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[XX DE INCENDIARIIS]

Incendiarii, qui quid in oppido praedandi causa faciunt, capite puniantur. QUI CASU INSULAM AUT VILLAM, NON EX INIMICITIIS INCENDERINT, LEVIUS. FORTUITA ENIM INCENDIA AD FORUM REMITTENDA SUNT, UT DAMNUM VICINIS SARCIATUR. Qui casam aut villam inimicitarum gratia incenderunt, humiliores in metallum aut in opus publicum damnantur, honestiores in insulam relegantur. Fortuita incendia, quae casu venti ferente vel incuria ignem supponentis ad usque vicini agros evadunt, si ex eo seges vel vinea vel olivae vel fructiferae arbores concrementur, datum damnum aestimatione sarcitur. Commissum vero servorum, si domino videatur, noxae deditio sarcitur. Messium sane per dolum incensores, vinearum olivarumve aut in metallum humiliores damnantur, aut honestiores in insulam relegantur. Qui noctu frugiferas arbores manu facta ceciderint, ad tempus plerumque in opus publicum damnantur aut honestiores damnum sarcire coguntur vel curia submoventur vel relegantur.

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The Buyer Who Wants to Pay More

A valid sale required a price that was agreed and certain.¹ Some modern works nevertheless consider whether the law ignored a certain species of error in price: the seller is willing to accept less money than the buyer wishes to give, and a valid sale is formed on the lesser price. A single text of Pomponius suggests this might

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¹ J.3.23.1; D.19.1.9 pr. (Ulpian 28 *Sab.*).

be the case.² The text is concerned with hire rather than sale, but some have drawn a wider lesson from the specific problem Pomponius describes. The question is whether they are right to do so, and whether we are therefore right to suppose that the law of sale ignored this species of error in price.

I.

The text is this:

D.19.2.52 (Pomponius 31 *ad Quintum Mucium*). Si decem tibi locem fundum, tu autem existimes quinque te conducere, nihil agitur: sed et si ego minoris me locare sensero, tu pluris te conducere, utique non pluris erit conductio, quam quanti ego putavi.

If I let a farm to you for 10 but you think you hired it for 5, the event is without effect. But even if I thought that I had let for less, you, that you had hired for more, there will at any rate be no hire for more than I believed to be the case.

A valid contract of hire required agreement on the rent,³ but the second of Pomponius' examples makes us hesitate. The second example suggests that a contract may arise on the lesser sum (Pomponius does not say outright that a contract will arise⁴). On consensual contracts and error, Kaser writes:

To the Romans it was a matter of *consentire*, correspondence of intentions. For them the *dissensus* that impedes the contract is accordingly a conflict of intentions, not statements, as is the case today.⁵

“Correspondence of intentions” gives considerable space for consent even between parties who talk past each other. So is there consent between the lessor and the tenant in Pomponius' second example? Do they agree on the rent? The answer bears directly on the question of error of price in sale: if Pomponius' example

² D.19.2.52 (Pomp. 31 *Quint. Muc.*).

³ See G.3.142; D.19.2.2 pr. (Gaius 2 *rer. cott.*); J.3.24 pr.

⁴ See the discussion below, notes 20 to 26 and accompanying text.

⁵ “Den Römern kommt es hier auf das *consentire*, die Übereinstimmung im Willen an. Der *dissensus*, der den Vertrag verhindert, ist bei ihnen folgerichtig das mangelnde Zusammenstimmen der Willensmeinungen, nicht (wie heutzutage) der Erklärungen.” M. Kaser, *Das römische Privatrecht*, 2, 2nd ed. (Munich 1971), 238.

preserves the principle of consent, then the example should equally serve contracts of sale, given the close assimilation of hire to sale, or indeed serve consensual contracts generally.⁶

II.

Modern writers have found various ways to preserve the principle of consent in Pomponius' example. Where the lessor expects to receive x and the tenant expects to give y , and $x < y$, Wunner, Kaser, de Zulueta, and others would say there is a partial consensus on x .⁷ Why then is there no partial consensus on y when $x >$

