

The controversy about the nature of the price in a contract of sale

Tessa LEESEN

(*Université de Tilburg*)

Introduction

The early Principate saw the emergence of two law schools in Rome, the Sabinian or Cassian school and the Proculian school. Their representatives defended opposite positions over some points of law, the so-called controversies. Both the Institutes of Gaius and the Digest of Justinian mention these controversies. Hitherto, Romanists generally believed that there was a fundamental difference between the two schools and that each school represented one side of a doctrinal coin¹. They also believed that the study of the controversies would reveal the nature of their opposing doctrines. All sorts of suggestions have been made, for instance, that their doctrinal difference derived from their adherence to different philosophical, political, or methodological traditions, but, so far, without any success. Romanists have never been able to single out one particular tradition or theory that could have been at the root of each controversy.

The aim of my study is to find an explanation for the controversies by throwing a new light on the subject. In my view, the controversies cannot be placed under one common denominator: there is no internal consistency among the positions of the Sabinians, nor among the

¹ See, for example, P.STEIN, *The Two Schools of Jurists in the Early Roman Principate*, CLJ 31 (1972), pp.8-31; G.L.FALCHI, *Le controversie tra Sabiniani e Proculiani*, Milano 1981; O.BEHREND, *Giurisprudenze e giuristi. Le due giurisprudenze romane e le forme delle loro argomentazioni*, Index 12 (1983), pp.189-225; M.G.SCACCHETTI, *Note sulle differenze di metodo fra Sabiniani e Proculiani*, in *Studi in onore di Arnaldo Biscardi*, V, Milano 1984, pp.369-404.

positions of the Proculians. On the contrary, for each conflict the representatives of the schools have constructed a new and individual argumentation in support of their view. In order to demonstrate this, the arguments, as mentioned in the sources, are to be analysed. If it can be shown that the jurists used rhetoric and, in particular, *topoi* to find their arguments and that, each time, they did so in a different way, it may be concluded that there is no coherent element binding the controversies with each other, and that the representatives of the schools have constructed for each individual legal problem an adequate argumentation.

The legal problems at the root of the controversies were not primarily of a theoretical, but also of a practical nature. When citizens were confronted with a legal problem, originating in daily life, they could consult jurists and ask them for advice. The jurists formulated a solution to the advantage of the party who consulted them². The controversies between the Sabinians and the Proculians were of extraordinary importance, because the leaders of the schools held the *ius publice respondendi ex auctoritate principis*. This means that they could give advice on behalf of the *res publica*, i.e., with the authority of the emperor³. If, therefore, both the head of the Sabinian and of the Proculian school gave conflicting advices about a specific dispute, the judges were bound by both advices and a so-called controversy arose.

The object of this paper is to demonstrate a connection between the arguments and the *topoi* by means of the controversy in Gai.3.141. For this purpose, I will first discuss the text of Gaius and two relevant texts of Paul in the Digest. These texts mention the opposite opinions of the Sabinians and the Proculians as well as the arguments in

² A text of Cicero (*De or.*, 1.239-240) demonstrates that it was not uncommon for a jurist to give an advice that served the cause of the citizen who consulted him. A citizen from the countryside consulted Publius Crassus on a legal problem and the jurist gave an advice that was not to the citizen's advantage. Servius Galba, who supported Crassus' candidature for the office of aedile, noticed that the citizen was disappointed and asked him what he had consulted Crassus about. The man presented his legal problem to Galba, who gave him a different advice that did serve his purpose. In support of his view, Galba cited several parallel cases and argued against a strict interpretation of the law, but for an equitable one. Crassus, at his turn, referred to some authorities in order to support his view, but eventually had to admit that Galba's argumentation seemed plausible and even correct.

³ This view has already been held by J.W.TELLEGEN, *Gaius Cassius and the Schola Cassiana in Pliny's letter VII 24.8*, SZ 150 (1988), pp.263-311.

support of their views. In the second part, the modern explanation of this controversy that is usually given will be discussed and countered. Finally, in the third part, I will demonstrate that both the argumentation of the Sabinian and of the Proculian school can be linked to a particular *topos* deriving from the *Topica*.

1. *Gai.3.141: Text and controversy*

The controversy about the nature of the price in a contract of sale is found in the Institutes of Gaius (*Gai.3.141*):

Item pretium in numerata pecunia con||sistere debet. Nam in ceteris rebus an pretium esse possit, veluti homo aut toga aut fundus alterius rei <pretium esse possit>, valde quaeritur. Nostri praeceptores putant etiam in alia re posse consistere pretium; unde illud est, quod vulgo putant per permutationem rerum emptionem et venditionem contrahi, eamque speciem emptionis venditionisque vetustissimam esse; argumentoque utuntur Graeco poeta Homero, qui aliqua parte sic ait:

*<ένθεν ἄρ οἰνίζοντο κάρη κομόωντες Ἀχαιοί,
ἄλλοι μὲν χαλκῷ, ἄλλοι δ' αἰθωνι σιδήρῳ,
ἄλλοι δὲ ρινοῖς, ἄλλοι δ' αὐτῆσι βόεσσι,
ἄλλοι δ' ἄνδραπόδεσσι...>*

et reliqua. Diversae scholae auctores dissentiunt aliudque esse existimant permutationem rerum, aliud emptionem et venditionem; alioquin non posse rem expediri permutatis rebus, quae videatur res venisse et quae pretii nomine data esse, sed rursus utramque rem videri et venisse et utramque pretii nomine datam esse absurdum videri. Sed ait Caelius Sabinus, si rem tibi venalem habenti, veluti fundum, [acceperim et] pretii nomine hominem forte dederim, fundum quidem videri venisse, hominem autem pretii nomine datum esse, ut fundus acciperetur⁴.

