

## *May Contracts be Entirely Free? Some Comparative Remarks on Various Approaches to Freedom of Contract\**

### Abstract

The range of the real freedom of contracts in private law was both a growth factor of societies as well as a measure of the extent of their internal changes. The practice worked out by the Roman lawyers, though limited formally by contract nominalism, became the basis of modern-day solutions. In spite of a simultaneous reconstruction of the social and economic systems which may be summed up after H. Maine as a development from status to contract – the principles of the freedom of contract together with their fundamental limitations, had remained valid. In this context, one may mention the laws which protect the rights of economically weaker subjects, such as the ban on the loss of the pledged asset (*lex commissoria*), the permissible relation of the price to the value during sale transactions (*laesio enormis*), maximum prices on basic goods (*edictum Diocletanii de pretiis rerum venalium*).

A special but continually valid issue which is analyzed, among others by Cicero, is that of mutual honesty of vendors and purchasers: to what extent can they make use of the information which is unknown to the other party; at what point we can say that they have overstepped the boundary-line of stratagem. As regards the latter issue, there is no uniformity of opinion in different legal systems; it seems that it is the principle of maximum facilitation of trade that takes the upper hand and is not unknown to the Roman law. The author of the article also analyzes the beginnings of *actio de dolo* and the different contemporary court experience. In conclusion, the author poses an open question concerning the future of contract law in view of the too far advanced freedom of contracts.

**Key words:** freedom of contracts, freedom of agreements, contract nominalism, pledged asset, loss of pledged asset, just price, sale, stratagem, error, comparative study, private law, Roman law

**Słowa kluczowe:** wolność umów, zasada nominalizmu, zastaw, przepadek zastawu, słuszna cena, sprzedaż, podstęp, błąd, komparatystyka, prawo prywatne, prawo rzymskie

Contractual relations are almost as old as the mankind and even older than the concept of society. Long before rules became law, people knew how to exchange or buy goods, hire land or *worker* even when no money was known. The inner feeling of the “contractual obligation” and “contractual liability” is well known even to small children exchanging

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\* This paper is to honour reverent Professor Doctor Kazimierz Baran, whose lectures and tutor’s aid were invaluable in my legal education.

or lending and borrowing their toys. Indeed Roman law put various ancient sources into one package giving this abiding, powerful set of tools to lawyers willing to dominate trade and business. Over twenty centuries of history could not undo the contribution Roman lawyers made to modern law.

It is more a matter of society rather than lawyers to discuss the question of how far the “freedom of contracts<sup>1</sup>” should go because, above all, it influences social and economic relations. Even *laissez-faire* systems must be kept in certain minimal boundaries by lawmakers. Roman law, with an almost non-existing protection of the socially weaker party had such limits, but scanty and introduced rather late. A good example is *lex commissoria* (D.18,3).<sup>2</sup> This early Roman legal practice allowed to secure debts by a pledge, and the creditor became their owner immediately after the fixed term of payment passed. One should have in mind the difference between the amount of the debt and the value of the pledge, which led debtors to poverty while *lex commissoria* became the best business for unscrupulous ancient bankers. This shows us how freedom of contracts works: in general it is useful, but it may kill the user as well. The debtor is fully aware of the consequences of not repaying the debt on time. However, thousands of poor families decided to borrow money and secure it with their last valuables or a piece of land. This gambling with time was often lost as they did not manage to pay back on time and *lex commissoria* deprived them of their property. To protect the poorest, in a way from themselves, emperor Constantine the Great banned *lex commissoria* in 326 A.D. (C.8,35,3). This interdict had to be repeated later, as it was very useful for creditors. The problem well-known not only in the Roman Empire, the medieval English Chancery jurisdiction (equity of redemption) faced it as well. The issue was even discussed by the 4<sup>th</sup> Lateran Council (canon 59). Many contemporary regulations exclude using *lex commissoria* (Polish art. 313 k.c., §1229 BGB *Verbot der Verfallvereinbarung*<sup>3</sup>). However, both Roman and modern law allowed for a simple contract of sale with a repurchase clause (*pactum de retroemendo*) in which the repurchase price could easily be increased by a hidden (illegal amount) interest rate. If the “vendor” (debtor) had not been able to pay