⁶ "[Das Fragment] enthält höchst bedeutsame Aussagen zur Frage der Maßgeblichkeit des Willens beim Abschluß von Verträgen, die consensu zustande kommen." K. Misera, "D. 19. 2. 52, Pomp. 31 ad Q. Mucium. Vertragsschluß consensu: Wille und *error* im klassischen römischen Recht," in F. Graf von Westphalen and O. Sandrock, eds., *Lebendiges Recht — Von den Sumerern bis zur Gegenwart. Festschrift für Reinhold Trinkner zum 65. Geburtstag* (Heidelberg 1995), 45. The ascription to book 31 *ad Quintum Mucium* possibly adds something to the question. Our fragment aside, book 31 is devoted to sale (see *Pal.*, 2, cols. 74–75 (Pomponius 300–308). Accordingly Lenel has placed the fragment under the rubric *De emptio nibus et venditionibus* and cited D.18.1.9 pr. (Ulpian 28 *Sab.*), apparently on the understanding that Pomponius (and Quintus Mucius) are discussing price and consent, and that our text on *locatio conductio* is part of a discussion of sale. Lenel's ordering may in fact have persuaded Watson and Stein that Quintus Mucius did not write on *locatio conductio* at all, though our text perhaps makes this less likely. See A. Watson, *Law Making in the Later Roman Republic* (Oxford 1974), 146 ("[T]here is not the slightest sign of a discussion of either [*locatio conductio* or *mandatum*] anywhere in Pomponius *ad Quintum Mucium* . . ."); P. Stein, "The Development of the Institutional System," in P. G. Stein and A. D. E. Lewis, eds., *Studies in Justinian's Institutes in Memory of J. A. C. Thomas* (London 1983), 152–53. The fact that *locatio conductio* is missing from the later work of Sabinus might be seen by some to suggest that Quintus Mucius' comparable work is also missing *locatio conductio*, and that therefore Pomponius is not *directly* writing about *locatio conductio* either, but making a point about sale. But even assuming this is true, we are no wiser on the question of whether our text on *locatio conductio* was offered to complement a similar rule in sale or to draw a contrast. In short, the ascription to 31 *ad Quintum Mucium* does not help us.

⁷ S. E. Wunner, *Contractus* (Graz 1964), 203–205; Kaser (note 5), 238 n.20 ("Teilkonsens"); F. de Zulueta, *The Roman Law of Sale* (Oxford 1945), 25 ("[F]rom [D.19.2.52] it is to be inferred that, where a buyer has intended a higher price than that to which the seller thought he was agreeing, the sale is good at the lower price, since as to that there was agreement."); R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Capetown 1990), 591 ("Minus in maiore

y? Wunner says that the result is dictated by an assessment of interests: if $x < y$, it is a case of *in maiore minus est*, and x is *minus*, but if $x > y$, the y is not *minus* but *aliud*.⁸ Similarly Zimmermann says that, where $x > y$, consensus on y is lacking because y is against the interests of the lessor.⁹ Thomas and Buckland say that the contract is void if the discrepancy is to the disadvantage of the party who was mistaken.¹⁰ Nicholas makes the principle broader, saying that either party may enforce at his opponent's price.¹¹

A second current of opinion preserves the principle of consent with the aid of "hypothetical intention." Backhaus and Misera argue that *in maiore minus* is an attractive but ultimately flawed basis for consent in this case. There is, they say, no intention (*Wille*) on the tenant's part to conclude a contract for the lesser sum — no more than in Pomponius' first example — and without intention there is no consent.¹² There is, however, hypothetical intention in the second example, because we may assume, hypothetically, that a tenant who is willing to hire for 10 would also be willing to hire for 5.¹³

est"); J. A. C. Thomas, *Textbook of Roman Law* (Amsterdam 1976), 230 ("the greater being deemed to include the less").

⁸ Wunner (note 7), 205.

⁹ Zimmermann (note 7), 591.

¹⁰ Thomas (note 7), 230; W. W. Buckland, *A Text-Book of Roman Law*, 3rd ed. rev. P. Stein (Cambridge 1963), 418. This might explain Pomponius' first example, but does not help with the second, where there is no identifiable "mistaken party." See below, notes 17 to 19 and accompanying text.

¹¹ B. Nicholas, *Introduction to Roman Law* (Oxford 1962), 177.

¹² This is also Wieacker's objection to Wunner: to find consent in Pomponius' second example is to reject the theory of intention. F. Wieacker, [Comptes Rendus], *T. v. R.*, 35 (1967), 141 (reviewing Wunner, *Contractus*, 1964).