Likewise, the price must be in money. There is, however, much question whether the price can consist of other things, for example, whether a slave, or a toga, or a piece of land can serve as a price for another thing. Our teachers think that the price can also consist of another thing. Hence they commonly think that by bartering things a contract of sale is concluded and that this is the most ancient form of

⁴ For the text edition, see, H.L.W.NELSON/U.MANTHE, *Gai Institutiones III 88-181. Die Kontraktobligationen*, Berlin 1999, pp.43-44.

sale⁵. And by way of argument they bring forward the Greek poet Homer, who has said somewhere: ‘Thence the long-haired Achaeans procured wine, some in exchange for bronze, others in exchange for gleaming steel, some for hides and others for the live cattle, and some for slaves’ and so on. The authorities of the other school disagree and hold that bartering things is one thing and that sale is another. Otherwise, when things are exchanged one cannot determine which thing is considered as having been sold and which as having been given by way of price. But, on the other hand, it seems absurd that both things are considered as sold and as given by way of price at the same time. Caelius Sabinus, however, has said that, if I have given to you, who offers a thing for sale – e.g., a piece of land – a slave by way of price, then the piece of land is considered as having been sold and the slave as having been given by way of price in order to acquire the piece of land.

This text is situated in the third book of Gaius’ *Institutes*, in the part on *emptio venditio* (Gai.3.139-141). In this part, Gaius has discussed some requirements for a contract of sale.

The legal question in Gai.3.141 is the following: ‘Did the price in a contract of sale necessarily have to consist of money or could it also consist of other things, such as a slave, a toga, or a piece of land?’ This question was the subject of one of the most famous school controversies in classical Roman law⁶. According to the Sabinians

⁵ W.M.GORDON/O.F.ROBINSON, *The Institutes of Gaius*, London 1988, p.345, have given an alternative translation: ‘That is their inference from the common belief that an exchange of things is sale, actually the oldest type.’ Their translation is prompted by an interpretation of the text. According to Gordon and Robinson, the Sabinians were in agreement with the common opinion (*vulgo*) that barter was a form of sale. In the same vein, J.E.SPRUIT/K.BONGENAAR, *De Instituten van Gaius*, Zutphen 1982, p.133. However, I think that the Sabinians are the subject of the verb *putant* and that, therefore, Gaius means that the majority of the Sabinians commonly held that by exchange of things a contract of sale was concluded. J.REINACH, *Gaius Institutes*, Paris 1950, p.118, furthermore, does not make it clear who is the subject of *putant*: ‘De là, l’opinion commune que l’achat-vente peut être fait sous forme de troc...’ Oltmans and De Zulueta, on the other hand, gave the correct translation. A.C.OLTMANS, *De Instituten van Gaius*, (3rd ed.), Groningen 1967, p.138: ‘Vandaar komt het, dat zij over het algemeen denken, dat koop en verkoop door ruil van zaken worden gesloten.’; F.DE ZULUETA, *The Institutes of Gaius. Part I: Text with Critical Notes and Translation*, (3rd ed.), Oxford 1958, p.197: ‘Hence their opinion commonly is that by exchange of things a sale is contracted.’

⁶ Regarding the nature of the price in a contract of sale, see, O.KARLOWA, *Römische Rechtsgeschichte, I*, Leipzig 1885, pp.663-664; G.BAVIERA, *Le due scuole dei*

(*nostrī praeceptores*), the price did not necessarily have to consist of money; it could also consist of other things. The Proculians (*diversae scholae auctores*), on the other hand, required that the price consisted of cash money.

Gaius listed the arguments used by the Sabinians and the Proculians in support of their view. The Sabinians argued that barter was a *species* of sale and, more specifically, its oldest *species*. They invoked the authority of the Greek poet Homer and referred to certain lines in the *Iliad*, namely Hom., *Il.*, 7.472-475. At this point in the *Iliad*, the Achaeans and the Trojans agreed to a truce in order to collect and burn the bodies of the men killed on the battlefield. Both the Achaeans and the Trojans grieved about the loss of their fellow combatants. At sunset, the hard task of the Greeks was accomplished. They slaughtered oxen and had dinner in their tents. From Lemnos, ships with wine on board had arrived. These ships had been sent by Euneas and contained a thousand jars of wine for Agamemnon and