<sup>1</sup> For freedom of contracts see in general R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Juta&Co, Ltd 1990; K. Zweigert, H. Kötz, *An Introduction to Comparative Law*, Clarendon Press 1998; E.A. Farnsworth, *Comparative Contract Law* [in:] *The Oxford Handbook of Comparative Law*, eds. M. Reimann, R. Zimmermann, Oxford 2006, pp. 919–935; P. Huber, *Comparative Sales Law* [in:] *The Oxford Handbook of Comparative Law*, pp. 938–967; M.J. Trebilcock, *The Limits of Freedom of Contracts*, Cambridge 1997, *The Fall and Rise of Freedom of Contract*, ed. F.H. Buckley, Durkam 1999; from the social and economic perspective see P. Cserne, *Freedom of Contract and Paternalism*, New York 2012. For relations between law and economy in Roman times see A. Wacke, *Wettbewerbsfreiheit und Konkurrenzverbotensklauseln in antiken und modernen Recht*, “Zeitschrift der Savigny-Stiftung Romanische Abteilung” 1982, Bd. 91, p. 188–215 and a summary *Freedom of Contract and Restraint of Trade Clauses in Roman and Modern Law*, “Law and History Review” 1993, vol. 11, No.1, pp. 1–19.

<sup>2</sup> A. Burdese, *Lex commissoria e ius vendendi nella fiducia e nel pignus*, Torino 1949, A. Biscardi, *La „lex commissoria” nel sistema delle garanzie reali*, [in:] *Studi in onore di E. Betti*, vol. II, Milano 1962, p. 573–589, P. Freeza, *La garanzie delle obbligazioni. Corso di diritto Romano II*, Padova 1963, F. Peters, *Der Erwerb des Pfandes durch den Pfandgläubiger im klassischen und nachklassischen Recht* [in:] *Studien in Römischen Recht*, Berlin 1973, p. 150–153. On the identical (no surplus was due) creditor’s right to purchase the pledged item for the price consisting of due loan and interests (*Fragmenta Vaticana* 9) see recently M. Sic, *Why the opinion of Papinian preserved by Fragm. Vat 9 was not inserted into Justinian’s Digest?* “Acta Universitatis Sapientiae, Legal Studies” 2012, vol. 1(1), p. 107–127.

<sup>3</sup> P. Bülow, *Recht der Kreditsicherheiten: Sachen und Rechte, Personen*, Hüthig Jehle Rehm 2012, p. 201.

his debt on time, the “subject of sale” (pledge) could not have been bought back. This gave way to legal short-term, pledge-secured loans offered by pawnshops under strict anti-usury regulations which brought the same result as the forbidden *lex commissoria*. This means that the parties achieve the same goal by using a different type of contracts, which is a fully legal practice.

However, the real social problem worth discussing here is not the threat of losing property, but losing it for a totally inadequate value. Another very similar example is the price-to-value relation in the contract of sale. There is no use discussing the problem from the purely legal point of view, since it has the same social dimension as *lex commissoria*. If not by mistake or lack of knowledge, why should anyone agree to sell their land, jewellery or a horse for half of their value? The simple answer was given a long time ago by the brilliant Lord Chancellor Robert Henley in the famous *Vernon vs. Bethell* (1762) judgment: “necessitous men are not, truly speaking, free men”.<sup>4</sup> This sentence demonstrates the essence of the contractual freedom and links Emperor Constantine’s ancient decision with modern ‘unfairness’ rules, like BGB §138(2) *Ausbeutung der Zwangslage* or its Polish equivalent, k.c. art. 388§1 *wyzysk przymusowego położenia*.<sup>5</sup>

The above mentioned issues are reflected in the modern English law by *economic duress*.<sup>6</sup> However, this defense is only possible when one party threatens the other to terminate the already existing contract so that the weaker party has to accept the new contract under worse conditions. It clearly differs from the continental solutions, where no preexisting contract is demanded. Under English law, similar situations, but not bound to the previous contractual relation may be subject to *undue influence*, in which parties remain in the special relationship of trust.<sup>7</sup>

Although modern law seems to be well equipped with tools against unfairness, they are rarely used, which unfortunately is not the result of fairness in social relations. The Polish k.c. art. 388§1 is a good example: it requires the court to decide whether the case fits the conditions of the rule, so it usually involves a longer and less efficient, but more expensive procedure with professional legal aid. Would-be plaintiffs, parties suffering unfair contractual treatment usually cannot afford it or simply are not aware of their rights. We need to emphasize: unfair exploitation is definitely not another defect of will, it ought to be understood as the substantive content of the contract, consciously known to both parties. This consciousness should never affect the validity of the contract: if it comes to a serious inadequacy of the counter performance through the unfair exploitation, such a contract is void. As the Polish Court of Appeal decided in 2004 – if you go to a pawnshop being fully aware of the necessity to accept strict loan terms, you are in

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<sup>4</sup> “This court, as a court of conscience, is very jealous of persons taking securities for a loan, and converting such securities into purchases. And therefore I take it to be an established rule, that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged, and the conveyance absolute. And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them” (1762) 28 ER 838, 2 Eden 110.

