [↑](#footnote-ref-185)
186. So as the document related to the *lex Manciana* in HM operated only in the *fundus Villae Magnae Varianae*, even though it’s not sure that it’s an adaptation of that *lex* (see above). [↑](#footnote-ref-186)
187. J. M. Cortés Copete, ‘*Eudaimonía* de los súbdItos, *Felicitas Augusti*. Adriano, primer agente económico del Imperio’, in H. González Bordas and A. Alvar Ezquerra (eds.), *Gestión y trabajo en las propiedades imperiales durante el reinado de Adriano: cinco casos de estudio* (Alcalá de Henares 2021), 129-130. [↑](#footnote-ref-187)
188. Side 1, line 25 onwards: *tritici ex a|[r]ea{m} partem tertiam, hordei ex area{m} | [pa]rtem tertiam, fab(a)e ex area{m} partem qu|[ar]tam, uin<i> de lac<u> partem tertiam, ol[e]|[i co]acti partem tertiam, mellis in alue|[is] mellari<i>s sextarios singulos qui supra | quinque alueos | habebit in tempore qu[o uin]|demia mellaria fu[it fuerit]*. Following Kehoe 1988 op.cit. (n. 1), 29-30. [↑](#footnote-ref-188)
189. The wording *aut uineis* is missing in LD version of the *sermo*. [↑](#footnote-ref-189)
190. See, in this volume, Dalla Rosa’s chapter. [↑](#footnote-ref-190)
191. D. P. Kehoe 1988, op.cit. (n. 1), 63 has proposed that the *sermo* is an adaptation of the *lex Hadriana* for the estates where the *lex Manciana* was in use. J. Carcopino 1906, op.cit. (n. 1), 466 considered the *sermo procuratorum* right away asan adaptation of the *lex Manciana*. [↑](#footnote-ref-191)
192. M. De Vos, ‘The rural landscape of *Thugga*: farms, presses, mills, and transport’, in A. Bowman and A. Wilson (eds.), *The Roman Agricultural Economy. Organization, Investment, and Production* (Oxford 2013), 143-218, see 172. [↑](#footnote-ref-192)
193. See González Bordas op.cit. (n. 5), 217 and 220-221. [↑](#footnote-ref-193)
194. On H.-G. Pflaum’s discovery of this system, see M. Christol, ‘« Pseudo-collégialité » et administration des domaines africains’, *Cahiers du Centre Gustave Glotz* 29 (2018), 57-71. See also G. Boulvert, *Esclaves et affranchis impériaux sous le Haut-Empire romain. Rôle politique et administratif* (Naples 1970), 109-112, 270-272 and 303-304 and P.R.C. Weaver, *Familia Caesaris. A Social Study of the Emperor’s Freedmen and Slaves* (Cambridge 1972), 264-265. H.-G. Pflaum noticed first this system, he called it “collégialité inégale”. [↑](#footnote-ref-194)
195. Letter of ...dius Marinus and Doryphorus to Primigenius (LD, side 1, l. 14-21; AJ, side 1, l. 3-8) : *[---dius Marinus et Doryphorus Priṃigenio suo salutem. Exemplum epistulae scrip|tae nobis a Tutilio Pudente egregio uiro ut notum haberes et id quod subiectum est celeberrimis locis propone. Letter of Verridius Bassus et Ianuarius à Martialis (AJ, side 1, l. 8- ?) : Verridius | Bassus et Ianuarius Martiali suo salut[em]. | Si qui agri cessant et rudes sunt [siue sil]|uestres aut palustres in eo sal[tu agri | sunt u]olentes lege Manci[ana eos agros | excolere ne prohibeas]...* A sort of precedent of these letters is to be found at the beginning of HM (side 1, l. 4-6), it concerns the publication of the document related to the *lex Manciana*: *data a Licinio [Ma]ximo et Feliciore Aug(usti) lib(erto) proc(uratoribus) ad exemplu[m] [leg]is Man[c]ian(a)e*. [↑](#footnote-ref-195)
196. See first H. González Bordas and J. France, ‘A new edition of the imperial regulation from the Lella Drebblia site near Dougga (*AE* 2001, 2083)’, *Journal of Roman Archaeology* 30 (2017), 411-414 and an update in González Bordas and Chérif op.cit. (n. 3), 1427-1428. [↑](#footnote-ref-196)
197. We have to assume that between *adiutores*- and -*ue* the stonecutter forgot to write one letter; if not, the restitution could be *adiutoresue eorum*:“or their *adiutores*”. [↑](#footnote-ref-197)
198. See also González Bordas and A. Chérif 2018, op.cit. (n. 3), 1426-1429. A different interpretation has been proposed by M. Christol 2018, op.cit, (n. 26), 66-68 but this is misleading, since he only takes into account the names and functions of the members of the imperial administration, omitting the geographical indications. [↑](#footnote-ref-198)
199. Although scholars as, for example, G. Boulvert 1970, op.cit*.* (n. 26), 291-293 and n. 182, have not followed Kolendo’s opinion. In fact, for G. Boulvert the *procuratores saltus* in the *tractus Karthaginiensis* begin to exist precisely under Hadrian. *Procuratores saltus* are otherwise known in the *regio Hipponensis et Thevestina,* but these are probably cases of homonymy between *saltus, regio, diocesis*. Some examples are *Inscriptions Latines d’Algerie* 1.3992; *CIL* 8.5351. In the *regio Hadrumetina*, even if homonymy cases also exist (*CIL* 8.11341), the freedman procurator mentioned in the inscription of the *saltus Massipianus* (*CIL* 8.587), ordering the *coloni* to restore buildings and to build arcs, can in fact be a *procurator saltus*. After J. Kolendo, D. Flach op.cit. (n.1), 456-468 formulated a different interpretation of the hierarchy of the procurators in the *tractus Karthaginiensis* coming back to some Rostovtzeff ideas. His view seems to me very difficult to accept since he considers that equestrian procurators can be in charge for the smaller *regiones*. [↑](#footnote-ref-199)
200. See note 27. [↑](#footnote-ref-200)
201. Kolendo op.cit. (n. 1), 328-329. [↑](#footnote-ref-201)
202. See supra in this chapter. [↑](#footnote-ref-202)
203. P. F. Bang, ‘The ancient economy and new institutional economics’, *Journal of Roman Studies* 99 (2009), 203. [↑](#footnote-ref-203)
204. I would like to thank Georgy Kantor and Peter Candy for their very helpful comments on an early draft of this paper. [↑](#footnote-ref-204)
205. Liv. 9.40.15-17; Varro *ap*. Non 853L; Liv. 26.11.7 (cf. Flor. *Epit*. 1.22.48); Liv. 26.27.1-2; Plin. *HN* 21.8. A potentially important new piece of evidence has recently been found in the form of a graffito, scratched on a fragmentary Genucilia plate from the Palatine and in a context dating between the last quarter of the fourth and the very early years of the third century BCE. The graffito is in Greek and comprises a personal name (‘Monatolos’, unattested elsewhere), followed by what appears to be a *nomen* *gentilicium* (‘Peinarios’) and the `word ‘*arkentarios*’. I am grateful to Marco Maiuro for alerting me to this discovery and to David Nonnis for providing further detail. [↑](#footnote-ref-205)
206. See P. Kay, ‘A graffito and the beginnings of banking in Rome’, Forthcoming. [↑](#footnote-ref-206)
207. Dem. 36.11. [↑](#footnote-ref-207)
208. J. M. Kelly, *Roman Litigation* (Oxford 1966), 1-30: “when state force did not yet exist as a sanction of private litigation, an advantage lay on the side of physical superiority”. [↑](#footnote-ref-208)
209. Polyb. 6.56.7-8; 6.56.13-14. [↑](#footnote-ref-209)
210. *Infamia*: *Dig.* 3.2; J. A. C. Thomas, *Textbook of Roman Law* (Amsterdam 1976), 410. [↑](#footnote-ref-210)
211. Plaut. *Pers*. 433-436: *Mirum quin tibi ego crederém, ut idem mihi / faceres quod partim faciunt argentarii: / ubi quid credideris, citius extemplo a foro / fugiunt quam ex porta ludis cum emissust lepus.* [↑](#footnote-ref-211)
212. T.J. Cornell, ‘Hannibal’s legacy. The effects of the Hannibalic war on Italy’, in T. J. Cornell, B. Rankov, and P. Sabin (eds). *The Second Punic War: A Reappraisal* (London 1996), 97-113. [↑](#footnote-ref-212)
213. Twelve Tables: M. H. Crawford (ed.), *Roman Statutes* (London 1996), no. 40. For a more detailed discussion of bankers in Plautus and my argument that Plautus was presenting a Roman rather than a Greek banking reality, see P. Kay, *Rome’s Economic Revolution* (Oxford 2014), 116-24. Plautus’ legal references are clearly Roman. [↑](#footnote-ref-213)
214. Gai. *Dig.* 1.2.1, from the *praefatio* to his lost work on the Twelve Tables. [↑](#footnote-ref-214)
215. J. W. Cairns and P. du Plessis, ‘Introduction: themes and literature’, in Cairns and du Plessis (eds.), *Beyond Dogmatics. Law and Society in the Roman World* (Edinburgh 2007), 3. [↑](#footnote-ref-215)
216. E.g. the works of Alan Watson and the radical and interesting work of Roberto Fiori. [↑](#footnote-ref-216)
217. Liv. 3.34.6. [↑](#footnote-ref-217)
218. *Hostis*: *XII tab.* 2.2; 6.4; cf. Cic. *Off*. 1.37 and the other sources cited in Crawford 1996, op.cit. (n.11), 622. [↑](#footnote-ref-218)
219. Liv. 8.28 gives 326 BCE during Poetilius’ consulship; Varro *Ling.* 7.105 suggests 313 during his dictatorship. ‘It seems likely on general grounds that the legislation of 326 or 313 did not outlaw *nexum*, but instructed magistrates to disallow the binding of persons in the case of *nexum*’ (Crawford 1996, op.cit. (n.11), 656). [↑](#footnote-ref-219)
220. Pompon. *Dig.* 1.2.2.35-38. Pomponius himself was active in the middle of the second century CE. [↑](#footnote-ref-220)
221. Gai 4.30; 4.39-44; Gell. *NA* 16.10.8; Cic. *Leg*. 1.17. Early praetorian actions: L de Ligt, ‘Legal history and economic history: The case of the *actiones adiecticiae qualitatis*’, *The Legal History Review* 67 (1999), 205-226; P. Candy, ‘Parallel developments in Roman law and maritime trade during the late republic and early Principate’, *Journal of Roman Archaeology* 33 (2020), 53-72; see also n.69 below for the possible implication for stipulations of the *lex Laetoria* of the late third or early second century BCE. This law gave an action against anyone alleged to have fraudulently induced a minor to enter into a transaction. [↑](#footnote-ref-221)
222. Gai 3.89: *Et prius videamus de his, quae ex contractu nascuntur. Harum autem quattuor genera sunt: aut enim re contrahitur obligatio aut verbis aut litteris aut consensu*. [↑](#footnote-ref-222)
223. Pompon. *Dig.* 1.2.2.41; B. W. Frier, *The Rise of the Roman Jurists: Studies in Cicero’s Pro Caecina* (Princeton 1985), 158-63. In any case, good faith contracts *consensu* do not appear until the second century. [↑](#footnote-ref-223)
224. R. Fiori, ‘Contracts, commerce and Roman society’, in P. du Plessis, C. Ando, and K. Tuori (eds.), *The Oxford Handbook of Roman Law and Society* (Oxford 2016), 581–95. [↑](#footnote-ref-224)
225. Gai 4.10-30. [↑](#footnote-ref-225)
226. Pompon. *Dig.* 1.2.2.6. [↑](#footnote-ref-226)
227. F. Schulz, *History of Roman Legal Science* (Oxford 1946), 15-22; Frier 1985, op.cit. (n.21), 157; Fiori 2016, op.cit. (n.22), 582. [↑](#footnote-ref-227)
228. Gai 4.11; 4.30. [↑](#footnote-ref-228)
229. Gai 4.11-12; cf. Cic. *Mur*. 26, which preserves part of the formula of a *legis actio*. [↑](#footnote-ref-229)
230. Gai 4.17a: Qui agebat sic dicebat: EX SPONSIONE TE MIHI X MILIA SESTERTIORVM DARE OPORTERE AIO: ID POSTVLO AIAS AN NEGES. Aduersarius dicebat non oportere. Actor dicebat: QVANDO TV NEGAS, TE PRAETOR IVDICEM SIVE ARBITRVM POSTVLO UTI DES; cf. Gai 4.20. Crawford 1996, op.cit. (n.11), 622; Fiori 2016, op.cit. (n.22). The use of the term, “sesterces” would of course have been anachronistic during the long third century. [↑](#footnote-ref-230)
231. E. Metzger, ‘Litigation’, in D. Johnston (ed.), *The Cambridge Companion to Roman Law* (Cambridge 2015), 274-6, 281-3. [↑](#footnote-ref-231)
232. Cic. *Top*. 28; *Rhet*. *Her*. 2.19; Thomas 1976, op.cit. (n.8), 5. [↑](#footnote-ref-232)
233. Fiori 2016, op.cit. (n.22), 582-4. [↑](#footnote-ref-233)
234. Gai 2.14-14a. The list of *res mancipi* was never subsequently increased to include more modern objects of high economic value, such as merchant ships (see L. Capogrossi Colognesi, ‘Ownership and power in Roman law’, in du Plessis, Ando and Tuori 2016, op.cit. (n. 22), 524-36. [↑](#footnote-ref-234)
235. Gai 1.119; Plin. *HN* 33.43. [↑](#footnote-ref-235)
236. Varro *Ling.* 5.163: *Aes raudus dictum; ex eo veteribus in mancipiis scriptum: ‘raudisculo libram ferito’* (Bronze was called *raudus*; from this the people of old had it written in their mancipations: ‘let him strike the scales with a piece of *raudus*!’); Fest. 265 L. [↑](#footnote-ref-236)
237. Varro *Ling.* 7.105; *XII tab.* 6.1: *cum nexum faciet mancipiumque, uti lingua nuncupasset, ita ius esto* (When he shall perform *nexum* and *mancipium*, as his tongue has pronounced, so is there to be a source of rights - Trans. Crawford 1996, op.cit. (n.11), 581). [↑](#footnote-ref-237)
238. Fiori 2016, op.cit. (n.22), 582-4. [↑](#footnote-ref-238)
239. Gai 4.17a.; *XII tab.* 1.12; A. Watson, *Roman Private Law around 200 BC* (Edinburgh 1971), 117-120; Crawford 1996, op.cit. (n.11), 603. [↑](#footnote-ref-239)
240. Gai 3.92-102. [↑](#footnote-ref-240)
241. An ‘*actus continuus*’:Ulp. *Dig.* 45.1.1; Ven. *Dig.* 45.1.137pr. [↑](#footnote-ref-241)
242. The *sponsio* and the verb *spondere* could be used only by Roman citizens but, at some unknown point, there developed another form of the oral question and promise, the *stipulatio*, which could be performed by *peregrini* (non-citizens) as well as by Roman citizens. It was identical to *sponsio* in all respects except that a verb of promise other than *spondere* had to be used (Fiori 2016, op.cit. (n.22), 587). Gaius (*Inst*. 3.93) provides a list of the verbs of promise that could, in his time, be used in a *stipulatio*. In both the *sponsio* and the *stipulatio*, the verb used in the reply had to be the same as that in the question. [↑](#footnote-ref-242)
243. Plaut. *Pseud*. 1070-1077: “*Ducentos nummos aureos Philippos probos dabin?*”, “*Dabo*”; cf. *Pseud.* 114-8, *Bacch*. 880-3. [↑](#footnote-ref-243)
244. E. A. Meyer, *Legitimacy and Law in the Roman World: Tabulae in Roman Belief and Practice* (Cambridge 2004); E. A. Meyer, ‘Writing in Roman legal contexts’, in Johnston 2015, op.cit. (n.29), 87 n.14. [↑](#footnote-ref-244)
245. A third kind of surety, the *fideiussor*, is not known before the first century. [↑](#footnote-ref-245)
246. Fiori 2016, op.cit. (n.22), 592. [↑](#footnote-ref-246)
247. Gai 3.121-7; D. Johnston, *Roman Law in Context* (Cambridge 1999), 90. [↑](#footnote-ref-247)
248. Gai 3.136. [↑](#footnote-ref-248)
249. *Mutui datio* is similar to *traditio*, the conveyance by simple delivery of a *res nec mancipi* i.e., an item that was not a *res mancipi* (Cic. *Top*. 28; Gai. 2.19). Fiori (2016, op.cit. (n.22), 582) places *traditio* in a group of ancient acts that “did not take the formation and the performance of the transaction into account, but only its final result, when coincidental with a transfer of property”. [↑](#footnote-ref-249)
250. Gai 3.90. [↑](#footnote-ref-250)
251. Gai 4.17b. [↑](#footnote-ref-251)
252. Johnston 1999, op.cit. (n.45), 84. [↑](#footnote-ref-252)
253. Watson, A., ‘The evolution of law: The Roman system of contracts’, *Law and History Review* 2.1 (1984), 5-6. [↑](#footnote-ref-253)
254. I am grateful to Dominic Rathbone for this suggestion. [↑](#footnote-ref-254)
255. Plaut. *Curc*. 68, *Pers*. 5; 43; 118; 256; 295; *Pseud*. 80; 85; 286; 294-295; 733; *Stich*. 255-256; *Trin*. 727; 758-762; 1051; 1055; Ter. *Heaut*. 601. [↑](#footnote-ref-255)
256. Plaut. *Asin*. 248: *Supplicabo, exobsecrabo ut quemque amicum videro, dignos indignos adire atque experiri certumst mihi, nam si mutuas non potero, certumst sumam faenore.* In relation to this passage, the fourth or fifth century CE grammarian, Nonius Marcellus notes that: *mutuum a fenore hoc distat, quod mutuum sine usuris, fenus cum usuris sumitur* (Non. 439 M)*.* [↑](#footnote-ref-256)
257. E.g. *TPSulp.* 55: *Publius Vergilius Ampliatus scripsi me accepisse mutua et debere Sexto Granio Numenio sestertia quinque millia nummum eaque HS V millia nummum quae supra scripta sunt, proba recte dari stipulatus est Sextus Granius Numenius spopondi Publius Vergilius Ampliatus.* (I, Publius Vergilius Ampliatus, have written that I received loans (*mutua*) and owe to Sex. Granius Numenius five thousand sesterces in coin. Sex. Granius Numenius stipulated that he be rightly repaid in good coin the 5,000 sesterces written above; I, Publius Vergilius, promised). [↑](#footnote-ref-257)
258. Despite the lexicographical theorising of Gaius and Paulus, who believed that the word *mutuum* was derived from “*meum tuum”*, its origin was probably in the verb *mutare* (to change, to exchange, to replace, to substitute). So, when a lender *mutuum dat*, he gives what must be given back by substitution. Eventually, the classical jurists appear to have favoured the view that, in a transaction in which a *mutuum* reinforced a *stipulatio* or vice versa, the contract was just a *stipulatio*: Ulp. *Dig.* 46.2.6.1; Pompon. *Dig.* 46.2.7. [↑](#footnote-ref-258)
259. The author of the *Collatio* (10.7.11) cites ‘*Pauli*’ *Sententiae* Book Two: *Ex causa depositi lege duodecim tabularum in duplum actio datur, edicto praetoris in simplum* (On account of deposit an action is given by the Twelve Tables for double, by the praetor’s edict for single); Watson 1984 op.cit. (n.51), 6-7. It has however been doubted whether there was an *actio ex causa depositi* specific to the Twelve Tables (Crawford 1996, op.cit. (n.11), 687 summarises the arguments). [↑](#footnote-ref-259)
260. *TPSulp.* 3; 40. [↑](#footnote-ref-260)
261. *TPSulp.* 69; 75. *TPSulp.* 69 does not contain the word *mutuum* but uses *debere* and a stipulation. [↑](#footnote-ref-261)
262. Ulp. *Dig.* 16.3.7.2; 42.5.24.2; Scaev. *Dig.* 2.14.47.1; 16.3.28; Papin. *Dig.* 16.3.24, Paul. *Dig.* 16.3.26.1; Johnston 1999 op.cit. (n.45), 87. [↑](#footnote-ref-262)
263. Gai 4.17a. [↑](#footnote-ref-263)
264. Cic. *Att*. 6.1.8; *Mur*. 25; *de Orat*. 1.186; Liv. 9.46.5; Plin. *HN* 33.17; Pompon. *Dig.* 1.2.2.7. [↑](#footnote-ref-264)
265. H. F. Jolowicz, and B. Nicholas, *Historical Introduction to the Study of Roman Law*, (Cambridge 1972, 3rd ed.), 91-2; J. W. Cairns, ‘Tiberius Coruncanius and the spread of knowledge about law in early Rome’, *The Journal of Legal History* 5.2 (1984), 129-135. [↑](#footnote-ref-265)
266. Frontin. *Aq*. 5-6; H. Dodge, ‘“Greater than the pyramids”. The water supply of ancient Rome’, in J. Coulston and H. Dodge (eds.), *Ancient Rome: The Archaeology of the Eternal City* (Oxford 2000), 166-209. [↑](#footnote-ref-266)
267. J.-P. Morel, ‘The transformation of Italy, 300-133 BCE: The evidence of archaeology’, in *CAH VIII2* (Cambridge 1989), 480; R. Roth, ‘Before *sigillata*: Black-gloss pottery and its cultural dimensions’, in J. D. Evans (ed.), *A Companion to the Archaeology of the Roman Republic* (Chichester 2013), 81‑96. [↑](#footnote-ref-267)
268. S. Bernard, *Building Mid-Republican Rome: Labor, Architecture, and the Urban Economy* (Oxford 2018); S. Bernard, ‘The social history of early Roman coinage’, *Journal of Roman Studies* 108 (2018), 1-26. [↑](#footnote-ref-268)
269. Gai 4.19. [↑](#footnote-ref-269)
270. Crawford 1996, op.cit. (n.11), no. 46. As the editors say, the *lex Silia de ponderibus* and the *lex Silia de condictione* were probably different statutes. [↑](#footnote-ref-270)
271. Watson’s argument (1971 op.cit. (n.37), 126-7) is that Plaut. *Rud*. 1376 ff., which involves money due under a *stipulatio*, also contains the *exceptio legis Laetoriae* and so the action must have been under a praetorian formula. This is because Gaius (*Inst*. 4.108) tells us that *legis actiones* did not have *exceptiones*, but that *exceptiones* were possible under praetorian formulas. It is virtually inconceivable that a *legis actio* would have been passed into law if there was already a praetorian formula in use and so the *condictio* must have been the earlier action. Other possible references to the *condictio*: Plaut. *Pers*. 477; *Rud*. 14; *Curc*. 496. [↑](#footnote-ref-271)
272. Gai 4.20. [↑](#footnote-ref-272)
273. Thomas 1976, op.cit. (n.8), 78; Metzger 2015, op.cit. (n.29), 289. [↑](#footnote-ref-273)
274. Cic. *Q. Rosc*. 13-15; cf. Gai 3.91; A. Watson, *The Law of Obligations in the Later Roman Republic* (Aalen 1984), 14-17. [↑](#footnote-ref-274)
275. In modern terminology, a dispositive written contractual document is one which embodies in permanent form the expression of the will of the parties and becomes effective only through this embodiment. *Obligatio litteris*: R.M. Thilo, *Der Codex accepti et expensi im Römishen Recht. Ein Beitrag zur Lehre von der Litteralobligation* (Göthingen 1980); Watson 1984, op.cit. (n.72), 18-39; B. Sirks, ‘Law, commerce, and finance in the Roman empire’, in A. Wilson and A. Bowman (eds.), *Trade, Commerce and the State in the Roman World* (Oxford 2018), 76-82. [↑](#footnote-ref-275)
276. It also of course became the practice for the responsible *paterfamilias* to record financial transactions in writing. [↑](#footnote-ref-276)
277. Plaut. *Curc*. 371-379: *Beatus videor. Subduxi ratiunculam / quantum aeris mihi sit quantumque alieni siet*. [↑](#footnote-ref-277)
278. Plaut. *Truc*. 66–73. Other references to financial records: Plaut. *Capt*. 192–193; *Truc.* 749; *Most*.304; *Curc*. 552; Ter. *Phorm*. 921-924. [↑](#footnote-ref-278)
279. Gai. *Dig.* 2.13.10pr -2; Ulp. *Dig.* 2.13.1.2; 2.13.4pr. Camodeca, believes that *TPSulp.* 94 and 95 represent fragments from a *codex rationum* (ledger) because the tablets from which they come are larger than those normally found in the archive and they are dated. If correct, this is the only example of a *codex rationum* to have survived in the archaeological record (G. Camodeca, *Tabulae Pompeianae Sulpiciorum (TPSulp.): Edizione critica dell’archivio puteolano dei Sulpicii* (Rome 1999), 205). [↑](#footnote-ref-279)
280. Dem. 49.5. [↑](#footnote-ref-280)
281. Plaut. *Asin*. 440: *Nunc satagit: adducit [sc.trapezitam] domum etiam ultro et scribit nummos*. (Now he settles up: furthermore, he brings [his banker] to the house and “writes coins”). Cf. Ter. *Phorm*. 921-3 (*rescribere*). [↑](#footnote-ref-281)
282. Polyb. 31.27.6-7. [↑](#footnote-ref-282)
283. W. V. Harris, ‘A revisionist view of Roman money’, *Journal of Roman Studies* 96 (2006), 1-24; 300,000 silver denarii x 3.86 g. = 1,158 kg. approx. [↑](#footnote-ref-283)
284. Such entries were subsequently rationalised by jurists of the classical period as being evidence of a notional *numeratio* (counting out) which, in the case of a loan, gave rise to the obligation to repay (Gai 3.131). But there is no evidence to suggest that this was how they were regarded in the middle republic. [↑](#footnote-ref-284)
285. Iust. *Inst.* 3.21: *Olim scriptura fiebat obligatio, quae nominibus fieri dicebatur, quae nomina hodie non sunt in usu*. (Formerly, an obligation was made by writing; this obligation was said to be made by account entries, but today these account entries are not in use). [↑](#footnote-ref-285)
286. Gai 3.128. [↑](#footnote-ref-286)
287. Gai 3.130. [↑](#footnote-ref-287)
288. Gai 3.138: cf. *FIRA2* 3.124; Thilo 1980, op.cit. (n. 73), 292-295. [↑](#footnote-ref-288)
289. We do not know whether a corresponding entry had to be made in the new debtor’s books, as the texts are always concerned with the creditor’s books. [↑](#footnote-ref-289)
290. E.g. Cic. *Att*. 15.15.4, asking Atticus to provide a year’s expenses for his son Marcus in Athens; D. B. Hollander, *Money in the Late Roman Republic* (Leiden 2007), 40-41. [↑](#footnote-ref-290)
291. In classical law, *delegatio* was one particular form of *novatio*: A. Berger, *Encyclopedic Dictionary of Roman Law*, Transactions of the American Philosophical Society 43.2 (1953), s.v. *Delegatio*; W. W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian* (Cambridge 1963, 3rd ed.), 570; cf. Paul. *Dig.* 46.3.56: “he who authorises a payment is considered as if he paid himself”; Julian. *Dig.* 46.1.18: *qui delegat solvit*. [↑](#footnote-ref-291)
