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Remarks on David Daube's Lectures on Sale, with  
Special Attention to the *liber homo* and *res extra  
commercium*

Ernest Metzger, *University of Glasgow*



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## VII

## Remarks on David Daube's Lectures on Sale, with Special Attention to the *liber homo* and *res extra commercium*

Ernest Metzger\*

*This article discusses a collection of lecture notes on the Roman law of sale prepared by David Daube for an advanced course conducted at the University of Aberdeen from 1954 to 1955. The article considers in detail Daube's lecture on the sale of the liber homo and res extra commercium in Roman law. An excerpt from that lecture is attached as an Appendix. His treatment of the subject is unfinished (and unpublished), though it is possible to see how his views might have developed. The final section offers an opinion on Daube's approach to interpreting texts and its value to students.*

David Daube left behind a collection of lecture notes in typescript, prepared for a course in the Roman law of sale. He gave the course at the University of Aberdeen in the academic years 1953/54 and 1954/55. This article discusses the course, and the character and contents of the typescript. It then briefly discusses Daube's treatment of an issue in sale (the sale of the *liber homo* and *res extra commercium*) on which, exceptionally, he did not publish. The final section offers an opinion on Daube's approach to interpreting texts, and suggests that students with no acquaintance of this approach are impoverished.

\* Douglas Professor of Civil Law, University of Glasgow. My thanks to Peter Stein and Jonathan M. Daube for certain details, and especially to William M. Gordon for his frequent assistance.

This article is intended to complement the remarks of William M. Gordon, also in this volume.<sup>1</sup> Professor Gordon attended the course for which the typescript was prepared, and in fact was the sole undergraduate to attend. He has provided invaluable details to help make sense of this unique document.

What makes it unique? First, though most of the substantive remarks can be found in Daube's published works, the notes themselves are a verbatim record of his teaching. His presentation is less guarded, and his mood more playful, than in his published works. At the same time the notes are nearly as lucid and polished as anything he published. Second, the course itself is of a kind — the examination of a Digest title — that no longer exists in the United Kingdom. The course in fact made philological demands on its audience that are not tolerated today.<sup>2</sup> In this regard the notes are a record of a lost time. Last, Daube recurs frequently to Aberdeen and the University for illustration. This naturally turns the notes into a kind of local document, but less obviously they become more intimate, and a sense of the occasion is stronger.

### The course

The course was titled 'Advanced Roman Law' and was announced in the Aberdeen University Calendar a year in advance of first being offered:<sup>3</sup>

- <sup>1</sup> W. M. Gordon, 'David's Teaching in Aberdeen', in E. Metzger, ed., *David Daube: A Centenary Celebration* (Glasgow 2010), 88–100.
- <sup>2</sup> I suspect the last teacher in the United Kingdom to lecture in this style was John Barton, Fellow of Merton College, Oxford, who retired in 1996. He gave a course in Roman *condictiones*, which I attended in the early 1990s.
- <sup>3</sup> *The Aberdeen University Calendar for the Year 1952–1953* (Aberdeen 1952), 381. The works recommended are: J. Mackintosh, *The Roman Law of Sale*, 2nd ed. (Edinburgh 1907); F. de Zulueta, *The Roman Law of Sale* (Oxford 1945). De Zulueta's book was amended to meet Daube's criticism on a small point that arose during the lectures (MS 52–53). The issue was the meaning of 'evictum' in D.18.1.8.1 (Pomp. 9 *Sab.*), which Mackintosh (at p. 27) translated as 'wrested' and de Zulueta (at p. 89) translated as 'snatched away'. Daube called these translations 'stupid' (MS 53) and 'strange' ('Purchase of a Prospective Haul', in *Studi in onore di Ugo Enrico Paoli* (Florence 1955), 297). De Zulueta amended the of-

**ADVANCED ROMAN LAW**

*(This course will not be available before 1954)*

Selected Title from *the Digest* for Special study. The Title for 1954 will be XVIII, 1, "De Contrahenda Emptione".

This course is intended to consist of 35 lectures, to be delivered in one term.

Books recommended—

J. Mackintosh, *Roman Law of Sale*; F. de Zulueta, *Roman Law of Sale*.

*University Calendar, 1952-1953*

To present 35 lectures in a single term was ambitious, particularly as the ten-week term in which the course was scheduled to appear (20 April – 25 June 1954) was foreshortened for examinations:<sup>4</sup>

**Third Year**

Winter Term.				
Conveyancing . . . . .	Professor MacRitchie . . . . .	Daily 9-10	-	-
Comparative Law . . . . .	Dr. J. Fackenheim . . . . .	Daily 11-12	3	3
Evidence, Pleading and Procedure . . . . .	Mr. A. Leslie Hay . . . . .	Daily 12-1	6	6
Spring Term				
Conveyancing . . . . .	Professor MacRitchie . . . . .	Daily 9-10	-	-
International Private Law . . . . .	Mr. A. E. Anton . . . . .	Daily 11-12	3	3
Evidence, Pleading and Procedure . . . . .	Mr. A. Leslie Hay . . . . .	Daily 12-1	-	-
Summer Term.				
Forensic Medicine§ . . . . .	Dr. R. Richards . . . . .	Daily 8-9	5	5
Public International Law . . . . .	Mr. A. E. Anton . . . . .	Daily 11-12	3	3
Comparative Law . . . . .	Dr. J. Fackenheim . . . . .	Daily 12-1	-	-
Advanced Roman Law . . . . .	} Professor Daube and Mr. W. P. G. Stein	(Each twice weekly as may be arranged).	-	-
Advanced Jurisprudence . . . . .			-	-

*University Calendar, 1953-1954*

The calendar printed for the following academic year (1954–1955) announced the course as it had done previously, but changing 'one term' to 'three terms':<sup>5</sup>

fending passages in his 1957 revision, acknowledging Daube's advice in the preface.

<sup>4</sup> *Aberdeen University Calendar 1953-1954* (Aberdeen 1953), 377.

<sup>5</sup> *Aberdeen University Calendar 1954-1955* (Aberdeen 1954), 387.

### ADVANCED ROMAN LAW

Selected Title from *the Digest* for Special study. The Title for 1955 will be XVIII, 1, "De Contrahenda Emptione".

This course is intended to consist of 35 lectures, to be delivered in three terms.

