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Alan Watson

University of Georgia School of Law, wawatson@uga.edu



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Emptio, 'taking'

By ALAN WATSON (Edinburgh)

According to Festus, "*Emere, quod nunc est mercari, antiqui accipiebant pro sumere*" and modern philologists do accept some such meaning as the original in Latin.¹⁾

The *Thesaurus Linguae Latinae*²⁾ however, thinks there is no certain example of this sense of *emere* and considers the instances adduced by Skutsch³⁾ to be scarcely convincing. I should like to produce for consideration a different instance drawn from the derivative *emptio* or *emptor*. The instance in question may not take us as far back as *emere* = *sumere* but will at least to *emere* = *accipere*.

Roman legal tradition⁴⁾ tells us that the codification of the mid-fifth century B.C.,⁵⁾ the XII Tables, contained a provision on the *statuliber*, that is, a slave ordered to be free under his master's will when a condition was fulfilled. The clause in question seems to have been along the lines that if the slave was to be free when he made a certain payment to the heir then, even if he were transferred by the heir, he obtained his freedom by giving the sum to his purchaser. It appears that in this clause either the recipient from the heir was designated as *emptor* or the transaction was called *emptio* or perhaps both these nouns occurred. Thus *Epit. Ulp.* 2.4 has:

Sub hac condicione liber esse iussus: SI DECEM MILIA HEREDI DEDERIT, etsi ab herede abalienatus sit, emptori dando pecuniam ad libertatem perveniet; idque lex duodecim tabularum iubet.

And more significantly, it is in this context that we find in D.40.1.29.1, "*quoniam lex duodecim tabularum emtionis verbo omnem*

¹⁾ Thus, e.g. Ernout & Meillet, *Dictionnaire étymologique de la langue latine*, i 4th ed. (Paris, 1959), p. 195; and Benveniste, *Le Vocabulaire des institutions indo-européennes* i (Paris, 1969), p. 137, who says it means 'prendre' but in the particular sense, 'tirer à soi'.

²⁾ V. 511.

³⁾ *Kleine Schriften* (Leipzig, 1914), pp. 145ff., 206.

⁴⁾ *Epit. Ulp.* 2.4; D. 40.1.25 (Modestinus 9 *diff.*); *h.t.* 29.1 (Pomponius 18 *ad Quintum Mucium*).

⁵⁾ Grave doubts have been expressed in the past as to the accuracy of the traditional dating of the XII Tables but see now, above all Wieacker, 'Die XII Tafeln in ihrem Jahrhundert', *Entretiens sur l'Antiquité classique xiii, Les Origines de la République romaine* (Fondation Hardt, Vandœuvres-Genève, 1967), pp. 293ff.

alienationem complexa videretur".⁶⁾ It cannot reasonably be doubted that in the wording of this provision as it came down to later ages⁷⁾ either *emptio* or *emptor* was to be found; and there is no particular reason to consider that in this respect the wording had undergone alteration.⁸⁾

Thus, we should accept as a working hypothesis that the word *emptio/emptor* existed by the mid-fifth century B.C. and was used in the XII Tables. Yet beyond doubt, the Roman contract of sale, *emptio venditio*, was not then in being⁹⁾ and further, an essential element of the very idea of sale, coined money, was also lacking.^{10, 11)} If we wish to give to *emptio* here a meaning akin to that which it had in later times we would have to say that the provision of the XII Tables applied and was intended to apply only when the slave was transferred for a prestation in bronze or silver (if we suppose that these metals had become the standard measures of exchange¹²⁾). On this view the *statuliber* could not get his freedom if he fulfilled the condition after he had been transferred in exchange for other property such as oxen or goats, or had been delivered as a gift, or as dowry on behalf of the heir's daughter, or consequent upon the death of the heir. Yet why should these cases (which would make up a fair proportion of all alienations) have been excluded from the scope of the Code's provision? And if they were at first excluded, what changed circumstances persuaded later jurists that the scope should be wider, that *emptio* should be treated—exceptionally and

⁶⁾ Though the point is not of importance in the present context this view of Pomponius inverts the situation. *Emptio*, whatever it may mean, is used of a transaction viewed (in its property aspect) from the standpoint of the recipient; *alienatio* from that of the transferor.