<sup>5</sup> Ł. Węgrzynowski, *Ekwiwalentność świadczeń w umowie wzajemnej* (Equivalency in counterperformance contracts) Warszawa 2011.

<sup>6</sup> See G. Virgo, *Principles of the Law of Restitution*, Oxford 1999, p. 205.

<sup>7</sup> N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, Andover 2006.

the state of an imposed position and may be regarded unfairly exploited.<sup>8</sup> On the other hand, in 2012 another Polish court decided that your personal need to obtain cash does not place you in the state of an imposed position.<sup>9</sup> We can clearly see – and understand – that the interpretation of the general rule of code may indeed be difficult.

The lack of an equal rule in the French civil code may seem strange; however, the French solved the problem in a very similar way to the Romans – by using pretorian *actio de dolo* or *exceptio doli*. 1116<sup>10</sup> of the *Code Civil* expresses the institution of *doli*: i when it came to unfair losses by exploiting the contractual party's age, illness or inexperience, the unfairly exploited party may have claimed the contract void. This particular solution seems to fit the need better than the rules applied in other countries, with the effect somehow similar to unjust enrichment. Both the German and Polish procedure requires also the plaintiff to prove the present imposed position.

Let's return to the question of whether the law should allow you to sell your house for the price not relevant to its value if you cannot afford to wait for a better offer. The late imperial rule allowed to void the contract in case the land was sold for less than half of its value (*laesio enormis*, C. 4, 44, 2; C. 4, 44, 8).<sup>11</sup> But for Roman lawyers, generally considered liberal, *pretium iustum* (fair or just price) was never a must,<sup>12</sup> as it was a sovereign matter of *pater familias*. There was no need for a general protecting rule, since different members of the society had their own safeguards (women, soldiers, children, inexperienced youths), not to mention the *bonae fidei* procedure in many contract-based claims. Although there were some attempts of emperors to interfere with prices (the famous *edictum Diocletanii de pretiis rerum venalium* and *laesio enormis*), it hardly ever worked.<sup>13</sup> We should remember the Roman private law was above all a tool to support the development of commerce. There is a good story of “Merchant of Rhodes” told by Cicero:<sup>14</sup> let's suppose the Rhodians were starving awaiting for the Alexandrian grain ships to arrive. Should the first merchant who reaches the shore let the people know about the others to arrive soon or sell the grain quickly for the maximum price? Well, philosopher's (and advocate's!) answer is simple: morality requires truth, but law-

<sup>8</sup> IACa 530/04.

<sup>9</sup> IACa 1008/12.

<sup>10</sup> “Le dol est une cause de nullité de la convention lorsque les manoeuvres pratiquées par l'une des parties sont telles, qu'il est évident que, sans ces manoeuvres, l'autre partie n'aurait pas contracté. Il ne se présume pas et doit être prouvé”.

<sup>11</sup> A.J.B. Sirks, *La laesio enormis en droit romain et Byzantine*, “The Legal History Review” 1985, vol. 53, p. 291–307.

<sup>12</sup> B. Sitek, *O koncepcji “iustum pretium” w historycznym zarysie* (Historical outline of the iustum pretium idea), “Zeszyty Naukowe Uniwersytetu Szczecińskiego. Prawo” 2001, no. 12, p. 17–31.

<sup>13</sup> W. Wołodkiewicz, *L'edictum de pretiis di Diocleziano. Il mito dell'onnipotenza del legislatore* [in:] *Leges Sapere. Studia i prace dedykowane profesorowi Januszowi Sondlowi (Studies and works dedicated to Professor Janusz Sondel)*, ed. W. Uruszczak, P. Świącicka, A. Kremer, Kraków 2008, p. 687.