Books recommended—

J. Mackintosh, *Roman Law of Sale*; F. de Zulueta, *Roman Law of Sale*.

*University Calendar, 1954-1955*

The course was now scheduled to be given over three terms, and fell within the second-year curriculum:

### Second Year

CLASS.	LECTURER.	DAYS AND HOURS.	FEE.
<b>Winter Term.</b>			
Accounting (for Law Students)	Mr. J. Grant	Daily 9-10	3 3
Administrative Law	Dr. Joan Smith	M., T., W., F. 10-11	3 3
Scots Law (Professional Course)	Professor Smith	{ T., Th. 12-1 F., 11-12	8 8
Jurisprudence	Professor Daube and Mr. P. G. Stein	{ M., W., F. 12-1 Times to be arranged	8 8
Roman Law (Advanced)			8 8
<b>Spring Term.</b>			
Accounting (for C.A. Students)	Mr. J. Grant	Daily 9-10	6 6
† Mercantile Law	Dr. Joan Smith	Daily 10-11	6 6
Scots Law (Professional Course)	Professor Smith	{ T., Th. 12-1 F., 11-12	- -
Jurisprudence	Professor Daube and Mr. P. G. Stein	{ M., W., F. 12-1 Times to be arranged	- -
Roman Law (Advanced)			- -
<b>Summer Term.</b>			
* Accounting (for C.A. Students)	Mr. J. Grant	Daily 9-10	- -
Conveyancing	Professor MacRitchie	Daily 9-10	8 8
† Mercantile Law	Dr. Joan Smith	Daily 10-11	- -
Scots Law (Professional Course)	Professor Smith	{ M., W., 11-12 T., Th. 12-1	- -
Jurisprudence	Professor Daube and Mr. P. G. Stein	{ M., W., F. 12-1 Times to be arranged	- -
Roman Law (Advanced)			- -

*University Calendar, 1954-1955*

The calendar, however, is not wholly trustworthy as a source for the scheduling of lectures. Calendars were printed well in advance of events. Professor Gordon, moreover, has privately noted that, in view of the small number of participants, the lectures could take place at any convenient time. Professor Gordon's own recollection is that he took the course in his second and third years (1953/54 and 1954/55); that Peter Stein was sometimes in attendance;<sup>6</sup> and that Reuven Yaron<sup>7</sup> attended the course after his arrival in the autumn of 1954. Professor Gordon also recalls that the curriculum was under review during his time as an undergraduate; this would account for the fact that the course moved from the third year to the second. The calendar is also somewhat misleading in suggesting the course was offered twice; Daube did not complete title 18.1 in the first year, and in the second year simply picked up where he had left off.

The course was a traditional examination of a single Digest title and proceeded sequentially by fragment, with frequent departures from the sequence when the topic recalled a fragment further ahead. Some of the issues Daube discussed were already the subjects of published papers,<sup>8</sup> while others would appear later.<sup>9</sup> Judging by the length of

<sup>6</sup> Now Regius Professor of Civil Law Emeritus, University of Cambridge. In a letter to Professor Gordon dated 7 March 2009, Professor Stein recalls attending the lectures together with Professor Gordon and Mrs MacBean, the secretary. Daube appears to address Professor Stein here: 'I believe antinomies are not unknown to Scots law or even, with all deference to Mr Stein, to English law.' MS 141. See also note 33 below.

<sup>7</sup> Now Professor Emeritus, Hebrew University of Jerusalem.

<sup>8</sup> See, e.g., D. Daube, 'Actions between paterfamilias and filiusfamilias with peculium castrense', in *Studi in memoria di Emilio Albertario*, 1 (Milan 1950), 435–74; 'The Three Quotations from Homer in Digest 18.1.1.1', *Cambridge Law Journal*, 10 (1949), 213–15. One earlier article discusses fragments that fall in the latter part of title 18.1, and possibly corresponds to portions of the typescript which have not yet been located: D. Daube, 'Generalisations in 18.1, de contrahenda emptione', in *Studi in onore di Vincenzo Arangio-Ruiz*, 1 (Naples 1952), 185–200.

<sup>9</sup> See, e.g., Daube, 'Purchase of a Prospective Haul' (note 3); 'Certainty of Price', in D. Daube, ed., *Studies in the Roman Law of Sale Dedicated to the Memory of Francis de Zulueta* (Oxford 1959), 9–45; 'Money and Justiciability', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (rom. Abt.), 96 (1979), 1–16. One later article possibly corresponds to portions of the typescript which have not yet been located: D. Daube, 'Three Notes on Digest 18.1, Conclusion of Sale', *Law Quarterly Review*, 73 (1957), 379–98.

the written notes, sessions will have lasted two hours. There was an excursus on legacies in Lecture No. 13. The course was not examined.<sup>10</sup>

### The typescript

The typescript is titled 'David Daube – Lectures on Sale D. 18.1. 1–24'.<sup>11</sup> It has 154 numbered leaves with typewritten catchwords at the base of each page. It contains about 54,000 words, with occasional handwritten corrections. It is divided into sixteen lectures of somewhat different lengths. Only half of the Digest title is represented in the typescript; the remaining half has not been located. It appears, however, that the remaining half does, or did at one time, exist. In a 1960 article Daube mentions the typescript in these words: 'It might, however, be argued that *utiliter* in our text [D.18.1.41 pr.] reflects the Proculian [position]', with a footnote to the remark: 'As was done by the writer himself in unpublished lectures on Digest 18.1. He did not convince Mr W. M. Gordon.'<sup>12</sup> The discussion to which Daube refers is not found in the typescript that survives.

Daube spoke extemporaneously from brief notes.<sup>13</sup> His words were recorded by the secretary, Mrs MacBean, who then prepared a typescript. The particular typescript we possess is almost certainly a subsequent draft. The presentation is simply too polished for a first draft. The citations are accurate, spelling and punctuation are near perfect, and quotations in Latin are largely free from error. At the same time, the typescript preserves the extemporaneous presentation, e.g.,

The text as it stands says that if I buy from you an object for the sum you bought the object for . . . or if I buy from you an object for whatever I may have in this box, then the sale is valid, because, although there may be ignorance about the price, the price is in effect certain. *Sorry, I should have*

<sup>10</sup> Gordon (note 1), 99.

<sup>11</sup> Notwithstanding the title, the lectures proceed through fragment 25.

<sup>12</sup> D. Daube, 'Utiliter agere', *IURA*, 11 (1960), 92 & n.77.

<sup>13</sup> He refers to these notes at MS 94, 96. See also Gordon (note 1), 91 (mentioning the same practice in Daube's ordinary class).

*said that the text explains that the price is certain because the sale is clear; and that there is ignorance rather than true uncertainty.*<sup>14</sup>

There are handwritten corrections throughout, but they are minor and sparing and none of them, so far as one can tell, is substantive: Daube improved a handful of expressions and altered the punctuation in small ways. Again, this indicates that the notes had already been closely revised.

## Contents

Daube takes up every fragment in the title and considers its meaning and condition carefully. All views are considered. He regularly agrees with Lenel,<sup>15</sup> disagrees with Buckland,<sup>16</sup> and grapples with Beseler. He also regularly solicits William Gordon's views. He expresses his own views freely, but when he is uncertain of a resolution, or an answer completely fails him, he says so. He apologises if he believes his arguments fall short.