¹³ R. Backhaus, "In maiore minus inest," *ZSS (rA)*, 100 (1983), 163–64; Misera (note 6), 48–49. A text which may or may not bear on the issue of consent is D.45.1.1.4 (Ulpian 48 *Sab.*): *Si stipulanti mihi "decem" tu "viginti" respondeas, non esse contractam obligationem nisi in decem constat. Ex contrario quoque si me "viginti" interrogante tu "decem" respondeas, obligatio nisi in decem non erit contracta. Licet enim oportet congruere summam, attamen manifestissimum est viginti et decem inesse.* The prevailing view is that this text is badly interpolated and does not express the classical law. See G.3.102; J.3.19.15; S. Riccobono, *Stipulation and the Theory of Contract*, trans. J. Kerr Wylie, rev. B. Beinart (Amsterdam 1957), 103–105. Backhaus, on the other hand, argues that the text does express the classical law but, perhaps in the same manner as D.19.2.52, states only that the mismatched sums are not necessarily fatal

A third current of opinion rejects altogether the idea that consent exists between the contracting parties. Wieacker argues that consent is simply absent in Pomponius' second example, but that the contract is valid notwithstanding the absence of consent, at least in Pomponius' opinion.¹⁴ It is valid for a purely sensible reason: the expectations of the lessor are not frustrated when he is given what he wanted to have.¹⁵ Wieacker suggests that, from case to case, the element of consent may be ignored if that is suitable to the result.¹⁶

III.

The issue here is whether the rule announced in Pomponius' second example held in contracts of sale, so that a contract would arise if the buyer believed the price was higher than the seller believed. Those who find either "partial consensus" or "hypothetical intention" would readily apply the text to sale, as hire and sale are created on the same foundation. But weighing against both of these explanations is the fact, pointed out by Wolf and Wieacker, that the parties in the example had never expressed the disputed sum to one another, or had done so imperfectly.¹⁷ Some manner of event has taken place that Pomponius describes with *minoris . . . pluris*, but to assume that the sums have been reversed from the first example, or that there has otherwise been some discernible common ground over the sums, is to assume too much. Negotiations over rent in a contract of hire go well beyond sums, and this makes it possible for all manner of misunderstanding to take place. The most obvious is a misunderstanding over the

to the contract. To a late classical jurist, he concludes, a "hypothetical intention" on the lesser sum is a possibility. Backhaus, 152–55, 163 n.140.

¹⁴ F. Wieacker, "Irrtum, Dissens oder gegenstandslose Leistungsbestimmung," in *Mélanges Philippe Meylan* (Lausanne 1963), 398.

¹⁵ Id.

¹⁶ F. Wieacker, *Societas. Hausgemeinschaft und Erwerbsgesellschaft* (Weimar 1936), 95.

¹⁷ J. G. Wolf, *Error im römischen Vertragsrecht* (Graz 1961), 79–80; Wieacker (note 14), 398:

[D]ie Parteien konnten nur Verschiedenes "meinen" (*sentire*), wenn sie den Pachtzins überhaupt nicht oder aber nicht eindeutig bestimmt hatten; sonst hätte Pomponius (wie im vorausgehenden Falle) sagen müssen, "*Ego* habe (um 10) verpachtet, *Tu* (um 5) zu pachten gemeint" (*existimes*). Man hat sich also vorzustellen, daß der Pachtzins überhaupt nicht oder nur in den Vorverhandlungen zur Sprache gekommen und es dort zur Klarheit nicht gekommen war.

term of the lease. If one party understands the term differently from the other, an “agreed” sum will conceal a genuine disagreement over the amount of the rent. I.e., if you are my tenant and anticipate a term which is shorter than I anticipate, then in Pomponius’ words *tu pluris te conducere* [*senseris*]. A misunderstanding could also arise where the rent is paid in produce from the land, a so-called *locatio partiaria*: a difference in expectation over the crop or the extent of land from which the crop is taken could result in a lessor believing he had let for less than the tenant believed.¹⁸ These sorts of misunderstandings would explain why Pomponius moves from *decem . . . quinque* in the first example to *minoris . . . pluris* in the second. He is not, perhaps, announcing a principle (“ . . . but when the tables are turned”), but is aware of specific, difficult leases where adhering to the rule of consent would be unjust. This alone makes Wieacker’s “vernünftige Auslegung”¹⁹ a better solution than consensus or hypothetical intention, which assume a misunderstanding over sums.