⁷⁾ Primarily through the *tripertita* of Sextus Aelius Paetus Catus, consul of 198 B.C.

⁸⁾ See *infra*, p. 296.

⁹⁾ Sometime in the 3rd century B.C. would seem to be the earliest date which any modern legal scholar would allow for the creation of the contract.

¹⁰⁾ The introduction of coinage is put very much later than the mid fifth century B.C.: cf. e.g. Sydenham, *The Roman Republican Coinage* (London, 1952), pp. 1ff.; Mattingly, *Roman Coins*, 2nd edit. (London, 1960), pp. 3ff.; Crawford, *The Roman Republican Coinage* (Cambridge, 1974), pp. 3ff., 589f.

¹¹⁾ *Emptio venditio* requires that the counter-prestation (or at least part of it) be in coined money, though the Proculians argued that *permutatio* was also *emptio venditio*; e.g. G. 3.141.

¹²⁾ As might be permissible from the reports of the *lex Aternia Tarpeia* and the *lex Menenia Sestia* reputedly of 454 and 452 B.C.: for the sources for these see Rotondi, *Leges publicae populi romani* (Milan, 1912), pp. 200f.

as a deliberate misinterpretation—as including all these other situations? In the absence of a convincing answer to either of these questions we should accept that we have in the XII Tables' provision on the *statuliber* an instance where *emptio/emptor* means "taking/taker" or at least "receiving/recipient". On this view, of course, problems and questions of interpretation would arise only when *emptio* acquired a more restricted meaning.¹³⁾

To return for a moment to the accuracy of the tradition of the wording. If one believes that *emptio/emptor* did not appear in the original but is later, then one must wonder how, when and why the change came about. If the alteration occurred at a time when *emere* meant 'to take' or 'to receive', the basic situation (for us) is unchanged; but if when *emere* meant 'to buy' then how could any verbal change so restricting the scope of the provision prove acceptable? And why ever was it made? There seems to be no answer.¹⁴⁾ In fact, one might even go so far as to state that the use of *emptio/emptor* with a sense wider than any involved in the context of sale is the strongest evidence of the accuracy of the tradition on the clause's wording.^{15, 16)}

¹³⁾ Ironically, the presence of *emptio/emptor* in the tradition has been one factor leading some modern scholars of Roman law to doubt the accuracy of the reports on the provision: Riccobono in *Fontes Iuris Romani Antejustiniani* i (Florence, 1941), p. 51; Voci, *Diritto ereditario romano* i, 2nd edit. (Milan, 1967), p. 75; Impallomeni, *Le Manomissioni mortis causa* (Padua, 1963), p. 19. The best answer to these doubts is, of course, the evidence provided by philologists that *emere* originally meant 'to take'. See also Kaser, *Das römische Privatrecht* i, 2nd edit. (Munich, 1971), p. 114.

¹⁴⁾ The same difficulty would exist if one were to suppose that the whole provision is a later invention.

¹⁵⁾ It has been suggested that in the wording for *mancipatio*, "mihi emptus esto hoc aere aeneaque libra" refers not to 'purchasing' but to 'taking' [Kaser, *Eigentum und Besitz im älteren römischen Recht*, 2nd edit. (Cologne, Graz, 1956) pp. 108, 117, 135, 141] or to 'receiving' [Prichard, 'Terminology of *mancipatio*', *Law Quarterly Review* lxxvi (1960), pp. 412ff.; cf. Jolowicz and Nicholas, *Historical Introduction to Roman Law* 3rd edit. (Cambridge, 1972), p. 149]. Such a view may well be correct but it cannot help us here, since any such meaning attributed to "emptus esto" in the *mancipatio* derives from external factors. In the context the meaning could easily be "let him have been bought": "hoc aere aeneaque libra" points to a purchase.

¹⁶⁾ I am grateful to Mr. R. M. Pinkerton for his generous help with this note.