He offers a large number of what one would call gnomic statements. They tend to concern the interpretation of texts, the habits of jurists, and the failings of modern scholars. Some are familiar from his published works, though perhaps he expressed himself more freely in making these statements privately. Some examples:

A further point against interpolation. There is here a reference to the veteres — the older jurists, which usually means the pre-classical jurists. If the decision were spurious, there would be no such reference. It cannot be invented. There would be no reason for a post-classical interpolator to bring in the old jurists.<sup>17</sup>

The 'tamen' which I think I have explained very well, is usually emended into 'tantum', 'only'. . . . But as you know I do not like such emendations. They frequently cover up a purposeful interference, a change in law. An emendation is plausible when a word is miswritten which has become unintelligible.<sup>18</sup>

<sup>14</sup> MS 38–39 (on D.18.1.7.1 (Ulpian 28 *Sab.*)).

<sup>15</sup> Cf. MS 3: 'Well, now, Lenel — who is always right, but I disagree with him — Lenel held that . . .'

<sup>16</sup> MS 6: 'I know that whenever I disagree with Buckland I am wrong, but still I disagree.' MS 94: 'This modern construction . . . was never thought of by the Romans. True, you find it in Buckland, and Buckland is always right. But I feel sure the Romans lawyers never took this line.'

<sup>17</sup> MS 38 (on D.18.1.7 pr. (Ulpian 28 *Sab.*)).

<sup>18</sup> MS 123 (on D.18.1.18.1 (Pomp. 9 *Sab.*)).

If one does start crossing out, and you shall see that I shall do so quite soon, one should cross out the general definition and leave the more particular cases in.<sup>19</sup>

All these things are rather conjectural, but it is better to take a view rather than leave everything undecided.<sup>20</sup>

Lawyers faced with a difficult problem are apt to pounce on a minor element of the case, make it the basis of their verdict and leave the problem unanswered.<sup>21</sup>

If you find statements about a simple case tacked onto . . . a complicated case, that does not necessarily mean that the simple case was looked at in the same way before the complicated case came up.<sup>22</sup>

There is also of course a good deal of humour.

Don't be afraid, there are only six texts.<sup>23</sup>

For reasons which are no longer clear to me . . . I prefer the view of Buckland.<sup>24</sup>

Now this text raises an interesting difficulty which has been solved in an admirable way by your present lecturer.<sup>25</sup>

This is a text on which I change my mind every time I look at it, and my changes of mind depend less on rational considerations than on weather conditions or the quality of my breakfast.<sup>26</sup>

In view of some disrespectful smiles I noticed last time when struggling with legacy per vindicationem, I will explain why I tried to evade the issue.<sup>27</sup>

I notice that Zulu — no doubt unwittingly, but Freud would find a subconscious motive behind it — in his book on Sale leaves this 'quia' clause untranslated.<sup>28</sup>

I will adopt the manner of post-classical lawyers and put a number of questions without answering them.<sup>29</sup>

He frequently mentions Aberdeen (both the city and University), and the street on which he lived (Osborne Place), to illustrate a point.

<sup>19</sup> MS 21.

<sup>20</sup> MS 22.

<sup>21</sup> MS 87.

<sup>22</sup> MS 116.

<sup>23</sup> MS 97.

<sup>24</sup> MS 16.

<sup>25</sup> MS 2. He is referring to 'The Three Quotations from Homer in Digest 18.1.1.1' (note 8).

<sup>26</sup> MS 83.

<sup>27</sup> MS 111. These disrespectful smiles led to an excursus on legacies in Lecture No. 13.

<sup>28</sup> MS 99 (on D.18.1.16 (Pomp. 9 *Sab.*)). De Zulueta leaves *quia nulla obligatio fuit* untranslated: de Zulueta (note 3), 91.

<sup>29</sup> MS 105.

[Y]ou build on my land with your granite (no brick at Aberdeen).<sup>30</sup>

[The sale-or-hire controversy: if a customer asks a craftsman 'to make a vase', it is plainly a sale.] The question could arise only where I tell him 'now you make a vase which has an ornament in the shape of King's College tower on one side and Marischal College [on] the other' and so on.<sup>31</sup>

[Y]ou would usually be able to distinguish a temple from a private dwelling-house, although nowadays some of the private dwelling houses do look like non-conformist chapels. We have one at the Grammar School end of Osborne Place.<sup>32</sup>

[I]f I think I am buying 65 Osborne Place and you think you are selling me a shed in Salisbury Place,<sup>33</sup> there is dissent as regards the corpus and therefore no sale.<sup>34</sup>

Suppose I have land for part of which the Corporation of Aberdeen offers an enormous price because they want to establish there one of their new and noisy departments, while a poor university professor offers me half the price for it.<sup>35</sup>

I wish to buy from you what you may catch this evening when the Lord Provost, who wishes to be re-elected, is going to distribute largess.<sup>36</sup>

### The Sale of the *liber homo* and *res extra commercium*

From the whole of the lectures I have chosen a single topic for closer discussion: the sale of certain things which ostensibly cannot be purchased but nevertheless, in the opinion of the jurists, permitted sale remedies.<sup>37</sup> I have chosen this from

<sup>30</sup> MS 134.

<sup>31</sup> MS 133.

<sup>32</sup> MS 25.

<sup>33</sup> Some gentle humour directed at Peter Stein, who had a house in Salisbury Place, small in comparison to the Daubes' spacious house in Osborne Place. Peter Stein will have been present to enjoy the remark.

<sup>34</sup> MS 56.

<sup>35</sup> MS 43 (on D.19.1.13.24 (Ulpian 32 *ed.*)). When he published on the text in 1959, the case was transferred to Oxford: 'Suppose in selling my property in Cornmarket I wish to preserve the peacefulness of the district. I sell it to an academic institution . . . ' Daube, 'Certainty of Price' (note 9), 30. Also Oxonian: 'Suppose I sell part of my estate to a quiet don at a low price though a noisy government department would be prepared to give far more.' Daube, 'Purchase of a Prospective Haul' (note 3), 205 n.4.

<sup>36</sup> MS 53. A reference, naturally, to the purchase of *missilia*.

<sup>37</sup> MS 21–28. He returns to the subject in Lecture No. 16, though confines himself to the fairly narrow questions raised in D.18.1.22, 24 (Ulpian 28 *Sab.*) and 23 (Paul 5 *Sab.*). For the latest views, see F. Procchi, "Dolus" e "culpa in contrahendo" nella compravendita. Considerazioni in tema di sinallagma genetico, in L. Garofalo, ed., *La compravendita e l'interdipendenza delle obbligazioni nel diritto Romano*, 1 (Milan 2007), 182–244; A. Trisciuoglio, 'Sinallagma genetico e vendita delle "res extra commercium"', in L. Garofalo, ed., *La compravendita e l'interdipendenza delle*

among other topics because, so far as I am aware, Daube never published on it.<sup>38</sup> Daube's arguments, moreover, are different from those offered by other scholars. The notes are set out in full in the Appendix below.<sup>39</sup> The topic requires a brief introduction.