<sup>14</sup> Cicero, *De officiis*, 3, XXIII, 57, see also R. Zimmermann, *The Law of Obligations...*, p. 257, also discussed by D. Weibel, *Aufstieg und “Fall” des alexandrinischer Getreidehändlers, Ausgewählte Informationsprobleme beim Kauf von Cicero bis Savigny* [in:] *Ins Wasser geworfen und Ozeane durchquert, Festschrift für Knut Wolfgang Nörr*, ed. M. Ascheri and others, Köln–Weimar–Wien 2003, pp. 1057–1074, and W. Decock, J. Hallebeek, *Pre-contractual duties to inform in Early Modern Scholasticism*, “Tijdschrift voor Rechtsgeschiedenis” 2010, vol. 1–2, pp. 89–133. For a *bona fides* perspective and discussion of this case see especially Martin J. Schermaier in: *Good Faith in European Contract Law*, eds. R. Zimmermann, S. Whitaker, Cambridge 2000, pp. 91–92.

yers would not tie business with honesty too closely.<sup>15</sup> For Cicero, an advocate but not a lawyer,<sup>16</sup> it was a good opportunity to gain profit without deceit. Zimmermann refers here to a similar modern case, touching the core and art of commerce: *Laidlaw vs. Organ* (1817).<sup>17</sup> During the war between the USA and England, the tobacco prices were very low as no export was possible. Organ received an early information that the peace treaty had been signed and quickly bought a great quantity of tobacco. Although he was asked to explain this unexpected purchase, the plaintiff did not reveal his secret. As a result, farmers had been selling very cheap, soon the prices doubled, but the court did not void the contract. *Laidlaw vs. Organ* entered upon the *caveat emptor* rule in the USA and nowadays is regarded one of the most important cases in the development of the contract law. It was also the warm-up before the commodities trading.<sup>18</sup> It is noteworthy that in 2008 the US Congress amended the *Commodity Exchange Act* and added *Laidlaw* to it. Trading did not have to be preceded with disclosing “nonpublic information that may be material to the market price, rate, or level of the commodity or transaction, except as necessary to make any statement made to the other person in or in connection with the transaction not misleading in any material respect”.<sup>19</sup>

The controversial decision in *Laidlaw* might have been expected after the famous myth story of Nathan Rotschild, who learnt about the Waterloo defeat with the help of carrier pigeons and his own fast couriers over 24 hours before it became public, and he gained enormous profits on the stock exchange. The point of special interest for lawyers (the case, if really happened, was never tried by any court) is a classical bluff made by Rotschild, who performed a brilliant example of short selling, later called “Waterloo coup”.<sup>20</sup> Having known about the Waterloo, he arrived at the stock exchange and publically started selling government bonds which he owned before. Other brokers joined him in panic, certain that Rotschild somehow found out the battle was won by Napoleon. When in a few hours prices had fallen over twenty times, Nathan Rotschild’s brokers silently bought all the bonds back almost for nothing, and by the time Wellington’s marathon runner finally reached London, Rotschild had already been a millionaire. Was it a deceit from a lawyer’s point of view? A great Roman lawyer, Julius Paulus „Prudentissimus” would surely oppose – *Non omne quod licet honestum est* (D.50,17,144, what is allowed is not always honest).<sup>21</sup> We can see that *Laidlaw vs. Organ* is almost identical and judges

<sup>15</sup> On the issue of truth in Roman law see the recently published T. Giaro, *Römische Rechtswahrheiten: ein Gedankenexperiment*, Frankfurt am Main 2007.

<sup>16</sup> J. Powell, J. Paterson, *Cicero the Advocate*, Oxford 2004.

<sup>17</sup> *Peter Laidlaw and Company v. Hector M. Organ*, 15 U.S. 2 Wheat. 178 (1817), on this case see M. Trebilcock, *The Limits...*, p. 113; A. Kronman, *Mistake, Disclosure, Information and the Law of Contracts* [in:] *Economic Analysis of the Law: Selected Readings*, ed. D. Wittman, John Wiley & Sons 2008, pp. 75–78.

<sup>18</sup> On the origins of commodities’ Roman law see K. Wyrwińska, *Kontrakty aleatoryjne w prawie rzymskim a współczesne towarowe instrumenty finansowe* (Aleatory contracts in Roman law versus modern commodity contracts), unpublished doctoral thesis (2010), available at Jagiellonian Library Lectorium.