292. Cic. *Att*. 12.3.2; 12.47.1; Cato *Agr.* 149.2: *donicum pecuniam solverit aut satisfecerit aut delegarit, pecus et familia, quae illic erit, pigneri sunto.* [↑](#footnote-ref-292)
293. Liv. 35.7.2-5. The fact that the chain of events which Livy describes ended in a unique piece of legislation (unique because at no other time did the Romans impose their private law on their allies) suggests that his account is in a reliable tradition and increases the likelihood of its details being substantially correct. [↑](#footnote-ref-293)
294. I.e., by these transfers to Italian non-citizens the loans ceased to be subject to Roman law, and became instead subject to the laws of the various allied communities to which the Italians in question belonged and which did not have the same interest-rate restrictions. [↑](#footnote-ref-294)
295. In financial contexts, *nomen* means a name entered in records of account on a wax tablet, hence the account itself and so, sometimes, a debt. At Plaut. *Curc*. 406-410, the banker Lyco says comically that he is familiar with the *nomen* of one of the characters, Therapontigonus Platagidorus, since it fills four wax tablets in his accounts! [↑](#footnote-ref-295)
296. E.g. Watson 1984, op.cit (n.72), 18-19. [↑](#footnote-ref-296)
297. *Nomina* as a means of payment in the first century: P. Heichelheim, *Wirtschaftsgeschichte des Altertums vom Paläolithikum bis zur Völkerwanderung des Germanen, Slaven und Araber* (Leiden 1938), 554-7; C. T. Barlow, Bankers, ‘Moneylenders and Interest Rates in the Roman Republic’, PhD. Diss. (University of North Carolina, Chapel Hill, 1978), 155-68; Harris 2006, op.cit. (n.81); Kay 2014, op.cit. (n.11), 109-10, 115-6, 239, 265. [↑](#footnote-ref-297)
298. Gai 3.133. [↑](#footnote-ref-298)
299. Cic. *Off*. 3.58-60; Watson 1984, op.cit. (n.72), 29-32. [↑](#footnote-ref-299)
300. Schulz (1946, op.cit. (n.25), 25) was highly sceptical of a third century BCE date, simply because it was early. [↑](#footnote-ref-300)
301. Hyp. *Ath*. 13; cf. Dem. 47.77; 56. 2; Plato *Symp*. 196c; Arist. *Rhet*. 1375b 9-10. [↑](#footnote-ref-301)
302. J. L. Brown, ‘Contracts in classical Athens’ , PhD. Diss. (Royal Holloway, University of London, 2008), 58; cf. Dem. 47.77 and 56.2 “which imply absolute governmental non-involvement in the conditions and terms of maritime finance” (E. E. Cohen, *Athenian Economy and Society: A Banking Perspective* (Princeton 1992), 162 n. 213). [↑](#footnote-ref-302)
303. Dem. 35.10-13. [↑](#footnote-ref-303)
304. Isoc. *Trap.* 17.20. [↑](#footnote-ref-304)
305. Dem. 32.1. [↑](#footnote-ref-305)
306. J. W. Jones, *The Law and Legal Theory of the Greeks* (Oxford 1956), 219. [↑](#footnote-ref-306)
307. Brown 2008, op.cit. (n.100), 90-110. The contract is now generally accepted as genuine (E. E. Cohen, ‘Commercial law’, in M. Gagarin and D. Cohen (eds.), *The Cambridge Companion to Ancient Greek Law* (Cambridge 2005), 298 n. 40). [↑](#footnote-ref-307)
308. E.g. Cic. *Top*. 96. *Stipulatio* reduced to writing in the classical period to provide proof: *TPSulp.* 55; Paul. *Dig.* 45.1.126.2; 45.1.140 pr. See Meyer 2004 op.cit. (n. 42) for the view that the recording of stipulations on tablets began much earlier. [↑](#footnote-ref-308)
309. Watson 1984, op.cit. (n. 51), 8-14; R. Fiori, ‘Rise and fall of the specificity of contracts’, in B. Sirks (ed.), *Nova Ratione: Change of Paradigms in Roman Law* (Wiesbaden 2014), 34. [↑](#footnote-ref-309)
310. For arbitration, see D. Roebuck, B. de Loynes de Fumichon, *Roman Arbitration*, (London 2004). The proportion of disputes in antiquity settled by arbitration is unknown. [↑](#footnote-ref-310)
311. Apart from the statutes, the written law consisted of the magistrates’ edicts. Comparison of the edicts and the commentaries on them demonstrate the enormous discrepancy between the written law and the customary practice which was not written down until these commentaries and naturally acquired after that the status of *ius vetus*. [↑](#footnote-ref-311)
312. See for this R.K. Merton, A.S. Rossi, ‘Contributions to the theory of reference groups’, in R.K. Merton (ed.) *Social Theory and Social Structures*, (New York 1968), 279–334. I would not exclude that in early times the behaviour of these groups were also considered for the religious and political welfare of the country, just as in the Middle Ages and later on immoral behaviour was considered to call God’s wrath upon the country. [↑](#footnote-ref-312)
313. Gai 3.149, also *Dig.* 17.2.30; see G. Santucci, ‘The equality of contributions and the liability of partners’, in B. Sirks (ed.), *Nova Ratione*, (Wiesbaden 2014), 93–94, with more literature. Further, for later times, see, e.g., *Dig.* 17.2.6 and 29pr–2. [↑](#footnote-ref-313)
314. See M. Kaser, *Das römische Privatrecht*, Bd. I (München 1971), 572–576; the *societas leonina* let a partner share only gains and no losses, *Dig.* 17.2.29.2. [↑](#footnote-ref-314)
315. *Dig.* 17.2.52.2; on this text see B. Sirks, ‘Ulpian *Dig.* 17,2,52,3: Gesellschaftsvertrag, aber auch Arbeits-, Kauf-, Verwahrungs- und Finanzierungsvertrag?’, in Th. Finkenauer, B. Sirks (eds.), *Interpretationes Iuris Antiqui* (Wiesbaden 2018), 323–334. [↑](#footnote-ref-315)
316. *Dig.* 17.2.18: apparently they did not need the consent of their owner to enter a partnership, nor was the wish of their owner that they renounce it sufficient: an act was required. [↑](#footnote-ref-316)
317. *Dig.* 17.2.58.3. Ulp. 31 *ad (ed.), Si servus meus societatem cum Titio coierit et alienatus in eadem permanserit, potest dici alienatione servi et priorem societatem finitam et ex integro alteram inchoatam, atque ideo et mihi et emptori actionem pro socio competere, item tam adversus me quam adversus emptorem ex his causis quae ante alienationem inciderunt dandam actionem, ex reliquis adversus emptorem solum.* A different view (silent continuation) by Ulpian in *Dig.* 17.2.58.2 where a *filius familias* is partner and then is emancipated. That is because the son acquires full right of action and now may be held liable also for the time before his emancipation (and we may assume, the same would be the case if his *pater familias* died and he became *sui iuris*). [↑](#footnote-ref-317)
318. One would indeed expect that it were to be rejected from the beginning with the argument that partners should not be confronted with a shareholder they might not have wished to contract with; as would be the case with an heir, even one who was already mentioned in the contract, *Dig.* 17.2.35 and 52.9. [↑](#footnote-ref-318)
319. See Kaser 1971, op. cit. (n. 5), 575; M.A. Fleckner, *Antike Kapitalvereinigungen* (Köln/Weimar/Wien 2010), 117–143 on the *societas*. [↑](#footnote-ref-319)
320. See Kaser 1971, op. cit. (n. 5), 575 and 575 note 30: it would be considered to form a *communio* if nothing else was agreed. [↑](#footnote-ref-320)
321. F.-S. Meissel, *Societas* (Frankfurt 2004), 270: the bought slaves were common property; 271: actions could be raised against any *socius* in proportion to his share. [↑](#footnote-ref-321)
322. See Kaser 1971, op.cit. (n. 5), 411, and 590–592 for the *communio*. [↑](#footnote-ref-322)
323. Meissel 2004, op.cit. (n. 12), 272–273, viz. a new partnership contract. [↑](#footnote-ref-323)
324. See Meissel 2004, op.cit. (n. 12), 277ff. [↑](#footnote-ref-324)
325. Fleckner 2010, op. cit. (n. 10), 356–361. It seems that Fleckner had primarily the obligatory aspects in mind, not the proprietary aspects. [↑](#footnote-ref-325)
326. Fleckner 2010, op. cit. (n. 10), 357. His following discourse on the possibility that a partner might be able to dispose of the entire co-property and so endanger the partnership is not even hypothetical. [↑](#footnote-ref-326)
327. That makes Fleckner’s exposition of Adler’s theory as cited (2010, op. cit. (n. 10), 359–360) superfluous. For this, see below note 38. [↑](#footnote-ref-327)
328. Thus in the division of the common property liabilities out of the partnership contract would be divided according to the shares in the contract, but the assets, which were the result after all liabilities and costs had been done with, would be divided according to the property shares. [↑](#footnote-ref-328)
329. Such as if the common property included a building, he might be forced to a *cautio damni infecti: Dig.* 39.2.40.4 Ulp. 43 *ad Sab. Si plures domini sint aedium, qui damni infecti sibi prospicere volunt, nec quisquam eis damni infecti caveat, mittendi omnes in possessionem erunt et quidem aequalibus partibus, quamvis diversas portiones dominii habuerint: et ita Pomponius scribit.* [↑](#footnote-ref-329)
330. R. Riccobono (ed.), *Fontes Iuris Romani Anteiustiniani* I (Florentiae 1968), 104 § 4. [↑](#footnote-ref-330)
331. See Kaser 1971, op.cit. (n. 5), 590–592, part. 592 for the final account. [↑](#footnote-ref-331)
332. All that returns enters the *res communis* and at the end it will be divided amongst the partners (see *Dig.* 17.2.38.1: *res ex societate communes*). See further for the concurrence between both actions Meissel 2004, op.cit. (n. 12), 281ff. [↑](#footnote-ref-332)
333. *Dig.* 17.2.38.1. [↑](#footnote-ref-333)
334. But it is very possible that a partner added to the common property, such as by his work. Could he also raise his capital share, or, once he had sold his portion, begin with a new portion? It depends on the distribution of the profit and losses, established at the beginning of the contract. If it were purely a capital partnership and the shares were in proportion to the capital brought in, the first suggestion should be possible. But the second is not, because that would require a new partnership. [↑](#footnote-ref-334)
335. *Consultatio* 6.10. [↑](#footnote-ref-335)
336. Meissel 2004, op.cit. (n. 12), 227–312 on specific questions regarding co-ownership of partnership property, 277ff in particular. [↑](#footnote-ref-336)
337. For these partnerships see now Fleckner 2010, op. cit. (n. 10), 145–215. There were more occasions where such companies were used: public construction, exploitation of public property (like mining), or maintenance of public utilities, further taxes like the inheritance tax and custom duties. I restrict myself to the allocation of provincial taxes because of their size and extension, but the exposition goes for the other taxes. Classic is E. Badian, *Publicans and Sinners, Private Enterprise in the Service of the Roman Republic* (Oxford/ Ithaca NY 1972). A good survey gives U. Malmendier, ‘Roman shares’, in W. Goetzmann and G. Rouwenhorst (eds.), *The Origins of Value. The Financial Innovations that Created Modern Capital Markets* (Oxford 2005). 31-42, 361-365. However, she too quickly assumes that the *partes* in these *societates* were negotiable shares and that there was a trading place for these, leaning on secondary literature. See also below and note 43. [↑](#footnote-ref-337)
338. See M. Corbier, ‘*Lex portorii* and financial administration’, in M. Cottier e.a.. (ed.), *The Customs Law of Asia* (Oxford 2008), 202–227, especially 212 and 222. She raises the interesting point that the assets offered as security were so to speak locked up capital for the time of the contract. [↑](#footnote-ref-338)
339. Cic. *Att.* 11.1.2; *Fam*. 5.20.9. See D. B. Hollander, *Money in the Late Roman Republic* (Leiden 2007), 43. [↑](#footnote-ref-339)
340. See *Dig.* 39.4 with references to the *familia*, inclusive the possibility of theft by it. [↑](#footnote-ref-340)
341. See for the *redemptura* and the structure of these companies Meissel 2004, op.cit. (n. 12), 206–208, with older literature. [↑](#footnote-ref-341)
342. E.g., *Dig.* 13.7.40.1 (*pars dominii*); *Dig.* 39.2.40.4 (*pars/portio dominii*); *Dig.* 39.2.5.1 (*pars dominii*); *Dig.* 40.12.7.3 (*pars dominii*); *Dig.* 41.1.45 (*pars dominii*); *Dig.* 41.1.63.1 (*pars dominii*). [↑](#footnote-ref-342)
343. Cic. *Vat*. 12.29: *et quoniam pecunias aliorum despicis, de tuis divitiis intolerantissime gloriaris, volo uti mihi respondeas, fecerisne foedera tribunus plebis cum civitatibus, cum regibus, cum tetrarchis; erogarisne pecunias ex aerario tuis legibus; eripuerisne partis illo tempore carissimas partim a Caesare, partim a publicanis? quae cum ita sint, quaero ex te sisne ex pauperrimo dives factus illo ipso anno quo lex lata est de pecuniis repetundis acerrima, ut omnes intellegere possent a te non modo nostra acta, quos tyrannos vocas, sed etiam amicissimi tui legem esse contemptam*; – ‘and since you despise the money of others, you pride yourself most intolerably of your richesses, I want that you reply to me, did not you conclude as tribune of the people treaties with towns, with kings, with tetrarchs? did not you spend money from the Treasury by your laws? did not you rob at that time participations, at that time very expensive, partly from Caesar, partly from publicans? Since these matters are so, I ask from you, were you not made from a very poor man into a rich man in that very year when the so severe statute on money claimed back was issued, so that all could understand that you despised not only our acts which you call tyrannical, but also the statute of your most dear friend.’ Fleckner 2010, op. cit. (n. 10), 480 thinks that Vatinius did not get the shares from the *publicani* but from the partnership itself. How this was done he does not say (it is not interesting for the question he is dealing with). Likewise he concludes that Vatinius got his *partes* straight from Caesar, again without entering upon the question how this might have been done. [↑](#footnote-ref-343)
344. Cic. *Rab. Post*. 2.4: *Hoc ille natus, quamquam patrem suum numquam viderat, tamen et natura ipsa duce, quae plurimum valet, et adsiduis domesticorum sermonibus in paternae disciplinae similitudinem deductus est. multa gessit, multa contraxit, magnas partis habuit publicorum; credidit populis; in pluribus provinciis eius versata res est; dedit se etiam regibus; huic ipsi Alexandrino grandem iam antea pecuniam credidit; nec interea locupletare amicos umquam suos destitit, mittere in negotium, dare partis, augere <re>, fide sustentare. quid multa? cum magnitudine animi, tum liberalitate vitam patris et consuetudinem expresserat. pulsus interea regno Ptolomaeus dolosis consiliis, ut dixit Sibylla, sensit Postumus, Romam venit. cui egenti et roganti hic infelix pecuniam credidit, nec tum primum; nam regnanti crediderat absens; nec temere se credere putabat, quod erat nemini dubium quin is in regnum restitueretur a senatu populoque Romano.* On this text and point see Fleckner 2010, op. cit. (n. 10), 482. Hollander 2007, op.cit. (n. 30), 49–51 discusses the text but does not give an explanation for the legal nature of the *partes*. [↑](#footnote-ref-344)
345. P.G.W. Glare (ed.), *Oxford Latin Dictionary* (Oxford 1982), s.v. ‘affinis’. [↑](#footnote-ref-345)
346. Fleckner 2010, op. cit. (n. 10), 488, 494. On 482: ‘die Ermöglichung der Mitwirkung an staatslichen Aufträgen’. It remains hypothetical and unclear how this materialised. [↑](#footnote-ref-346)
347. Both Meissel 2004, op.cit. (n. 12), 263 and Fleckner 2010, op. cit. (n. 10), 359 mention also K. Adler, *Zur Entwicklungslehre und Dogmatik des Gesellschaftsrechts* (Berlin 1895), 7–8 who accordingly to them said that since a partner would remain partner, notwithstanding a transfer of all of his part in the *res communis*, he would always remain involved in the distribution of gains (and losses) due to the partnership agreement. Both do not think this applied to the Roman partnership. [↑](#footnote-ref-347)
348. Meissel 2004, op.cit. (n. 12), 208, thinking, apparently, of a *depositum irregulare*, with interest established by stipulations. It is not clear how such *deposita* could be attractive, or be transferred. [↑](#footnote-ref-348)
349. Of course their portions could be called *partes* too and perhaps some sold their entire portion. [↑](#footnote-ref-349)
350. *Dig.* 17.2.59pr., with moderation: if the *redemptura* depended on the personal contribution of the deceased, his heir might not be acceptable. [↑](#footnote-ref-350)
351. See Fleckner 2010, op. cit. (n. 10), 473 note 110 with this and other texts. [↑](#footnote-ref-351)
352. Particulary on basis of Cic. *Vat.*, 12.29. See Fleckner 2010, op. cit. (n. 10), 450 –459, 455, n. 54, gives a survey of all authors since 1835 up till 2009 who assume share companies (‘Aktiengesellschaften’) and stock markets, without, however, any evidence. On 455, n. 55 he lists those authors who are skeptical (amongst whom Meissel). The most recent author is U. Malmendier, *Societas publicanorum* (Köln/Weimar/Wien 2002), who makes a daring comparison with the modern stock exchanges in U. Malmendier, ‘Law and finance at the origin’, *Journal of Economic Literature* 47 (2009), 1076, 1089. Similarly in Malmendier 2005, op.cit. (. 28), 32: anticipation of the modern corporation and the use of fungible shares and limited liability. Limited liability existed indeed through the *actiones adiecticiae qualitatis* but that was not connected to shares. See for the ringing refutation of her and other authors supporting this view Fleckner’s critique as referred to in the following note, also 474, n. 118. [↑](#footnote-ref-352)
353. Fleckner 2010, op. cit. (n. 10), 459–462 gives a survey of the authors, with again Malmendier 2002, op.cit. (n. 43), 249. [↑](#footnote-ref-353)
354. Fleckner 2010, op. cit. (n. 10), 462–485 on literary sources, 485–494 on legal sources, with 494 his conclusion; and part. 471, n. 102 on Malmendier’s errors, 485 on literary sources, 485–494 on legal sources, with 494 his conclusion; and part. 471, n. 102 on Malmendier’s errors. [↑](#footnote-ref-354)
355. See Meissel 2004, op.cit. (n. 12), 275ff; for the continuation see 211–215. [↑](#footnote-ref-355)
356. B. Sirks, ‘Chirographs: negotiable instruments?’, *Zeitschrift der Savigny-Stiftung rom. Abt.* 133 (2016), 265–285. The trade in these was apparently such that the emperor Anastasius fixated their value at the price paid, regardless of their nominal value. [↑](#footnote-ref-356)
357. Fleckner 2010, op. cit. (n. 10), 485–494. [↑](#footnote-ref-357)
358. Fleckner 2010, op. cit. (n. 10), 488. [↑](#footnote-ref-358)
359. Fleckner 2010, op. cit. (n. 10), 450ff, notwithstanding his remarks on the *communio* on 356–357, focuses solely on transferability of partnership. As sole source for this his Text 16 remains (*Dig.* 39.4.94, at 494) but again this is not pertinent for such an interpretation. [↑](#footnote-ref-359)
360. In practice: although shareholders have, as owners of a company, the ultimate right to define the management of it, for many shareholders their investment is merely a capital investment comparable with investing in bonds, and this certainly if they have certificates. [↑](#footnote-ref-360)
361. As Fleckner 2010, op.cit. (n. 10) does, though be it with great reserves since he also acknowledges the lack of sources for this interpretation. [↑](#footnote-ref-361)
362. \* I would like to thank Prof. Koenraad Verboven and David Djaoui for their comments and suggestions, that have improved this piece immeasurably. Any errors that remain are, of course, my own responsibility.

 R. Fiori, ‘La Definizione Della “*Locatio Conductio”* g*iurisprudenza romana e tradizione romanistica* (Naples 1999), 286; ‘Forme e regole dei contratti di trasporto marittimo nel diritto romano’, *RDN* 49-1 (2010), 149–176; ‘L’allocazione del rischio nei contratti relativi al trasporto’ in E. Lo Cascio & D. Mantovani (eds.), *Diritto romano e economia. Due modi di pensare e organizzare il mondo (nei primi tre secoli dell’Impero)* (Pavia 2018), 507-567; ‘The allocation of risk in carriage-by-sea contracts’, in E. Mataix Ferrandiz & P. Candy (eds.), *Roman Law and Maritime Commerce* (Edinburgh 2022); P. Du Plessis. *Letting and Hiring in Roman Legal Thought : 27 BCE - 284 CE* (Leiden 2012), 12-13. For the use of *locatio conductio* for the lease of imperial domains, see Dalla Rosa in this volume. [↑](#footnote-ref-362)
363. *Dig.* 19.2.1.1. (Ulp. *ad ed*.34)*.* For a bibliography on *ius gentium,* see G. Lombardi, *Ricerche in Tema Di ‘Ius Gentium’* (Milan 1946); P. Frezza. *Ius Gentium* (Padua 1995); F. De Martino, ‘Variazioni postclassiche del concetto romano di ius gentium’, in *Diritto economia e societa nel mondo romano. Diritto pubblico* II (Naples 1996), 53ff.; G. Falcone. *Il rapporto ius gentium - ius civile e la societas vitae* (Palermo 2013); R. Fiori, ‘La nozione di *ius gentium* nelle fonti di età repubblicana’, in *Scritti per Alessandro Corbino* 3 (Tricase 2016), 109‑129. [↑](#footnote-ref-363)
364. The Roman concept of obligation implied that when an obligation is established, there is a legal tie by which a person could be considered liable for the unfulfilment of a required duty. On the Roman law of obligations, see also Kay in this volume. [↑](#footnote-ref-364)
365. C. Cascione, *Consensus: problemi di origine, tutela processuale, prospettive sistematiche* (Naples 2003), 16‑17. [↑](#footnote-ref-365)
366. *Dig.* 14.2.2pr. (Paul. 34 *ad ed.*) seems to indicate that, as in the case of the sale contract (*emptio venditio*), the *LC* agreement is complete once the price is established. [↑](#footnote-ref-366)
367. Fiori op.cit. (n. 1), 286-290. [↑](#footnote-ref-367)
368. *Dig.* 19.2.14. *Ulp. 71 ad (ed.), Qui ad certum tempus conducit, finito quoque tempore colonus est: intellegitur enim dominus, cum patitur colonum in fundo esse, ex integro locare, et huiusmodi contractus neque verba neque scripturam utique desiderant, sed nudo consensu convalescunt.* See R. Yaron, ‘Remarks on Consensual Sale’; *RLT* 59 (2004) 61ff.; P.J. Du Plessis, ‘The Roman concept of *Lex Contractus*’, *RLT* 3 (2006), 79, 83. [↑](#footnote-ref-368)
369. *Dig.* 2.14.1.3-4 (Ulp. 4 *ad ed.*). [↑](#footnote-ref-369)
370. *Dig.* 46.3.95.12 (Pap. 28 *quaest.*); C.A. Cannatta, ‘La “distinction” Re-Verbis-Litteris-Consensu et Les Problémes de La Pratique’, in *Sein Und Werden Im Recht. Festgabe Für Ulrich von Lübtow* (Amsterdam 1995), 431‑455; R. Fiori, ‘*Contrahere* e *solvere obligationem* in Q. Mucio Scevola’, in C. Cascione, and C. Masi Doria (eds.), *Fides humanitas ius : studi in onore di Luigi Labruna* (Naples 2007), 1974; ‘The Roman conception of contract’, in T.A.J. McGinn (ed.) *Obligations in Roman Law. Past, Present, and Future* (Ann Arbor 2012), 54; ‘“Contrahere” in Labeone.’ in *Carmina Iuris. Mélanges En l’honneur de Michel Humbert* (Paris 2012), 313 n.7. [↑](#footnote-ref-370)
371. For another more simplified reconstruction of the elements composing a maritime loan see D. Jones, *The Bankers of Puteoli, Finance, Trade and Industry in the Roman World* (Stroud 2006), 111-113. [↑](#footnote-ref-371)
372. *Dig.* 14.1.1pr-2 (Ulp. 28 *ad ed.*); *Dig.* 14.1.1.12 (Ulp. 28 *ad ed.*). [↑](#footnote-ref-372)
373. *Dig.* 14.1.1.12 (Ulp. 28 *ad ed.*); *Dig.* 19.2.13.1 (Ulp. 32 *ad ed.*). In fact, the *ostraca* from the Ilôt de l’Amirauté (Carthage) indicate that these carriers were registered with their name and role, *cf.* T. Peña, ‘The mobilisation of state olive oil in Roman Africa: The evidence of the fourth century ostraka from Carthage’ in *Carthage Papers. The Early Colony’s Economy, Water Supply, a Public Bath, and the Mobilization of State Olive Oil* (Portsmouth 1998), 123ff. Some papyri indicate the declarations of the carriers once arrived *at* their destination (e.g. *P.Oxy.* 49. 3481; *P.Giss.* 285). [↑](#footnote-ref-373)