The term *res extra commercium* broadly indicates things which are beyond the power of private persons to buy and sell. Bonfante:

There is a distinction in the class of things which relates to whether they are more or less open to private juridical relationships; in general scholars tend to express this distinction with the terms *res in commercio* and *res extra commercium* on the one hand, and *res in patrimonio* and *res extra patrimonium* on the other. Both of these terms are found in the sources: in the jurists of the Digest we find the term *in commercio* or *extra commercium*; Gaius, followed by Justinian's Institutes, uses *in patrimonio*, *extra patrimonium* [G.2.1; J.2.1 pr.]. The former denotes that the thing is open (or not open) to a juridical relationship from the 'dynamic' standpoint; the latter shows, so to speak, the 'static' aspect.<sup>40</sup>

*obbligazioni nel diritto Romano*, 1 (Milan 2007), 277–310; L. Winkel, 'Culpa in contrahendo in Roman Law and Some Modern Dutch Court Decisions', in L. de Ligt, et al., eds., *Viva Vox Iuris Romani: Essays in Honour of Johannes Emil Spruit* (Amsterdam 2002), 149–57; R. Zimmermann, *The Roman Law of Obligations* (Oxford 1996), 241–45; R. Evans-Jones and G. MacCormack, 'The Sale of *res extra commercium* in Roman Law', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (rom. Abt.), 112 (1995), 330–51; R. Evans-Jones, 'The Origins of Justinian's Institutes 3.23.5', *Cambridge Law Journal*, 53 (1994), 473–79. For other views cited below see the following works: B. Biondi, 'La vendita di cose fuori di commercio', in *Studi in onore di Salvatore Riccobono*, 4 (Palermo 1936), 1–56; W. W. Buckland, *The Roman Law of Slavery* (Cambridge 1908); F. Haymann, *Die Haftung des Verkäufers für die Beschaffenheit des Kaufsache*, 1 (Berlin 1912); M. Kaser, 'Vom Begriff des "commercium"', in *Studi in onore di Vincenzo Arangio-Ruiz* (Naples 1953), 131–67; P. Stein, *Fault in the Formation of Contract in Roman Law and Scots Law* (Edinburgh 1958); J. A. C. Thomas, 'The Sale of *res extra commercium*', *Current Legal Problems*, 29 (1976), 136–49; F. de Zulueta, *The Roman Law of Sale* (Oxford 1945; rev. 1957).

<sup>38</sup> But see below, notes 59–62 and accompanying text.

<sup>39</sup> Below, 119–26.

<sup>40</sup> P. Bonfante, *La proprietà* [*Corso di diritto Romano*, 2] (Milan 1966), 13–14:

La distinzione delle cose secondo che sono più o meno suscettibili di rapporti giuridici privati in generale si usa designare dagli interpreti coi termini *res in commercio* e *res extra commercium*, ovvero *res in patrimonio* e *res extra patrimonium*. Entrambe le designazioni hanno base nelle fonti: nei giureconsulti delle Pandette abbiamo la designazione *in commercio* o *extra commercium*: Gaio, e con lui le Istituzioni di Giustiniano, usano *in patrimonio*, *extra patrimonium*. Con la prima

Justinian's well-known rule on the sale of *res extra commercium* mentions *loca sacra, religiosa, and publica*,<sup>41</sup> and allows the unknowing buyer of these places to have an action on the sale.

J.3.23.5. *Loca sacra vel religiosa, item publica, veluti forum basilicam, frustra quis sciens emit, quas tamen si pro privatis vel profanis deceptus a venditore emerit, habebit actionem ex empto, quod non habere ei liceat, ut consequatur, quod sua interest deceptum eum non esse. Idem iuris est si hominem liberum pro servo emerit.*

One who knowingly purchases sacred or religious places, as well as public places such as a forum or basilica, does so without effect. But if someone purchases them, having been misled by the seller into believing that they were capable of private ownership or non-sacred, he will have a buyer's action, because he may not remain in possession. He will then recover the amount of his interest in not being misled. The result is the same if he shall buy a 'slave' who is in fact a free man.

The text adds the *liber homo* at the end and brings it under the same rules, though the rules for the *liber homo* and *res extra commercium* evolved separately, and are assimilated here only because the finer points in the classification of actions were unimportant to Justinian.<sup>42</sup> The buyer of a *res extra commercium* did not in fact receive a proper *actio ex empto* under the classical law, but an *actio in factum*. The separate evolution of these two classes of objects is the subject of two modern studies.<sup>43</sup>

The following is a summary of Daube's views on this evolution. A handful of contrasting views is given in the footnotes.

1. Under the classical law, the sale of a free man is a valid

si indica il lato dinamico della suscettibilità o insuscettibilità di rapporti giuridici, con la seconda l'aspetto, per così dire, statico.

<sup>41</sup> The reference to *loca publica* (and elsewhere, *res publicae*) is usually regarded as an addition by Justinian, and interpolated in the various Digest texts where it appears (D.18.1.6 pr. (Pomp. 9 *Sab.*); 18.1.22 (Ulpian 22 *Sab.*); 18.1.62.1 (Modest. 5 *reg.*)). See Stein (note 37), 77–78; MS 145.

<sup>42</sup> For the most part the classical jurists spoke separately of the sale of 'res extra commercium' and 'liber homo', though one text of Paul appears to bring them together. D.18.1.34.1 (Paul 33 *ed.*): *Omnium rerum, quas quis habere vel possidere vel persequi potest, venditio recte fit: quas vero natura vel gentium ius vel mores civitatis commercio exuerunt, earum nulla venditio est.* ('One may properly sell all things that may be held, possessed or sued for. However, one may not sell things which are placed outside commerce by nature, the law of nations or state morals.')

<sup>43</sup> Evans-Jones (note 37); Evans-Jones and MacCormack (note 37).

- sale, if the buyer was unaware.<sup>44</sup>
2. To Pomponius/Sabinus,<sup>45</sup> the vendor's knowledge is irrelevant.<sup>46</sup>
  3. Under the classical law, the sale of a *locus sacer* or *religiosus* is not a valid sale, as the buyer does not acquire an economic asset. A *locus sacer*, such as a temple, is self-evidently *extra commercium*, though this is not necessarily true of a *locus religiosus*.
  4. The classical jurists would give an *actio ex empto* where a free man was purchased, and an *actio in factum* where a *locus sacer* or *religiosus* was purchased.<sup>47</sup>
  5. The post-classical lawyers extended the *actio ex empto* to *locus sacer* or *religiosus*, the distinction between that action and the *actio in factum* no longer being meaningful.
  6. Justinian (in J.3.23.5) seems to have required fraud on the seller's part before a remedy might be granted to the buyer. This may have been the resolution of a classical dispute, reflected in two texts.<sup>48</sup>

The novelty of Daube's argument emerges from his reconstruction of this central trio of texts:

D.18.1.4 (Pomponius 9 *ad Sabinum*). Et liberi hominis et loci sacri et religiosi, qui haberi non potest, emptio intellegitur, si ab ignorante emitur,

(There may even be a purchase of things that cannot be kept — free persons and sacred and religious land — so long as it is purchased [by? from?] an unknowing person.)