giureconsulti romani, Firenze 1898 (repr. Roma 1970), pp.86-90; B.KÜBLER, *Rechtsschulen*, RE 2.1 (1914), c.387; E.BETTI, *Sul valore dogmatico della categoria 'contrahere'*, BIDR 28 (1915), pp.27-29; F.STELLA-MARANCA, *Omero nelle Pandette*, BIDR 35 (1927), pp.1-53; F.DE ZULUETA, *The Roman Law of Sale*, Oxford 1945, pp.16-18; D.DAUBE, *The Three Quotations from Homer in Digest 18.1.1.1*, CLJ 10 (1948-1950), pp.213-215; C.A.MASCHI, *Impostazione storica della compravendita e della permuta nel libro 33 ad edictum di Paolo*, Studi in onore di Pietro de Francisci, II, Milano 1956, pp.357-389; P.MEYLAN, *Permutatio rerum, Ius et Lex: Festgabe zum 70. Geburtstag von Max Gutzwiller*, Basel 1959, pp.45-63; F.DE ZULUETA, *The Institutes of Gaius. Part II: Commentary*, (2nd ed.), Oxford 1963, pp.167-170; K.F.THORMANN, *Der doppelte Ursprung der Mancipatio*, München 1969, pp.125-143; M.KASER, *Das Römische Privatrecht, I*, (2nd ed.), München 1971, p.550; STEIN (1972), p.20; D.LIEBS, *Rechtsschulen und Rechtsunterricht im Prinzipat*, ANRW 2.15 (1976), p.260; M.TALAMANCA, *Per la storia della giurisprudenza romana*, BIDR 80 (1977), p.225, n.49; V.ARANGIO-RUIZ, *La compravendita in diritto romano, I*, Napoli 1978, pp.134-138; FALCHI (1981), pp.85-99; C.NICOLET, *Pline, Paul et la théorie de la monnaie*, Athenaeum: Studi periodici di letterature e storia dell'antichità 62 (1984), pp.105-135; SCACCHETTI (1984), pp.386-390; R.ZIMMERMANN, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, München 1990, pp.250-252; E.STOLFI, *Il modello delle scuole in Pomponio e Gaio*, SDHI 63 (1997), pp.57-59; H.L.W.NELSON/U.MANTHE, *Gai Institutiones III 88-181. Die Kontraktobligationen*, Berlin 1999, pp.263-272, pp.525-531; O.BEHREND, *Der ungleiche Tausch zwischen Glaukos und Diomedes und die Kauf-Tausch-Kontroverse der römischen Rechtsschulen*, Historische Anthropologie 10 (2002), pp.245-266; T.MAYER-MALY, *Homer in römischen Rechtstexten*, TR 72 (2004), pp.231-241; A.WATSON, *Law and Society*, J.W.CAIRNS - P.J.DU PLESSIS (eds.), *Beyond Dogmatics. Law and Society in the Roman World*, Edinburgh 2007, pp.9-52.

Menelaos. From this stock, the Achaeans, who could use some distraction after a hard day, procured wine in exchange for other things, such as bronze, steel, hides, cattle, and slaves.

The Proculians, on the other hand, argued that sale and barter were two distinct contracts. If barter was a *species* of sale, it would be impossible to define which thing was the *merx* and which the *pretium*⁷. The qualification of each of the bartered things as sold and as given by way of price at the same time seemed absurd. The Sabinian Caelius Sabinus (1st century AD) replied that, when something was offered for sale and the buyer has paid *in natura*, the first thing delivered had to be qualified as *merx* and the other thing as *pretium*. In other words, the order of exchange was important. Whereas the thing that was handed over first was the merchandise, the other thing was the price.

2. Texts in the Digest: Paul

In the time of Paul, i.e., at the end of the 2nd and the beginning of the 3rd century AD, the controversy about the nature of the price in a contract of sale was still unsolved. Paul has pointed this out in the following text, namely Paul, D.18.1.1.1:

PAULUS libro trigesimo tertio ad edictum. Sed an sine nummis venditio dici hodieque possit, dubitatur, veluti si ego togam dedi, ut tunicam acciperem. Sabinus et Cassius esse emptionem et venditionem putant: Nerva et Proculus permutationem, non emptionem hoc esse. Sabinus Homero teste utitur, qui exercitum Graecorum aere ferro hominibusque vinum emere refert, illis versibus:

*ἔνθεν ἄρ' οἰνίζοντο καρηκομόωντες Ἀχαιοί,
ἄλλοι μὲν χαλκῶ, ἄλλοι δ' αἰθωνι σιδήρῳ,
ἄλλοι δὲ ρινοῖς, ἄλλοι δ' αὐτῆσι βόεσσι,
ἄλλοι δ' ἀνδραπόδεσσιν.*

sed hi versus permutationem significare videntur, non emptionem, sicut illi: ἔνθ' αὐτε Γλαύκῳ Κρονίδης φρένας ἐξέλετο Ζεύς, ὃς πρὸς Τυδείδην Διομήδεα τεύχε' ἄμειβεν. Magis autem pro hac sententia illud diceretur, quod alias idem poeta dicit: πρίατο κτεάτεσσιν ἐοῖσιν. Sed verior est

⁷ According to WATSON (2007), p.32, Gaius only mentions the Sabinian argument. However, he fails to recognise that the difference between barter and sale, underlined by the Proculians, is an argument in support of their view that the price in a contract of sale had to consist of money.

Nervae et Proculi sententia: nam ut aliud est vendere, aliud emere, alius emptor, alius venditor, sic aliud est pretium, aliud merx: quod in permutatione discerni non potest, uter emptor, uter venditor sit.

PAUL, book 33 *ad edictum*. But today it is a matter of doubt whether one can talk of sale when no money passes, as when I have given a toga in order to receive a tunic. Sabinus and Cassius think that it is sale. Nerva and Proculus maintain that this is barter and not sale. Sabinus invokes as a witness Homer, who relates that the army of the Greeks bought wine in exchange for bronze, steel, and slaves in these lines: ‘Thence the long-haired Achaeans procured wine, some in exchange for bronze, others in exchange for gleaming steel, some for hides and others for the live cattle, and some for slaves.’ These lines, however, seem to suggest barter and not sale, as also do the following: ‘And then Zeus, son of Kronos, so deranged the mind of Glaukos that he exchanged his armour with Diomedes, son of Tydeus.’ Sabinus would have found more support for his view in what the poet says elsewhere: ‘He bought with his possessions.’ But the opinion of Nerva and Proculus is the sounder one: for just like it is one thing to sell, another to buy, one thing to be a buyer, another to be a seller, the price is one thing, the merchandise another. In case of barter, however, one cannot discern who is buyer and who is seller.

