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'Arra' in the Law of Justinian

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So much has been written in recent years on *arra* in Justinian's law that one hesitates to add to it (1). But there is, I submit, a solution to the problem raised by the texts which is simpler than any so far suggested, and which gives a satisfactory result.

The texts at the heart of the matter are C. 4. 21. 17. and J. 3. 23. pr. The former is generally — but not universally — admitted to be the earlier (with which *communis opinio* I agree) (2), and gives rise to no great problem. The constitution enacts in its *principium* that with regard to certain specified contracts, including sale and *arrarum datio,* if the parties have agreed that the contract be put in writing, then the contract will be of no effect until the writing has been properly completed i.e. reduced to its final form and confirmed by the subscription of the parties (3), and where it is being drawn up by a notary completed by him and finally released to the parties. A draft in the handwriting of one or both of the parties, we are told, will not enough. § 2 enacts that where *arra* is given, whether with writing or without, in respect of the making of

(1) See, for example, Thomas, « Arra in Sale in Justinian Law », 24 Tijd. 253 (and the references given therein) ; « Arra Reagitata », 1956, *Butterworths South African Law Review* 60 ; « A Postscript on Arra », *Jura* 10 (1959) ; D'Ors, « Las Arras en la Compraventa Justinianea », *Jura* 6 (1955) 149 ; « 'Arra Reagitata' sive in scriptis sive sine scriptis », *Jura* 9 (1958) 78. Schuster, « Die Funktion der 'Arrha' by Justinian », *Labeo* 5 (1959), p. 26, came to notice too late for consideration.

(2) Contra D'Ors, *loc. cit.*

(3) De Zulueta is surely wrong ('The Roman Law of Sale', Oxford, 1945, p. 22) when he says that this constitution laid down that *subscriptio* is required of documents made *per alium* but not of autographs of the parties. Possibly J. 3. 23. pr. relaxed the provision where the writing was autograph of the parties, but this does not necessarily follow from the wording of the text.

a sale, then, if the person who promised to sell repudiates the sale he will be compelled to pay double the value of the *arra*, if the person who promised to buy withdraws from the purchase he will forfeit the *arra* he has given. In this part of the constitution *sive in scriptis sive sine scriptis* refers to the giving of *arra* (4).

The difficulty lies in the interpretation of J. 3. 23. pr. The passage reads :

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

From the beginning to *innovatum est*, the text deals with unwritten sales and Justinian categorically states that he has made no change in the law relating to them. From there to *fuerit datum* he is concerned with sales which are to be put into writing. He declares, first, that such an *emptio venditio* is not *perfecta* until the agreement has been put into writing and the formalities demanded by C. 4. 21. 17. completed ; secondly, that

(4) Cf. THOMAS, 24 Tijd., pp. 263-267.

so long as anything in the formalities is lacking, either party may withdraw without penalty ; thirdly, than he can only so withdraw without penalty where no *arra* has been given. At this stage one could expect Justinian to explain what happens in cases of sale to be put into writing where *arra* is given and one party withdraws before the formalities are completed. And that, I suggest, is what he does do. This view is supported by the words *hoc etenim subsecuto* which clearly link the sentence in which they occur with what precedes. The words which cause all the difficulty, *sive in scriptis sive sine scriptis venditio celebrata est,* should be translated « Whether the sale (scil. which has to be put into writing with other attendant formalities) was agreed upon in writing (i.e. but which lacks the other formalities) or without writing ». In other words, the parties have agreed on the terms of the sale but have declared it should be put in writing, and at the time of the withdrawal either there is no writing or there is writing which does not meet all the requirements laid down in C. 4. 21. 17. and repeated in this *lex.* On this interpretation, the Institutes' passage would be in complete harmony with the Code, and would also be entirely self-consistent. It is most unlikely that, in this passage, the compilers after declaring they had not altered the classical law of unwritten sale, would have surreptitiously introduced a new rule (which is not mentioned at all in the Digest) or could have allowed what is on any other interpretation, so blatant a mistake, even if it did give the *de facto* position (5). A view which involves holding (a) that we have suddenly moved to a general discussion of *arra* in sale, (b) that Justinian is altering, deliberately or accidentally, the law of unwritten sale, and (c) that carelessly he has left out *celebranda* after *in scriptis,* needs too many conjectures to be readily acceptable.