18.1.5 (Paul 5 *ad Sabinum*). quia difficile dinosci potest liber homo a servo.

(because it can be difficult to distinguish a free person from a slave.)

<sup>44</sup> Accord: Buckland (note 37), 6; Stein (note 37), 62. Cf. Haymann (note 37), 163 (invalid sale; no *actio*); Biondi (note 37), 11 (valid sale, regardless of the buyer's knowledge); de Zulueta (note 37), 10 (invalid sale); Thomas (note 37), 141 (invalid sale); Evans-Jones (note 37), 475 (valid sale, first recognised when both parties were *ignorans*).

<sup>45</sup> D.18.1.4 (Pomp. 9 *Sab.*), discussed below.

<sup>46</sup> Cf. Stein (note 37), 65 (Sabinus' opinion based on both parties being *ignorans*); Thomas (note 37), 142 (Sabinus expresses no opinion on either party's knowledge).

<sup>47</sup> Accord: Evans-Jones (note 37), 476 (*actio in factum* available against the fraudulent seller of *locus religiosus*). Cf. Stein (note 37), 75 (*actio ex empto* available to buyer of *locus sacer* or *religiosus*).

<sup>48</sup> D.18.1.62.1 (Modest. 5 *reg.*) (appearing to require fraud on the seller's part) and 70 (Licinn. 8 *reg.*) (noting that many jurists require ignorance on the part of both buyer and seller). Accord: Stein (note 37), 66.

18.1.6 pr. (Pomponius *ad Sabinum*). Sed Celsus filius ait hominem liberum scientem te emere non posse nec cuiuscumque rei si scias alienationem [prohibitam *Mom.*] esse: ut sacra et religiosa loca aut quorum commercium non sit, ut publica, quae non in pecunia populi, sed in publico usu habeatur, ut est campus Martius.

(But the younger Celsus says that you cannot knowingly purchase a free person, or indeed anything, if you know that its transfer is forbidden: for example sacred and religious land or land excluded from private commerce, such as public land which is not in public possession but which is kept for public use, like the Field of Mars.)

There is clearly a great deal wrong in the condition of these texts. The erroneous assimilation of the two classes of sale, created by the insertion of *et loci sacri et religiosi* in fragment 4, has caused, in turn, a mismatch between the singular *potest* and its subjects. These two errors, at least, cancel each other out. The *si ab ignorante emitur* remains: it is naturally taken to refer to the unknowing buyer (particularly in view of Justinian's later formulation), but to read it in this way deprives fragment 6 — introduced by *sed* — of all contrast. Not surprisingly, it is usual to remove the contrast by emendation.<sup>49</sup>

Daube's achievement was to preserve both the *si ab ignorante emitur* and the *sed*.<sup>50</sup> From his notes one can reconstruct his emendations as follows.

D.18.1.4 (Pomponius 9 *ad Sabinum*). Et liberi hominis ~~et loci sacri et religiosi, qui haberi non potest~~,<sup>51</sup> emptio intellegitur, si ab ignorante emitur,

<sup>49</sup> See, e.g., Stein (note 37), 64 (*si ab ignorante emitur* removed); Thomas (note 37), 140–41 (*si ab ignorante emitur* removed).

<sup>50</sup> Note that Evans-Jones and MacCormack, though they pursue a very different explanation from Daube's, maintain, like Daube, the authenticity of both *si ab ignorante emitur* and *sed*. Evans-Jones (note 37); Evans-Jones and MacCormack (note 37).

<sup>51</sup> The removal of *et loci sacri et religiosi* is not controversial, for the reasons mentioned above. The removal of *qui haberi non potest*, however, is odd, if its authenticity is the basis for the removal of *et loci* etc. Daube suggests *qui haberi non potest* was added by way of generalization, to show that the land could not be 'kept'; it does not, he says, relate to the matter of eviction. The latter point, at least, is sound, for the simple reason that an eviction remedy presumes a valid contract of sale, and 'it is deemed a sale because the buyer might be evicted' would be nonsense. Note, however, that Evans-Jones and MacCormack persuasively argue the reverse proposition, that the desirability of an eviction remedy where the seller was innocent prompted the recognition of a valid sale in the case of the *liber homo*, and that traces of this eviction remedy appear in the words *quod non habere ei liceat* of J.3.23.5: Evans-Jones and MacCormack (note 37), 339, 349; Evans-Jones (note 37), 474–76.

18.1.5 (Paul 5 *ad Sabinum*). quia difficile dinosci potest liber homo a servo.

18.1.6 pr. (Pomponius *ad Sabinum*). Sed Celsus filius ait hominem liberum scientem te emere non posse ~~nec cuiuscumque rei si scias alienationem esse: ut sacra et religiosa loca aut quorum commercium non sit, ut publica, quae non in pecunia populi, sed in publico usu habeatur, ut est campus Martius.~~

The contrast between *si ab ignorante emitur* and *sed* is not, according to Daube, expressed in the text that survives. Daube supplies the contrast by speculating that Celsus, rather than asserting something *different* from Pomponius/Sabinus, was asserting something *more*. Daube would have Celsus say, in a sentence replacing the one which has been removed, that one who knowingly purchases a *locus sacer* or *religiosus* does not have an *actio in factum*. If this is correct, then the contrast could be paraphrased thus: 'Pomponius/Sabinus said that the unknowing buyer of a free man has contracted a sale, *while* Celsus said that, not only does the knowing buyer of a free man fail to contract a sale, but the knowing buyer of a *locus sacer* or *religiosus* will not receive an *actio in factum*.'

Daube's analysis is incomplete; he does not attempt to describe the nature of the classical disputes. However, those who are familiar with his writings on sale will have their suspicions where his analysis is leading. A thesis he returned to again and again concerned a school dispute which he perceived affected sale contracts that were in some respect abortive.

The Sabinians were generally more disposed to assume the existence of a contract of sale than the Proculians, who worked with actions *in factum*.<sup>52</sup>

He introduced the thesis in his 1959 article, 'Certainty of Price'. He argued that a seller who seeks to enforce a *pactum de retrovendendo* (a term allowing a seller to repurchase on a certain event) would proceed *ex empto* according to the Sabinians, *in factum* according to the Proculians.<sup>53</sup> He suggested the same would be true for the enforcement of a term

<sup>52</sup> D. Daube, 'Condition Prevented from Materializing', *Tijdschrift voor Rechtsgeschiedenis*, 28 (1960), 283.