Paul refers back to the controversy between the Sabinians and Proculians about the nature of the price in a contract of sale. The Sabinians had argued that the price could also consist of other things, because barter was a *species* of sale. In this text, Paul intends to criticise this argument. To clarify the case, he gives an example of barter as a starting point. If someone has given a toga in order to receive a tunic, the Sabinians qualify this as sale, whereas it is merely barter. In order to support this view, they refer to a text by Homer. Paul compares this text with another quotation of Homer in order to demonstrate that both cases were examples of barter and not sale⁸. In fact, Paul is saying that the Homeric quotation, as cited by the Sabinians, is a weak argument and that the Sabinian view is therefore unfounded. Then he refers to a third quotation of Homer that would

⁸ In the second quotation, namely *Il.*, 6.234, the Trojan Glaukos and the Greek Diomedes exchanged armours. The mind of Glaukos was deranged, because he exchanged his valuable armour for Diomedes’ plain one, giving gold for bronze. Whereas the armour of Glaukos was worth a hundred cattle, the armour of Diomedes was worth less than ten. By quoting these lines, Paul wanted to demonstrate that this case (just like the former) concerned barter and not sale.

have been more likely to support the Sabinian view⁹. By citing these Homeric texts, Paul intentionally or not demonstrates his knowledge of the works of Homer. Not surprisingly, at the end, he opts for the Proculian view (*sed verior est Nervae et Proculi sententia*). Like the Proculians, Paul considers barter and sale to be two distinct contracts. Whereas in a contract of sale it was essential to make a distinction between selling and buying, a buyer and a seller, the price and the merchandise, in barter such distinctions could not be made.

In D.19.4.1*pr.*, Paul also refers to the difference between barter and sale:

PAULUS libro trigesimo secundo ad edictum. Sicut aliud est vendere, aliud emere, alius emptor, alius venditor, ita pretium aliud, aliud merx. At in permutatione discerni non potest, uter emptor vel uter venditor sit, multumque differunt praestationes. Emptor enim, nisi nummos accipientis fecerit, tenetur ex vendito, venditori sufficit ob evictionem se obligare possessionem tradere et purgari dolo malo, itaque, si evicta res non sit, nihil debet: in permutatione vero si utrumque pretium est, utriusque rem fieri oportet, si merx, neutrius. Sed cum debeat et res et pretium esse, non potest permutatio emptio venditio esse, quoniam non potest inveniri, quid eorum merx et quid pretium sit, nec ratio patitur, ut una eademque res et veneat et pretium sit emptionis.

PAUL, book 32 *ad edictum*. Just like selling is distinct from buying and a buyer is distinct from a seller, the price is distinct from the merchandise. For in barter it is impossible to discern who is buyer and who is seller, their tasks being very different. The buyer is liable on the *actio venditi* if he has not made the recipient the owner of the money. For the seller it suffices to oblige himself in the event of eviction, to transfer possession and to remain free of *dolus malus*, so that he owes nothing if the thing is not evicted. But in barter, if both things are price, the thing should become the property of both parties, if merchandise, then they need not become the property of either. But because there has to be a thing and a price, barter cannot be sale, for it cannot be ascertained which of the things would be merchandise and which price, nor does common sense allow that one and the same thing is the object that is sold and the price that is paid.

⁹ By referring to the Odyssey of Homer (*Od.*, 1.430), Paul mentions a quotation that would have been more likely to speak up for the Sabinian opinion. Laërtes had bought Eurykleia when she was just a young girl and had paid twenty oxen for her. Here, Homer uses the word *πρίασθαι*, which means ‘to buy’, even though the price was not in money. According to Paul, these lines may suggest that, in ancient Greece, barter could be regarded as sale.

In this text, that has come down to us under the title 'De rerum permutationem', Paul compares the legal implications of barter and sale. First, he discusses the contract of sale. He points out that, in a contract of sale, it was essential to distinguish between a seller and a buyer (between selling and buying, and between the merchandise and the price), since both the seller and the buyer had different tasks (*multumque differunt praestationes*). The buyer was bound to transfer the money into the ownership of the seller. By means of the *actio venditi*, the seller could claim the payment of the money. The seller, however, was not obliged to make the buyer the owner of the merchandise; he merely had to deliver it. The buyer could claim the delivery of the merchandise through an *actio empti*. Although the seller did not have to grant ownership to the buyer, he was liable for eviction. When the buyer was evicted, he could hold the seller responsible. The seller also had to remain free of *dolus malus*. If, for instance, he deliberately sold the object of somebody else or if he concealed either a servitude or defects in the merchandise, the buyer had recourse to an *actio empti*. So, obviously, it was indispensable in a contract of sale to determine which of the contracting parties was the seller and which the buyer.