374. *Dig.* 14.1.1.12 (Ulp. 28 *ad ed.*); *FIRA* 3.154-155. [↑](#footnote-ref-374)
375. *TPSulp*. 106 (*ab Sidon(e) parasem[o* ---). [↑](#footnote-ref-375)
376. *Dig.* 14.2.10.2 (*Lab. 1 pit a Paulo epit.)*; *Dig.* 14.1.1.12 (Ulp. 28 ad ed.); *Dig.* 19.2.61.1 (*Scaev. 7 digest); TPSulp*.106 (*modium XVIII pl[u]s minus*). [↑](#footnote-ref-376)
377. *Dig.* 14.2.10.2 (*Lab. 1 pit a Paulo epit.); Dig.* 19.2.15.6 (Ulp. 32 *ad ed*.). [↑](#footnote-ref-377)
378. For example, D. Gaurier, *Droit maritime Romain* (Nantes 2004), 129-132; E. Damiani. *Contratto di assicurazione e prestazione di sicurezza* (Milan 2008), 64. Some authors mistakenly confuse maritime loans or provisions in case of jettison with the existence of a concept of insurance in Roman law. See P. Huvelin, *Études d’histoire du droit commercial romain* (Paris 1929), 95ff.; D. C. Gofas, ‘Encore une fois sur la Tabula pompeiana 13. Essai d’une interprétation nouvelle’, *Symposion* 93(1994), 251-260; G. Thür, ‘Die Aestimationsabrede im Seefrachtvertrag’, *Symposion* 92 (1993), 267-271; E. García Vargas, ‘Los *tituli picti* de las ánforas romanas de salazones y salsas de pescado: Estructura, función, protagonistas’, *Amphorae ex Hispania* (2016), 121. A maritime insurance consists on a sum of money paid beforehand by a society or an individual in order to prevent suffering the full economic consequence in case of shipwreck. Instead, a maritime loan constitutes a sum of money given to pay for a maritime venture; in addition the dispositions regarding jettison are meant to compensate the loss of some for the benefit of others in cases where cargo needed to be thrown overboard to prevent a ship from perishing. [↑](#footnote-ref-378)
379. *Dig.* 14.1.1.12. (Ulp. 28 *ad ed.); Dig.* 19.2.13.1. (Ulp. 32 *ad ed.).* [↑](#footnote-ref-379)
380. As detailed in for example *Dig.* 14.1.1pr. (Ulp. 28 *ad ed*). [↑](#footnote-ref-380)
381. See title 14.2.2 of the Digest. [↑](#footnote-ref-381)
382. See J.-J. Aubert, ‘Commerce’, in D. Johnston (ed.). *The Cambridge Companion to Roman Law* (Cambridge 2015) 233-234. [↑](#footnote-ref-382)
383. Fiori 1999, op.cit. (n.1), 559-562. [↑](#footnote-ref-383)
384. The model follows *Dig.* 14.2.10.1 (*Lab. 1 pit a Paulo epit.)* and *Dig.* 19.5.1.1 (Pap. 1 *quaest*). [↑](#footnote-ref-384)
385. The model follows *Dig.* 19.2.13.1 (Ulp. 32 *ad ed*) and *Dig.* 19.2.15.6 (Ulp. 32 *ad ed*). [↑](#footnote-ref-385)
386. For the text see J. Andreau et al.,‘*CIL* IV 9591: un transport de blé entre Ostie et Pompéi’, *MEFRA-Antiquité* 129-1 (2017); for a discussion see J. Andreau et al., ‘*CIL* IV 9591: un transport de blé entre Ostie et Pompéi. II’, *MEFRA-Antiquité* 131-1 (2019). [↑](#footnote-ref-386)
387. *Cf.* A. Varone, ‘Schede di pitture e anforette (deigmata)’, in G. Stefani (ed) *Cibi e sapori a Pompei e dintorni* (Pompei 2005), 104, who linked this artefact with type IX of Schone-Mau or the Dressel 28. Some of the samples are quite differently shaped than transport amphorae (e.g. D. Djaoui and N. Tran, ‘Une cruche du port d’Arles et l’usage d’échantillons dans le commerce de vin Romain’, in ‘*Origines’: Percorsi Di Ricerca Sulle Identità Etniche nell’Italia Antica – Identity Problems in Early Italy: A Workshop on Methodology – Varia – Regards Croisés* (Rome 2014), 2-12; D. Djaoui, ‘Découverte d’un pot mentionnant la société des DD Caecilii dans un contexte portuaire situé entre 50-140 av. J-C’, in *Colloque International de La SECAH, Ex Officina Hispana* (Braga 2014) 693-710, but others, such as the one identified by M. Poux, ‘Du vin Marsellais pour Staius Regillus: Un témoignage du commerce Rhodanien et de la colonisation des campagnes entre Lyon et Vienne’, *Archaeologia Mosellana* 9 (2014), 405-420, are identified as an amphora Dressel 2-4, indicating that a sample-recipient could be shaped in various forms, and that it is its epigraphic *apparatus* and context of distribution that will provide the key to identify it as such. [↑](#footnote-ref-387)
388. A. Wallace-Hadrill, *Houses and Society in Pompeii and Herculaneum* (Princeton 1994), 191-192. [↑](#footnote-ref-388)
389. Varone 2005, op.cit. (n. 26), 105; Andreau et al.2017, op.cit. (n. 25), 3. Another sample-recipient found in Marseille (dating 150-250 CE) refers to *Rubrio,* in this case also referring to the recipient. B. Liou and M. Morel, ‘L’orge des Cavares: Une amphorette à inscription peinte trouvée dans le port antique de Marseille’, *RAN* 10 (1977), 192. [↑](#footnote-ref-389)
390. Some contracts mention the destination where the cargo might be stored in a warehouse, since the cargo was often used as a warranty for a pledge. *Cf. Dig.* 19.2.11.3 (Ulp. 32 *ad ed.*), the *ostraca* of the ílot de l’amirauté in Carthage (Peña 1998, op.cit. (n.12) 162), *TPSulp.* 45-46. See in this respect: G. Camodeca, *Tabulae Pompeianae Sulpiciorum (TPSulp.) Ed critica,* (Roma 1999), 121-126; E. Jakab, ‘*Horrea*, sûretés et commerce maritime dans les archives des Sulpicii’, in J.P. Coriat et al. (eds.). *Inter Cives Necnon Peregrinos. Essays in Honour of Boudewijn Sirks* (Gottingen 2014), 332ff. [↑](#footnote-ref-390)
391. Although we cannot be certain in this particular case samples traveling separately from their loads were not rare even in earlier periods, as shown, for instance, in the Ptolemaic Egyptian archive of Zeno (third cent. BCE). See A. Bresson, *L’économie de la Grèce des cités: Les espaces de l’échange* (Paris 2008), 79-82. [↑](#footnote-ref-391)
392. Personal observation by Mr. Djaoui. See for instance the text on a Baetican amphorae at the Musée Départemental de l’Arles Antique (n.inv. RHO.90.00.74). [↑](#footnote-ref-392)
393. D. Djaoui, G. Piques and E. Botte, ‘Nouvelles données sur les pots dits “à garum” du Latium, d’après les découvertes subaquatiques du Rhône (Arles)’ in E. Botte and V. Leichs (eds.), *Fish & ships. Production et commerce des salsamenta durant l’Antiquité* Aix-en-Provence 2014), 177, 183; D. Djaoui and C. Capelli, ‘Objets d’importation ou objets personnels? La dotation de bord des marins au regard du grand commerce’,in *SFECAG, Actes du Congrès de Narbonne* (Marseille 2017), 120. [↑](#footnote-ref-393)
394. M. Ossana, ‘Games, banquets, handouts, and the population of Pompeii as deduced from a new tomb inscription’, *JRA* 61 (2018), 310-322; J. Bodel et al., ‘Notes on the elogium of a benefactor at Pompeii’, *JRA 32* (2019), 148-182. [↑](#footnote-ref-394)
395. J. Bodel et al. 2019, op.cit. (n. 33), 165. [↑](#footnote-ref-395)
396. M. Della Corte, ‘Pompei. Scoperte epigrafiche (Reg. I, ins. VII-VIII e varie)’, *NSA* (1946), 84-129; R. Marichal, ‘Paléographie latine et française’, *Annuaires de l’École pratique des hautes études* 107-1 (1974), 524-27; R. Marichal and J. Dufour ‘Paléographie latine et française’, *École pratique des hautes études. 4e Section, Sciences historiques et philologiques* 100-1 (1968) 295–316.; A. Varone, ‘L’anforetta del grano’, in P. Parisi Presicce and O. Rossini (eds.), *Nutrire l’impero. Storie di alimentazione da Roma e Pompei* (Roma 2015) 21-22; Andreau et al.2017, op.cit. (n. 25). [↑](#footnote-ref-396)
397. For a complete study of the inscription, see E. Mataix Ferrándiz, ‘CIL.IV.9591: Propuesta reconstructiva de una *locatio conductio* para el transporte de mercancías por mar’, in V. Revilla and Aguilera Martin, A. *Estudios homenaje al profesor Jose Remesal Rodriguez* (Barcelona 2019), 787-820. [↑](#footnote-ref-397)
398. For the critical apparatus, see: *1. tral vel trav pro translatum vel transvectum XVCC* (Della Corte)2. *In n̄(ave) C. Umbr(ici) Amprioc(i)* (Della Corte); *cumbaroAmpriocidmagister nauisin n̄(ostra) cumban̄(ostra)estisamp* (Marichal); 3. *Parasemum* (Marichal); *tutelariri tutela Iouis et* (Marichal); 6. *Vectores* (Varone) ; *[e]stis; sol(ven)do* (Della Corte) 8. *S(ine) F(raude)* (Andreau et al) ; [e]*stis* (Della Corte) [↑](#footnote-ref-398)
399. I propose *accepta* as a reconstruction, bearing in mind the legal sense of this verb to indicate the acceptance of money (*pecunia*), see. *Dig.* 2.14.47.1 (Scaev. 1 *dig.*); *Dig.* 4.2.9.7 (Ulp. 11 *ad ed*); *Dig.* 4.4.47.1 (Scaev. 1 *resp*); *Dig.* 13.7.6 (Pomp. 35 *ad Sab.*); *Dig.* 14.3.5.9 (Ulp. 28 *ad ed.*); *Dig.* 15.1.35pr. (Iav. 12 *ex cassio*); *Dig.* 15.3.3.4 (Ulp. 29 *ad ed.*) *Dig.* 16.1.17.2 (Afr. 4 *quaest.*); also, *TPSulp*. 63 (=*AE* 1982, 195). Especially referring to *vectura*, *Dig.* 5.3.29pr (Ulp. 15 *ad ed.*); *Dig.* 19.2.15.6 (32 ad ed). De Romanis, in Andreauet al. 2017, op.cit. (n. 25), 2 proposes *a(ccipienda)*, but this term, when used to indicate that money or *vectura* is taken, appears in the sources written as *accepta,* see also *VIR* (vol.1)*,* 80-97, esp.87. Another possible option would be *a(dsignata)*, but this term just appears in the legal sources to refer to corporal things (*res),* see. *Dig.* 4.9.1.8 (Ulp. 14 *ad ed.*); *Dig.* 30.33 (Paul 3 *reg.*); *Dig.* 18.1.62.2 (Mod. 5 *reg*.). [↑](#footnote-ref-399)
400. I thank Koenraad Verboven for his note on this: “We are probably dealing here with African grain, since the shipper is from Clupea. A sea voyage from Clupea to Ostia takes only 4 to 5 days. The market price at Ostia would be around 3 to 4 sesterces per *modius* in normal circumstances (much higher in bad years). So, 15,000 *modii* (deducting the 200 *modii* free of charge) would work out as 45,000 – 60,000 sesterces; two percent of that would be 900-1200 sesterces. Even if we consider a week lost loading and unloading the ship that is a respectable profit.” [↑](#footnote-ref-400)
401. Another meaning of the word is ‘copy’, as mentioned in several classic authors (e.g. Plin. *HN.* 6.62; Fronto, *Ep*. 3.10.2.6), and one inscription of *T.Vind.* 89, seeM.A. Speidel, *Die Römischen Schreibtafeln von Vindonissa: Lateinische Texte Des Militärischen Alltags Und Ihre Geschichtliche Bedeutung* (Baden 1996), 237. [↑](#footnote-ref-401)
402. The ‘*s’* interspersed in the word *exsemplar* is a mistake of the amanuensis, and is not attested in any other epigraphic source; *exemplar* without the adjectival *ante* is also found written on a small sack conserved in a collection from Cairo, published by Gueraud, *AE* 1934, 6; O. Gueraud, ‘Deux documents relatifs au transport des céréales dans l’Egypte Romaine’, *Annales du service des antiquités de l’Égypte* 33 (1933), 62-64, reading: *EXEMPLAR/ HORDEI MISSI PER CHAE/ REMONAM ANUBIONIS GUBERNATOREM. EX NO/MO MEMPHITE A[D] METRO/POLIN.* [↑](#footnote-ref-402)
403. Sall. *Iug*. 76.5; also, in *CIL* 4.5894 (see Marichal 1974, op.cit (n. 35) 524; Andreau et al. 2017, op.cit. (n. 25), 4. [↑](#footnote-ref-403)
404. P. Mayerson, ‘Standardization of wine measures at Oxyrhynchus in the third century CE and its extension to the Fayum’, *BASP* 37 (2002), 105-109. [↑](#footnote-ref-404)
405. E.g. *P.Cair.Zen.* 2.59190; *BGU* 8.1742; 18.1.2736; 2738; 2737. However, the samples could also be used to invite a potential buyer to try a product and convince him to buy it. This practice is already attested in the Hellenistic period, in the Zenon archive, see E. Campbell Cowan (ed.), *Zénon Papyri, 5 vol, Catalogue général des antiquités égyptiennes du Musée du Caire*, (Cairo 1925–1940), and in the references to Athens’ *deigma* by many sources, such as: Plut. *Pomp.* 42.11; Xen. *Hell.* 5.1.21; Dem. 35.29; 50.24; and: D. C. Gofas, ‘La vente sur échantillon à Athènes d’après un texte d’Hypéride’, in *Études de Droit grec des affaires antique, byzantin et post-Byzantin* (Athens 1993), 79-85.; G. Casanova, ‘Campione: Testimonianze del vocabolo, con un papiro inedito’, *Aegyptus* 75-1 (1995), 28-36.; Bresson 2008, op.cit. (n. 30), 79-82; G. Geraci, ‘Sekomata e deigmata nei papiri come strumenti di controllo delle derrate fiscali e commerciali’, in V. Chankowski (ed.) *Tout vendre, tout acheter. Structure et équipements des marchés antiques* (Paris/Bordeaux/Athens 2012), 347-363; C.P. Dickenson. *On the Agora: The Evolution of a Public Space in Hellenistic and Roman Greece (c. 323 BC – 267 AD)*, (Leiden 2016), 253. [↑](#footnote-ref-405)
406. Gueraud 1933, op.cit. (n.41); O. Gueraud, ‘Un vase ayant contenu un echantillon de blé (*deigma*)’, *JJP* 4(1950), 107-115; Liou and Morel 1977, op.cit. (n.28), 189-197.; Casanova 1995, op.cit. (n.44), 30-31; D. Vera, ‘Un’ iscrizione sulle distribuzioni pubbliche di vino a Roma (*CIL* 6.1785=31931)’, in M. Silvestrini, T. Spagnuolo Vigorita and G. Volpe (eds.), *Studi in onore di Francesco Grelle* (Bari 2006), 303–317. [↑](#footnote-ref-406)
407. Sources such as the Claudian plebiscite (Liv. 21.6) or the Claudian edict (Gai. 1.32) mention amphora and *modius* as standard measures, the *lex silia de ponderibus publicis* (Fest. 288 L; *FIRA* 1.3.1) from 287‑218 BCE mentions the equivalence established for *modius* and amphora. Many sources use *modius* as a measuring unit for grain, see *Tab. Vind.* 180; *Dig.* 19.2.61.1. *Scaev. 7 digestorum; Dig.* 18.1.35.5 (Gai. 10 *ad ed.prov.*); *Dig.* 19.2.31 (Alf. 5 *a Paulo epit.*); *Dig.* 45.1.74 (Gai. 8 ad (ed.), provinc.); *P.Bing.* 77, *inter alia.* [↑](#footnote-ref-407)
408. Andreau 2017, op.cit. (n.25), 333-334 who surveys the various attestations of the word *cumba* in our sources. [↑](#footnote-ref-408)
409. e.g. *Dig.* 14.2.10.2 *(Lab 1 pith a Paulo epit.); Dig.* 19.2.61.1 (Scaev. 7 *dig.*). [↑](#footnote-ref-409)
410. Evidence for this comes from learning that sailors used ingots for ballast to balance ships were aware of issues such as the depth of the waterways or the process of transhipping, and that they considered weight in the case of jettisoning goods, e.g. *Dig.* 14.2.2.2 (Paul 34 *ad ed*.); *Dig.* 14.2.10pr. (*Labeo 1 pith a Paul epit*.); *Dig.* 19.2.19.7 (Ulp. 32 *ad ed.*). [↑](#footnote-ref-410)
411. The importance of this practice is underlined by L. Casson, *Ships and Seamanship in the Ancient World* (New Jersey 1995), 344, n. 2, with abundant literature. [↑](#footnote-ref-411)
412. *Dig.* 14.1.1.12. (Ulp. 28 *ad ed.*). [↑](#footnote-ref-412)
413. *Dig.* 14.2.10.1 (Labeo libro 1 *pithanon a Paulo epit.*). [↑](#footnote-ref-413)
414. *Dig.* 5.1.19.1-2. (Ulp. 60 *ad ed.*). [↑](#footnote-ref-414)
415. Compare*Dig.* 19.2.31 *In navem Saufeii cum complures frumentum confuderant*; see also navigation contracts in papyri showing ships being identified by their owner’s name (e.g. *P.Oxy.* 45.3250; *P.Oxy. Hels.* 37; and most of all *P.Bing.* 77). The contract preserved in *TPSulp.* 106, describes a ship by its owner, its capacity (18,000 *modii*),and its *parasemon*. [↑](#footnote-ref-415)
416. G. Stefani and G.Di Maio, ‘Considerazioni sulla linea di costa del 79 d.C. e sul porto dell’antica Pompei’, *Rivista di Studi Pompeiani* 14 (2003), 141-195; E. Curti. ‘Le aree portuali di Pompei: nuovi dati’, in V.Scarano Ussani, *Moregine. Suburbio ‘portale di Pompei’* (Napoli 2005), 51-76. [↑](#footnote-ref-416)
417. Or rather perhaps*: ante [e]xenplar tritici / in nave Cn(aei) Senti (H)omeri / Ti(beri) Claudi Orp(h)ei / vect(ura)*; Marichal 1974, op. cit. (n.35), 524. [↑](#footnote-ref-417)
418. The place corresponds to Clipea (Aspis). *Cf.* [*https://pleiades.stoa.org/places/314892*](https://pleiades.stoa.org/places/314892)*.*  [↑](#footnote-ref-418)
419. The business manager’s assignment was spelled out in a bill or charter called *lex praepositionis,* referred to by Ulpian in *Dig.* 14.1.1.12 (Ulp. *ad ed.*28). Unfortunately, we do not have any documents attesting to this sort of contract, see J.-J. Aubert, *Business Managers in Ancient Rome* (Leiden 1994), 10-13. [↑](#footnote-ref-419)
420. Andreau et al.,op.cit. (2019) (n. 25), 2. [↑](#footnote-ref-420)
421. *Dig.* 13.4.7pr (Paul 28 *ad ed*.); G. Branca, ‘Adempimento’, in *ED* I (Milan 1958), 548-55; other authors, such as W.W. Buckland. *A Textbook of Roman Law from Augustus to Justinian* (Cambridge 1921), 538, quote *Dig.* 13.4.9 (Ulp. 47 ad Sab.), but that text refers to a *stipulatio*, which constitutes a verbal and not a consensual obligation as was the case with the *locatio conductio*. Concerning the *locus solutionis*, see F. Amarelli, *Locus solutionis. Contributo alla teoria del luogo dell’adempimento in diritto romano* (Naples 1984), 16-17; B. Gomez Periñán, ‘*Forum debitoris* y locus solutionis’, *SDHI* 67 (2001), 317–349; F. Pulitanò. *De eo certo loco. Studi sul luogo convenzionale dell’ adempimento nel diritto romano* (Milan 2009), 336-337. [↑](#footnote-ref-421)
422. *Dig.* 5.1.38 (Lic. 4 *reg*) *Praeterea quod pondere aut numero aut mensura continetur, ibi dari debet ubi petitur, nisi si adiectum fuerit ‘centum modios ex illo horreo’ aut ‘vini amphoras ex illo dolio’.* [↑](#footnote-ref-422)
423. The place of fulfilment of the obligation is also attested in documents such as: *FIRA* 3.475-476 (*P.Grenf.* 2.108); *FIRA* 3.479-480 (*P.Oxy.* 1.44); K.A. Worp, ‘Documents on transportation by ship’, *ZPE* 20 (1976), 157‑165; Id., ‘Cair. Preisigke 34: A New Edition’, *Bulletin of the Egyptological Seminar* 1 (1979), 95-103. [↑](#footnote-ref-423)
424. On the allocation of risks of this sort of transport, see G. Purpura, ‘On the Roman documentation concerning shipping in bulk’, in E. Mataix Ferrandiz and P. Candy (eds.), *Roman Law and Maritime Commerce* (Edinburgh 2022). [↑](#footnote-ref-424)
425. E.g. Gai. 3.142; *Dig.* 19.2.2pr; Iust. *Inst.* 3.24. [↑](#footnote-ref-425)
426. As indicated also by D. Johnston, *Roman Law in Context* (Cambridge 1999), 80. [↑](#footnote-ref-426)
427. *Dig.* 19.2.15.6 (Ulp. 32 *ad ed.*). [↑](#footnote-ref-427)
428. *Dig.* 14.2.10pr (Labeo 1 *pithanon a Paulo epit.*). [↑](#footnote-ref-428)
429. *Dig.* 19.2.61.1 (Scaev. 7 *dig.*). [↑](#footnote-ref-429)
430. If we accept the proposed hypothesis of Andreau et al. 2019,op.cit. (n. 25). [↑](#footnote-ref-430)
431. E. Longo, ‘Pagamento’, in *NNDI* XII (Turin 1965), 316-321. [↑](#footnote-ref-431)
432. In archaic times, this *solutio* required the performance of a liberating act, as in the case of *nexum,* which bound a debtor in slavery; or as in the *solutio per aes et libram*, which involved performing a complex and formalistic procedure (*solutio imaginaria*). SeeGai. 3.169; 3.171; 3.173; *Dig.* 46.3.54 (Paul 56 *ad ed.*). Initially, these acts had no formalities, but, according to S. Cruz, *Da “*solutio*”. Terminologia, conceito e caracteristicas, e analise de varios institutos afins. I Epocas arcaica e classica* (Coimbra 1962), 23ff, they progressively assumed them. *Solutio* later evolved into payment for the delivery of a quantity or a thing, G. Melillo, *In solutum dare: contenuto e dottrine negoziali nell’adempimento inesatto* (Naples 1970), 57ff.; M. Sargenti, ‘Pagamento’, in *ED* 31 (Milan 1981), 533; also Branca 1958, op.cit(n. 60), 549, quoting Gai. 3.168; *Dig.* 42.1.4.7 (Ulp. 58 *ad ed.*); *Dig.* 46.3.54 (Paul 56 *ad ed.*). [↑](#footnote-ref-432)
433. *Solutio* may sometimes be equated with the *satisfactio*, which roughly refers to carrying out an obligation of any kind (e.g. *Dig.* 18.1.19 (Pomp *ad Quint.*)). However, this term is sometimes also opposed to *solutio*, when it refers to other types of fulfilment of obligations, with a real and effective character. See *Dig.* 46.3.52 (Ulp. 14 *ad ed.*); *Dig.* 50.16.176 (Ulp. 45 *ad ed.*); *TPSulp.* 63; *TPsulp*. 79; Cruz 1962, op.cit. (n. 71), 110ff. [↑](#footnote-ref-433)
434. *Dig.* 50.26.176 (Ulp. 45 *ad. Sab)*; *Dig.* 46.3.54 (Paul. 56 *ad ed.*). [↑](#footnote-ref-434)
435. *Dig.* 46.3.80 (Pomp. 4 *ad Quintum Mucium*). [↑](#footnote-ref-435)
436. R. Zimmerman. *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford 1996), 758. See also chapter five in this volume. [↑](#footnote-ref-436)
437. *Vid. Tab. Vind.* 615; 649=*AE* 1994, 1134; *Dig.* 14.2.10.pr. (Lab 1 *pith a Paulo epit*). [↑](#footnote-ref-437)
438. Also, Andreau et al. 2019,op.cit. (n. 25), 8. [↑](#footnote-ref-438)
439. e.g. *Tab. Vind.* 180; *Dig.* 18.1.35.5 (Gai. 10 *ad ed prov.*). [↑](#footnote-ref-439)
440. Veg. *Mil*. 4.39. [↑](#footnote-ref-440)
441. By necessity I refer to the different remedies proposed by Roman Emperors to solve famines, as happened in the case of Claudius, see Suet. *Claud*. 18-19. [↑](#footnote-ref-441)
442. J. Beresford, *The Ancient Sailing Season* (Leiden 2013), 32-36. [↑](#footnote-ref-442)
443. Varone 2005, op.cit. (n. 26), 105; Andreau et al. 2017, op.cit. (n. 25), 8. [↑](#footnote-ref-443)
444. Della Corte 1946, op.cit. (n. 35), 111. [↑](#footnote-ref-444)
445. Andreau et al. 2017, op.cit. (n. 25), 12, n. 31, cites *Dig.* 35.4.32 instead of *Dig.* 35.1.32 (Afr. lib IX *quaest*). [↑](#footnote-ref-445)
446. *Dig.* 37.6.1.14 (Ulp. 40 *ad ed.*). [↑](#footnote-ref-446)
447. *Dig.* 50.16.131pr (Ulp. III *ad legem Iuliam et Papiam*). [↑](#footnote-ref-447)
448. *Dig.* 4.6.26.2 (Ulp. 12 *ad ed*); *Dig.* 47.10.32pr (Ulp. 42 *ad Sab.*); *Dig.* 48.2.8pr (Macer 2 de *publ. iudic*.) [↑](#footnote-ref-448)
449. *Dig.* 12.6.26.12 (Ulp. 26 *ad ed*.); *Dig.* 35.2.1pr. (Paul. l. s. *ad l. Falcid*.); *Dig.* 40.9.10pr (Gai. 1 *rer. cott. sive aur.*) [↑](#footnote-ref-449)
450. *Dig.* 29.4.6.8 (Ulp. 50 *ad ed*); *Dig.* 48.5.26pr (Ulp. 2 ad leg. *Iuliam de adult.*) [↑](#footnote-ref-450)
451. As in the case of adoption, *Dig.* 37.6.1.14 (Ulp. 40 *ad ed*.); *Dig.* 40.9.5.2 (Iul. 64 *dig.*), Refers to a *sponsio*, which constitutes a verbal obligation (formalised by pronouncing some words). [↑](#footnote-ref-451)
452. E.g. *Dig.* 12.26.6 (Ulp. 26 *ad ed.*); *Dig.* 13.7.11.2 (Ulp. 28 *ad ed.); Dig.* 44.1.11 (Mod. 13 *resp.*); *Dig.* 46.3.58pr (Ulp. 80 *ad ed.*); *Dig.* 12.6.59 (Pap. 2 *defin*.); *Dig.* 18.2.4.6 (Ulp. 28 *ad Sab); Dig.* 46.3.16 (*Pomp. 15 ad Sab.); Dig.* 46.3.37 (Iul. 2 *ad Urseium Ferocem*) [↑](#footnote-ref-452)
453. Branca 1958, op.cit(n. 60), 551; seealso the various Pompeian *apochae* (receipts) from Iucundus’ bank compiled by Arangio-Ruiz in *FIRA* 3.400ff. [↑](#footnote-ref-453)
454. The reference of *solutio facta* in relation to the fulfilment of an obligation can be read in sources such as those quoted in n.85, as well as *Dig.* 13.3.4pr. (Gai. 9 *ad ed prov.*) [↑](#footnote-ref-454)
455. See e.g. *Dig.* 14.3.20 (Scaev. 5 *dig.*); *Dig.* 40.3.7 (Ulp. 27 *ad Sab*); *Dig.* 45.1.113 (Proc. *epist.* 2) [↑](#footnote-ref-455)
456. *CIL* 3.p 0950,13 (p 1058, 2215) = *IDR* 1.44. [↑](#footnote-ref-456)
457. There has been some debate concerning the relation between obligation and *consensus,* (theacceptance of a contract), in order to assess which of these concepts had a major role in making a contract binding for the parties involved.From the beginning of the twentieth century, some scholars rejected the role of *consensus* in favour of the idea of obligation. See, for example A. Pernice, ‘Parerga. III. Zue Vertragslehre der römischen Juristen’, *ZSS* 9 (1888), 195-260; S. Perozzi, *Dalle obbligazioni da delitto alle obbligazioni da contratto* (Bolonia 1915-1916). Responding to this, S. Riccobono underlines the importance of *consensus* for the contract (‘Dal diritto romano classico al diritto moderno, a proposito di *Dig.* 10, 3, 14 (Paul. 3 ad Plautium)’, in S*critti di diritto romano* 2 (Palermo 1964)). At the same time, scholars such as P. Bonfante, *Istituzioni di diritto romano* (Milan 1987); or E. Betti. *Istituzioni di diritto romano* (Padova 1962) established a theory by which they understood the importance of *consensus,* but mostly emphasized the role of obligation. The last few years have seen a growth in consensualist theories, by authors such as: F. Gallo, ‘Eredità di giuristi romani in materia contrattuale’, *SDHI* 49 (1989), 405ff.; A. Schiavone, *Giuristi e nobili nella Roma republicana* (Roma 1987), 68ff.; Zimmerman 1996, op.cit (n. 75), 23-34; Cascione 2003, op.cit. (n.4), 55ff., who all highlighted the historical context, the theories of individual jurists, and provided a more developed focus. Lately, Fiori’s work (1999, op.cit. (n. 1)), has been demonstrated to be essential because of its nuanced focus on individual jurists, concluding that Romans did not consider *consensus* as themost important element to make the different contracts binding. [↑](#footnote-ref-457)