<sup>53</sup> See C.4.54.2 (AD 222); D.19.5.12 (Proc. 11 *epist.*); Daube, 'Certainty of Price' (note 9), 32.

setting a price partly by reference to a further sale by the buyer.<sup>54</sup> Then:

The conflict between the schools was of a rather fundamental nature, the Sabinians sponsoring and the Proculians declining the main contractual action in many other cases — cases of an incipient contract, or of a contract which fails, or of the remoter effects of a contract.<sup>55</sup>

Daube later detected the same school dispute where a buyer had deliberately frustrated a conditional sale<sup>56</sup> and where a seller had deliberately frustrated the sale of future fruits or offspring.<sup>57</sup>

The texts above on the sale of the *liber homo* and *res extra commercium* are open to the same interpretation. Fragments 4 and 6 contrast two views of an abortive sale, without making the nature of the contrast clear. Daube had found some degree of contrast by supposing that the younger Celsus (a Proculian) considered the application of actions *in factum* where *res extra commercium* are purchased. Daube says nothing about school disputes. But we can easily suppose that, in time, he would have suggested that some state of affairs — perhaps the inadequacy of the available remedies — prompted the schools to put forward their favoured remedies: the Sabinians an action on the sale, the Proculians an action *in factum*. Daube may even have taken the view that a Proculian would give *in factum* in the case of the *liber homo*, and that this is the controversy the compilers have hidden from view in the three texts (and particularly the mangled D.18.1.6 pr.).<sup>58</sup> We have some unlikely evidence that Daube was leaning in this direction from a 1983 piece written by Yoav Ben-Dror.<sup>59</sup> Daube appears to have helped with the piece,

<sup>54</sup> Daube, 'Certainty of Price' (note 9), 31–32

<sup>55</sup> Id., 32.

<sup>56</sup> Daube, 'Condition Prevented from Materializing' (note 52), 283–84 (on D.18.1.50 (Ulpian 11 ed.)).

<sup>57</sup> Id., 287 (on D.18.1.8 pr. (Pomp. 9 Sab.)).

<sup>58</sup> A convenient hypothesis for explaining D.18.1.70 (Licinn. 8 reg.): *Liberi hominis emptionem contrahi posse plerique existimaverunt, si modo inter ignorantes id fiat*. Were the Proculians the dissenters, with their grudging actions *in factum*?

<sup>59</sup> Y. Ben-Dror, 'The Perennial Ambiguity of *Culpa in Contrahendo*', *Journal of Legal History*, 27:2 (1983), 142–98.

and is acknowledged.<sup>60</sup> Writing on D.18.1.6 pr., Ben-Dror says:<sup>61</sup>

It seems that the original text draws a line between two categories: *liber homo* on the one hand and *locus sacer* and *locus religiosus* on the other. Pomponius stated that, according to the younger Celsus, the sale of a free man is invalid if the buyer knows that he is a free man. Pomponius went on to say that, similarly, there is no *actio in factum* for *locus sacer* or *locus religiosus* if the buyer knows the real nature of his purchase.

A reader will examine the text in vain for mention of an *actio in factum*: Ben-Dror has stated Daube's hypothesis perfectly. Further along, Ben-Dror describes the broad school dispute on sale actions and actions *in factum* put forward by Daube. Then, in a footnote Ben-Dror writes: 'This explains Dig. Just. 18.1.4, 5, & 6.'<sup>62</sup> Ben-Dror, in short, appears to be stating Daube's otherwise unrecorded opinion.

### Teaching to interpret

Readers of Daube's published works know the kind of scholar he was. He did not aspire to be a system builder; to set out rules precisely and elegantly; to construct grand theories of societal evolution; to treat laws as social facts. His method, as Alan Rodger once described it in a public lecture, was to consider a text and to ask, as an initial matter, why the text is expressed as it is.<sup>63</sup> In a companion piece to that lecture I considered Daube's method in detail, finding it to be deeply anti-positivist and at the same time meticulously scientific: if one's goal is to explain texts 'causally', as Daube did, then every 'cause' one discovers and isolates is a new weapon in the reader's arsenal, permitting the reader to discover more precise explanations for an ever-widening number of texts.<sup>64</sup>

<sup>60</sup> Id., 142.

<sup>61</sup> Id., 164–65.

<sup>62</sup> Id., 167 n.157.

<sup>63</sup> A. Rodger, 'Law for All Times: The Work and Contribution of David Daube', in E. Metzger, ed., *Law for All Times. Essays in Memory of David Daube* [*Roman Legal Tradition*, 2] (Lawrence, KS 2004), 11–14.

<sup>64</sup> E. Metzger, 'Quare? Argument in David Daube, After Karl Popper', in E. Metzger, ed., *Law for All Times. Essays in Memory of David Daube* [*Roman Legal Tradition*, 2] (Lawrence, KS 2004), 27–58.

Naturally this is a method of interpretation which Daube followed equally in his teaching. Gordon:<sup>65</sup>

What helped to enliven his lectures was his explanations of why the law was as he said it was and how it was likely to have come into being. It was not simply an exposition of the rules but an exposition of the reason for them.

To describe how a rule came into being is partly a historical exercise, but in Daube's hands also an exercise in imagination. The rule announced in a text can be the product of generalization, abbreviation, misunderstanding, shortness of time, transmission error, hesitation, enthusiasm, vanity, or pettiness. A jurist may change his mind, express himself badly, inflate a minor point, diminish an inconvenient fact, or fabricate a controversy.

We know that any of these factors and limitless others can leave its mark on a text and help us to understand it. But the lesson must be learned. A student, left to himself, will not attempt to understand a text in this way, but instead perversely turn the text into something he can understand. The texts on the *liber homo* and *res extra commercium* illustrate the point. If a teacher asks a student to describe the law, the student will probably answer with a single statement: 'an innocent buyer of a *liber homo* or *res extra commercium* has contracted a valid sale'. But simplicity comes at a cost: the student has actively ignored factors that brought the texts to their present condition, not to mention the little tics and flashes by which the jurists have given away their meaning unconsciously. Daube knew that the more acute reader will be able to describe the law more accurately than the less acute, and he taught his students accordingly.

Daube, in other words, was not teaching his students to be advocates, who embark on interpretation in the expectation that a single statement of the law is waiting at the finish. Advocates, disagreements notwithstanding, compete to reach the same goal. It is therefore no wonder, having set themselves a fixed distance to travel, that they avoid imagining other paths that would lengthen the journey, or that they

<sup>65</sup> Gordon (note 1), 95 (speaking of Daube's Roman law lectures at ordinary level).

shorten the journey by adhering to fixed rules of interpretation. Daube encouraged his students to take the longer journey.