Since it is impossible to make these distinctions in barter, the Proculians do not regard barter as a *species* of sale. If barter is regarded as a *species* of sale, clearly practical difficulties will arise. Paul mentions two possible ways to overcome these difficulties. 1) In barter, both things can be regarded as price. In this case, both parties have to make each other owner of the things bartered. The bartered things can also be qualified as merchandise. In this case, they do not become the property of either party¹⁰. 2) The alternative is to qualify each of the bartered things as sold and as given by way of price at the same time. According to Paul, however, this alternative does not make sense (Paul., D.19.1.4pr: '*nec ratio patitur*'; see also Inst.3.23.2: '*rationem non pati*'). Gaius even calls it absurd (Gai.3.141: '*absurdum videri*'). Paul does not refer to the opinion of Caelius Sabinus as mentioned by Gaius.

¹⁰ Paul, D.19.4.1pr: '*In permutatione vero si utrumque pretium est, utriusque rem fieri oportet, si merx, neutrius*' ('But in barter, if both things are price, the thing should become property of both parties, if merchandise, then they need not become the property of either.')

3. *The controversy in Gai.3.141: Modern theories*

Both Betti and Stein explained the controversy in Gai.3.141 by qualifying the Sabinians as anomalists and the Proculians as analogists¹¹. Only this interpretation will be discussed, because it is characteristic for the controversy under consideration. The anomalist Sabinians ‘tried to subsume new fact-situations under the old familiar categories. They identified divergent fact-situations with typical fact-situations and allowed the actions given in those typical situations, without any modification of the *formula*, so avoiding the recognition of new actions¹²’. In this way, the Sabinians identified barter with sale and allowed the *actio empti* and *venditi* to be used in case of barter as well. The Proculians, on the other hand, ‘recognised the differences and were ready to recognise new legal categories which would take account of those differences. They allowed not the identical action given in the typical situation, but an analogous, parallel action, with a modified *formula*¹³’. In other words, the Proculians stressed the difference between barter and sale and maintained that the actions of sale could not be applied to barter.

The theory of Betti and Stein is not persuasive, because they took the Sabinian and Proculian argumentation for a dogmatic reasoning. Therefore, they did not correctly define the legal problem. They assumed that the legal question was whether the price in a contract of sale necessarily had to consist of money and whether barter was a *species* of sale. However, only the question whether the price had to consist of money was at issue. The Sabinians argued that it could also consist of other things, because barter was a *species* of sale. In other words, the Sabinian assumption that barter was a *species* of sale was an argument and not a dogmatic issue. The Proculians, on the other hand, argued that the price had to consist of money, because barter

¹¹ BETTI (1915), pp.27-29; STEIN (1972), p.20; P.STEIN, *Sabino contra Labeone: Due tipi di pensiero giuridico romano*, BIDR 80 (1977), pp.63-65; P.STEIN, *Le scuole, Per la storia del pensiero giuridico romano. Da Augusto agli Antonini*, Torino 1996, p.6. In the same vein, SCACCHETTI (1984), pp.386-390, p.401.

¹² STEIN (1972), p.20. In the same vein, BETTI (1915), p.27: ‘Partendo da un criterio anomalistico (empirico) la teoria Sabiniana tende anzitutto a identificare fin dove ciò sia possibile la fattispecie divergente con la fattispecie tipica: così p. es., identifica la *permutatio rerum* con la *emptio venditio* (Inst.3.141).’

¹³ STEIN (1972), p.20.

and sale were two distinct contracts. Betti and Stein failed to acknowledge the argumentative value of these assumptions and took their reasoning even one step further. They maintained that, in the end, the legal problem was whether the actions of sale could also be applied to barter¹⁴.

However, this question about the actions was not the core of the legal problem. The actual legal problem only arose after the contract of sale had been concluded and the buyer had offered to pay *in natura* instead of in money. Then, the question arose whether the price in a contract of sale necessarily had to consist of money. There are two arguments in the texts to support my view. Gaius mentions the controversy in the context of sale and, therefore, the controversy is about sale and not about barter. Moreover, Caelius Sabinus described the contract as concluded between a person who offers a thing for sale (*rem venalem habenti*) and someone who offers a price *in natura*. Secondly, the buyer is willing to pay *in natura* and, therefore, the plaintiff does not need and does not want to bring an action to claim payment *in natura*. Instead, he brings an action for payment in money. Consequently, the question is not whether the actions of sale can be applied to barter.

4. *The locus a specie, auctoritas, and the locus a differentia in Gai.3.141*

Two parties had entered into a contract of sale. Whereas the seller (A) was bound to deliver the merchandise (e.g., a toga), the buyer (B) had to pay a set price for it. A delivered the merchandise, but B refused to pay the price. Instead, he offered to pay *in natura* (e.g., by means of a tunic of the same value as the toga). The seller (A), for his part, was not interested in the tunic of B. He just wanted his money. Therefore, he consulted the Proculians about this legal problem and expected a *responsum* to his advantage. The Proculians advised A to bring an *actio venditi* against the buyer.

The *formula* of the *actio venditi* was as follows:

¹⁴ Also SCACCHETTI (1984), pp.386-390 and ZIMMERMANN (1990), pp.250-252, formulated the legal question in this way.

*Quod As. As. No. No. togam qua de agitur vendidit, qua de re agitur, quidquid ob eam rem Nm. Nm. Ao. Ao. dare facere oportet ex fide bona, eius iudex Nm. Nm. Ao. Ao. condemnato si non paret, absolvito*¹⁵.

According to this *formula*, the contract of sale obliged the buyer to give or do whatever was necessary on account of the *bona fides*. This part of the *formula* admits of more than one interpretation. The words ‘quidquid ... dare facere oportet ex fide bona’ do not explicitly define the obligation of the buyer: was he obliged to pay a price in money or could he also fulfil his obligation by handing over a tunic? According to the Sabinians he could, but the Proculians argued that he was obliged to pay a price in money, for the parties had agreed on that point.