458. Fiori 1999, op.cit. (n.1), 14ff.; Cascione 2003, op.cit.(n.4), 21; 292ff. [↑](#footnote-ref-458)
459. A similar case is presented by K. Czajkowski and B. Eckhardt, ‘Law, status and agency in the Roman Provinces’, *P&P* 241 (2018), 27, referring to the writing tablets from Alburnus Maior. [↑](#footnote-ref-459)
460. Fiori 1999, op.cit. (n.1), 515-527. [↑](#footnote-ref-460)
461. As affirmed by Andreau et al. 2019, op.cit. (n. 25), 6. [↑](#footnote-ref-461)
462. This is also connected with the peculiarities of grain transport, which followed specific distribution routes, probably managed by specialised traders, e.g. P. Erdkamp. *The Grain Market in the Roman Empire* (Cambridge 1995), 326. [↑](#footnote-ref-462)
463. For example, *TPSulp*. 78 a document that on the one hand includes a mixture of elements identified as typical of a ship lease contract, while on the other it presents details of the maritime loan. SeeCamodeca 1999, op.cit. (n. 29), 177-180. [↑](#footnote-ref-463)
464. The paper by E. Santamato, ‘Il termine *probatio* tra retorica, storia e diritto’, *Talia dixit* 7 (2012), 38 describes all the different meanings of *probatio*, but for our case we shall focus on its meaning in the context of procedure. In that sense, it refers either to the presentation of evidence to support an argument or to the approval by an authority (in this case a magistrate) of the evidence provided. Another related meaning would be the approval from the technician, corresponding to the *probatio operis,* the approval of the work leased by the Roman state. See S.D. Martin, ‘A reconsideration of *probatio operis*’, *ZRG* 103 (1986), 321. [↑](#footnote-ref-464)
465. D. Roebuck and B. de Loynes de Fumichon, *Roman Arbitration* (Oxford 2004), 91, 101, 108. T. Terpstra, ‘Roman law, transaction costs, and the roman economy: evidence from the Sulpicii archive’ in K. Verboven, K. Vandorpe and V. Chankowski (eds.), *Pistoi dia tèn technèn: Bankers, Loans and Archives in the Ancient World* (Leuven 2008), 369 indicating “business partners doubtless avoided lawsuits where they could”; id., *Trade in the Ancient Mediterranean: Private Order and Public Institutions* (Princeton 2018), 128. [↑](#footnote-ref-465)
466. See the work developed by the ERC project “Law, Governance and Space” (https://www.helsinki.fi/en/researchgroups/law-governance-and-space), and F. De Angelis, *Spaces of Justice in the Roman World* (Leiden 2010); R. Farber, *Römische Gerichtsorte. Räumliche Dynamiken von Jurisdiktion Im Imperium Romanum* (München 2014) and A. Russell, *The Politics of Public Space in Republican Rome* (Oxford 2016). [↑](#footnote-ref-466)
467. The well-known Hellenistic *dikai emporikai* were specific judicial procedures for commercial cases, as indicated by Bresson 2008, op.cit (n. 30), 90; E. M. Harris, ‘The meaning of symbolaion and maritime cases in Athenian law’, *Dike* 18 (2015), 7-36; contrary to what was manifested by E. Cohen, *Ancient Athenian Maritime Courts* (Princeton 2015), who thought that *dikai emporikai* constituted commercial courts that were dedicated to these sort of procedures. [↑](#footnote-ref-467)
468. *Dig.* 5.1.19.2 (Ulp. 60 ad ed.); *Dig.* 5.1.38 (Lic. 4 reg); *Cod. Theod.* 15.3.2. For the *Codex Theodosianus,* we know that in the fourth and fifth centuries CE, the *navicularii* used to be linked to a *forum*, this being a city and its port (*Cod. Theod.* 13.5.4). Other evidence is that of the mosaics of the *Piazzale delle Corporazioni* in Ostia (*CIL* 14.4549. 3; 10-12; 18-9; 34; 40) or the epigraphic record, confirming that *navicularii* were associated with the province from which they operated (e.g. *AE* 1913, 196; 208; *CIL* 3.14165, 08; *AE* 1955, 183). The same trend appears in Hadrian’s Athenian oil law, who indicated that if the fraudster who was trying to export a larger amount of oil than permitted had already left Athens when his fraud was discovered, the people should submit complaints to the city of origin of the shipping agent or the Emperor (*IG* 22.1100, ll. 46-47). [↑](#footnote-ref-468)
469. W.V. Andringa, ‘Cités et communautés d’expatriés installées dans l’empire romain: le cas des cives Romani consistentes’ in N. Belayche and S. C. Mimouni, *Les communautés religieuses dans le monde gréco-romain. Essais de définition* (Turnhout 2003), 53-54. [↑](#footnote-ref-469)
470. *Lex. Irn*. 19; *Dig.* 21.1pr. (Ulp. 1 *aed. cur*). See also: F. Serrao. ‘Impressa, mercato, diritto’, in E. Lo Cascio, *Mercati permanenti e mercati periodici nel mondo romano* (Bari 2000) 33, 37-40; E. Kondratieff, ‘Aediles’, in *Encyclopedia of Ancient History* (New York 2018), 1-2. [↑](#footnote-ref-470)
471. One famous inscription found in Beirut (*CIL* 3.14165 = *ILS* 6987), dating to the Severan period, displayed a complaint from the *navicularii* of Arles to the *praefectus* of the *annona* because their distribution operations were not properly surveyed by the authorities, causing them a loss. [↑](#footnote-ref-471)
472. Petr. *Sat*. 13.5-7. [↑](#footnote-ref-472)
473. W. Broekaert, ‘Freedmen and agency in Roman business’, in A. Wilson and M. Flohr (eds.), *Urban Craftsmen and Traders in the Roman world* (Oxford 2016), 222-253. [↑](#footnote-ref-473)
474. e.g.,*TPSulp.* 42-44, which, however, attests *emptiones cum stipulations duplae* for the sale of a slave (*res mancipi*) and differs therefore from our case, which concerns grain (*res nec mancipi*); seeCamodeca 1999, op.cit. (n. 29), 115-120. [↑](#footnote-ref-474)
475. e.g. *TPSulp.* 45-47, Camodeca 1999, op.cit. (n. 29), 121-127, which, however, include a pledge to guarantee the contract, implying the inclusion of a real contract, instead of merely the consensual obligation (?) of *locatio.* [↑](#footnote-ref-475)
476. e.g. *TBloomb*. 87, *cfr.* R.S.O. Tomlin, *Roman London’s First Voices. Writing tablets from the Bloomberg Excavations, 2010-2014* (London 2016), 152; or *TPSulp*. 80 (= *Tab. Pomp.* 47), cf. Camodeca 1999, op.cit. (n. 29), 184 and L. Bove, ‘*TPSulp*. 80 (=*Tab. Pomp.* 47): un *mandatum* per epistulam (con χειρέμβολον: Ulp. *Dig.* 4.9.1.3.)?’, in M. Silvestrini, T. Spagnuolo Vigorita & G. Volpe (eds.), *Studi in onore di Francesco Grelle* (Bari 2006), 21-25. [↑](#footnote-ref-476)
477. In G. Minaud, *La comptabilité à Rome: essai d’histoire économique sur la pensée comptable commerciale et privée dans le monde antique romain* (Lausanne 2005), 349, the author generally refers to *tabulae* as the format used for registering commercial accounts. [↑](#footnote-ref-477)
478. In this case, grain constitutes a *res fungibilis,* being things identified by their weight, number or measure (Gai. 3.90; *Dig.* 12.1.2.1 (Paul 28 *ad ed.*); *Dig.* 30.30pr (Ulp. 19 *ad Sab*)), which leads to a generic obligation, meaning that these goods should be identified in some way, such as by their amount or quality, *cf.* M. Marrone, *Iztituzioni di diritto Romano* (Palermo 2006, 3rd ed.), 280, 480*.* Also, G. Purpura, ‘Il χειρέμβολον e il caso di Saufeio: responsabilità e documentazione nel trasporto marittimo romano’, *AUPA* 57 (2014), 137-147, highlights the importance of marking the cargo to identify it, in order to prove the *receptum* and the liability of the shipper. I have developed this theory further in, E. Mataix Ferrandiz, *Explaining the Commerce of Roman Mediterranean Ports: The Evidence from scripta commercii and Law* (2 vols) (Southampton-Lyon 2018). [↑](#footnote-ref-478)
479. Quint. *Inst. Orat.* 5.10.2*;* the list is commented on by G. Pugliese, ‘La prova nel processo Romano classico’, *Jus* 11 (1960), 418-419. [↑](#footnote-ref-479)
480. *Dig.* 22.4.1 (Paul): *Instrumentorum nomine ea omnia accipienda sunt, quibus causa instrui potest: et ideo tam testimonia quam personae instrumentorum loco habentur*; see also *Dig.* 22.4.2 and 4-5. The importance of informal documents can vary in each case, depending on what the parties consider important to prove a transaction, especially in cases where we are probably dealing with arbitration or bilateral discussion. *Cf.* Sen. .*Ben*. 3.15.1-3. In this sense, Quint. *Inst Orat*. 5.9.1-2 argues that indications (*signa*), like *tabulae* or non-technical proofs, differ from arguments, as they are not ‘discovered’ by the orator but come to himas part of the case itself. [↑](#footnote-ref-480)
481. *Dig.* 22.4.4: *In re hypothecae nomine obligata ad rem non pertinet, quibus fit verbis, sicuti est et in his obligationibus, quae consensu contrahuntur: et ideo et sine scriptura si convenit, ut hypothecae sit, et probari poterit, res obligata erit de qua conveniunt. Fiunt enim de his scripturae, ut quod actum est per eas facilius probari possit: et sine his autem valet quod actum est, si habeat probationem, sicut et nuptiae sunt, licet testatio sine scriptis habita est.* [↑](#footnote-ref-481)
482. *Dig.* 49.1.28.1. (Scaev. 25 *Dig*.) [↑](#footnote-ref-482)
483. M. Kaser, *Das Römische Zivilprozessrecht* (Munich 1966), 280; F. Arcaria, ‘La prova giudiziaria nel diritto Romano’, in *Le prove* 1 (Turin 2007), 45-47, which has plenty of references to the topic of the evolution of proof; S. Schiavo, *Il falso documentale tra prevenzione e repressione: impositio fidei criminaliter agere civiliter agere* (Milan 2007), 33-40; A. Triggiano, *Le prove giudiziarie nel mondo antico Tra retorica e diritto* (Milan 2017) 84, 141. [↑](#footnote-ref-483)
484. Terpstra 2018, op.cit. (n. 103), 125-130. [↑](#footnote-ref-484)
485. Gai. 1.120-121; 192; 2.14-16. [↑](#footnote-ref-485)
486. *CIL* 3.p 948,10 (p 1058) = *IDR* 1.41. Terpstra 2018, op.cit. (n. 103), 155. [↑](#footnote-ref-486)
487. V. Arangio-Ruiz, *La compravendita indiritto Romano. vol 1* (Naples 1987), 86 “il contratto consensuale si puo riconoscere solo come la prima fase di una vicenda giuridica, che si compie con l’esecuzione dell’una e dell’altra parte”. [↑](#footnote-ref-487)
488. E.g. *SB* 14.11552, *FIRA* 3.477-479 and *P.Oxy.* 43.3111. However, these contracts present features of Hellenistic law, such as the fact that they include an execution clause (κύρια) that states, “The *naulotiké* has binding authority”. Greek law lacked a concept of obligation derived from the contract, and a breach of it entailed repercussions corresponding to tort law. Therefore, in many papyri we can find a series of clauses that establish repercussions or conditions for the contracting parties, since these explicit clauses supply the absence of a notion of obligation. *Cfr.* F. Pringsheim, *The Greek Law of Sale* (Weimar 1950), 157; A. Biscardi, *Diritto greco antico* (Milan 1982), 161; H. Dedek and M.J. Schermaier, ‘Obligation, Greek and Roman’, in R.S. Bagnalln et. al. (eds.), *The Encyclopedia of Ancient History* (New York 2013), 4560. [↑](#footnote-ref-488)
489. E. Meyer, *Legitimacy and Law in the Roman World: Tabulae in Roman Belief and Practice* (Cambridge 2004), 294, “to be effective Roman law initially drew its authority from outside government and outside itself, from the wider world of belief in which it was embedded” [↑](#footnote-ref-489)
490. *TBloomb*. 45 (<https://romaninscriptionsofbritain.org/inscriptions/TabLondBloomberg45>; and Tomlin 2016, op.cit. (n. 114), 156-159). [↑](#footnote-ref-490)
491. S. Johnstone, *A History of Trust in Ancient Greece* (Chicago 2011), uses this focus for the Greek case. [↑](#footnote-ref-491)
492. This assertion is clearly explained in the case of Chinese merchants in the modern era and their reliance on cultural similitudes, identity, or clan organisation by J. Tai Landa, *Trust, Ethnicity, and Identity* (Michigan 1999), 189-207; id., *Economic Success of Chinese Merchants in Southeast Asia: Identity, Ethnic Cooperation and Conflict* (London 2016), 137; 191. [↑](#footnote-ref-492)
493. See esp. P.J. du Plessis, *Cicero’s Law. Rethinking Roman Law of the Late Republic* (Edinburgh 2016), with overview of recent scholarship in the ‘Introduction’, 1–7. Cf. already J.W. Tellegen, ‘*Oratores*, Iurisprudentes and the «*Causa Curiana*»‘, *Revue Internationale des droits de l’antiquité* 30 (1983), 293–311, here: 293–295. [↑](#footnote-ref-493)
494. On frame analysis, see E. Goffman, *Frame Analysis. An Essay on the Organization of Experience* (Cambridge, MA 1974), but also C.F. Fillmore, ‘Frame semantics and the nature of language’, *Annals of the New York Academy of Sciences* 280 (1976), 20–32, and M. Minsky, ‘A framework for representing knowledge’, in: D. Metzing (ed.), *Frame Conceptions and Text Understanding* (Berlin 1980), 1–25. On frames in linguistics, see D. Busse, *Frame Semantik. Ein Kompendium* (Berlin 2012). On its recent, but still less than commonplace use in *Altertumswissenschaften*, see, e.g., S. Günther, ‘(K)einer neuen Theorie wert? Neues zur Antiken Wirtschaftsgeschichte anhand *Dig.* 50,11,2 (Callist. 3 cognit.)’, *Gymnasium* 124 (2017), 131–144; T. Georgakopoulos, ‘A frame-based approach to the source-goal asymmetry. Synchronic and diachronic evidence from ancient Greece’, *Construction and Frames* 10 (2018), 61–97; E. Günther, ‘Mehrdeutigkeiten antiker Bilder als Deutungspotenzial. Zu den Interdependenzen von Affordanzen und *frames* im Rezeptionsprozess’, in E. Günther and J. Fabricius (eds.), *Mehrdeutigkeiten. Rahmentheorien und Affordanzkonzepte in der archäologischen Bildwissenschaft*. Philippika 147 (Wiesbaden 2021), 1–40. Modern legal concepts and language are accessed via frame analysis in D. Busse, M. Felden, and D. Wulf, *Bedeutungs- und Begriffswissen im Recht. Frame-Analysen von Rechtsbegriffen im Deutschen* (Berlin 2018). On ancient legal language (in Ovid), see S. Günther, ‘More than a Mere Illustration!? Legal Language in Ovid’s *Remedia Amoris*’, in Xu Xiaoxu and Wang Daqing (eds.), *New World History* (Beijing 2019), 136–155. [↑](#footnote-ref-494)
495. On the two-step formulary procedure, see M. Kaser, *Das römische Zivilprozessrecht*. Handbuch der Altertumswissenschaft. Rechtsgeschichte des Altertums III/4 (Munich 1966), 107–338. Especially on the negotiation due to the complexity of the formulary procedure before and *in iure*, see E. Metzger, ‘Republican civil procedure. Sanctioning reluctant defendants’, in P. du Plessis, C. Ando, and K. Tuori (eds.), *The Oxford Handbook of Roman Law and Society* (Oxford 2016), 245–256. See Cic. *Part*. 28.99 (H. Rackham (trans.), *Cicero*. *On the Orator: Book 3. On Fate. Stoic Paradoxes. Divisions of Oratory.* Loeb Classical Library 349 (Cambridge, MA 1942)): *Atque etiam ante iudicium de constituendo ipso iudicio solet esse contentio, cum aut sitne actio illi qui agit aut iamne sit aut num iam esse desierit aut illane lege hisne verbis sit actio quaeritur. Quae etiamsi ante quam res in iudicium venit aut concertata aut diiudicata aut confecta non sunt, tamen in ipsis iudiciis permagnum saepe habent pondus cum ita dicitur: plus petisti; sero petisti; non fuit tua petitio; non a me, non hac lege, non his verbis, non hoc iudicio*. / “And even before the trial begins there is usually a dispute about the institution of the trial itself, when the question is raised whether the party taking proceedings has the right to do so, or has the right to do so yet, or has now ceased to have it, or whether action is open to him under the law cited, or in the terms employed. And even if these questions have not been raised or decided or settled before the case comes into court, nevertheless they often carry very great weight during the actual proceedings, when the statement is advanced, ‘You have sued for an excessive amount,’ or ‘You have taken proceedings too late,’ or ‘The suit was not one for you to institute,’ or ‘I was not the party to be sued,’ or ‘not under this law,’ or ‘not in this form of words,’ or ‘not before this court.’” Cf. also Cic. *Inv*. 2.19.57–58 (see below). On the development from the *legisactio* to the formulary procedure, see also the chapter by Philip Kay in this volume. [↑](#footnote-ref-495)
496. See esp. Busse, Felden, and Wulf 2018, op. cit. (n. 2), 10–17. [↑](#footnote-ref-496)
497. The amount of scholarship on this speech cannot be reviewed here. See the comprehensive treatment in J. Platschek, *Studien zu Ciceros Rede für P. Quinctius.* Münchener Beiträge zur Papyrusforschung und antiken Rechtsgeschichte 94 (Munich 2005). We do not know the outcome of the case of Naevius vs. Quinctius. It was published by Cicero himself later, but not further mentioned, and not counted among the speeches that supplied his glory as orator (cf. Tac. *Dial*. 37.6). On the question, see Platschek, op. cit., 8f. (with further literature). On the dissolution procedure as mirrored in the speech, see Platschek, op. cit., 13–30. On issues of transferring shares in *societates*, see also the chapter of Boudewijn Sirks in this volume. [↑](#footnote-ref-497)
498. The text is taken from M.D. Reeve (ed.), *M. Tulli Ciceronis scripta quae manserunt omnia. Fasc. 7: Oratio pro P. Quinctio* (Stuttgart and Leipzig 1992), adjustments following the manuscripts are marked. The translation is taken from J.H. Freese (trans.), *Cicero, in Twenty-Eight Volumes. Vol. VI: Pro Publio Quinctio – Pro Sexto Roscio Amerino – Pro Quinto Roscio comoedo – De lege agrarian I., II., III. With an English Translation*. Loeb Classical Library 240 (Cambridge, MA and London 1984), also in the following, albeit adapted and marked where the Latin text reads different from his. [↑](#footnote-ref-498)
499. Reeve 1992, op. cit. (n. 6), ad loc. has defended the conjecture “cuius”, but see Platschek 2005, op. cit. (n. 5), 97–110, esp. 105–106 who convincingly argues for keeping “*quoniam eius*.” [↑](#footnote-ref-499)
500. I translate “because his” instead of Freese’s “whose”, see n. 7. I keep the capital writing although Platschek *ibid.* made it likely that the wording of Naevius does not resemble the correct legal phrasing at least in part. [↑](#footnote-ref-500)
501. I write it in capitals, and “possessed” without quotation marks, as I argue below that it is the wording which Quinctius proposes as counterplea. [↑](#footnote-ref-501)
502. A comprehensive summary with an own solution is given by Platschek 2005, op. cit. (n. 5), 95–126. [↑](#footnote-ref-502)
503. See Platschek 2005, op. cit. (n. 5), 97–110 who discusses the extensive debates among legal scholars, and argues for the wording of Naevius, and Cicero imitating him here. [↑](#footnote-ref-503)
504. Cf. Platschek 2005, op. cit. (n. 5), 111f. [↑](#footnote-ref-504)
505. See A. Berger, *Encyclopedic Dictionary of Roman Law* (Philadelphia 1953), 458, s.v. Exceptio: “A defense opposed by the defendant to the plaintiff’s claim to render it ineffective and exclude the defendant’s condemnation as demanded by the plaintiff in the INTENTIO of the procedural formula. … The defendant’s objection made during the proceedings *in iure*, is inserted into the formula as a negative condition, to wit, the judge may condemn the defendant ‘if there has not been an agreement that the plaintiff will not bring an action.’ … Some exceptions are an integral part of the interdict …, others were inserted in a specific case by the praetor upon the request of the defendant.” [↑](#footnote-ref-505)
506. Trans. M.H. Hubbell (trans.), *Cicero*. *On Invention. The Best Kind of Orator. Topics.* Loeb Classical Library 386 (Cambridge, MA 1949). [↑](#footnote-ref-506)
507. On the question of whether the thirty days were really specified in the praetor’s edict (as in the *sponsio praeiudicalis*), see Platschek 2005, op. cit. (n. 5), 113–119. [↑](#footnote-ref-507)
508. See Platschek 2005, op. cit. (n. 5), 119–126. [↑](#footnote-ref-508)
509. For the likely wrong wording by Naevius, cf. Platschek 2005, op. cit. (n. 5), 110. [↑](#footnote-ref-509)
510. See G. Schiemann, ‘Aequitas’, in *Der Neue Pauly* 1 (1996), 188–189. Esp. emphasised by Cicero in our speech in *Quinct*. 14.45–46: *Quis tandem nobis ista iura tam aequa discribit? Quis hoc statuit, quod aequum sit in Quinctium, id iniquum esse in Naevium? …* (46) *Inveniri ratio, C. Aquili, non potest, ut ad suum quisque quam primum sine cuiusquam dedecore, infamia pernicieque perveniat? … qui (sc. Naevius), cum revocetur ad id iudicium, unde haec nata sunt omnia, condicionem aequissimam repudiet, fateatur se non pecuniam, sed uitam et sanguine petere …* . / “Who is it, I ask, who imposes upon us such equitable terms? Who has decided that what is fair for Quinctius is unfair for Naevius? … (46) Cannot some way be found, Aquilius, whereby each of the parties may come into his own without bringing disgrace, infamy, and ruin upon the other? … who (sc. Naevius), when he is brought back to trying the question which is the origin of all the rest, rejects the most equitable terms, thereby virtually admitting that it is not my client’s money but his life-blood that he is seeking … .” [↑](#footnote-ref-510)
511. See *OLD* s.v. nouus, 1316f. with references. [↑](#footnote-ref-511)
512. For *fama* (and *existimatio*) as an important concept for the self-identity of Roman *nobilitas*, see K.‑J. Hölkeskamp, *Die Entstehung der Nobilität. Studien zur sozialen und politischen Geschichte der Römischen Republik im 4. Jhdt. v.Chr*. (Stuttgart 1987), 216–218. For *de capite* as threatening of a person’s life, see *TLL* III s.v. caput, IV.A.1a–b, 416, l. 31 – 420, l. 26. [↑](#footnote-ref-512)
513. On the question as to whether only C. Aquilius Gallus and his *consilium* or a broader public were present, see Platschek 2005, op. cit. (n. 5), 4–6. [↑](#footnote-ref-513)