A very plausible emendation. I don't believe in it.<sup>66</sup>

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<sup>66</sup> MS 133 (on D.18.1.20 (Pomp. 9 *Sab.*)).

## Appendix

## David Daube — Lectures on Sale D. 18.1. 1–24

## Lecture No. 3 (excerpt: MS 21–28)

We come now to the controversial fragment 4. This comes from Pomponius's section on the contract of sale, so again, as regards the original context, it is in order. As it stands, the text says that the sale of a free man or of a *locus sacer* or *religiosus* that cannot be held — privately held, I suppose — is possible so long as the buyer is ignorant of the quality of the object.

First of all let me note that we have not to do here with eviction. The question is not what the buyer of such objects may do if he is evicted, but whether the sale is valid, i.e., whether it is enforceable when the buyer discovers the quality of the object, enforceable in the sense that he can ask for his interest — for damages.

As the text stands it says that the contract is enforceable: there is a sale. Haymann regards the decision as entirely due to Justinian, and therefore he rewrites the text. According to him, it originally ran '*nec liberi hominis, nec loci sacri, nec religiosi, emptio intellegitur*'. So you have the opposite decision; no sale of any of those things is recognised. Others, less radical, cross out the three words '*sacri et religiosi*' because they say that it is enough to speak of a piece of land which cannot be held — '*qui haberi non potest*'. However, it is very dangerous to cross out a few words because they are included in a more general expression. If one does start crossing out, and you will see that I shall do so quite soon, one should cross out the general definition and leave the more particular cases in. If we did resort to crossing out in this connection, it would be more probable that '*qui haberi non potest*' should be considered as added — the wider expression — and that the narrow references to *locus sacer* and *locus religiosus* would be original.

Many authorities reject the very last clause, which says that this sale is valid 'if the buyer does not know about the

quality'. The reason is that this reservation recurs in fragment 6, which is also from Pomponius, and therefore they say it is here superfluous: it is a generalization of a particular decision recorded in fragment 6. It does not matter much, because it does not alter the state of the law. Even the authorities who reject these final few words admit that if the buyer knows of the quality, then the sale is not enforceable.

Now for the crossing out to which I shall subscribe. Some scholars cross out the whole passage from 'et loci sacri' up to 'potest'. I shall tell you why I subscribe to this. All these things are rather conjectural, but it is better to take a view rather than leave everything undecided. I think that Pomponius admitted an enforceable sale in the case of a free man if the buyer did not know that he was free. But in the case of *locus sacer* and *locus religiosus*, I think in classical law there were other remedies. The remedy might be an *actio doli*, e.g. if the vendor knew. The remedy might be *condictio*, whether the vendor knew or not. *Condictio* if you had paid something. And the remedy might even be an *actio in factum*, which would give you much the same as an *actio ex empto*. My reason for assuming this will come later. We shall find references to an *actio in factum* in such cases.

Naturally, for the Byzantines and compilers, the difference between an *actio in factum* and an *actio ex empto* meant very little. While Pomponius distinguished between a free man and *locus sacer* or *religiosus*, giving *actio empti* in the former case and *actio in factum* in the latter, the compilers put all the cases together, because these subtleties of the formulary system did not count for them.

A question we have to ask is: Why was there a difference between these cases in classical law? Why should there be an *actio ex empto* in the case of a free man and an *actio in factum* in the case of *locus sacer* or *religiosus*? Well, one reason which seems to have been mentioned by the classical lawyers will come in fragment 5: it is very difficult to distinguish a free man from a slave by the look of him, and the legal situation may be in doubt. A man may think himself he is a slave and may be free; remember the *bona fide serviens*. That will come in fragment 5, and I would point out that in fragment 5,

as we shall see, mention is made only of the free man but not of *locus sacer* and *locus religiosus*. Paul in fragment 5 refers only to the *liber homo*.

But there may have been a further reason for the distinction. After all, it may be difficult to see from a piece of land whether a man was buried there or not; so *locus religiosus* may be difficult to distinguish from ordinary land — though, to be sure there would be normally be a tombstone. At any rate, a reason for the distinction between free man and *locus sacer* or *religiosus* which has been suggested, and which seems to be quite plausible, is this. If I acquire a free man in the belief that he is a slave, I do really acquire an economic asset, since, although he is free, you will remember that whatever I acquire through him — *ex operis* or *ex re* — vests in me, not in him. But when I acquire a *locus sacer* or *religiosus*, I do not acquire a true economic asset. That seems to be a relevant difference.

In classical law, then, in the case of a free man, if the buyer did not know, there seems to have been an action on the contract, in the case of *locus sacer* or *religiosus* an action *in factum*. The post-classical lawyers extended the validity of the sale and gave *actio empti* also where it was a question of a piece of land. They emphasised that extension by saying that the action should lie for any piece of land '*qui haberi non potest*', which was *extra commercium*. We find the extension in Justinian's Institutes 3.23.5, where land and free men are equated.

Now as regards knowledge. From the text which is before us it appears that the knowledge or otherwise of the vendor is irrelevant. However, in Justinian 3.23.5 it looks as if the vendor must know, must be *dolose*, if he is to be answerable, because there is something about *deceptus* in the text. It is not absolutely certain, but it very much looks as if fraud — knowledge on the part of the vendor — were required. This would accord with Byzantine moralizing tendencies.

In our title there are two interesting texts to which we shall come, namely fragment 62.1, from Modestinus, where again it looks — because the word *decipere* is used — as if fraud were required if you want to get full damages. I say 'it

looks'; I am not certain, because I suppose it could be argued that 'ne deciperetur' is used in an objective sense: the buyer has been — not 'deceived' but — 'disappointed', he has been let down whether or not the lender knew. Or it may be argued that Modestinus uses traditional language coming from ancient promises by the vendor not to cheat, but that he would not confine the action to fraud. However, 'decipere' does suggest fraud. On the other hand, in fragment 70, from Licinnius Rufinus, it is made quite clear that by most authorities fraud is not required: 'si modo inter ignorantes id fiat'. So there seems to have been a problem here, perhaps a dispute, and Justinian appears to require fraud, although I am not absolutely certain.

Another problem is again connected with fragment 70. Fragment 70 at first sight seems to show that even in the case of a free man there were lasting doubts whether a sale was enforceable: 'plerique existimaverunt', 'most authorities have held'. But possibly the doubts expressed here are not about enforceability of such a sale in general, but only about its enforceability if the vendor was innocent, did not know that the man was free. Licinnius Rufinus may intend to say that 'most authorities held' that full damages were due even if the vendor did not know that the man was free, 'si modo inter ignorantes id fiat'.