The leaders of the schools had to base their *responsa* on convincing arguments and, therefore, they used rhetoric and, in particular, *topoi*. *Topica* is a part of rhetoric and, more specifically, of *inventio*. Invention implies the discovery and formulation of arguments pro and contra on any subject. The term *topica* is derived from the Greek word *topos*, which is translated in Latin as *locus* and literally means ‘place’. *Topoi* or *loci* are places where arguments lurk. They are characterized by their names (e.g., a *locus a definitione*, a *locus a similitudine*, or a *locus a differentia*) and are meant to guide an associative process that might lead to an argument for or against a certain point of view.

For jurists, the main information on *topoi* was contained in the *Topica* of Cicero and, to a lesser extent, in the *Institutio Oratoria* of Quintilian. In 44 BC, Cicero wrote the *Topica* for his friend, the jurist C. Trebatius Testa. The work of Quintilian dates back to 94 or 95 AD and is an exhaustive and pedagogically oriented treatment of rhetoric.

In *Top.*, 17.66, Cicero makes a very interesting remark about formulary procedures in which the clause ‘ex fide bona’ is added to the *formula*. In those procedures, the jurists had to be prepared to interpret this clause. Cicero argues that, when the jurists have carefully studied the *topoi* of arguments, they will be able, like orators and philosophers, to argue with abundant material about the questions brought before them.

¹⁵ O.LENEL, *Das Edictum Perpetuum. Ein Versuch zu seiner Wiederherstellung*, (3rd ed.), Leipzig 1927 (repr. Aalen 1957), p.299.

Let us now return to the case under consideration. First, I will discuss the argument used by the Sabinians in support of their *responsum* and examine under which *topos* they may have found it. Then, I will do the same for the Proculian argument.

5. The Sabinian view

As already stated, the legal problem turned on the interpretation of the words ‘quidquid ... dare facere oportet ex fide bona’. In order to benefit the buyer, the Sabinians interpreted these words broader than the Proculians did. The *bona fides* allowed B to fulfil his obligation by handing over a valuable tunic. So, the price in a contract of sale could consist of money as well as of other things. In support of this view, the Sabinians argued that barter was the most ancient form of sale and they invoked the authority of Homer. In *Il.*, 7.472-475, Homer related that the Achaeans procured wine in exchange for bronze, steel, hides, cattle, and slaves¹⁶.

The argument in question was found under the *locus a specie*, i.e., a *topos* that serves to make a pertinent definition of a term by means of the *genus* and the *species*¹⁷. According to the Sabinians, barter was a *species* of the *genus* of sale and more specifically its oldest *species*

¹⁶ NICOLET (1984), pp.116-119, enumerated several arguments, which he held the Sabinians used in support of their view that barter was a *species* of sale. First of all, Nicolet maintained that the Sabinians appealed to the common opinion that barter was a form of sale (Gai.3.141: ‘unde illud est, quod vulgo putant per permutationem rerum emptionem et venditionem contrahi’; Inst.3.23.2: ‘quod vulgo dicebatur...’). However, the subject of the verb ‘putant’ and ‘dicebatur’ are the Sabinians (see *supra*). According to Nicolet, moreover, the Sabinians also used an historical argument. In his view, they departed from the idea that barter was the most ancient form of sale (Gai.3.141: ‘eamque speciem emptionis venditionis vetustissimam esse’). Nicolet stated that this sentence was the perfect summary of a text by Paul (namely D.18.1.1pr.). In this text, Paul maintains that sale had its origin in barter. Every primitive society, in which money had not yet been introduced, traded by way of barter. Barter, however, had a specific disadvantage: the other party was not always interested in the goods offered in exchange. To solve this problem, money was introduced as a medium of exchange. Hence, sale as a refined form of barter was born. However, it is not because barter is a predecessor of sale, that it is necessarily also a form of sale. In my view, therefore, the Sabinians did not use an historical argument to support their view. According to Nicolet, finally, the Sabinians introduced the Homeric lines to illustrate the pre-monetary period.

¹⁷ According to Quintilian (*Inst. or.*, 5.10.56), *genus*, *species*, *difference*, and *proprium* were elements, which particularly seemed to belong to Definition. Regarding the *locus a specie*, see, Cic., *Top.*, 3.14 and Quint., *Inst. or.*, 5.10.57.

(Gai.3.141: ‘... *eamque speciem emptionis venditionisque vetustissimam esse*’). Therefore, barter was covered by the definition of sale. Since it was not so easy to demonstrate that barter was a *species* of sale, the Sabinians invoked the authority of Homer. The idea to use a Homeric passage as a testimony is found by means of a *locus* that is brought in from without¹⁸.

Arguments that are brought in from without depend on testimony (*testimonium*). Cicero defines testimony as everything that is brought in from without in order to convince. The persons who are able to provide a testimony are all endowed with authority (*auctoritas*). In Cic., *Top.*, 19.73-20.78, Cicero gives an enumeration of the different kinds of testimony and explains why they carry authority and belief. The relevant text in connection with the Sabinians’ reference to Homer is Cic., *Top.*, 20.78:

In homine virtutis opinio valet plurimum. Opinio est autem non modo eos virtutem habere qui habeant, sed eos etiam qui habere videantur. Itaque quos ingenio, quos studio, quos doctrina praeditos vident quorumque vitam constantem et probatam, ut Catonis, Laeli, Scipionis, aliorumque plurium, rentur eos esse qualis se ipsi velint; nec solum eos censent esse talis qui in honoribus populi reque publica versantur, sed et oratores et philosophos et poetas et historicos, ex quorum et dictis et scriptis saepe auctoritas petitur ad faciendam fidem.