514. On C. Aquilius Gallus, see W. Kunkel, *Die römischen Juristen. Herkunft und soziale Stellung*. Unveränderter Nachdruck der 2. Auflage von 1967 mit einem Vorwort von D. Liebs (Cologne, Weimar and Vienna 2001), 21f. (Nr. 35); still essential is the *RE*-article by E. Klebs and P. Jörs, ‘23) C. Aquilius Gallus’, *RE* II/1 (1895), 327–330; also B.W. Frier, *The Rise of the Roman Jurists. Studies in Cicero’s* Pro Caecina (Princeton 1985), 140–155. On his legal way of thinking, see Cic. *Top*. 51 (trans. T. Reinhardt (ed.), *Marcus Tullius Cicero: Topica. Edited with Translation, Introduction, and Commentary*. Oxford Classical Monographs (Oxford 2003)): *Ac loci quidem ipsius forma talis est. Admonet autem hic locus, ut quaeratur quid ante rem, quid cum re, quid post rem evenerit. ‘Nihil hoc ad ius; ad Ciceronem,’ inquiebat Gallus noster, si quis ad eum quid tale rettulerat, ut de facto quaereretur. Tu tamen patiere nullum a me artis institutae locum praeteriri; ne, si nihil nisi quod ad te pertineat scribendum putabis, nimium te amare videare. Est igitur magna ex parte locus hic oratorius non modo non iuris consultorum, sed ne philosophorum quidem*. / “This indeed is the form the Place itself takes. And it instructs us to enquire what happened before, contemporaneously with, or after the event. ‘This has nothing to do with the law – it’s Cicero’s business.’, our Gallus used to say if someone had brought before him such as a matter as turned out to be a question of fact. Nevertheless, you must allow me not to leave out a single Place belonging to the theory; for if you think nothing should be written which is not of direct concern to you, I fear you may be thought to be rather too fond of yourself. Now this rhetorical Place is for the most part not only not the province of jurisconsults, but not even of philosophers.” See Reinhardt 2003, op. cit., 305 (ad loc.) for explanatory commentary. Cf. also Frier 1985, op. cit., 147: “… Both lawsuits hinged on highly technical procedural questions, with which Aquilius was obviously comfortable.” Based on this (although later) observation one could argue that Cicero alludes to Aquilius’ critical view of forensic oratory and all performance of influence outside the legal sphere right from the beginning. Cf. Cic. *Quinct*. 1.1: *Quae res in ciuitate duae plurimum possunt, eae contra nos ambae faciunt in hoc tempore: summa gratia et eloquentia. Quarum alterum, C. Aquili, uereor, alteram metuo. Eloquentia Q. Hortensi ne me in dicendo impediat non nihil commoueor; gratia Sex. Naeui ne P. Quinctio noceat, id vero non mediocriter pertimesco.* / “Two things which have most power in the state – I mean great influence and eloquence – are both working against us to-day; the one, Gaius Aquilius, fills me with apprehension, the other with dread. That the eloquence of Quintus Hortensius may embarrass me in my pleading is a thought that causes me some disquietude; that the influence of Sextus Naevius may injure the cause of Publius Quinctius – of that I am gravely afraid.” N.B. the parallelisation of Cicero and Quinctius in comparison with the alleged “stronger” and “more influential” orator Q. Hortensius Hortalus and Naevius. [↑](#footnote-ref-514)
515. Cf. Platschek 2005, op. cit. (n. 5), 267. [↑](#footnote-ref-515)
516. A thesis on frames and framing in Cicero’s *Pro Cluentio* has been successfully defended by the author’s PhD-student Zhang Hongxia in June 2021. [↑](#footnote-ref-516)
517. On the complex questions related to the edict’s details in this respect, see Platschek 2005, op. cit. (n. 5), 147–266. [↑](#footnote-ref-517)
518. Freese 1984, op. cit. (n. 6), 94 n. a discusses a possible difference between Quinctius’ ownership expressed by *possideat*, and Naevius’ *possideto*, which he interprets as having the property in detention. Detention is described as physical holding of a thing (*tenere*, *in possessione esse*); full possession needs the physical holding and the intention (*animus possidendi*). See Berger 1953, op. cit. (n. 13), s.v. Possessio, 636f. [↑](#footnote-ref-518)
519. Cf. Tellegen, op. cit. (n. 1), *passim* on how the rhetorical framing of the *causa Curiana* in 92 BCE was based on legal arguments, and not on the opposition between jurisprudents (in this case: Q. Mucius Scaevola) and orators (L. Licinius Crassus). [↑](#footnote-ref-519)
520. A. Watson, ‘The origins of consensual sale: a hypothesis’, *Tijdschrift voor Rechtsgeschiedenis* 244 (1964), 245 ff; idem, ‘The evolution of law: the Roman system of contracts’, *Law and History Review* 4.1 (1984), 8. [↑](#footnote-ref-520)
521. Gai. 3.135; Ulp. *Dig.* 18.1.2.1 (1 *ad sab*.); 9.1 (28 *ad sab*.); Paul. *Dig.* 19.4.1.2 (32 *ad ed*.); M. Kaser, *Das römishce Privatrecht, Erster Abschnitt: Das altrömische, das vorklassische und klassische Recht* (München 1971, 2nd ed.), 547-548; R. Zimmermann, *The Law of Obligations, Roman Foundations of the Civilian Tradition* (Oxford 1996), 230, 239. [↑](#footnote-ref-521)
522. Gai. 3.137; Iust. *Inst*. 3.22.3. [↑](#footnote-ref-522)
523. Ulp. *Dig.* 18.1.2.1 (1 *ad sab*.); Kaser 1971, op. cit. (no.2), 547-548; Zimmermann 1996, op. cit. (no.2), 230-231. [↑](#footnote-ref-523)
524. Gai. 3.139. [↑](#footnote-ref-524)
525. Pompon. *Dig.* 18.1.19 (**31 *ad quint. muc.***); Kaser 1971, op. cit. (no.2), 545-548; A. Jördens, ‘Kaufpreisstundungen (sales on credit)’, *Zeitschrift für Papyrologie und Epigraphik* 98 (1993), 263-282. [↑](#footnote-ref-525)
526. Paul. *Dig.* 18.1.34.1 (33 *ad ed*.): “*Omnium rerum, quas quis habere vel possidere vel persequi potest, venditio recte fit*”. English translation follows A. Watson, *The Digest of Justinian. Latin text edited by Theodor Mommsen with the aid of Paul Krueger; English translation edited by Alan Watson* (Philadelphia 1985). [↑](#footnote-ref-526)
527. Gai. 3.140; Paul. *Dig.* 19.2.20.pr. (34 *ad ed*.); Ulp. *Dig.* 18.1.37 (3 *disput*.). [↑](#footnote-ref-527)
528. Ulp. *Dig.* 18.1.7.2 (28 *ad sab*.); 19.1.13.24 (32 *ad ed*.); Zimmermann 1996, op. cit. (no.2), 253-254. [↑](#footnote-ref-528)
529. i.e., more than *nummus unus*; Ulp. *Dig.* 19.2.46 (69 *ad ed*.), in the case of *locatio conductio*. [↑](#footnote-ref-529)
530. *Cod. Iust.*4.44.2 (Diocl., 285); 8 (Diocl., 293). [↑](#footnote-ref-530)
531. Much has been written on *laesio enormis*; see, for example, A. Watson, ‘The hidden origin of enorm lesion’, *Journal of Legal History* 2.2 (1981), 186-93; A. J. B. Sirks, ‘La laesio enormis en droit romain et byzantin’, *Tijdschrift voor rechtsgeschiedenis (= Revue d’histoire du droit)* 53.3-4 (1985), 291-307; idem, ‘Diocletian’s option for the buyer in case of rescission of a sale. A reply to Klami’, *Tijdschrift voor rechtsgeschiedenis (= Revue d’histoire du droit)* 60 (1992), 39-47; idem, ‘Laesio enormis und die Auflösung fiskalischer Verkäufe’, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 112 (1995), 411-422; idem, ‘Laesio enormis again’, *Revue internationale des droits de l’antiquité* 54 (2007), 461-469; H. T. Klami, ‘Laesio enormis in Roman Law’, *Labeo* 33 (1987), 48-63; T. Mayer-Maly, ‘Pactum, Tausch und laesio enormis in den sog. Leges Barbarorum’, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 108 (1991), 213-233; Zimmermann 1996, op. cit. (no.2), 255-270; J.D. Harke, ‘Laesio enormis als error in negotio’, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 122 (2005), 91-102; R. Westbrook ‘The Origin of Laesio Enormis’, *Revue internationale des droits de l’antiquité* 55 (2008), 39-52; J. Platschek, ‘Bemerkungen zur Datierung der laesio enormis’, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 128 (2011), 406-409. [↑](#footnote-ref-531)
532. Gaius discusses twenty-two such controversies, and some are mentioned also in Justinian’s *Corpus Iuris Civilis*; T. G. Leesen, *Gaius Meets Cicero: Law and Rhetoric in the School Controversies* (Leiden 2010). [↑](#footnote-ref-532)
533. For a short summary of the state of research, see Leesen 2010, op. cit. (n.13), 5-20. [↑](#footnote-ref-533)
534. Gai. 3.141: “*Item pretium in numerata pecunia consistere debet. Nam in ceteris rebus an pretium esse possit, veluti homo aut toga aut fundus alterius rei <pretium esse possit>, valde quaeritur. Nostri praeceptores putant etiam in alia re posse consistere pretium; unde illud est, quod vulgo putant per permutationem rerum emptionem et venditionem contrahi, eamque speciem emptionis venditionisque vetustissimam esse; argumentoque utuntur Graeco poeta Homero, qui aliqua parte sic ait:* ἔνθεν ἂρ οἰνίζοντο κάρη κομόωντες Ἀχαιοί, / ἄλλοι μὲν χαλκῷ, ἄλλοι δ’ αἴθωνι σιδήρῳ, / ἄλλοι δὲ ρινοῖς, ἄλλοι δ’ αὐτῇσι βόεσσιν, / ἄλλοι δ’ἀνδραπόδεσσι. *et reliqua. Diversae scholae auctores dissentiunt aliudque esse existimant permutationem rerum, aliud emptionem et venditionem; alioquin non posse rem expediri permutatis rebus, quae videatur res venisse et quae pretii nomine data esse, sed rursus utramque rem videri et venisse et utramque pretii nomine datam esse absurdum videri. Sed ait Caelius Sabinus, si rem tibi venalem habenti, veluti fundum, [acceperim et] pretii nomine hominem forte dederim, fundum quidem videri venisse, hominem autem pretii nomine datum esse, ut fundus acciperetur*”. English translation follows T. G. Leesen, ‘The controversy about the nature of the price in a contract of sale’, *Revue internationale des droits de l’antiquité* 55 (2008), 285-286. [↑](#footnote-ref-534)
535. Paul. *Dig.* 18.1.1.1 (33 *ad ed*.): “*Sed an sine nummis venditio dici hodieque possit, dubitatur, veluti si ego togam dedi, ut tunicam acciperem. Sabinus et Cassius esse emptionem et venditionem putant: Nerva et Proculus permutationem, non emptionem hoc esse. Sabinus Homero teste utitur, qui exercitum Graecorum aere ferro hominibusque vinum emere refert, illis versibus:* ἔνθεν ἂρ οἰνίζοντο κάρη κομόωντες Ἀχαιοί, / ἄλλοι μὲν χαλκῷ, ἄλλοι δ’ αἴθωνι σιδήρῳ, / ἄλλοι δὲ ρινοῖς, ἄλλοι δ’ αὐτῇσι βόεσσιν, / ἄλλοι δ’ἀνδραπόδεσσι. *Sed hi versus permutationem significare videntur, non emptionem, sicuti illi:* ἔνθ’ αὖτε Γλαύκῳ ρονίης φρένας ἐξέλετο Ζεύς, ὃς πρς Τυδείδην Διομήδεα τεύχε ἄμειβεν. *Magis autem pro hac sententia illud diceretur, quod alias idem poeta dicit: πρίατο κτεάτεσσιν ἑοῖσιν. Sed verior est Nervae et Proculi sententia: nam ut aliud est vendere, aliud emere, alius emptor, alius venditor, sic aliud est pretium, aliud merx: quod in permutatione discerni non potest, uter emptor, uter venditor sit*.” English translation follows Watson 1985, op. cit. (n.7). [↑](#footnote-ref-535)
536. Paul. *Dig.* 19.4.1.pr. (32 *ad ed*.): “*Sicut aliud est vendere, aliud emere, alius emptor, alius venditor, ita pretium aliud, aliud merx. At in permutatione discerni non potest, uter emptor vel uter venditor sit, multumque differunt praestationes. Emptor enim, nisi nummos accipientis fecerit, tenetur ex vendito, venditori sufficit ob evictionem se obligare possessionem tradere et purgari dolo malo, itaque, si evicta res non sit, nihil debet: in permutatione vero si utrumque pretium est, utriusque rem fieri oportet, si merx, neutrius. Sed cum debeat et res et pretium esse, non potest permutatio emptio venditio esse, quoniam non potest inveniri, quid eorum merx et quid pretium sit, nec ratio patitur, ut una eademque res et veneat et pretium sit emptionis.*” English translation follows Watson 1985, op. cit. (n.7). [↑](#footnote-ref-536)
537. Also, Ulp. *Dig.* 19.1.11.2 (32 *ad ed*.). [↑](#footnote-ref-537)
538. e.g. Ulp. *Dig.* 18.1.25.1 (34 *ad sab*.); 28 (41 *ad sab*.), who states explicitly that sale of a third party’s property is valid; Kaser 1971, op. cit. (no.2), 550-551; Zimmermann 1996, op. cit. (no.2), 278-279. [↑](#footnote-ref-538)
539. *Res mancipi* is an archaic category of property that included “lands and houses on Italic soil; likewise [slaves](https://en.wikipedia.org/wiki/Slaves) and animals that are commonly broken to draught or burden, such as oxen, horses, mules, and asses; likewise [rustic](https://en.wikipedia.org/w/index.php?title=Rustic_servitudes&action=edit&redlink=1) [praedial servitudes](https://en.wikipedia.org/w/index.php?title=Praedial_servitudes&action=edit&redlink=1)”; Gai. 2.14a; English translation follows F. de Zulueta, *The Institutes of Gaius. Text with critical notes and translation* (Oxford 1946). For the procedure of *mancipatio*, see Gai. 1.119-122; 4.131; Paul. *Sent.* 1.13a.4. Also, see Kaser 1971, op. cit. (no.2), 131-134, 545-546; Zimmermann 1996, op. cit. (no.2), 271-272. [↑](#footnote-ref-539)
540. Gai. 2.19-20. From the late republic praetorian ownership over *res mancipi* could pass also by *traditio* via the act of sale, in which case the sale provides the *iusta causa traditionis*. This could be achieved by the passing of the object of the sale from hand to hand; e.g. Paul. *Dig.* 41.2.1.21 (54 *ad ed*.); or, by already having it in the possession of the purchaser before the sale took place (*traditio longa/ brevi manu*); e.g. Ulp. *Dig.* 6.2.9.2 (16 *ad* *ed*.); Gai. *Dig.* 41.1.9.5-6 (2 *cott*.); Paul. *Dig.* 41.2.3.1 (54 *ad ed*.). Also, see Kaser 1971, op. cit. (no.2), 416-418, 546-547; Zimmermann 1996, op. cit. (no.2), 239-240. [↑](#footnote-ref-540)
541. Iust. *Inst.* 3.23.2, who follows Gai. 3.141, in reporting the controversy, but states that previous emperors (*anteriores divi principes*) had already settled it in favour of the Proculians. Also, *Cod. Iust.*4.64.7 (Diocl. et Maxim., 294), who explicitly state that exchanging grain for oil does not fall within the category of sale, and that a decision to this effect had already been given before. [↑](#footnote-ref-541)
542. e.g. Paul. *Dig.* 19.5.5.1 (5 *Quest*.). [↑](#footnote-ref-542)
543. M. Elon, *Jewish Law: History, Sources, Principles* (Jerusalem 1994), G·7, 80. [↑](#footnote-ref-543)
544. *M. Qidd.* 1:1: “By three means is the woman acquired and by two means she acquires her freedom. She is acquired by money or writ or by intercourse. ... And she acquires her freedom by a bill of divorce or by the death of her husband.” English translation follows H. Danby, *The Mishnah. Translated from the Hebrew with introduction and brief explanatory notes* (London 1933). [↑](#footnote-ref-544)
545. I wish to thank Dr. Amit Gvaryahu for this comment. [↑](#footnote-ref-545)
546. *Gen.* 23:8-19, where Abraham bought the Cave of the Patriarchs in Hebron from Ephron the Hittite; *Ruth* 4:7, where Boaz bought all that was Elimelech’s property from the kinsman that was to inherent it; *Jer.* 32:9-12; 44, were Jeremiah bought a field at Anathoth from his cousin Hanamel. [↑](#footnote-ref-546)
547. Elon 1994, op. cit. (n.24), G·7, 583-584. [↑](#footnote-ref-547)
548. Elon 1994, op. cit. (n.24), G·7. [↑](#footnote-ref-548)
549. C. E. Hayes, *Between the Babylonian and Palestinian Talmuds: accounting for halakhic difference in selected Sugyot from Tractate Avodah Zarah* (Oxford 1997), 3-24; S. Fraade, ‘Introduction to the symposium: What Is (The) Mishnah?’, *Association for Jewish Studies Review* 32.2 (2008), 221-223; S. Albeck, *Introduction to Jewish law in Talmudic times* (Ramat-Gan, Israel 2013), 97-106. [↑](#footnote-ref-549)
550. The date of concluding the *Talmuds* is generally unknown and is a source for many scholarly discussions. See, for example, Hayes 1997, op. cit. (n.30), 20; Albeck 2013, op. cit. (n.30), 114-115. [↑](#footnote-ref-550)
551. *M. B. Meṣ.* 4:1: “הכסף קונה את הזהב והזהב אינו קונה את הכסף. הנחשת קונה את הכסף והכסף אינו קונה את הנחשת. מעות הרעות קונות את היפות והיפות אינן קונות את הרעות. אסימון קונה את המטביע והמטביע אינו קונה את אסימון. המטלטלין קונים את המטביע והמטביע אינו קונה את המטלטלים. זה הכלל: כל המטלטלין קונים זה את זה. ”. English translation follows H. W. Guggenheimer, *The Jerusalm Talmud. Edition, Translation and Commentary* (Berlin 1999-2015), Band 45 (Berlin 2008), 348. [↑](#footnote-ref-551)
552. Y. B. Meṣ. 4:1: “זהו כללו שלדבר. כל הירוד מחבירו קונה את חבירו. אמ’ ר’ חייה בר אשי: מאן תניתה? ר’ שמעון בר’. אמ’ ליה אבוי: חזור בך ותני כהדא "הזהב קונה את הכסף". אמ’ ליה: לינא חזר בי, דעד דהוה חילך עליך אתניתני "הכסף קונה את הזהב". מילתיה דר’ אמ’: זהב כפירות. מתנית’ אמרה: כסף כפירות. <מתניתה [דר’ חייה] אמרה: זהב כפירות. מלתיה אמרה: כסף כפירות. כהדה> ברת ר’ חייה רובה אוזפת לרב דינרין, אתת שאלת לאבוה, אמ’ לה: שקילי מיניה דינרין טבין ותקילין. מברת ר’ חייה ילפין? אמ’ ר’ אידי: אוף אבה אבוי דשמואל בעא קומי ר’: מהו ללוות דינרין בדינרין? אמ’ ליה: מותר. אמ’ ר’ יעקב בר אחא: אוף ר’ יוחנן וריש-לקיש תריהון מרין: מותר ללוות דינרין בדינרין. קרט בקרט שרי, לקן בלקן אסור.”. English translation follows Guggenheimer 1999-2015, op. cit. (n.32), 350-352. See also, *m.* *Qidd*. 1:16. [↑](#footnote-ref-552)
553. *B. B. Meṣ.* 4:1a [44a]: “הזהב קונה את הכסף והכסף אינו קונה את הזהב. הנחשת קונה את הכסף והכסף אינו קונה את הנחשת. מעות הרעות קונות את היפות והיפות אינן קונות את הרעות. אסימון קונה את המטביע והמטביע אינו קונה את אסימון. המטלטלין קונים את המטביע והמטביע אינו קונה את המטלטלים. זה הכלל: כל המטלטלין קונים זה את זה. ”. English translation follows H. Freedman, *Hebrew-English Edition of the Babylonian Talmud. Baba Meẓi’a* (London 1962). [↑](#footnote-ref-553)
554. i.e., Rabbi Judah the Patriarch. [↑](#footnote-ref-554)
555. *B. B. Meṣ.* 4:1b [44a-b]: “מתני ליה ר’ לר’ שמע’ בר’: ‘‘הזהב קונה את הכסף’’. אמ’ ליה: ר’, שניתה לנו בילדותך "הכסף קונה את הזהב". בילדותו מאי סבר ובזקנותו מאי סבר? בילדותו סבר: דהבא דחשיב הוי טיבעא, כספא דלא חשיב הוי פירא – וקני ליה פירא לטיבעא. בזקנותו סבר: כספא דחריף הוי טיבעא, דהבא דלא חריף הוי פירא – וקני ליה פירא לטיבעא. ”. English translation follows Freedman 1962, *op. cit.* (n.35). [↑](#footnote-ref-555)
556. *B. B. Meṣ.* 4:1c [44b]: “אמ’ רב אשי: כילדותו מסתברא, מדקתני: ‘‘הנחשת קונה את הכסף’’. אי אמרת בשלמ’: כספא לגבי דהבא פירא הוי, הינו דקתני ‘‘הנחשת קונה את הכסף’’ – דאע’ג דלגבי דהבא כספא פירא הוי, לגבי נחשא טיבעא הוי. אלא אי אמרת: כספא לגבי דהבא טיבעא הוי, השתא לגבי דהבא דחשיב מיניה אמרת: טיבעא הוי; לגבי נחשא דאיהו חשיב ואיהו חריף מיבעיא?! אצטריך, סל’ דע’ אמינ’: הני פריטי באתרא דסגיאן אינהו חריפין טפי מכספא – אימא טיבעא הוי, קמ’ל.”. English translation follows Freedman 1962, *op. cit.* (n.35). [↑](#footnote-ref-556)
557. Rab is the short name for Abba Arikha, the nephew of Rabbi Ḥiyya. [↑](#footnote-ref-557)
558. *B. B. Meṣ.* 4:1d [44b]: “ואף ר’ חייא סבר: דהבא טיבעא הוי. דרב יזיף דינרי מברתיה דר’ חייא. איקור. אתא לקמיה דר’ חייא, אמ’ לה: זיל הב לה דינרין טאבין ותקלין. אי אמרת בשלמ’: דהבא טיבעא הוי – שפיר. אלא אי אמרת: פירא הוי – הוה ליה סאה בסאה ואסיר! לא, רב דינרי הוו ליה, וכיון דהוו ליה דינרי, נעשה כאומ’ לו: הלויני עד שיבא בני או עד שאמצא מפתח.”. English translation follows Freedman 1962, *op. cit.* (n.35). See also *B. B Meṣ*. 75a. [↑](#footnote-ref-558)
559. e.g. E. Kleiman, ‘Bimetallism in Rabbi’s time, two variants of the Mishna “Gold Acquires Silver”‘, *Zion* 38 (1973), 48-61 (in Hebrew); D. Sperber, ‘Gold and silver “standards”. A study in rabbinic attitudes to Roman coinage’, *Numismatic Chronicle* 7/8 (1968), 83-109; idem, *Roman Palestine, 200-400: money and prices* (Ramat-Gan, Israel 1974): 69-97; B. Geva, ‘The monetary legal theory under the Talmud’, *Revue internationale des droits de l’antiquité* 55 (2008), 13-38. [↑](#footnote-ref-559)
560. *Y. B. Meṣ.* 4:1; y. B. Meṣ. 4:1b ; also, see Sperber 1974, op. cit. (n.42), 71-72. [↑](#footnote-ref-560)
561. I wish to thank Dr Amit Gvaryahu for pointing out the need to clarify this issue. [↑](#footnote-ref-561)
562. Sperber 1974, op. cit. (n.42), 69-90; Guggenheimer 2008, op. cit. (n.32), 349. [↑](#footnote-ref-562)
563. *B. B. Meṣ.* 4:1b [44b]; n.37 above. [↑](#footnote-ref-563)
564. *B. B. Meṣ.* 4:1c [44b]; n.38 above. [↑](#footnote-ref-564)
565. See, n.42 above. [↑](#footnote-ref-565)
566. Elsewhere in the *Mishnah* we read that “all movables are acquired by drawing”; M. Šeb. 10:9: “כל המטלטלין נקנים במשיכה”. [↑](#footnote-ref-566)
567. I wish to thank Prof A. J. Boudewijn Sirks for pointing out the need to add these clarifications. [↑](#footnote-ref-567)
568. e.g. with further references, C. Ando, ‘Sovereignty, territoriality and universalism in the aftermath of Caracalla’, in C. Ando (ed.), *Citizenship and Empire in Europe 200–1900. The Antonine Constitution after 1800 years* (Stuttgart 2016), 7-28; G. Kantor, ‘Local law in Asia Minor after the *Constitutio Antoniniana*’, in C. Ando (ed.), *Citizenship and Empire in Europe 200–1900. The Antonine Constitution after 1800 years* (Stuttgart 2016), 45-62; A. Imrie, *The Antonine Constitution: an edict for the Caracallan Empire* (Leiden; Boston 2018). [↑](#footnote-ref-568)
569. Namely, see *Cod. Theod.* 2.1.10 (398 CE); *Cod. Iust.*1.9.8 (398 CE). For further references and discussions see, A. M. Rabello, ‘The legal conditions of the Jews in the Roman Empire’, *Aufstieg und Niedergang der roemischen Welt, II: Prinzipat* 13(Berlin1980), 731-738; S. Simonsohn, [*The Jews of Italy: Antiquity*](https://primo.bgu.ac.il/primo-explore/fulldisplay?docid=972BGU_ALMA51147906800004361&context=L&vid=972BGU&lang=iw_IL&search_scope=972BGU_ALL&adaptor=Local%20Search%20Engine&tab=972bgu_all&query=any,contains,The%20Jews%20of%20Italy:%20Antiquity&offset=0)(Leiden 2014), 118-156. [↑](#footnote-ref-569)
570. \* Many thanks to José Luis Alonso for his comments and to Anna Elisa Stauffer for her linguistic help. All remaining errors are mine. [↑](#footnote-ref-570)
571. On the economic importance of inheritances and legacies in Rome see K. Verboven, *The Economy of Friends.* *Economic Aspects of Amicitia and Patronage in the Late Republic* (Brussels 2002), 183-201; on the historiography on the question see R.Swedberg, ‘The case for an economic sociology of law’*, Theory and Society* 32 (2003), 1-37. [↑](#footnote-ref-571)
572. On *captatores* and *captatio* see E. Champlin, *Final Judgements.* *Duty and Emotion in Roman Wills 250 B.C.–A.D. 250* (Berkeley 1991), 87-102; Chr. Paulus, *Idee der postmortalen Persönlichkeit* (Berlin 1992), 246-251; Verboven 2002, op. cit. (n. 1), 196-199. [↑](#footnote-ref-572)
573. It would also be interesting to consider the role of the fisc in this respect; on some aspects of fiscal evasion see U. Babusiaux, ‘Il valore della terra e il *fideicommissum familiae relictum*. Una configurazione giuridica motivata da fattori economici?’, in C. Lorenzi and M. Navarra (eds.), *Atti dell’Accademia Romanistica Costantiniana XXII. Questioni della terra. Società. Economia. Normazioni. Prassi* (Perugia 2017), 405-435. [↑](#footnote-ref-573)
574. See also D. Johnston, *The Roman Law of Trusts* (Oxford 1988), vii. [↑](#footnote-ref-574)
575. F. Schulz, *Classical Roman Law* (Oxford 1951), 204: “The labyrinthine law cries out for historical analysis; available materials are unusually rich; all factors in Roman legal evolution are clearly visible, in particular the strength of Roman jurisprudence as well as its limits and shortcomings.” [↑](#footnote-ref-575)
576. For a recent overview see U. Babusiaux, *Wege zur Rechtsgeschichte. Römisches Erbrecht* (Köln, Weimar, Wien 2015), 266-273. [↑](#footnote-ref-576)
577. S. Ogilvie, ‘Whatever is, is right? Economic institutions in pre-industrial Europe’*,* *Economic History Review* 60 (2007), 649-684, 668 rightly observes that institutions are made for many purposes. [↑](#footnote-ref-577)
578. Iust. *Inst.* 2.23 and 2.25, on which see Johnston 1988, op. cit. (n. 4), 25-34. For the use of the English word “trust” to translate *fideicommissa* see Johnston 1988, op. cit. (n. 4), 1f. [↑](#footnote-ref-578)
579. On the post-classical development of *fideicommissa* see Johnston 1988, op. cit. (n. 4), 213-221. [↑](#footnote-ref-579)
580. M. Kaser and K. Hackl, *Römisches Zivilprozessrecht* § 69.III.1 (Munich 1996, 2nd ed.), 462f.; Johnston 1988, op. cit. (n. 4), 277; at the latest M. Peachin, ‘Die neue Gerichtsbarkeit der Konsuln und Prätoren in der frühen Kaiserzeit’*,* in K. Wojciech and P. Eich (eds.), *Die Verwaltung der Stadt Rom in der Hohen Kaiserzeit. Formen der Kommunikation, Interaktion und Vernetzung* (Paderborn 2018), 79-94, esp. 93f. [↑](#footnote-ref-580)
581. On Gaius see U. Babusiaux and D. Mantovani (eds.), *The Institutes of Gaius. Adventures of a Bestseller. Transmission, Use and Transformation of the Text* (Pavia 2019). [↑](#footnote-ref-581)
582. Schulz 1951, op. cit. (n. 5), 315 nr. 552; Johnston 1988, op. cit. (n. 4), 256-271; on *Dig.* 30.1 Ulp. 67 *ad (ed.),* see also U. Babusiaux, ‘Zum Rechtsschutz von Fideikommissen im Prinzipat’, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 136 (2019), 140-213, 203-205. [↑](#footnote-ref-582)
583. Cf. Gai. 2.268in comparison Gai. 2.284; the text of Gaius follows U. Manthe (ed.), *Gaius Institutiones* (Darmstadt 2004, 2nd ed.). [↑](#footnote-ref-583)
584. This excludes the *fideicommissa* granting freedom to slaves, as they are subject to special rules. For a recent account, see F. M. Silla, *Libertates fideicommissae. Profili processuali* (Padua 2008). [↑](#footnote-ref-584)
585. Gai. 2.249-251. For an application see also Gai. 2.184. [↑](#footnote-ref-585)