And now one more remark, and this is of a kind every Roman lawyer likes to make, because every Roman lawyer likes to be able to show that a colleague and friend of his is wrong. That is a natural quality of Roman lawyers, and de Zulueta in his book on sale p. 10 note 7 commits a blunder, and, of course, it is wonderful! It is a very small mistake (and I have told him).<sup>67</sup> He says that in principle the sale of a liber homo was void. In principle it was void but gradually it was allowed. In note 7, the first text he adduces to support this principle is from Justinian's Institutes 3.19.2. Well, this text should not be quoted in this connection. His other text is all right, but this text is not because it speaks about stipulatio — not about sale. Now we must not transfer the principles of

<sup>67</sup> [De Zulueta did not, however, amend the note for the 1957 edition.]

stipulatio to sale. Why not? In stipulatio I maintain that the other party should dare the object, 'Stichum dare oportere', he is under a civil law obligation to transfer the object. Well, once I have found out this is a free man, then in principle I cannot claim such a thing — I cannot claim that you should at civil law convey a free man to me. In sale I claim something quite different — 'quidquid dare facere oportet ex fide bona', whatever may be due to me on the ground of good faith. I may claim damages on the ground of good faith even when it turns out that this man is free. So the text which says that once you have discovered that this man is free you cannot in principle bring the action under the stipulatio is no proof that you can't bring an action under sale in classical law, because the formula is quite different.

Well, now, we come to fragment 5, which is from Paul, and it is from Paul where he discusses the contract of sale, so it is all right so far as the original context goes. It just says that it is difficult to distinguish a free man from a slave.

I have pointed out that this fragment applies to free men — not to land. Let us ask how far the reason would, in fact, apply to land. It would hardly apply to locus sacer because you would usually be able to distinguish a temple from a private dwelling-house, although nowadays some of the private dwelling houses do look like non-conformist chapels. We have one at the Grammar School end of Osborne Place. But often it would also be easy to see that land is locus religiosus, because usually there would be a tombstone.

Regarding locus publicus, the term 'locus publicus' may mean two things; it may mean a piece of land which happens for the moment to belong to the state but which the state at any moment might sell, and it might mean things like public baths or the Campus Martius — land permanently and intrinsically dedicated to public use. In the latter case again it must often be quite easy to see that the thing is public — and if it is not public in the sense of permanently devoted to public use, no special rules apply. It must be easy to distinguish a forum or a theatre. But occasionally — and we shall see that these cases had a certain importance, being mentioned, e.g., in clauses of the contract — you would not be

able to say at once whether a piece of land was public or not. For instance, you might not be sure whether a certain corner of a road belongs to the road or not; it might belong to the adjoining private estate.

We will now go on to fragment 6, and this also comes from Pomponius on sale. As the text stands — I shall not read words which modern editors (such as Mommsen) have inserted — it tells a confused story.

The younger Celsus holds that the sale of a free man is not valid if the buyer knows that he is free. Nor is the transfer of anything valid if you know. Then we are given the examples of *locus sacer* and *locus religiosus* or things — yes, it says ‘or’ things — which are *extra commercium*, such as public places, which do not just happen to belong to the *populus* but which are permanently in public use, such as the *Campus Martius*.

Clearly, this fragment has been interfered with. It is rather confused. First let us see what Haymann makes of it. He crosses out ‘*sed*’ because, according to him, sale of a free man is always void in classical law whether the buyer knows or not. So he crosses out ‘*sed*’. He cannot tolerate a contrast with the preceding fragments as reconstructed by him. He also crosses out ‘*scientem*’, because the sale is always void. And then he crosses out everything from ‘*cuiuscumque*’ up to the word ‘*sacra*’, so that he obtains ‘*Celsus ait hominum [sic] liberum te emere non posse, nec sacra aut religiosa loca*’, i.e. ‘you can’t buy a free man, *locus sacer* and *locus religiosus* also cannot be bought’. Such is his theory, but it goes too far for me. Other learned authorities cross out everything from ‘*nec cuiuscumque*’ right to the end of the text, because from ‘*nec cuiuscumque*’ you must admit that the text as it stands is unsatisfactory.

I think the text has suffered both abbreviation and addition. From ‘*nec cuiuscumque*’ it makes no sense and the Latin is bad. No valid sale of a free man if you know — nor a transfer or anything if you know, or perhaps, nor a sale of anything if you know that it is alienation; it is ridiculous. It is simply absurd. Mommsen, following inferior manuscripts, inserted the word ‘*prohibitam*’, but that is Mommsen, not the text. Moreover, even with Mommsen’s insertion the genitive ‘*cuius-*

cumque rei' would be in the air. You cannot knowingly buy a free man or 'of anything' if you know that transfer is prohibited: very bad Latin. Then there comes a difficulty also in the next part, because the text speaks of *loca sacra* and *religiosa* 'or' things which are not in *commercio*. Surely, *loca sacra* and *religiosa* are not in *commercio*. So why mention these and continue 'or things *extra commercium*'? Here we have a generalization tacked on to specific cases in a manner similar to that which we found in fragment 4 — 'qui haberi non potest'.

I will tell you what I think Pomponius said. He said that, according to Celsus, the sale of a free man is not valid if you, the buyer, know he is free. Then, I think, he went on to say that, similarly, there is no *actio in factum* for *locus sacer* or *locus religiosus* if you know about the quality. In fact this division he makes between a free man and a *locus sacer* or *religiosus* — and he obviously did discuss them one after the other instead of together — supports the thesis that there was only an *actio in factum* in the case of *locus sacer* or *religiosus*. Pomponius obviously had two quite different sentences. He did not say: You cannot knowingly buy a free man, a *locus sacer* or a *locus religiosus*. He first dealt with the free man, refusing action on the contract, and then with *locus sacer* or *religiosus*, refusing *actio in factum*.

The public land may possibly have been added later. Now why? This creates a difficulty. In fragment 22 of our title there is also a strong indication that the public land is added, because it does not appear in the first part, in the clause of the contract, but only in the second part, after 'ceterum si'. On the other hand, in fragment 72.1 I see no reason to regard the public land as added. Here it seems to be alright. Well, then, supposing the public land in fragment 6 is added, why did Pomponius not speak about it? Let me insert that I am not sure that it is a later addition. Possibly he did speak about it, and the fact that he does so in a separate clause may be explicable by his intention of making the distinction between land which was only for the moment belonging to the state but could be trafficked in and land permanently and essentially public. But it is also possible that the whole thing

about public land is added. Well, if so, we may conclude that this case was really less important than the other cases, because usually — although not always — public land could easily be distinguished from other land. Usually you had no difficulty in noticing a theatrum or forum. However, where such land was not distinguishable — say, the end of a public road — I suppose that in principle the same rules would have applied to public land as applied to locus sacer or locus religiosus.

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