In a man, the impression of his virtue is very important. However, the impression is not only that those have virtue who actually have it, but also those who seem to have it. And so people see persons who are gifted with talent, zeal, and learning and whose life is stable and good, like that of Cato, Laelius, Scipio and many others, and they regard them as such a kind of men they would like to be themselves. They are of the opinion that not only those men who are versed in honours of the people and public affairs are of such a kind, but also orators and philosophers and poets and historians. Their words and writings are often used as authority to create belief.

¹⁸ At the beginning of the *Topica*, Cicero has made a classification of the different kinds of *topoi*. In Cic., *Top.*, 2.8, he distinguishes two main kinds of *topoi*: those that are inherent in the very nature of the subject and those that are brought in from without. The former are arguments which are derived from ‘*loci ex toto*’, ‘*ex partibus eius*’, ‘*ex nota*’, and ‘*ex eis rebus quae quodam modo affectae sunt ad id de quo quaeritur*’. In this context, they are not relevant.

In this paragraph, Cicero did not only present statesmen as men with authority, but also orators, philosophers, poets, and historians. The words and writings of these persons can be used as authority to convince. The Sabinians used the authority of Homer's writing by way of argument (Gai.3.141: '...argumentoque utuntur Graeco poeta Homero qui aliqua parte sic ait: ...'). According to the Sabinians, the buyer (B) was allowed to pay *in natura* by handing over a valuable tunic, because the most famous poet ever had written in a well-known and charming passage that the Greeks had already used barter to buy wine¹⁹.

Not only Cicero has given some useful information on *topoi* that are brought in from without, also Quintilian's information about this kind of *topoi* is interesting²⁰. He too mentions authority as a kind of extrinsic argument. Among the people who carry authority, Quintilian (*Inst. or.*, 5.11.36) includes famous poets (*inlustribus poetis*)²¹:

Adhibebitur extrinsecus in causam et auctoritas. Haec secuti Graecos, a quibus κρίσεις dicuntur, iudicia aut iudicationes vocant, non de quibus ex causa dicta sententia est (nam ea quidem in exemplorum locum cedunt), sed si quid ita visum gentibus, populis, sapientibus viris, claris civibus, inlustribus poetis referri potest.

Also authority will be brought in from without to support a Cause. Following the Greeks, who call these arguments *kriseis*, they call them *iudicia* or *iudicationes*; this does not mean verdicts given in legal proceedings (for these come under the head of 'Examples'), but opinions which can be attributed to nations, people, wise men, distinguished citizens, or famous poets.

The essential word in Homer's testimony is the verb οἰνίζομαι with which he expressed the exchange of wine for other things. Liddell and Scott translate this verb in two different ways: 1) to procure wine by barter or 2) to buy wine²². At first sight, the

¹⁹ WATSON (2007), p.32, asks himself the question what possible authority Homer could be and answers 'None Whatsoever!' Admittedly, the Homeric passage does not deliver a strong argument, but the texts of Cicero and Quintilian show that illustrious poets certainly carried authority.

²⁰ DAUBE (1948-1950), p.215, has noted the following: 'Still, writers like Cicero (*Topica* 20.78) and Quintilian (*Institutio Oratoria* 5.11.36-37) do state that a certain persuasive force attaches to the opinions of illustrious poets'. Yet, he disregards that the Sabinians may have actually used *topoi* to find such an argument.

²¹ Quint., *Inst. or.*, 5.11.36.

²² H.G.LIDDELL/R.SCOTT, *A Greek-English Lexicon*, Oxford 1996, p.1207.

argumentation of the Sabinians only makes sense if the verb οἰνίζομαι has a connotation of sale and is translated as ‘to buy wine’. The quotation of Homer would demonstrate that, even in ancient Greek society, the exchange of wine for other things was regarded as sale. However, the verb οἰνίζομαι cannot have had a connotation of sale in the Homeric passage, because money had not yet been introduced in the days of the Trojan War, nor in the days of Homer²³.

So, the verb οἰνίζομαι has to be translated as ‘to procure wine by barter’. In this case, the Homeric lines merely describe the functioning of barter in ancient Greek society. How could this Homeric quotation support the Sabinian opinion that a price could also consist of other things than money²⁴? The Sabinians probably adduced this quotation because it was the famous poet Homer who had stated that the Greeks had already used barter to procure things. To modern readers, this argument does not seem very strong.

We can now reconstruct the Sabinian argumentation in support of the buyer as follows:

- Since Homer had already stated that barter was used to procure things, barter is a *species* (and, particularly, the oldest *species*) of sale.
- Therefore, the price could also consist of other things than money.
- The buyer offers to hand over a valuable tunic.
- Thus: he can fulfil his obligation of the contract of sale.

6. The Proculian view

After the buyer (B) had defended himself, the seller (A) argued that the price in a contract of sale could not consist of other things than money. Indeed, the Proculians maintained that barter and sale were two distinct contracts (Gai.3.141: ‘*Diversae scholae auctores ... aliudque esse existimant permutationem rerum, aliud emptionem et venditionem*’). The Proculians provided the following argument in support of this view. Whereas, in a contract of sale, it was indispensable to make a distinction between buying and selling,

²³ In the Greek world, money was introduced at the end of the 7th century BC in Lydia: H.CHANTRAINE, *Münzwesen, Der kleine Pauly* 3 (1969), p.1447.