586. Namely *Latini Iuniani* (cf. Gai. 2.275) and women as far as they are excluded by the *lex Voconia* (cf. Gai. 2.274). Note that slaves can be appointed as heirs and receive bequests as legatees insofar as they represent their masters. [↑](#footnote-ref-586)
587. Gai. 2.261-262. [↑](#footnote-ref-587)
588. Gai. 2.269. [↑](#footnote-ref-588)
589. Gai. 2.277. [↑](#footnote-ref-589)
590. Gai. 2.271. [↑](#footnote-ref-590)
591. Gai. 2.270. [↑](#footnote-ref-591)
592. Gai. 2.270a; see also Gai. 2.273. [↑](#footnote-ref-592)
593. Gai. 2.281. [↑](#footnote-ref-593)
594. Gai. 2.289. [↑](#footnote-ref-594)
595. Gai. 2.101-102 *testamentum per aes et libram*; on the ritual cf. Gai. 2.104. [↑](#footnote-ref-595)
596. Gai. 2.119; on the evolution of the will of civil and praetorian law see Th. Rüfner, ‘Testamentary formalities in Roman law’*,* in K. G. C. Reid and M. J. De Waal and R. Zimmermann (eds.), *Testamentary Formalities* (Oxford 2011), 1-26. [↑](#footnote-ref-596)
597. On the adaptations of *praetorian law* see inter alia Gai. 2.147-148. [↑](#footnote-ref-597)
598. Gai. 2.122. [↑](#footnote-ref-598)
599. Gai. 2.115-116 speaks about *institutio heredis sollemni more facta sit*. [↑](#footnote-ref-599)
600. Cf. Gai. 2.116-7. [↑](#footnote-ref-600)
601. Gai. 2.232. [↑](#footnote-ref-601)
602. Gai. 2.229. [↑](#footnote-ref-602)
603. *Substitutio vulgaris*, on which see Gai. 2.176-178. [↑](#footnote-ref-603)
604. *Substitutio pupillaris*, on which see Gai. 2.179-183. [↑](#footnote-ref-604)
605. Gai. 2.123-129. [↑](#footnote-ref-605)
606. Gai. 2.130-134. [↑](#footnote-ref-606)
607. Gai. 2.135. [↑](#footnote-ref-607)
608. The rule is transmitted in *Dig.* 50.17.7 Pomp. *3 ad Sab.;* on the text (which deals with the *testamentum militis*) see Babusiaux 2015, op. cit. (n. 6), 84f. [↑](#footnote-ref-608)
609. See *Dig.* 50.16.64 Paul. 67 *ad (ed.),* The shares of the testamentary heirs who are unwilling to take over the inheritance are acquired by this heir via accretion, see *Dig.* 29.2.53.1 Gai. 14 *ad leg. Iul. et Pap*. [↑](#footnote-ref-609)
610. The rule is called *semel heres, semper heres*, on which see *Dig.* 28.5.34 Pap. 1 *def.* with Babusiaux 2015, op. cit. (n. 6), 149f. Exceptions are allowed for the *testamentum militis*, cf. *Dig.* 29.1.15.4 Ulp. 45 *ad ed*.; see also B. Nicholson, *An Introduction to Roman Law* (Oxford 1962), 241. [↑](#footnote-ref-610)
611. Gai. 2.144-145. [↑](#footnote-ref-611)
612. Gai. 2.151-151a. [↑](#footnote-ref-612)
613. Gai. 2.235. [↑](#footnote-ref-613)
614. Gai. 2.238; see also Gai. 2.244f. [↑](#footnote-ref-614)
615. Chr. Paulus, ‘Die Verrechtlichung der Familienbeziehungen in der Zeit der ausgehenden Republik und ihr Einfluß auf die Testierfreiheit’, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 111 (1994), 425-435. [↑](#footnote-ref-615)
616. First the children and other descendants of the deceased are entitled to take up the inheritance; praetorian law equates emancipated children to children *in patria potestate* and allows considering women’s cognates as entitled to taking the estate too. In the absence of descendants, the closest relative in the male line, the *proximus agnatus*, is the intestate heir. In the absence of any legitimate heir, relatives by blood (*cognati*) and husbands and spouses can claim the estate; see Nicholson 1962, op. cit. (n. 40), 246-250. [↑](#footnote-ref-616)
617. *Dig.* 28.2.11 Paul. 2 *ad Sab*., on which see A. Wacke, ‘Erbrechtliche Sukzession als Persönlichkeitsfortsetzung? Personelle Identifikation mit dem Verstorbenen – oder Rollenverschiedenheit von Nachlassinhaber und Erben. Rechtsgeschäftliche Abwicklung versus Konfusion’, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 123 (2006), 197-247, esp. 210-216. [↑](#footnote-ref-617)
618. The very detailed rules of the *Senatus consultum Trebellianum* and the *Senatus consultum* *Pegasianum* limiting the obligation of the trustee in case of a universal *fideicommissum* will not be dealt with here; for a recent account, see Babusiaux 2019, op. cit. (n. 12), 167-185. [↑](#footnote-ref-618)
619. The classical account is still L. Lombardi, *Dalla ‘fides’ alla ‘bona fides’* (Milan 1961) esp. 47-104. [↑](#footnote-ref-619)
620. See *Dig.* 31.70pr. Pap. 20 *quaest*., on which see Johnston 1988, op. cit. (n. 4), 19; U. Babusiaux, *Papinians Quaestiones*. *Zur rhetorischen Methode eines spätklassischen Juristen* (Munich 2011), 41-44, 200f.; *Dig.* 30.78 Ulp. 8 *disp*. [↑](#footnote-ref-620)
621. See Gai. 2.270; *Dig.* 29.7.8.1 Paul. l. *sing. de iur. cod*., on both see Babusiaux 2015, op. cit. (n. 6), 270f. [↑](#footnote-ref-621)
622. Cf. E. Genzmer, ‘La genèse du fidéicommis comme institution juridique’, *Revue historique de droit français et étranger* 40 (1962), 319-350, esp. 329f. [↑](#footnote-ref-622)
623. Cf. also Gai. 2.23.1. [↑](#footnote-ref-623)
624. It might be seen as a disadvantage that the beneficiary of a *fideicommissum* cannot sue the reluctant heir for twice the amount while the legatee of a *legatum per damnationem* is entitled to sue the *infitiatus* for the *duplum* of the value of the bequest. See Gai. 2.282. [↑](#footnote-ref-624)
625. The extraordinary character of these proceedings has been discussed from different perspectives. For an overview, see I. Buti, ‘La ‘cognitio extra ordinem’ da Augusto a Diocleziano’, in H. Temporini (ed.), *Aufstieg und Niedergang der römischen Welt,* II.14 (Berlin, New York 1982), 29-59, notably 30-32; the continuity between the formulary procedure and the *cognitio* has been stressed by G. Scherillo, *Lezioni sul processo, Introduzione alla ‚cognitio extra ordinem’. Corso di diritto romano* (Milan 1960), 209-213. [↑](#footnote-ref-625)
626. Gai. 2.279. [↑](#footnote-ref-626)
627. Gai. 2.280*.* [↑](#footnote-ref-627)
628. Gai. 2.283*.* [↑](#footnote-ref-628)
629. M. von Bethmann-Hollweg, *Der Civilprozeß des gemeinen Rechts in der geschichtlichen Entwicklung: Der römische Civilprozeß 3: Cognitiones* (Bonn 1866), 32 (on the Diocletian era); the subsisting influence of this account can be seen in M. Kaser and R. Knütel and S. Lohsse, *Römisches Privatrecht. Ein Studienbuch* (Munich 2017, 21st ed.), § 87, no. 4, 476: “Der Kaiser stattet die Kognitionsrichter mit einem *weiten Ermessensspielraum* aus, der es ihnen gestattet, das Verfahren den Bedürfnissen der Zweckmäßigkeit anzupassen. Die Parteien unterwirft er ihnen gegenüber einer stärkeren *Zwangsgewalt*. Die Gewähr für eine *unparteiische* Rechtspflege suchen die Kaiser nicht mehr durch die Unabhängigkeit des Urteilsrichters zu erreichen, sondern dadurch, daß die Partei, die sich durch ein ungerechtes Urteil verletzt fühlt, dieses Urteil durch *Appellation* anfechten kann, (…).” (emphasis in original). [↑](#footnote-ref-629)
630. For a recent account, see Babusiaux 2019, op. cit. (n. 12), 149-155 with further references. [↑](#footnote-ref-630)
631. The classical reference would be F. Wieacker, ‘Offene Wertungen bei den römischen Juristen*’*, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 94 (1977), 1-42, esp. 32-38; the question on the function of these values, however, needs further research, cf. D. Mantovani, ‘L’Aequitas romana, Una nozione in cerca di equilibrio’, *Antiquorum Philosophia* 11 (2017), 15-60, 50f. who underlines (with regard to Cicero): “I loci *aequitatis* si inseriscono in una visione complessiva dell’uomo in società: (…) la ricerca dell’*aequitas* coinvolge la *natura* e la legislazione positiva, e che per quanto riguarda la *natura* richiama virtù e valori come *religio*, *pietas*, *vindicatio*, *observantia*, *veritas*. Questo significa che *l’aequitas* presuppone un’antropologia politica, cioè un’idea dell’uomo nella sua vita in società.” [↑](#footnote-ref-631)
632. For an overview, see Babusiaux 2019, op. cit. (n. 12), 156-167 with further references. [↑](#footnote-ref-632)
633. Gai. 4.48*,* on which seeJ. M. Kelly, *Roman Litigation* (Oxford 1966), 69-84;M. Pennitz, *Der ‚Enteignungsfall’ im römischen Recht der Republik und des Prinzipats* (Wien, Köln, Weimar 1991), 249-263. [↑](#footnote-ref-633)
634. This consequence has been referred to as ‘expropriation of the claimant’, cf. E. Levy, ‘Die Enteignung des Klägers im Formularprozeß’*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 42 (1921), 476-514. [↑](#footnote-ref-634)
635. In the same vein see A. Romano, ‘Condanna ‚in ipsam rem’ e condanna pecuniaria nella storia del processo romano’, *Labeo* 1 (1982), 131-149, 132-134. [↑](#footnote-ref-635)
636. Some examples are *Dig.* 31.69pr.-1 Pap. 19 *quaest*.; *Dig.* 36.1.30 Marcian. 4 *inst*., on which see Babusiaux 2019, op. cit. (n. 12), 152-159; on *Dig.* 34.4.30.3 Scaev. 22 *dig*., see M. Wimmer, *Das Prälegat* (Vienna 2004), 27-31; A. Häusler, ‘Letztwillige Verfügungen in griechischer Sprache bei Q. C. Scaevola, Paulus und Modestinus’*,* *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 133 (2016), 420-444, 434f. [↑](#footnote-ref-636)
637. On this effect of the *fideicommissum de familia* see G. Impallomeni, ‘L’efficacia del fedecommesso pecuniario nei confronti dei terzi. La *in rem missio’*, *Bullettino dell’Istituto di Diritto Romano Vittorio Scialoja* 70 (1967), 1-104; D. Johnston, ‘Prohibitions and perpetuities: family settlements in Roman law’, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 102 (1985), 220-290. [↑](#footnote-ref-637)
638. On the text see S. Solazzi, *Il concorso dei creditori nel diritto romano III* (Napels 1940), 195-200; Babusiaux 2011, op. cit. (n. 50), 159-162 with further references. [↑](#footnote-ref-638)
639. in A. Watson, *The Digest Vol. 3* (Philadelphia 1985), 54 (with modifications, U.B.). [↑](#footnote-ref-639)
640. On these insolvency proceedings see M. del Pilar Pérez Álvarez, *La bonorum venditio, Estudio sobre el concurso de acreedores en Derecho Romano clásico* (Madrid 2000). [↑](#footnote-ref-640)
641. For details see Kaser and Hackl 1996, op. cit. (n. 10), § 58.I.4, 397f.; Pilar Pérez Álvarez 2000, op. cit. (n. 70), 227-328. [↑](#footnote-ref-641)
642. For an overview of the preferential rights in insolvency procedures see Kaser and Hackl 1996, op. cit. (n. 10), § 59, 401-403. [↑](#footnote-ref-642)
643. The situation of legatees of a *legatum per vindicationem* might have been different, but Justinian deleted all references to this *legatum in rem*. One notable exception is *Dig.* 32.78.6 Paul. 2 *ad Vitell*., where a legatee tries to obtain *condemnatio in ipsam rem* for a *legatum per vindicationem* from the *praetor* *fideicommissarius*. On the text see Babusiaux 2011, op. cit. (n. 50), 206-208. [↑](#footnote-ref-643)
644. That legatees are to be satisfied after all the other creditors is only true in the case of insolvency of the inheritance itself, see Kaser and Hackl 1996, op. cit. (n. 10), § 59.II, 403 with further references. [↑](#footnote-ref-644)
645. Cf. H. Wagner, *Die Entwicklung der Legalhypotheken am Schuldnervermögen im Römischen Recht (bis zur Zeit Diokletians)* (Cologne, Vienna 1974), 70-87 (on the special rights of the fisc). [↑](#footnote-ref-645)
646. A nuanced criticism in Ogilvie 2007, op. cit. (n. 7), 649-684, 653-656, 665-667. [↑](#footnote-ref-646)
647. On cultural beliefs, see V. Nee, ‘The new institutionalism in economics and sociology’, in N. J.Smelser and R. Swedberg (eds.), *The Handbook of Economic Sociology* (Princeton 2005, 2nd ed.), 49-74; K. Verboven, ‘Cité et réciprocité. Le rôle des croyances culturelles dans l’économie romaine’, *Annales. Histoire*, *Sciences Sociales* 67 (2012), 913-942, 914. [↑](#footnote-ref-647)
648. This does not necessarily imply including culture as part of the institution; on this problem see Ogilvie 2007, op. cit. (n. 7), 660f. and 668f.; Verboven 2012, op. cit. (n. 77), 921-923. [↑](#footnote-ref-648)
649. D. Mantovani, ‘Inter aequum et utile. Il diritto come economia nel mondo romano?’, in E. Lo Cascio and D. Mantovani (eds.), *Diritto romano e economia. Due modi pensare e organizzare il mondo (nei primi tre secoli dell’Impero* (Pavia 2018),785-809, 787. [↑](#footnote-ref-649)
650. D. Daube*,* ‘The preponderance of intestacy at Rome’*,* in D. Cohen and D. Simon (eds.), *Collected Studies in Roman Law* (Frankfurt/M. 1991), 1087-1096 (= Tulane Law Review 39 [1965], 187-196) who underlines that the social expectation for a Roman to leave a will does not mean that all Romans died leaving valid wills. [↑](#footnote-ref-650)
651. On *supremum iudicium*, cf. Champlin 1991, op. cit. (n. 2), 11-28. [↑](#footnote-ref-651)
652. Suet. *Aug*. 17.1. [↑](#footnote-ref-652)
653. Genzmer 1962, op. cit. (n. 52), 323. [↑](#footnote-ref-653)
654. *Dig.* 50.16.120 Pomp. 5 *ad Q. Muc*. [↑](#footnote-ref-654)
655. On women as heirs, see U. Manthe, ‘Das Erbrecht der römischen Frauen nach der lex Papia und die ratio Voconiana’*,* in P. Nève and C. Coppens (eds.), *Vorträge gehalten auf dem 28. Deutschen Rechtshistorikertag in Nimwegen 1990* (Nijmegen 1992), 33-36. [↑](#footnote-ref-655)
656. P. Leuregans, ‘Testamenti factio non privati sed publici iuris est’, *Revue historique de droit français et étranger* 53 (1975), 225-257. [↑](#footnote-ref-656)
657. Champlin 1991, op. cit. (n. 2), 120-126; see also J.A. Crook, ‘Women in Roman succession’, in B. Rawson (ed.), *The Family in Ancient Rome. New Perspectives* (Ithaca 1986), 58-82. For the hereditary status of wives and spouses, see L. Monaco, *Hereditas e mulieres. Riflessioni in tema di capacità successoria della donna in Roma antica* (Napoli 2000). [↑](#footnote-ref-657)
658. On Suet. *Aug*. 66.4, see Paulus, op. cit. (n. 2), 69-71; Verboven 2002, op. cit. (n. 1), 190. [↑](#footnote-ref-658)
659. Another opinion is expressed by Champlin 1991, op. cit. (n. 2), 11: “economic advantage was the least of his concerns”; on symbolic legacies see also Verboven 2002, op. cit. (n. 1), 195. [↑](#footnote-ref-659)
660. *Amicitia* is especially well attested for emperors, on which see R. S. Rogers, ‘The emperors as heirs and legatees’, *Transactions and Proceedings of the American Philological Association* 78 (1947), 140-158; on the special clause for the *princeps* see Chr. Paulus, *Die Idee der postmortalen Persönlichkeit im römischen Testamentsrecht. Zur gesellschaftlichen und rechtlichen Bedeutung einzelner Testamentsklauseln* (Berlin 1992), 93‑143. [↑](#footnote-ref-660)
661. In fact, Augustus, who set out a great number of legacies, disposed that bequests to individual persons should only be paid out one year after the opening of the will. This delay is explained by lack of liquidity. In Suetonius’ words (Suet. *Aug*. 101.3.): *quamvis viginti proximis annis quaterdecies milies ex testamentis amicorum percepisset, quod paene omne cum duobus paternis patrimoniis ceterisque hereditatibus in rem p. absumpsisset. Iulias filiam neptemque, si quid iis accidisset, vetuit sepulcro suo inferri.* The excuse brought forward by Suetonius clearly shows that Augustus had accumulated the fortune that he spent for the sake of the Roman people both through legacies (through the wills of his friends) and through his status as heir. [↑](#footnote-ref-661)
662. See Verboven 2002, op. cit. (n. 1), 210-220. [↑](#footnote-ref-662)
663. Gai. 2.285. *Ut ecce peregrini poterant fideicommissa capere, et fere haec fuit origo fideicommissorum. sed postea id prohibitum est, et nunc ex oratione diui Hadriani senatus consultum factum est, ut ea fideicommissa fisco uindicarentur.* “Thus peregrines could take under trusts – indeed, this was probably the origin of trusts – but later this was forbidden, and now on the proposition of the late emperor Hadrian a senatus-consult has enacted that such trusts should be claimed for the fisc.” (Translation by De Zulueta [1946]). [↑](#footnote-ref-663)
664. See also Verboven 2002, op. cit. (n. 1), 221. [↑](#footnote-ref-664)
665. Still fundamental in this respect D. Nörr, *Die Fides im römischen Völkerrecht* (Karlsruhe 1991); in this respect, it is not helpful to distinguish between private and public law, cf. É. Jakab, ‘Privatrechtliche Rechtsfiguren im Völkerrecht der Republik’, in H. Altmeppen et al. (eds.), *Festschrift für Rolf Knütel* (Heidelberg 2009), 439-350, 449. [↑](#footnote-ref-665)
666. Gai. 1.1. Curiously, the label of *ius gentium* cannot be found for any legal institution within the law of succession; one could be tempted to explain this lacuna by Hadrian’s initiative to rule out peregrines from *fideicommissa.* [↑](#footnote-ref-666)
667. *Inst Iust.* 2.23 (…) *quibus enim non poterant hereditates vel legata relinquere, si relinquebant, fidei committebant eorum qui capere ex testamento poterant: et ideo fideicommissa appellata sunt, quia nullo vinculo iuris, sed tantum pudore eorum qui rogabantur.* “Some people lack the capacity to take under a will. If you wanted such a person to get your estate, or a legacy, the way to do it was to leave it to someone who did have capacity and rely on his honour. Trusts, in Latin ‘fideicommissa’, are so called because the trustee was bound only by his conscience, not at law.” (Translation by Birks and McLeod [2001]). [↑](#footnote-ref-667)
668. On *fides* as the cement of personal relations, see Verboven 2002, op. cit. (n. 1), 39-41. [↑](#footnote-ref-668)
669. R. A. Kaster, ‘The shame of the Romans’, *Transactions of the American Philological Association* 127 (1997), 1-19, 4-6. [↑](#footnote-ref-669)
670. Kaster 1997, op. cit. (n. 99), 10-12. [↑](#footnote-ref-670)
671. Kaster 1997, op. cit. (n. 99), 15. On the central role of ‘honneur’ in the evolution of Roman norms, see also Verboven 2012, op. cit. (n. 77), 926f. [↑](#footnote-ref-671)
672. These translations are mine. U.B. [↑](#footnote-ref-672)
673. The predominant interpretation of the text is that Augustus did favours for these very honourable and influential persons, i.e., that they were the beneficiaries, cf., e.g. O. Behrends and R. Knütel and B. Kupisch and H. H.Seiler, *Corpus Iuris Civilis. Die Institutionen.* (Heidelberg 2013, 4th ed.): “mit Rücksicht auf das Ansehen der Betreffenden”. In the context of *pudor*, the adverse interpretation seems to be more plausible, i.e., that they are the trustees; in this sense, cf. also P. Birks and G. McLeod, *Justinian’s Institutes* (London 2001): “as a favour to petitioners”. [↑](#footnote-ref-673)
674. On linkages between the emperor’s well-being and that of the state see D. Wardle, *Suetonius. Life of Augustus. Vita Divi Augusti.* Translated With Introduction and Historical Commentary (Oxford 2014), 396f. [↑](#footnote-ref-674)
675. Theoph. *Par*. 2.23.1: “(…) … through his gracious consideration for those in whose favour trust had been left (for sometimes such persons were known to him, or, it might be, were worthy of honour on account of their accomplishment or of some other excellence), or again, because the heirs, though they had sworn by his safety, yet frequently contemned the oath; or by reason of a very serious breach of faith (for sometimes a rich man had been asked to make over property to poor and very young children, or to aged parents of the deceased, and then had broken his word) (…).” (Translation by Murison [2010]); on this passage see V. Giodice-Sabbatelli, *La tutela giuridica dei fedecommessi fra Augusto e Vespasiano* (Bari 1993), 44-49. [↑](#footnote-ref-675)
676. See also Suet. *Aug*. 66.4 and Dio 56.23.3, on both, see Wardle 2014, op. cit. (n. 104), 433. [↑](#footnote-ref-676)
677. On the universal character of *ius gentium* see L.C. Winkel, ‘Einige Bemerkungen über *ius naturale* und *ius gentium’*, in M. Schermaier and Z. Végh (eds.), *Festschrift für Wolfgang Waldstein* (Graz 1993), 443-449; R. Fiori, ‘La nozione di ius gentium nelle fonti di età repubblicana’, in I. Piro (ed.), *Scritti per Alessandro Corbino III* (Tricase 2016), 109-129. [↑](#footnote-ref-677)
678. In this respect, it is noteworthy that Theoph. *Par*. 2.23.1 still mentions the *peregrini*, see also Giodice-Sabbatelli 1993, op. cit. (n. 105), 46f. [↑](#footnote-ref-678)
679. This is indeed a moral understanding of *fides*; on the evolution see Lombardi 1961, op. cit. (n. 49), 3-46 with further references. [↑](#footnote-ref-679)
680. Iust. *Inst.* 2.25, on which see Giodice-Sabbatelli 1993, op. cit. (n. 105), 49-54; Peachin 2018, op. cit. (n. 10), 85f. On the term of *peregrinatio* as “traveling outside Italy” see M. A. Claussen, ‘*Peregrinatio* and *peregrini* in Augustine’s *City of god*’, *Traditio* 46 (1991), 33-75, 37f.; on motives for mobility, see A. Kolb, ‘Communication and mobility in the Roman Empire’,in Chr. Bruun and J. Edmondson (eds.), *Oxford Handbook of Roman Epigraphy* (Oxford 2014), 649- 670, 660f. [↑](#footnote-ref-680)
681. On the time for news to travel, see A. Kolb, *Transport und Nachrichtentransfer im Römischen* *Reich* (Berlin 2000), 321-332. [↑](#footnote-ref-681)
682. The best examples are codicils with the request to pass over the inheritance to another beneficiary; these codicils cannot be used as additions to the will (like in the Lentulus-case, Iust. *Inst.* 2.25) but are valid as *fideicommissa*, see, e.g., *Dig.* 36.1.61 Paul. 14 *resp*., on which see Babusiaux 2015, op. cit. (n. 6), 274f. [↑](#footnote-ref-682)
683. See, e.g. A. Coşkun, ‘Freundschaft, persönliche Nahverhältnisse und das Imperium Romanum. Eine Einführung’*,* in A. Coşkun (ed.), *Freundschaft und Gefolgschaft in den auswärtigen Beziehungen der Römer* *(2. Jh. v.Chr. – 1. Jh. n.Chr.*) (Frankfurt/M. 2008), 11-27; Chr. Wendt, ‘*More clientium*. Roms Perspektive auf befreundete Fürsten’, in E. Baltrusch and J. Wilker (eds.), *Amici – socii – clients? Abhängige Herrschaft im Imperium Romanum* (Berlin 2015), 19-35; M. A. Speidel, ‘Fernhandel und Freundschaft. Zu Roms *amici* an den Handelsrouten nach Südarabien und Indien’, *Orbis Terrarum* 14 (2016), 155-193. [↑](#footnote-ref-683)
684. For an overview, see B. Strobel, *Römische Testamentsurkunden aus Ägypten vor und nach der Constitutio Antoniniana* (Munich 2014); M. Nowak, *Wills in the Roman Empire. A Documentary Approach* (Warsaw 2015). [↑](#footnote-ref-684)
685. E.g. *P.Oxy.* 6.907; *P.Oxy.* 27.2474, on which see Strobel 2014, op. cit. (n. 114), 197-288; U. Babusiaux, ‘Rez. Benedikt Strobel, Römische Testamentsurkunden aus Ägypten vor und nach der Constitutio Antoniniana (München 2014)’, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 133 (2016), 517-533, 528f. [↑](#footnote-ref-685)
686. Cf. J. L. Alonso, ‘The status of peregrine law in Egypt: ‘customary law’ and legal pluralism in the Roman Empire’, *Journal of Juristic Papyrology* 43 (2013), 351-404. [↑](#footnote-ref-686)
687. The most visible traces are the Greek “wills”, on which see Häusler 2016, op. cit. (n. 66), 69 with further references. A comparative reading of the so-called Gnomon (*BGU* 5.1210) and the Digest reveals additional information, see U. Babusiaux, ‘Römisches Erbrecht im Gnomon des Idios Logos’, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 135 (2018), 108-177. [↑](#footnote-ref-687)
688. Romano 1982, op. cit. (n. 65), 149f.; important modifications in Kelly 1966 op. cit. (n. 63), 76-81, who argues, not very convincingly, that *condemnatio pecuniaria* was introduced as a measure of social discrimination. [↑](#footnote-ref-688)
689. For an overview on the traditional position, see T. Pekáry, ‘Studien zur römischen Währungs- und Finanzgeschichte von 161 bis 235 n. Chr.’, *Historia* 8 (1959), 443-489; see also M. De Cecco, ‘Monetary theory and Roman history’*,* *The Journal of Economic History* 45 (1985), 809-822, 815-818; A. Wassink, ‘Inflation and financial policy under the Roman empire to the price edict of 301 A.D.’, *Historia* 40 (1991), 465-493, based on R. Duncan-Jones, *Money and Government in the Roman Empire* (Cambridge 1994). [↑](#footnote-ref-689)