Weighing even more heavily against consensus or hypothetical intention is the fact that a contract would not necessarily arise on Pomponius’ second example. To paraphrase his words: the *conductio* will not be for more than the lessor believes, if there is a *conductio* at all.²⁰ Pomponius introduces the second example with *sed et si*, signalling that he will attenuate the facts but arrive at the same result: no contract.²¹ Paul and Ulpian use *sed et si* in similarly constructed examples elsewhere in the Digest, and both of them finish with *idem fiet*.²² Our fragment does not finish with

¹⁸ For discussion of and texts on *locatio partiaria*, see Buckland (note 10), 499; J. A. C. Thomas, “The Nature of *merces*,” 1958 *Acta Juridica*, 197–98. Compounding any misunderstanding is the possibility, argued by du Plessis, that a lease survived the death of the *locator* or *conductor*: the magistrate or judge is then left to determine an imperfectly expressed *merces* without the evidence of one side. P. J. du Plessis, “The Hereditability of *Locatio Conductio*,” in J. W. Cairns and P. du Plessis, eds., *Beyond Dogmatics: Law and Society in the Roman World* (Edinburgh 2007), 139–53.

¹⁹ Wieacker (note 14), 398.

²⁰ See Backhaus (note 13), 163 n.140; Misera (note 6), 48–49. Neither Backhaus nor Misera says outright that the second example allows the possibility of a failed contract, but both acknowledge that it could have this meaning.

²¹ See Misera (note 6), 48: “[S]cheint Pomponius die Auffassung nicht gänzlich verwerfen zu wollen, die auch hier ein Scheitern des Vertragsschlusses annimmt. Dies wäre zugleich eine erste Erklärung für das ‘et – auch, sed et si ego . . .’”

²² D.8.4.6.2 (Ulpian 28 *Sab.*); D.46.4.11 pr. (Paul 12 *Sab.*).

idem fiet, but the final concessive clause (*utique . . .*), conceding to a proposition that is never actually stated, makes us suspect that the compilers have taken something out and (possibly) added *utique* to maintain sense. Wolf in fact believes that a contract always arises on these facts and that both *sed et si* and *utique* are interpolated,²³ but this pushes interpolation too far. Pomponius writes *non pluris erit conductio quam*, not *erit conductio non pluris quam*, and only the latter would convey “there will be a contract.” It seems instead that the proposition to which *utique* is a concession (“sometimes there is a *conductio*”), perhaps along with other juristic opinion or examples, have been struck out of the text. If this is the case, the text may have read something like the following:

sed et si ego minoris me locare sensero, tu pluris te conducere, <idem fiet.>

followed by contrary juristic opinion, or examples where the contract survives, and ending with a concessive

<sed> [utique] non pluris erit conductio, quam quanti ego putavi.

The text therefore acknowledges the possibility that a contract does not arise, as in Pomponius’ preceding example. This is so even if the text is not interpolated.

This possibility speaks against the explanation that consent or hypothetical intention underlies *minoris / pluris*. There were instances in which no contract arose notwithstanding a tenant’s desire to pay more. Even if, for the sake of argument, the successful contracts were due to consent or imputed consent, distinguishing between the successful and unsuccessful contracts requires a deeper principle still. This is why Wieacker’s “vernünftige Auslegung” is again the better solution: the judge or magistrate would not be obliged to recognize a contract if, for example, a tenant did not wish to submit to a contract that left him with potential liabilities beyond the rent,²⁴ or if a lessor preferred to proceed by *condictio*.²⁵ And where, to the contrary, the parties

²³ Wolf (note 17), 79, 82. If we accept that both *sed et si* and *utique* are interpolated, i.e. remove all equivocation about the validity of the contract, then D.19.2.52 as a whole is reduced to a kind of droll anomaly, offered without explanation.

²⁴ E.g., *Pauli Sententiae* 2.18.2.

²⁵ D.12.6.65.7 (Paul 17 *Plaut.*) (urban leasehold).

are willing to pass up such advantages and submit to a contract before the magistrate or judge, it is inaccurate to say that at some earlier occasion, when they were negotiating their contract, they were in agreement on the rent, actually or hypothetically. It is more accurate to say, as Wieacker does, that the requirement of consent is being ignored and a contract recognized, or as Frier does, that the parties' disagreement on the rent is being "judicially resolved."²⁶

IV.

Does a contract of sale arise when a seller is willing to accept less money than the buyer wishes to give? Our only text is D.19.2.52, and whether any wider principle can be taken from it and applied to contracts of sale is doubtful. We do not need this text to tell us that in exceptional cases a magistrate can grant an action on the facts. We also know that sale would not typically create the kinds of circumstances that made Pomponius' departure from the rule of consent necessary. The text does not answer the question.

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²⁶ B. W. Frier, *Landlords and Tenants in Imperial Rome* (Princeton 1980), 60 n.11.

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