Of course, the interpretation which is here put forward involves holding that to some extent the words *sive in scriptis sive sine scriptis venditio celebrata est* repeat what has gone before, but it is not surprising that Justinian should emphasise his own legal reforms ; moreover, the passage is wholly com-

(5) Cf. THOMAS, *loc. cit.*

pilatorial and we see from his Paraphrase that Theophilus at least was not averse to repetition. This present view, however, can only hope to win support if it can be shown, first, that the words *in scriptis* in this text may mean « in writing, but where the other formalities are lacking », and secondly, that *venditio* may be used where the sale is not perfect.

For the first of these points we have the evidence of C. 4. 38. 15. 1. which is another of the constitutions of Justinian.

> Quam decidentes censemus, cum huiusmodi conventio super venditione procedat ' quanti ille aestimaverit ', sub hac condicione stare vendiitonem, ut, si quidem ipse qui nominatus est pretium definierit, omnimodo secundum eius aestimationem et pretia persolvi et venditionem ad effectum pervenire, sive in scriptis sive sine scriptis contractus celebretur, scilicet si huiusmodi pactum, cum in scriptis fuerit redactum, secundum nostrae legis definitionem per omnia completum et absolutum sit.

Clearly, then, in view of the qualification at the end (*cum in scriptis fuerit redactum etc.*) the fact that the contract is now *in scriptis* does not mean that all the requirements have been met, and accordingly, such a contract *in scriptis* may still be *imperfecta* and of no avail. In this text, the first use of the words *in scriptis* (in the phrase *sive in scriptis sive sine scriptis*) and the second use of these words (in the phrase *cum in scriptis fuerit redactum*) correspond respectively to the use of *scriptura* and *in scriptis* in J. 3. 23. pr.

As for the second point, it is not uncommon to find *emptio* or *venditio* used where the sale is not yet in existence or is void. An example of *emptio* being used in this way is, in fact, found in the very passage of Justinian's Institutes with which we are concerned. The sentence runs : *Donec enim aliquid ex his deest, et paenitentiae locus est et potest emptor vel venditor sine poena recedere ab emptione.* It will suffice to give one other example, viz. D. 18. 1. 36 (Ulpian 43 *ad edictum*) :

> Cum in venditione quis pretium rei ponit donationis causa non exacturus, non videtur vendere.

In a similar way, one uses *emptor* and *venditor, emere* and *vendere,* where there is no sale (6). Although it is perhaps not technically accurate, it is convenient.

Likewise, there is no difficulty in the use of *celebrata est. Celebrare* takes its colour from the noun to which it relates, and if *venditio* means « imperfect sale » or « agreement for sale » *sive in scriptis... venditio celebrata est* would mean « whether the agreement for sale (or « sale not yet perfected ») was made in writing... ». It does not follow from the use of a past tense of *celebrare* that the agreement etc. to which it relates is valid ; e.g. on the giving of security in law suits, J. 4. 11. 7.

In conclusion, one can say that Justinian has not innovated on *arra* in the Institutes ; that he retains the classical law for unwritten sales, and follows his own constitution in the Code for sales to be put into writing. Confusion has arisen as a result of his careless use of words, but his choice is not unreasonable or indeed unprecedented, and the meaning was probably clear to his contemporaries (7).

(6) E.g. D. 18. 1. 34. 3 ; h.t. 35. 1 ; h.t. 16. pr. ; h.t. 41. 1.

(7) There is nothing in Theophilus or the Basilica which militates against this solution.