²⁴ DAUBE (1948-1950), pp.213-215, has given a particular interpretation of how the Homeric quotation could support the Sabinian view. In his view, the words *aes* and *χαλκός* in Paul, D.18.1.1.1 have to be translated as “money”. However, as already stated, money had not yet been introduced in the days of the Trojan war, nor in the days of Homer.

between a seller and a buyer (Paul, D.19.4.1.pr: because they had different tasks), and between the price and the merchandise, in barter such distinctions could not be made.

The Proculians built this argumentation by means of the *locus a differentia*. This *locus* is mentioned by Cicero as well as by Quintilian. The latter provides an interesting example in Quint., *Inst. or.*, 5.10.60:

Quod autem proprium non erit, differens erit, ut aliud est servum esse, aliud servire, qualis esse in addictis quaestio solet: 'qui servus est si manu mittatur, fit libertinus, non item addictus', et plura, de quibus alio loco.

What is not a *proprium*, will be a difference. It is, for example, one thing to be a slave, another to be in servitude. A common issue concerning persons in servitude for debt: 'If a slave is manumitted, he becomes a freedman, not so a person in servitude.' There are other differences like this, which I shall deal with later.

In this text, Quintilian makes a distinction between a slave and a person in servitude for debt: 'ut aliud est servum esse, aliud servire'. Next, he explains why a person in servitude for debt was not a slave. He argued that a slave who was manumitted became a freedman, whereas a person in servitude for debt became a free citizen after his manumission and that, for this reason, a person in servitude for debt was not a slave. The other differences, which Quintilian refers to are discussed in Quint., *Inst. or.*, 7.3.26.

The argumentation of the Proculians is similar to that of Quintilian. They made a distinction between barter and sale in the following words (Gai., 3.141): '*diversae scholae auctores ... aliudque esse existimant permutationem rerum, aliud emptionem et venditionem*'. The similarity in wording between Gai., 3.141 and Quint., *Inst. or.*, 5.10.60 is remarkable. Gaius used the same words to describe the distinction between barter and sale as Quintilian had used to make a distinction between a person in servitude for debt and a slave²⁵. This indicates that the Proculians may have used the *locus a differentia* to stress the difference between barter and sale.

²⁵ See also Paul, D.18.1.1.1: '*nam ut aliud est vendere, aliud emere, alius emptor, alius venditor, sic aliud est pretium, aliud merx: quod in permutatione discerni non potest, uter emptor, uter venditor sit.*' and Paul, D.19.4.1.pr.: '*Sicut aliud est vendere, aliud emere, alius emptor, alius venditor, ita pretium aliud, aliud merx. At in permutatione discerni non potest, uter emptor vel uter venditor sit, multumque different praestationes.*'

In his *Topica*, Cicero also provides an example of the *locus a differentia*²⁶. The relevant words ‘*multum enim differt*’ are similar to those used by Paul in D.19.4.1pr., namely ‘*multumque differunt praestationes*’.

Now, the Proculian argumentation in support of the seller may be reconstructed:

- Since it is essential in a contract of sale to make a distinction between a buyer and a seller and since such a distinction cannot be made in barter, barter is not a species of sale.
- Therefore, the price necessarily had to consist of money.
- The buyer offers to pay a price that consisted of a tunic.
- Thus: The buyer does not fulfil his obligation of the contract of sale.

Conclusion

In this paper, I argue that a legal problem, originating in daily life, provoked the controversy about the nature of the price in a contract of sale. The legal problem can be described as follows: ‘Does the price in a contract of sale necessarily have to consist of money or could it also consist of other things, such as a slave, a toga, or a piece of land?’ However, Romanists have taken the Sabinian and Proculian argumentation for a dogmatic reasoning and assumed that the legal question was whether barter was a *species* of sale and whether the actions of sale could also be applied to barter. The dispute between the two parties arose because the *formula* of an *actio venditi* was ambiguous. It can be looked at from different angles and two solutions were proposed. The jurists solved the problem to the advantage of the party who consulted them. According to the Sabinians, the price did not necessarily have to consist of money; it could also consist of other things. They argued that barter was a *species* of sale and, more specifically, its oldest *species*. They even invoked the authority of the Greek poet Homer. I have demonstrated the Sabinians built up their argumentation by means of the *locus a specie* and an authority argument. The Proculians, on the other hand, used the *locus a*

²⁶ Cic., *Top.*, 3.16: *A differentia: Non, si uxori vir legavit argentum omne quod suum esset, idcirco quae in nominibus fuerunt legata sunt. Multum enim differt in arcane positum sit argentum an in tabulis debeatur.*

A differentia: If a man has bequeathed all the silver that was his to his wife, he has not therefore bequeathed things that are owed to him. For it makes a great difference whether silver is kept in a strong-box or is on his books.

differentia to underline that barter and sale were two different contracts. My conclusion is that the legal reasoning of the jurists was in no way different from the way it was described in the books on oratory, such as the *Topica* of Cicero and the *Institutio Oratoria* of Quintilian. The controversy between the Sabinians and the Proculians came into existence because of a distinct use of argumentation and does not indicate any fundamental difference in their concept of law.