690. A. Bürge, ‘Geld- und Naturalwirtschaft im vorklassischen und klassischen römischen Recht’, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 99 (1982), 128-157, 140f. on the role of *aestimatio*; this view is corroborated by Duncan-Jones 1994, op. cit. (n. 119), 29-32. [↑](#footnote-ref-690)
691. Bürge 1982, op. cit. (n. 120), 155-157. On monetisation in the late republic and early empire see D.B. Hollander, ‘The demand for money in the late Roman republic’, in W.V. Harris (ed.), *The Monetary Systems of the Greeks and Romans* (Oxford 2008), 112-136. [↑](#footnote-ref-691)
692. L. de Ligt, ‘Roman law and Roman economic history: some methodological problems’, in E. Lo Cascio and D. Mantovani (eds.), *Diritto romano e economia. Due modi di pensare e organizzare il mondo (nei primi tre secoli dell’Impero)* (Pavia 2018), 209-221, 219-221. See also Johnston 1988, op. cit. (n. 4), 271f.; “General theories of legal change are hard to construct, and readily undermined. It is hard to determine how far the course of development of any legal institution is conditioned by external social factors, and how far it is a matter of the ‘autonomous’ development of a legal doctrine in the hand of lawyer”. [↑](#footnote-ref-692)
693. P. F. Bang, *The Roman Bazaar. A Comparative Study of Trade and Markets in a Tributary Empire* (Cambridge 2008), 4f. [↑](#footnote-ref-693)
694. Bang 2008, op. cit. (n. 123), 5. “Merchants in the bazaar seek to cultivate personal and lasting relations of exchange with particular business partners”; on the organisational element of *fides* see also Verboven 2012, op. cit. (n. 77), 929-932. [↑](#footnote-ref-694)
695. See, e.g., *Dig.* 5.1.50pr-2 Ulp. 6 *fideicomm*.; *Dig.* 36.3.5.3 Pap. 28 *quaest*., on which see Kaser and Hackl 1996, op. cit. (n. 10), § 72.II.1, 483. [↑](#footnote-ref-695)
696. On the greater efficiency of the *cognitio extra ordinem,* see also Verboven 2012, op. cit. (n. 77), 936f. [↑](#footnote-ref-696)
697. See also Hollander 2008, op. cit. (n. 121), 125f., who stresses the low costs of exchanges ‘in kind’. [↑](#footnote-ref-697)
698. Cf. also Wardle 2014, op. cit. (n. 104), 310; see also C. Nicolet, ‘Les variations des prix et la ‘théorie quantitative de la monnaie’ à Rome, de Cicéron à Pline l’Ancien’, *Annales. Histoire, Sciences Sociales* 26 (1971), 1203-1227, 1213f.; E. Lo Cascio, ‘State and coinage in the late republic and early empire’, *Journal of Roman Studies* 71 (1981), 76-86, 84f. [↑](#footnote-ref-698)
699. For pharaonic Egypt: S. Allam, ‘Foundations in pharaonic Egypt: The oldest-known private endowments in history’, *Die Welt des Orients* 37 (2007), 8–30; for the Hellenistic period: K. Harter-Uibopuu, ‘Money for the *polis*. Public administration of private donations in Hellenistic Greece’, in R. Alston and O.M. Van Nijf, eds. *Political Culture in the Greek City after the Classical Age* (Leuven 2011), 119–139, and E.M. Harris, ‘Toward a typology of Greek regulations about religious matters: A legal approach’, *Kernos* 28 (2015), 71-77, with further references. [↑](#footnote-ref-699)
700. Cf. Allam 2007, op. cit. (n.1), 26-27; T. Bekker-Nielsen, *Urban Life and Local Politics in Roman Bithynia: The Small World of Dion Chrysostomos* (Aarhus, 2008), 70. [↑](#footnote-ref-700)
701. B. Laum, *Stiftungen in der griechischen und römischen Antike* I-II (Berlin, 1914). [↑](#footnote-ref-701)
702. E.F. Bruck, ‘Die Stiftungen für die Toten in Recht, Religion und politischem Denken der Römer’, in E.F. Bruck, (ed.),*Über Römisches Recht im Rahmen der Kulturgeschichte* (Berlin, 1954), 46–100, and id, ‘Les facteurs moteurs de l’origine et du développement des fondations grecques et romaines’, *Revue internationale des droits de l’antiquité* 2 (1955), 159–166. [↑](#footnote-ref-702)
703. R. Feenstra, ‘Le concept de fondation du droit romain classique jusqu’à nos jours: théorie et pratique’, *Revue Internationale des Droits de l’Antiquité*3 (1956), 245–263; Allam 2007, op. cit. (n.1), 27. For the ‘vulgar nature’: Bruck 1955, op. cit. (n.4). See also C.E.F. Rickett, ‘Charitable giving in English and Roman law: A comparison of method’, *Cambridge Law Journal* 38 (1979), 118–147, for a comparative survey of charitable giving in English and Roman law. The main problem with Rickett’s discussion, however, is his treatment of Roman provincial sources as necessarily reflecting ‘Roman law’, without the slightest differentiation between the Italian *municipia* or Roman colonies in Spain, and the Greek *poleis* which had a long history of private benefactions of their own. [↑](#footnote-ref-703)
704. Harris 2015, op. cit. (n.1), 71-72. Cf. Rickett 1979, op. cit. (n.5), 141: “The establishment of the foundation as a legal creature possessing a separate personality began only in the post-classical period”. The term is nonetheless used for the Hellenistic period in Harter-Uibopuu 2011, op. cit. (n.1), interchangeably with ‘trust fund’ and ‘private donation’, and in C.P. Jones, ‘A deed of foundation from the territory of Ephesos’, *Journal of Roman Studies* 73 (1983), 116–125, among others, for the Roman period. [↑](#footnote-ref-704)
705. I thank Edward Harris for his useful comments in this regard at the Ancient Law in Context workshop in Edinburgh, April 2019. [↑](#footnote-ref-705)
706. For entrenchment clauses: J. Sickinger, ‘Indeterminacy in Greek law. Statutory gaps and conflicts’, in E.M. Harris and G. Thür, eds. *Symposion 2007: Vortrage zur Griechischen und Hellenistischen Rechtsgeschichte* (Vienna 2008), 99–112. [↑](#footnote-ref-706)
707. Plin. *Epist*. 7.18: *Numeres rei publicae summam: verendum est ne dilabatur. Des agros: ut publici neglegentur*. [↑](#footnote-ref-707)
708. See e.g. Peplos’ donation to Ephesos (edition and translation in Jones 1983, op.cit. (n.6), 125, ll. 4-5: “these sums [*sc*. fines] shall be exacted by the archons of the subsequent year and by the *paraphylax*”. [↑](#footnote-ref-708)
709. *IG* 5.1.1208, with K. Harter-Uibopuu, ‘The trust fund of Phaenia Aromation (*IG* V.1 1208) and imperial Gytheion’, *Studia Humaniora Tartuensia* 5 (2004), <http://www.ut.ee/klassik/sht/2004/harter-uibopuu1.pdf>. Cf. *SEG* 13.258, and A.D. Rizakis, ‘Commerce de parfums et evérgétisme civique en Laconie (Gytheion) sous l’Empire’, *Mediterraneo Antico* 16:2 (2013), 549–562. [↑](#footnote-ref-709)
710. Lines 11-17: ὅπως ἐκ τῆς ἐ]μῆς χάριτος καὶ δωρεᾶς ἀθάνατα προσ[γίνη]|[ται κέρδη τοῦ ἀρ]γυρίου ἐγδιδομένου καὶ τῶν λαμβανόν[των τὸ] | [ἀργύριον ἐγγύ]ας ἐνγαίους τῇ πόλει διδόντων ἀξι[οχρέονας] | [ἵνα ἐκ τῶν τόκων τ]ὸ ἔλαιον εἰς αἰῶνα τοῖς Γυθεατῶν πολί[ταις τε] | [καὶ ξένοις χορ]ηγῆται, πᾶσάν τε πίστιν καὶ σπουδὴν [οἱ ἄρχον] |[τες καὶ οἱ σύ]νεδροι εἰσφέρωνται κατ’ ἔτος, ὅπως ἀΐδιο[ς ἡ τοῦ ἐ]|[λαίου δόσις τῶι] γυμνασίωι διαμίνῃ καὶ τῇ πόλει. (“In doing so they should make every effort in order that immortal benefit is derived from my gift and the donation of the capital that is being lent and that those who receive the capital should give real security commensurate with the loan, so that oil may always be provided from the interest paid to the citizens of Gytheion and the foreigners. The *archontes* and the *synedroi* must contribute all good faith and industry every year, in order that the supply of oil to the gymnasium and the *polis* remains everlasting”, here and thereafter, trans. by K. Harter-Uibopuu, op. cit. (n.11)) [↑](#footnote-ref-710)
711. Lines 38-41: βούλομαι δὲ καὶ τοὺς δούλους τῆς τοῦ [ἐλαίου εἰς αἰῶ]|[να χορηγ]ίας μετέχει<ν> κατ’ ἔτος ἐπὶ ἓξ ἡμέρας, τρῖς [μὲν τὰς σε]|[βαστέ]ους καὶ τρῖς τὰς τῆς θεοῦ, μήτε ἄρχοντος [μήτε συνέδρου] | [μήτε γ]υμνασιάρχου κωλύοντος αὐτοὺς ἀλείφεσθαι. (“I also wish that the slaves shall share in the eternal supply of oil every year for six days, of which three (should be) festival days of the Augusti and three festival days of the goddess, when no archon or *synedros* or *gymnasiarchos* shall prevent them from anointing themselves”) [↑](#footnote-ref-711)
712. See, for instance, the gymnasiarchical law of Beroia, mid-second c. BCE, denying entry to slaves, freedmen, and their sons (ll. 27-29): P. Gauthier and M. Hatzopoulos, *La loi gymnasiarchique de Beroia*. Meletemata 16 (Athens 1993), whence *SEG* 43.381, cf. *SEG* 27.261. See also N.B. Crowther, ‘Slaves and Greek athletics’, *Quaderni Urbinati di Cultura Classica* 40:1 (1992), 38-39, with references. Compare *IG* 4.606 from Argos, commemorating a certain Tiberius Claudius Diodotos as the first and only (μόνος καὶ πρῶτος) to give out oil to free people and slaves alike. [↑](#footnote-ref-712)
713. Lines 19-28: [ἐὰν δὲ οἱ γινόμ]ενοι κατ’ ἔτος ἄρχοντες ἢ οἱ σύνεδροι ἢ ἡ πό[λις ὀ]|[λιγωρήσωσιν] τῆς εἰς αἰῶνα τοῦ ἐλαίου χορηγίας ἢ μὴ κα[τὰ τὰ] | [γεγραμμένα ἐγ]δανείσωσι τὸ ἀργύριον ἢ μὴ ἀξιοχρέονας [ἐνγαί]|[ους ἐγγύας λάβωσ]ιν παρὰ τῶν τὸν ἐλαϊκὸν μελλόντων [τῶι δημο]|[σίωι ἀποφέρε]ιν τόκον, ἵνα ἐκ παντὸς ᾖ τὸ ἄλειμμα [τῇ πό]|[λει, ἢ μὴ μερ]<ι>μνήσωσι εἰς τὸ τὴν ἐμὴν τοῦ ἀργυρίου [δόρ]|[εάν ἐμμένει]ν, ἀλλὰ μὴ τῆς πόλεως γενέσθαι δόξα[ν κατολι]|[γωρίας, ἐξέστω] τῷ βουλομένῳ καὶ Ἑλλήνων καὶ Ῥωμαίων̣ [κα]|[τηγορῆσαι ὀλι]γωρίας τῆς πόλεως ἐπὶ τοῦ δήμου [τῶν Γυθε]|[ατῶν. On voluntary prosecution in more detail, see L. Rubinstein, ‘Volunteer prosecutors in the Greek world’, *Dike* 6 (2003), 87–113. [↑](#footnote-ref-713)
714. *SEG* 11.924, r. Augustus: Ῥωμαῖοι | οἱ ἐν ταῖς πόλεσιν τῆς | Λακωνικῆς πραγματευό|μενοι. Cf. *IG* 5.1.1146, ll. 32-40 (=*Syll*.3 748; *SEG* 50.386): two Roman brothers acting as creditors in Gytheion in the 70s BCE. [↑](#footnote-ref-714)
715. *SEG* 11.923. [↑](#footnote-ref-715)
716. Lines 28-30: δεχο]μένων μὲν τῶν ἀρχόντων τὴν ἐπανγελί[αν ταύ]|[την, τὸ δὲ ἀντίγ]ραφον διδόντος τοῦ κατηγόρου καὶ προθεσ[μί]|[αν τοίς συνέδροι]ς. [↑](#footnote-ref-716)
717. Compare lines 46-56 of the famous Athenian oil law drafted by Hadrian (*IG* 22.1100), which specified that lawsuits of up to fifty *amphorae* were to be judged by the *boule* alone, while those exceeding this limit had to be heard before the *boule* and the *demos*, thus clearly discrediting the view that city councils took over all lawsuits of higher significance in the imperial period or, indeed, that public assemblies lost their judicial powers altogether. [↑](#footnote-ref-717)
718. Line 30: μὴ δεχομένων δὲ ἐκκολλήσαντ[ω . . . ] [↑](#footnote-ref-718)
719. Harter-Uibopuu 2004, op. cit. (n. 11), 12. [↑](#footnote-ref-719)
720. Lines 31-34: τ]ὸ μὲν τέταρτον ἔστω μέρος [τῶν] | [ὀ]κτακ[ισχιλίων διναρίων] τοῦ κατηγορήσαντος, ἐὰν ἐλ[έν]|[ξῃ] τὴ[ν τῶν Γυθεατῶν] ῥαθυ[μία]ν, τὰ δὲ ἑξακισχίλια δινά[ρια τῆς] | [π]όλεως [τῶν Λακεδ]αιμονίων. (“A fourth of the eight thousand *denarii* shall belong to the prosecutor who has exposed the callousness of the Gytheatai, and the six thousand *denarii* shall belong to the *polis* of the Lakedaimonioi.”) [↑](#footnote-ref-720)
721. Lines 34-38: ἐὰν̣ [δ]ὲ καὶ Λακεδαιμόνιοι [ὀλι]|[γω]ρήσωσιν [τῆς ἐμ]ῆς χάριτος, ἔστω [τὰ ἑ]ξακισχίλια διν[άρια] | [τῆς] Σεβαστῆ[ς θε]ᾶς, ἐλένξαντος τοῦ β[ουλ]ομένου τὴν [Λα]|[κεδα]ιμονίων ὀλιγ[ω]ρίαν καὶ τοῖς Σεβαστοῖς τὸ ἀρ̣[γύριο]ν ἀνε[νεγ]|[κόν]τ̣ος. (“If the Lakedaimonians too neglect my donation, the six thousand *denarii* shall belong to the Dea Augusta, if a volunteer prosecutor has demonstrated the neglect of the Lakedaimonians and has transferred the capital to the Sebastoi.”) [↑](#footnote-ref-721)
722. This must surely apply to the penalty of 250,000 *denarii* payable to the Jewish patriarch in the case of non-compliance with the terms of Tiberius Claudius Polycharmos’ donation of part of a building to the Jewish community at Stobi in Macedonia: *I.Stobi* 19, 163/4 CE. Note the scholarly disagreement regarding the dating of this inscription, some preferring a later date, as the Jewish patriarch is not otherwise attested before the third century CE: see discussion in E. Habas, ‘The dedication of Polycharmos from Stobi: Problems of dating and interpretation’, *The Jewish Quarterly Review* 92 (2001), 41–78, rightly pointing out that the fine of 250,000 *denarii* is extraordinary for either dating. The donor’s evocation of a religious authority, albeit remote, must be playing a primarily dissuasive role too, appealing to the primary beneficiaries of his donation, i.e., the Jewish population of Stobi. For Jewish communities in Thessalonike, see P.M. Nigdelis, ‘Synagoge(n) und Gemeinde der Juden in Thessaloniki: Fragen aufgrund einer neuen jüdischen Grabinschrift der Kaiserzeit’, *Zeitschrift für Papyrologie und Epigraphik* 102 (1994), 297–306, and A. Koukouvou, ‘Η εβραϊκή κοινότητα της Βέροιας στην Αρχαιότητα: Νέες επιτύμβιες επιγραφές’, *Tekmeria* 4 (1998), 13–31, for Beroia. [↑](#footnote-ref-722)
723. *ILS* 6957, 161-169 CE. [↑](#footnote-ref-723)
724. *CIL* 13.5042, third c. CE. S. Mrozek, ‘Le fonctionnement des fondations dans les provinces occidentales et l’économie de crédit à l’époque du Haut-Empire romain’, *Latomus* 59:2 (2000), 327–345, interprets this as a system of mutual guarantees (“systeme d’assurance des fondations”) between the provincial towns due to their close proximity, economic ties, and shared political elite. [↑](#footnote-ref-724)
725. Aigiale: *IG* 12.7.515, l. 129: ὁ βουλομένος Αἰγιαλέω[ν]. Ephesos: Jones 1983, op. cit. (n. 6), 125, ll. 5-6: ἐὰν δὲ μὴ πράξωσι[ν], αὐτοὶ ὀφειλέτωσ[αν] καὶ πραχθ[ήτ]ωσαν ὑπὸ παντ[ὸς τοῦ] [βουλο]μένου, πολείτου τε καὶ ξ[έ]νου. [↑](#footnote-ref-725)
726. *IG* 12.7.515, ll. 130-133: τὸν δὲ νόμον τόνδ[ε] | [ε]ἶν[αι κύριον] εἰς τὸν πάντα χρόνον, καὶ ὁ γραμματεὺς αὐτὸν ἀναγ[ρα]|[ψ]άτω εἰς τὰ δημόσια γράμματα πάντα καὶ εἰς τὰς δέλτους, οὗ οἱ [νόμοι] | [ε]ἰσ̣ὶν ἀναγ[εγ]ραμ[μ]ένοι. (“This law shall be valid for all time, and the secretary shall register it in the public records and in the tablets where the laws are registered”.) See discussion of this document in Harter-Uibopuu 2011, op. cit. (n.1), 126-130. [↑](#footnote-ref-726)
727. The guardian’s name appears in full in l. 62. Harter-Uibopuu 2004, op. cit. (n.11), 13, draws on H. Taeuber, ‘Stifterinnen im griechischen Osten’, in E. Specht, (ed.),*Frauenreichtum: Die Frau als Wirtschaftsfaktor im Altertum* (Vienna 1994), 199–219, to point out that Greek women, unlike their Roman counterparts, did not normally need a legal guardian to initiate such transactions. [↑](#footnote-ref-727)
728. *FD* 3.6.126, ll. 6-8: ἀπέδοτο Δωνά|τα διὰ κυρίου καὶ φροντιστοῦ Εὐνεικί|δα Εὐανθέως τὰν ἰδίαν θρεπτὰν Ζω|σίμαν τῶι Πυθίωι Ἀπόλλωνι. (“Donata consecrated, through her guardian Euneikidas, son of Euanthes, her home-bred slave Zosima to the Pythian Apollo.”) [↑](#footnote-ref-728)
729. E.g. *SGDI* 2.2066, 188 BCE. [↑](#footnote-ref-729)
730. *SEG* 18.350, with F. Camia, ‘II testamento di Rebilus e l’epistola di Vinuleius Pataecius ai Tasii’, *Zeitschrift für Papyrologie und Epigraphik* 146 (2004), 265–271, cf. *SEG* 54.816, dating the inscription to the late first century BCE – early first century CE, and J. Fournier, ‘Retour sur un décret thasien: la donation testamentaire de Rebilus’, *Bulletin de Correspondance Hellénique* 138 (2014), 79–102, arguing for 22 CE. Compare *SEG* 54.617: an honorary inscription for the same Rebilus from Serrai, possibly also in relation to donation of land. Note, in particular, the prohibition against any change to the decree (fr. C, l. 4: εἰ δέ τις εἰση[γήσηται]), almost identical to the one in the Thasian inscription (ll. 11-14): ἐὰν δέ τ[ις εἰση]γήσηται περί τ[ι]|νος τούτων ἢ γράψῃ ἤ ἐπιψ[ηφίσῃ ἢ ἄ]ναγράψῃ εἰς τὸ | τῆς πόλεως γραμματοφυλά[κιον, τ]ὰ μὲν γραφέντα | καὶ τὰ ψηφισθέντα ἄκυρα εἶναι. (“If someone introduces a proposal on this subject, submits it in writing, puts it to the vote or records it in the archives of the city, that the written proposal and the vote be null and void”, here and thereafter, trans. my own.) [↑](#footnote-ref-730)
731. Lines 7-11: τὴν δὲ τῶν [ἀγ]ρῶν δωρεὰν τη|ρεῖν ἀθάνατον ἡμᾶς καὶ μήτε [ὑπ]οθέσθαι ποτἐ τοὐ[ς] | ἀγροὺς ἡμᾶς μήτε ἀποδόσθαι [αὐ]τοὺς μήτε ὅλους | μήτε μέρη μήτε περι[ιδ]εῖν ἀπ[αλ]λοτριουμένους | κατὰ μηδένα τρόπον. (“That we keep the donation of land in perpetuity, without ever pledging these lands, nor selling them in whole or in part, nor allowing them to be alienated in any way”) For inalienability clauses in general: J. Velissaropoulou-Karakostas, *Droit grec d’Alexandre à Auguste (323 av. J.-C-14 ap. J.-C.): Personnes, biens, justice II* (Athens 2011), 55-58. [↑](#footnote-ref-731)
732. Lines 11-20: ἐὰν δέ τ[ις εἰςη]γήσηται περὶ τ[ι]|νος τούτων ἤ γράψῃ ἤ ἐπιψ[ηφίσῃ ἤ ἐ]νγράψῃ εἰς τὸ | τῆς πόλεως γραμματοφυλά[κιον, τ]ὰ μὲν γραφέντα | καὶ τὰ ψηφισθέντα ἄκυρα εἶναι, [τὸν δὲ] εἰπόντα ἤ | γράψαντα ἤ ἐπιψηφίσαντα ἤ ἀναγ[ράψα]ντα τὴν γνώ|μην εἰς τὸ τῆς πόλεως γραμματοφ[υλ]άκιον ὀφεί|λειν τοῖς τῶν Σεβαστῶν ναοῖς στατῆ[ρ]ας ἀτι[μ]ή̣τ̣ο̣υ̣[ς] | [δ]ισμυρίους καὶ ἄτιμον εἶναι καὶ αὐτὸν καὶ γέν[ος] | [ἐνέχ]εσθαι δὲ αὐτοὺς καὶ τῆι εἰς τοὺς Σεβα̣σ̣τ̣ο̣ὺ̣ς̣ [ἀσε]|[βείαι· [↑](#footnote-ref-732)
733. Fournier 2014, op. cit. (n.32), 93. [↑](#footnote-ref-733)
734. On the legal basis of Hellenistic donations: Harris 2015, op. cit. (n.1), 71-77. [↑](#footnote-ref-734)
735. *IG* 10.2.300, cf. *SEG* 30.566. [↑](#footnote-ref-735)
736. Lines 16-19: ἔδοξεν τῇ βουλῇ | τὴν τοῦ ἀνδρὸς σεμνότητα κὲ βούλησιν | ἀποδέξασθαι ἐπί τε ταῖς ὑπ’ αὐτοῦ κατὰ | τὴν διαθήκην γεγραμμέναις αἱρέσεσιν; cf. ll. 22-25: μήτε τοῦ προγεγραμμέ|νου κεφαλαίου ἀπαναλίσκειν τι εἰς ἑτέραν | χρείαν μήτε τοῦ κατ’ ἐνιαυτὸν γινομένου τό|κου. [↑](#footnote-ref-736)
737. *IG* 10.2.348-349, ll. 23-28: ἐὰν | δ̣ὲ̣ μὴ ἄγωσιν τὴν ἡμέραν κα|θ̣’ ἃ̣ ἐ̣ν̣γέγραπται, ἔσται τὸ χρῆ|[μ]α τῶν κληρονόμων μου | ἢ τῶν ἐγγόνων ἢ κληρο|νόμων αὐτῶν. Cf. Scaevola in *Dig.* 33.1.21.3 for a similar stipulation in the bequest of a Roman citizen to Sebaste in Cilicia. [↑](#footnote-ref-737)
738. Though not necessarily that of Roman private law, as testamentary donations are widely attested in pre-Roman sources too: see, for instance, *Syll.*3631 from Delphi, dating to 182 BCE, characteristic of Hellenistic period documents. See discussion in Harter-Uibopuu 2011, op. cit. (n.1), 121-122, with other examples. [↑](#footnote-ref-738)
739. Communities: Ulp. *Epit.* 24.28: *civitatibus omnibus quae sub imperio populi Romani sunt legari potest: idque a divo Nerva introductum postea a senatu auctore Hadriano diligentius constitutum est* (“A legacy may be left to any city belonging to the Empire of the Roman people. This rule was first introduced by the divine Nerva, and was afterwards, at the instance of Hadrian, more specifically established by the Senate.”) Individuals: Gai. 2.110: *peregrini quidem ratione ciuili prohibeantur capere hereditatem legataque* (“peregrines are forbidden by the civil law from receiving estates and legacies”). Cf. Cic. *Arch.* 11, concerning proof of one’s Roman citizen status: “he more than once made a will according to our laws, and he entered upon inheritances left him by Roman citizens”, and Paus. 8.43.5: Antoninus Pius repealing a law which barred Roman citizens in the Greek provinces from leaving property to their children who were born in mixed marriages and thus followed the Greek status (ἐτέλουν ἐς τὸ Ἑλληνικόν). [↑](#footnote-ref-739)
740. It is equally possible that Nerva’s enactment referred to by Ulpian simply legitimised an already widespread practice, thus reflecting how the social nature of legal practices often preceded specific legal enactments. [↑](#footnote-ref-740)
741. *Epist.* 5.7: *Nec heredem institui nec praecipere posse rem publicam constat*. [↑](#footnote-ref-741)
742. *Epist*. 5.7: *Mihi autem defuncti voluntas <…> antiquior iure est.* [↑](#footnote-ref-742)
743. *Dig.* 22.6.9.5, in relation to the *lex Falcidia*. [↑](#footnote-ref-743)
744. Cf. Gai 2.285 on bequests to peregrines as the *origo* of *fideicommissa*. For more on *fideicommissa*, see Ch. 10 in this volume. [↑](#footnote-ref-744)
745. Plin. *Epist*. 10.75-76. [↑](#footnote-ref-745)
746. *IG* 10.2.336, 126/7 CE: τῇ πόλει καὶ τὸν ναὸν καὶ τοὺς ἐν αὐτῷ ἀνδριάντας ἀποκαθέστησαν | καὶ δηνάρια πεντακιχείλια ἠρίθμησαν τῇ βουλῇ ἐκ διαθήκης Ἀνθεστίας | Φούσκας οἱ κληρονόμοι. Cf. *ILS* 7196, ll. 1-9, from Nakoleia in Phrygia, r. Hadrian. [↑](#footnote-ref-746)
747. J.H. Oliver, ‘The ruling power. A study of the Roman empire in the second century after Christ through the *Roman Oration* of Aelius Aristides’, *Transactions of the American Philosophical Society* 43:4 (1953), 963-980, on the Greek East, and D. Johnston, ‘Munificence and*municipia*: Bequests to towns in classical Roman law’, *Journal of Roman Studies* 75 (1985), 105–125, on Roman *municipia* in the West. Cf. K.M.T. Atkinson, ‘The ‘constitutio’ of Vedius Pollio at Ephesus’, *Revue Internationale des Droits de l’Antiquité* 9 (1962), 261–289. [↑](#footnote-ref-747)
748. *IG* 5.1 1147, r. Hadrian (ll. 8-25). [↑](#footnote-ref-748)
749. *IG* 22 .1092, with J.H. Oliver, ‘The Eleusinian endowment’, *Hesperia* 21 (1952), 381–399, ll. 33-42. See also Oliver 1953, op. cit. (n. 49), 966-968, on the identity of the Roman ἔπαρχος. [↑](#footnote-ref-749)
750. Lines 39-42: προνοήσονται δὲ το[ῦ ὅ]λ̣ου μάλισ[τα ὅ τε ἱεροφ]άντης καὶ ὁ | δαδοῦχος πρὸς τὸ μὴ σ[α]λευθῆν[αὶ ποτε τοῦ]το τὸ κεφά|λαιον μήτε τὴν ποσό[τ]ητα τῶν [καθιερωμέν]ων δηναρίῳι | μειωθῆναι. (“It is especially understood that the hierophant and the *daduchus* shall have complete charge in order that this capital investment be never endangered and in order that the amount of the consecrated interest be never reduced by a single *denarius*”, trans. by Oliver 1952, op. cit. (n.51).) [↑](#footnote-ref-750)
751. *I.Ephesos* 27. [↑](#footnote-ref-751)
752. Compare F. Millar, *Rome, the Greek World, and the East. Vol. 2: Government, Society, and Culture in the Roman Empire* (London 2004), 65, on the dubious legal basis of references to fines payable to the *fiscus* where the imposing authority is not specified. [↑](#footnote-ref-752)
753. *TAM* 2.905, Rhodiapolis, 152/3 CE, ll. 66-70: τὴν οὖν προδηλουμέ|νην αὐτοῦ δωρεὰν βεβαιῶ ἐπί τε τῷ ἀσάλευ|τον καὶ ἀμετάθετον εἰς τὸν ἀεὶ χρόνον εἶ|ναι, καὶ ἐπὶ ταῖς ἄλλαις αἱρέσεσιν αἷς ἐπην|γ̣[ε]ί̣λ̣ατο. [↑](#footnote-ref-753)
754. As envisaged by Johnston 1985, op. cit. (n.49), 121. [↑](#footnote-ref-754)
755. Cf. Oliver 1953, op. cit. (n.49), 973. [↑](#footnote-ref-755)
756. Cf. Harter-Uibopuu 2011, op. cit. (n.1), 130. [↑](#footnote-ref-756)
757. *IG* 5.1.1208, ll. 41-48: κα̣[ὶ εἰς] | [λιθίν]ας τρεῖς στήλας ἀναγραφῆναι τὴν τῆς ἐμῆς [χάριτος ἐ]|[πὶ τοῖς] ῥητοῖς γεινομένην τῷ γυμνασίωι καὶ τῇ πόλει δω[ρεάν] <…> μία δὲ εἰς τὸ γυμνάσιον, ἵνα καὶ πολ[ί]|[ταις καὶ] ξένοις εἰς αἰῶνα φανερὰ καὶ εὔγνωστος ᾖ πᾶσιν [ἡ] | [τῆς ἐμ]ῆς χάριτος φιλανθρωπία. (“And I wish that three stone *stelai* shall be inscribed with my donation and the terms on which it has been granted to the gymnasium and the *polis* <…> and one at the gymnasium, so that the generosity of my donation shall be well-known and evident to everyone, both citizens and foreigners, forever.”) [↑](#footnote-ref-757)
758. Edition and translation in W.H. Buckler, ‘A charitable foundation of A.D. 237’, *The Journal of Hellenic Studies* 57:1 (1937), 1–10. [↑](#footnote-ref-758)
759. See D.J.D. Miller and P. Sarris, *The Novels of Justinian: A Complete Annotated English Translation* (2 vols., Cambridge, 2018). [↑](#footnote-ref-759)
760. D. Feissel, ‘Pétitions aux empereurs et formes de rescript dans les sources documentaires’, in D. Feissel and J. Gascou (eds.), *La Pétition à Byzance* (Paris, 2004) [↑](#footnote-ref-760)
761. P. Sarris, *Empires of Faith. The Fall of Rome to the Rise of Islam, 500-700* (Oxford, 2011), 125-152. [↑](#footnote-ref-761)
762. Z. Rubin, ‘The reforms of Khusro Anushirwan’, in A. Cameron (ed.) *The Byzantine and Early Islamic Near East, Volume III: States, Resources and Armies* (Princeton, 1995). [↑](#footnote-ref-762)
763. M. Meier, ‘The Justinianic plague. The economic consequences of the pandemic in the eastern Roman Empire and its cultural and religious effects’, *Early Medieval Europe* 24 (2016). [↑](#footnote-ref-763)
764. M. Keller et al., ‘Ancient *yersinia pestis* genomes from across Western Europe reveal early diversification during the First Pandemic (541-75)’, *Proceedings of the National Academy of Sciences of the United States of America* (June 4, 2019). See also P. Sarris ‘New approaches to the plague of Justinian’, *Past and Present* 254 (2022), 315-346. [↑](#footnote-ref-764)
765. Miller and Sarris op.cit (n.1), 799-800. [↑](#footnote-ref-765)
766. Miller and Sarris op.cit (n.1), 799 f. 1 and 800 f.4. [↑](#footnote-ref-766)
767. Miller and Sarris op. cit. (n.1), 782 f. 6, 783-784 f. 9 and 786 f. 17. [↑](#footnote-ref-767)
768. Miller and Sarris op.cit. (n.1), 788 f.21 and 789 f.25. [↑](#footnote-ref-768)
769. P. Sarris, *Economy and Society in the Age of Justinian* (Cambridge, 2006), 219; see also M. Hendy, ‘Light-weight solidi, tetartera, and the Book of the Prefect’, *Byzantinische Zeitschrift* 65 (1972). [↑](#footnote-ref-769)
770. Sarris, op. cit. (n.11), 222-227. [↑](#footnote-ref-770)
771. See H. Leppin, *Justinian: Das christliche Experiment* (Hamburg, 2011). [↑](#footnote-ref-771)
772. P. Sarris, ‘Justinian’, in J. Witte and G.S. Haulk (eds.), *Christianity and Family Law – An Introduction* (Cambridge, 2017). [↑](#footnote-ref-772)
773. Miller and Sarris, op. cit. (n.1.), 539-540. [↑](#footnote-ref-773)
774. Miller and Sarris, op. cit. (n.1.), 399. [↑](#footnote-ref-774)
775. K. Harper, *From Shame to Sin: The Christian Transformation of Sexual Morality in Late Antiquity* (Cambridge Mass., 2013). [↑](#footnote-ref-775)
776. Miller and Sarris, op. cit. (n.1), 181-4. [↑](#footnote-ref-776)
777. K. Hopkins, *Conquerors and Slaves* (Cambridge, 1978). See also S. Tougher, *The Eunuch in Byzantine History and Society* (London, 2008). [↑](#footnote-ref-777)
778. Miller and Sarris, op. cit. (n.1), 933-5. [↑](#footnote-ref-778)
779. See the excellent discussion in G. Merianos and G. Gotsis, *Managing Financial Resources in Late Antiquity: Greek Fathers’ Views on Hoarding and Saving* (London, 2017), which reveals the range of positions taken by different authors, and C.P. Schroeder, *St. Basil the Great on Social Justice* (New York, 2009), for one of the most strident and influential. [↑](#footnote-ref-779)
780. R. Rees, *Diocletian and the Tetrarchy* (Edinburgh, 2004), 139-40 and 142. [↑](#footnote-ref-780)
781. *Cod. Theod.* 7.4.28. [↑](#footnote-ref-781)
782. *Dig.* 13.4.3 (originally from Gaius, *Ad edictum provinciale*, 2nd century). [↑](#footnote-ref-782)
783. John 2:13-6. [↑](#footnote-ref-783)
784. By far the best study of this material is to be found in D. Rockwell, ‘The corrupting sea loan: Justinian’s failed regulation of *pecunia traiectitia*’ (MA diss., Central European University, 2019). I am grateful to Mr. Rockwell for granting me permission to refer to this important work, as also to Dr. P. Candy for further discussion. See Miller and Sarris, op. cit. (n.1), 697-700, which requires revision in the light of Mr. Rockwell’s convincing analysis. [↑](#footnote-ref-784)
785. *Dig.* 14.2. See also M. T. G. Humphreys, *Law, Power, and Imperial Ideology in the Iconoclast Era* (Oxford, 2015), 179-194. [↑](#footnote-ref-785)
786. Iust. *Nov.* 106, pr. See Miller and Sarris, op.cit. (n.1.), 698. [↑](#footnote-ref-786)
787. Iust. *Nov.* 110, convincingly explained by Rockwell, op. cit. (n. 26). [↑](#footnote-ref-787)
788. Miller and Sarris, op. cit. (n.1), 697 f.1. [↑](#footnote-ref-788)
789. Miller and Sarris, op. cit. (n.1), 339-340. [↑](#footnote-ref-789)
790. Miller and Sarris, op. cit. (n.1), 340 f. 4. [↑](#footnote-ref-790)
791. Iust. *Nov.* 121, Iust. *Nov.* 138; Iust. *Edict* 9. [↑](#footnote-ref-791)
792. Iust. *Nov.* 160: discussed in Miller and Sarris, op. cit. (n.1), 999-1001. [↑](#footnote-ref-792)
793. *Dig.* 3.4.1-2: see also the discussion in S. Consentino, ‘La legilazione di Giustiniano sui banchieri’, in G. Vespignani (ed.) *Polidoro – Studi offerti ad Antonio Carile* (Spoleto, 2013). [↑](#footnote-ref-793)
794. Iust. *Edict* 9 c.5: see Miller and Sarris, op. cit. (n.1) p. 1060. [↑](#footnote-ref-794)
795. Miller and Sarris, op. cit. (n.1), 905 f.1. [↑](#footnote-ref-795)
796. Iust. *Edict* 7: see Miller and Sarris, op. cit. (n.1), 1044. [↑](#footnote-ref-796)
797. Miller and Sarris, op. cit. (n.1), 1043 f. 1. [↑](#footnote-ref-797)
798. Procop. *Anecd.* 22.3-4. [↑](#footnote-ref-798)
799. Iust. *Nov.* 136, dating from 535. [↑](#footnote-ref-799)
800. Iust. *Nov.* 120, dating from 544. [↑](#footnote-ref-800)
801. Iust. *Edict* 9 c.6: see Miller and Sarris, op. cit. (n.1), 1062. [↑](#footnote-ref-801)
802. *Contra* M. Hendy, *Studies in the Byzantine Monetary Economy* (Cambridge, 1985), 238. [↑](#footnote-ref-802)
803. Iust. *Nov.* 136 c.2: see Miller and Sarris, op. cit. (n.1), 907. [↑](#footnote-ref-803)
804. Iust. *Edict* 9 c. 2: see Miller and Sarris, op. cit. (n.1), 1058. [↑](#footnote-ref-804)
805. Iust. *Edict* 7 c. 2: see Miller and Sarris, op. cit. (n.1), 1045. [↑](#footnote-ref-805)
806. Iust. *Nov.* 136 c.2. [↑](#footnote-ref-806)
807. See Iust. *Nov.* 97. [↑](#footnote-ref-807)
808. Iust. *Nov.* 22 c.18. [↑](#footnote-ref-808)
809. Constant. Porph., *Caer. Aul. Byz.* 1.91-415. [↑](#footnote-ref-809)
810. See Consentino, op. cit. (n.35) and S. Consentino ‘Banking in early byzantine Ravenna’, *Cahiers de Recherches Médiévales et Humanistes* 28 (2015). [↑](#footnote-ref-810)
811. Joh. Lyd. *Mag.* 3.48. [↑](#footnote-ref-811)
812. Miller and Sarris, op. cit. (n.1), 1056 f.1. [↑](#footnote-ref-812)
813. See discussion in J. Banaji, *Agrarian Change in Late Antiquity – Gold, Labour and Aristocratic Dominance* (2nd edition, Oxford, 2007). [↑](#footnote-ref-813)
814. See *P.Oxy.* 1.136 and *PSI* 1.76. [↑](#footnote-ref-814)
815. Discussed in J. Keenan, ‘From the archive of Flavia Christodote: observations on *PSI* I 76’, *Zeitschrift für Papyrologie und Epigraphik* 29 (1978). [↑](#footnote-ref-815)
816. Iust. *Nov.* 136 c.5. [↑](#footnote-ref-816)
817. Malal. 18.141: for further references, see also Miller and Sarris, op. cit. (n.1), 904 f. 1. [↑](#footnote-ref-817)
818. A. Cameron (ed.) *Flavius Cresconius Corippus: In Laudem Iustini Augusti Minoris, Libri IV* (Oxford, 1976), 101 (= II, 370-375). [↑](#footnote-ref-818)
819. C. Zuckerman, ‘Silk “Made in Byzantium”: a study of economic policies of emperor Justinian’, *Travaux et Mémoires* 17 (2013). [↑](#footnote-ref-819)
820. See Miller and Sarris, op. cit. (n.1), 923-924 and 167-71. [↑](#footnote-ref-820)
821. Iust. *Nov.* 154: see A.D. Lee, ‘Close-kin marriage in late antique Mesopotamia’, *Greek, Roman and Byzantine Studies* 29 (1988). [↑](#footnote-ref-821)
822. Iust. *Nov.* 129. [↑](#footnote-ref-822)
823. Iust. *Nov.* 144 c.2: see Miller and Sarris, op. cit. (n.1), 942. [↑](#footnote-ref-823)
824. On the Roman-Canon *ius commune* as a “system” of norms see: F. Calasso, *Storia e sistema delle fonti del diritto comune*, vol. 1 *Le origini* (Milan 1938), afterwards included in: F. Calasso, *Medio evo del diritto*, vol. 1 *Le fonti* (Milan 1954), e.g. 387 ff., 469 ff. [↑](#footnote-ref-824)
825. The role played by commerce and commercial law in ancient Rome is still debated: see par. 4 on the different historiographical points of view. [↑](#footnote-ref-825)
826. B. Stracca, *Tractatus de mercatura, seu mercatore* (Venetiis 1553). [↑](#footnote-ref-826)
827. It has to be underlined, though, that the autonomy of the field is still at the centre of academic debates: I. Birocchi (ed.), *“Non più satellite”. Itinerari giuscommercialistici tra Otto e Novecento* (Pisa 2019). In particular, see the essay by Pio Caroni: ‘Quale continuità nella storia del diritto commerciale?’, 27 ff*.*  [↑](#footnote-ref-827)
828. L. Goldschmidt, *Universalgeschichte des Handelsrechts* (Stuttgart 1891). The text was translated into Italian by Vittorio Pouchain and Antonio Scialoja: *Storia universale del diritto commerciale* (Torino 1913). In general, therefore, it was read in German. [↑](#footnote-ref-828)
829. See for example the project “The making of commercial law. Common practices and national legal rules from the early modern to the modern period” financed by the Academy of Finland and by the Finnish Cultural Foundation and directed by prof. Heikki Pihlajamäki (University of Helsinki), which led to a series of events and publications, such as the volume on the effects of merchants’ travels on the development of commercial law: S. Gialdroni, A. Cordes, H. Pihlajamäki, S. Dauchy, D. De ruysscher (eds.), *Migrating Words, Migrating Merchants, Migrating Law: Trading Routes and the Development of Commercial Law* (Leiden 2019). One of the latest outputs of this interdisciplinary trend is: D. De ruysscher, H. Pihlajamäki, S. Dauchy, S. Gialdroni, A. Cordes (eds.), *Commerce, Citizenship, and Identity in Legal History* (Leiden 2021). [↑](#footnote-ref-829)
830. Founded in 1858 under the name of *Zeitschrift für Handelsrecht*. [↑](#footnote-ref-830)
831. University of Berlin, 1875. [↑](#footnote-ref-831)
832. E. Vidari, ‘Lewin Goldschmidt’, in *Scritti vari di Ercole Vidari. Pubblicati per il 45° anno del suo insegnamento nella Università di Pavia* (Milan 1908), 239-242, 239. [↑](#footnote-ref-832)
833. Goldschmidt was proclaimed *Doctor honoris causa* by the Universities of Edinburgh (1884) and Bologna (1888). He received several decorations in different countries: Germany (1891), Italy (1882), Russia (1883) and Norway (1889): M. Pappenheim, *Levin Goldschmidt* (Stuttgart 1897), 48. See also: W. Silberschmidt, ‘Le droit commercial avant et après L. Goldschmidt’, *Revue historique du droit français et étranger* (1934), 643-699. W. Schön, ‘Recht und Ökonomie bei Levin Goldschmidt’, in G. Bitter et al. (eds.), *Festschrift für Karsten Schmidt zum 70. Geburtstag* (Cologne 2009), 1427-1446, 1428. The most extensive study on the life and work of Goldschmidt is currently: L. Weyhe, *Levin Goldschmidt. Ein Gelehrtenleben in Deutschland: Grundfragen des Handelsrechts und der Zivilrechtswissenschaft in der zweiten Hälfte des 19. Jahrhunderts* (Berlin 1996). For an in-depth analysis of the long-lasting influence of Goldschmidt even in the USA, see: J. Whitman, ‘Commercial Law and the American *Volk*: A Note on Llewellyn’s German Sources for the Uniform Commercial Code’, *Yale Law Journal* 97.1 (1987), 156-175. [↑](#footnote-ref-833)
834. See: E. Hamburger, *Juden im öffentlichen Leben Deutschlands. Regierungsmitglieder, Beamte und Parlamentarier in der monarchischen Zeit, 1848-1918* (Tübingen 1968), on Goldschmidt: 265-266. [↑](#footnote-ref-834)
835. On July 23 1847, the law “Gesetz über die Verhältisse der Juden” had forbidden Jews access to the public administration. For this reason, Goldschmidt chose at first another faculty. For an in depth analysis of Goldschmidt’s education, see: Weyhe 1996, op. cit. (n. 10), 27 ff. [↑](#footnote-ref-835)
836. As a consequence of the 1848 Revolution, in fact, the “Verordnung über eigene Grundlagen der künftigen preußischen Verfassung” was enacted (6 April 1848). It stated, in par. 5, that citizens’ rights were in no way connected to religious views. [↑](#footnote-ref-836)
837. The title of the dissertation was: *De societate en commandite specimen I* (Halle 1851). At that time, the discussion was still held in Latin: Pappenheim 1897, op. cit. (n. 10), 4, n. 11. Goldschmidt obtained the dual title only 25 years later, when he became full professor at the University of Berlin. [↑](#footnote-ref-837)
838. Goldschmidt 1851 (n. 14), 78: “Insignes gratias mihi agendas esse putavi Kellero, Mittermaiero, qui exercitationibus tam exegeticis quam practicis in jure civili atque criminali institutis haud spernendo modo mihi profuerunt”. [↑](#footnote-ref-838)
839. Weyhe 1996, op. cit. (n. 10), 34. [↑](#footnote-ref-839)
840. At the “Danziger Stadt-und Kreisgericht” and also at the “Handelsgericht”: Weyhe 1996, op. cit. (n. 10), 50 ff. [↑](#footnote-ref-840)
841. Weyhe 1996, op. cit. (n. 10), 53-55, 58. [↑](#footnote-ref-841)
842. L. Goldschmidt, *Untersuchungen zur l. 122 § 1 D. de V. O. (45.1)* (Heidelberg 1855)*.* See: Weyhe 1996, op. cit. (n. 10), 421 ff. [↑](#footnote-ref-842)
843. See: K.-P. Schroeder, ‘Levin Goldschmidt (1829-1897). Vom Heidelberger Rechtsprofessor zum Richter am Bundesoberhandelsgericht’, in D. Fischer and M. Obert (eds.), *Festschrift für Dietrich Pannier* (Cologne 2010), 171-180. [↑](#footnote-ref-843)
844. For a reconstruction of the very long and complicated publication process of this unfinished work, see: S. Gialdroni, ‘The “Handbuch des Handelsrechts” by Levin Goldschmidt’, in S. Dauchy, G. Martyn, A. Musson, H. Pihlajamäkj, A. Wijffels (eds.), *The Formation and Transmission of Western Legal Culture. 150 Books that Made the Law in the Age of Printing* (Cham 2016), 379-382. [↑](#footnote-ref-844)
845. See for example the prefaces to the issues n. 1, 4 and 35 of the *ZHR*. [↑](#footnote-ref-845)
846. Weyhe 1996, op. cit. (n. 10), 200. [↑](#footnote-ref-846)
847. Replaced in 1879 by the “Reichsoberhandelsgericht”. [↑](#footnote-ref-847)
848. He was linked to the city also from a political point of view: in 1875, as a national liberal, Goldschmidt substituted the ill mayor of Leipzig Stephani in the “Reichstag”. [↑](#footnote-ref-848)
849. Pappenheim 1897, op. cit. (n. 10), 12: “Mit dem größten Bedauern sehe ich Sie aus der bisherigen Stellung scheiden. Sie haben in dieser Stellung durch musterhafte Wirksamkeit Sich ausgezeichnet und Sich in jeder Hinsicht die größten Verdienste um den Gerichtshof erworben, welcher sein Ansehen in nicht geringem Maße Ihrer aufopfernden Thätigkeit und Ihren hervorragenden Leistungen verdankt”. [↑](#footnote-ref-849)
850. Pappenheim 1897, op. cit. (n. 10), 14: “Irgend ein Stück seiner zeitweiligen Heimat trägt ja der Mensch an der Sohle mit sich, und so mag auch ich, aus dem Norden Deutschlands nach dem Süden und dann rückwärts wieder nach Osten gewandert, das Zusammenwirken der juristischen Kräfte aus allen Theilen Deutschalands (sc. in dieser Zeitschrift), die Verschmelzung der ja ehemals sehr verschiedenartigen Anschauungen gefördert haben”. [↑](#footnote-ref-850)
851. Pappenheim 1897, op. cit. (n. 10), 16. [↑](#footnote-ref-851)
852. Pappenheim 1897, op. cit. (n. 10), 17. [↑](#footnote-ref-852)
853. Pappenheim 1897, op. cit. (n. 10), 19. For an in-depth analysis of Goldschmidt’s works devoted to German legal history see: Weyhe 1996, op. cit. (n. 10), 428 ff. [↑](#footnote-ref-853)
854. See for example: *ZHR*, vol. 1, 5; Goldschmidt 1891, op. cit. (n. 5), 62 ff. [↑](#footnote-ref-854)
855. G. Astuti ‘Review of: W. Silberschmidt, Le droit commercial avant et après L. Goldschmidt’, *Rivista di storia del diritto italiano*, 8.3 (1935), 1-8, 7. [↑](#footnote-ref-855)
856. *ZHR*, vol. 35, 11. [↑](#footnote-ref-856)
857. *Dig.* 50.17.1, see also: Pappenheim 1897, op. cit. (n. 10), 21. [↑](#footnote-ref-857)
858. His interest in the field of comparative law (as well as comparative legal history) is witnessed also by his commitment in international organizations such as the “Institut de droit international” (co-founder, 1873), the “Société de législation comparée (member, 1876) and the “Association for the Reform and Codification of Law of Nations” (vice-president for Norddeutschland, 1878). [↑](#footnote-ref-858)
859. L. Goldschmidt, *Handbuch des Handelsrechts* (Erlangen 1864), VI-VII. [↑](#footnote-ref-859)
860. Pappenheim 1897, op. cit. (n. 10), 33-34. [↑](#footnote-ref-860)
861. Valeria Carro has recently summed up the debate. This reconstruction is based on her thoughts on the topic: V. Carro, ‘Aspetti problematici del diritto commerciale romano’, *Revista europea de historia de las idea políticas y de las instituciones públicas*, 8 (2014). Available at: <http://www.eumed.net/rev/rehipip/08/diritto-commerciale.html> (accessed 28 August 2019). [↑](#footnote-ref-861)
862. R.S. Lopez, *The Commercial Revolution of the Middle Ages: 950-1350* (Cambridge 1971). [↑](#footnote-ref-862)
863. Carro 2014, op. cit. (n. 38), see footnotes 11 and 12. [↑](#footnote-ref-863)
864. G. Carnazza, *Il diritto commerciale dei romani* (Catania 1891), 13-14. [↑](#footnote-ref-864)
865. L. Goldschmidt, *Lex Rhodia und Agermanament: der Schiffsrath. Studie zur Geschichte und Dogmatik des Europäischen Seerechts* (Stuttgart 1889). [↑](#footnote-ref-865)
866. Carnazza 1891, op. cit. (n. 41), 156. Caranazza is quoting Goldschmidt again (his 1890 translation, p. 6). It has to be stressed that his works, and in particular his translation of Goldschmidt’s *Lex Rhodia*, were harshly criticized: A. Agnello, ‘Carnazza, Gabriello’, in *Dizionario biongrafico degli italiani*, vol. 20 (1977), available at: [https://www.treccani.it/enciclopedia/gabriello-carnazza\_(Dizionario-Biografico)/](https://www.treccani.it/enciclopedia/gabriello-carnazza_%28Dizionario-Biografico%29/) (accessed 24 December 2021). [↑](#footnote-ref-866)
867. Pappenheim 1897, op. cit. (n. 10), 17. [↑](#footnote-ref-867)
868. A. Guarino,‘Relazione di sintesi-Convegno di Erice’, in M. Marrone (ed.), *Imprenditorialità e diritto nell’esperienza storica*: Erice, 22-25 novembre 1988 (Palermo 1992), 307-316, 313. [↑](#footnote-ref-868)
869. A. Wilson and A. Bowman (eds.), *Trade, Commerce, and the State in the Roman World* (Oxford 2017), 2. [↑](#footnote-ref-869)
870. T. Terpstra, ‘Review of: A. Wilson and A. Bowman (eds.), ’Trade, commerce, and the state in the Roman world’, *The Economic History Review* 72.2 (2019), 777-778. [↑](#footnote-ref-870)
871. B. Sirks, ‘Law, commerce, and finance in the Roman empire’, in A. Wilson and A. Bowman 2017, op. cit. (n. 46), 53 ff. In reality, the autonomy of commercial law is contested even today, because of the unavoidable connections with civil law: “Il diritto commerciale non è il diritto del commercio: non regola, né mai ha regolato, *tutto* il commercio; non è mai stato un sistema normative autosufficiente, ordinante un intero settore della vita economica; ed a regolare il commercio ha sempre concorso, con le norme sulle obbligazioni e sui contratti, anche il diritto civile”: F. Galgano, *Lex mercatoria* (Bologna 2001, 4th ed.), 10. [↑](#footnote-ref-871)
872. R. Galiano Court, ‘*Honore et utile*: The approaches and practice of sixteenth-century Genoese merchant customs’, in H. Pihlajamäki, A. Cordes, S. Dauchy, D. De ruysscher (eds.), *Understanding the Sources of Early Modern and Modern Commercial Law: Courts, Statutes, Contracts, and Legal Scholarship* (Leiden 2018), 55-86, 59, footnote 7. 53 f; so: 11he Customary Law Merchant, Texas Law Review w Review ecento, Forum Historiae Iuris he problem is wehter the assem [↑](#footnote-ref-872)
873. E.g. A. Cordes, ‘Auf der Suche nach der Rechtswirklichkeit der mittelalterlichen Lex Mercatoria’, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (ZSS) Germ. Abt., 118 (2001), 168-184; E. Kadens, ‘The myth of the customary Law Merchant’, *Texas Law Review* 90 (2012), 1153 ff. [↑](#footnote-ref-873)
874. R. Michaels, ‘Legal medievalism in Lex Mercatoria scholarship’, *Texas Law Review* 90 (2012), 259 ff. [↑](#footnote-ref-874)
875. Schön 2009, op. cit. (n. 10), 1427-1446. [↑](#footnote-ref-875)
876. Schön 2009, op. cit. (n. 10), 1429. [↑](#footnote-ref-876)
877. Schön 2009, op. cit. (n. 10), 1432. [↑](#footnote-ref-877)
878. Schön 2009, op. cit. (n. 10), 1436. [↑](#footnote-ref-878)
879. C. Menger, *Untersuchungen über die Methode der Socialwissenschaften und der politischen Ökonomie insbesondere* (Leipzig 1883), 15 ff. [↑](#footnote-ref-879)
880. Schön 2009, op. cit. (n. 10), 1436. According to Goldschmidt, positive law is the outward display of inherent natural laws valid at all times: “Alles positive Recht ist äußere Entfaltung und Anerkennung der den jederzeiten Lebensverhältnissen (Thatbeständen) immanenten natürlichen Rechtsnormen”: Goldschmidt 1891, op. cit. (n. 5), 33. [↑](#footnote-ref-880)
881. “Ein kosmopolitisches Handelsrecht – ein wahres *jus gentium* im Sinne der Römischen Theorie”: Goldschmidt 1891, op. cit. (n. 5), 11. [↑](#footnote-ref-881)
882. Schön 2009, op. cit. (n. 10), 1436. [↑](#footnote-ref-882)
883. Pappenheim 1897, op. cit. (n. 10), 41. Furthermore, he considered the problem of the education of lawyers of utmost importance and often contributed to the debate on the topic (ibid. 36-38). [↑](#footnote-ref-883)
884. Weber obtained his PhD from the University of Berlin in 1889 with a dissertation entitled *Entwicklung des Solidarhaftungprinzips und des Sondervermögens der offenen Handelsgesellschaft aus den Haushalts-und Gewerbegemeinschaften in den italienischen Städten*. An extended version of the dissertation was published the same year under the title *Zur Geschichte der Handelsgesellschaften im Mittelalter*. L. Kaelber, ‘Max Weber’s dissertation’, *History of the Human Sciences*, 16.2 (2003), 27-56; G. Dilcher, ‘Dalla storia del diritto alla sociologia. Il confronto di Max Weber con la Scuola storica tedesca’, *Scienza & Politica* 37 (2007), 95-115; L.R. Ford, ‘Max Weber on property: an effort in interpretative understanding’, *Socio-Legal Review* 6 (2010), 25-100. [↑](#footnote-ref-884)
885. Kaelber 2003, op. cit (n. 61), 31. [↑](#footnote-ref-885)
886. As quoted in: Kaelber 2003, op. cit (n. 61), 32. [↑](#footnote-ref-886)
887. B. Grossfeld and I.M. Pappagiannis, ‘Levin Goldschmidt’, *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*, 159 (1995), 529-49, 548. [↑](#footnote-ref-887)
888. M. Bloch, *Apologie pour l’histoire ou Métier d’historien* (Paris 2007) (1st (ed.),1949), 35. [↑](#footnote-ref-888)
889. As it is evident in a speech given by Goldschmidt in 1891 on the occasion of a meeting of Jewish scholars: “Dem großen deutschen Nationalstaate gehören wir deutschen Juden auf freiem Willen und von ganzer Seele an”: Pappenheim 1897, op. cit. (n. 10), 40. [↑](#footnote-ref-889)
890. Vidari 1908, op. cit. (n. 9), 242. [↑](#footnote-ref-890)
891. On Goldschmidt’s legacy see also: K. Schmidt, ‘Levin Goldschmidt (1829-1897): Levin Goldschmidt in Berlin – Eine Skizze über die Berliner Universitätsjahre 1875-1897, in S. Grundmann *et al*. (eds.), *Festschrift 200 Jahre juristische Fakultät der Humboldt-Universität zu Berlin: Geschichte, Gegenwart und Zukunft*, 327-342, 340. [↑](#footnote-ref-891)
892. Goldschmidt was among the founders of the “Institut de droit international” (1873), member of the “Société de législation comparée” (since 1876) and vice-president for Norddeutschland of the “Association for the Reform and Codification of Law of Nations” (since 1878): Pappenheim 1897, op. cit. (n. 10), 26. [↑](#footnote-ref-892)
893. Schön 2009, op. cit. (n. 10), 1428. [↑](#footnote-ref-893)
894. *ZHR*, vol. 35, 9 ff. and also vol. 1, 1. [↑](#footnote-ref-894)
895. Weyhe 1996, op. cit. (n. 10), 526 ff. [↑](#footnote-ref-895)
896. Even though it has to be underlined that before him Heinrich Thöl already worked in this direction: J.H. Thöl, *Das Handelsrecht*, vol. I (Göttingen 1841). [↑](#footnote-ref-896)
897. Dilcher 2007, op. cit. (n. 61), 99-100. [↑](#footnote-ref-897)