<sup>19</sup> J.W. Markham, *Law Enforcement and the History of Financial Market Manipulation*, 2013, p. 245.

<sup>20</sup> See D. McCarthy, *International Business History: A Contextual and Case Approach*, Greenwood Publishing Group 1994, p. 26; L. Harris, *Trading and Exchanges: Market Microstructure for Practitioners*, Oxford 2003, p. 266.

<sup>21</sup> Paul. D. 50,17,144. It is remarkable how Heinrich Cornelius Agrippa, a famous *enfant terrible* of Renaissance, himself a lawyer, argues with D.1,1,10 *honeste vivere* inspired by D.50 *regulae iuris*, see *De incertitudine et vanitate scientiarum declamatio invectiva*, Cologne 1527: *Vim vi repellere licet. Frangenti*

strictly followed Paulus. However, if we consider the problem as a purely business matter, we may dangerously approach the modern idea of “insider trading” – the unauthorized use of classified information with the aim of gaining profit before it becomes public. One good example is the 1964 Securities and Exchange Commission vs. Texas Gulf Sulphur Co. case.<sup>22</sup> Having been secretly informed about profitable mining activities, the company officers bought shares of Texas Gulf. At the same time, they officially denied it in order to mislead investors. The government agency, U.S. Securities and Exchange Commission (SEC) succeeded to show Texas Gulf insiders the fine line between good business and ethics.<sup>23</sup>

Another important comparative issue found in Laidlaw vs Organ is a completely different understanding of the mistake and deceit as a possible defect of will. Laidlaw expressed his will in the contract of sale affected by the mistake concerning the state of war and the tobacco export blockade. This mistake (error) however, as decided by Judge Marshall, could not result as a defect of will. Why? Modern American law strongly limits the possibilities to void contracts for error, leaving the party to suffer losses, which may be understood rather as a result of the liberal attitude to commerce and market, typical for the U.S. economy. Things look different in Europe, where the Laidlaw case would probably be decided on the grounds of the quite strict regulation of the mistake and deceit. At the same time courts in Europe are far more indulgent, and the mistaken or often deceived party may seek the remedy. Where is the border between a mistake and deceit? If both parties were ignorant of important facts, this would be obvious. If only one party was ignorant, but the second would not realize that, it that would still be a mistake. But if the second party is aware of the situation or even may easily get informed, the mistake becomes a deceit *or equal to deceit*.

Trying to research the limits of such mistakes and price-to-value relation, let us have a look at the *Anatole vs. Bob* example case, provided and discussed by Ruth Sefton-Green<sup>24</sup>. Anatole, a Frenchman, an art historian working for the Orsay museum sold some of his privately owned paintings to Bob’s NY gallery for a bargain price, sure his

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*fidem fides frangatur eidem: Fallere fallentem non est fraus. Dolosus doloso nullo tenetur. Culpa cum culpa compensari potest. Male meriti nulla debent iustitia, nec fide gaudere. Volenti non fit iniuria. Licitum est contrahentibus se decipere. Tantum valet res quanti vendi posset. Item, ut liceat sibi consulere cum damno alterius. Ad impossibile neminem obligari. Item, si te vel me confundi oporteat, potius eligam te confundi quam me.* On this, see I. Maclean, *Interpretation and Meaning in the Renaissance: The Case of Law*, Cambridge 1992, p. 154.

<sup>22</sup> See Dennis C. Hansley, *Securities Regulation – Trading by Insiders – S.E.C v. Texas Gulf Sulphur Co.*, 401 F.2d.833(2d cir.1968), “William and Mary Law Review” 1969, vol. 10, issue 3, pp. 755–760.

<sup>23</sup> One purely non-legal but adequate example may be recalled here. During World War II, in the occupied Warsaw, the chief-commander of the Polish resistance Home Army, General Tadeusz Komorowski “Bór”, gave the order to commence the Warsaw Uprising, an attempt to liberate the city. As the exact date and hour of the uprising had to remain a secret, there was no way of warning and protecting the people of Warsaw, especially women and children. General “Bór” did not say a word even to his own pregnant wife. After the war Komorowski explained he could not warn every woman in Warsaw, so there was no excuse for a special treatment of his own family. During the 63 days of the Warsaw Uprising 16 000 soldiers of the Polish Home Army and up to 200 000 civilians were killed by German forces under the command of SS-Obergruppenführer Erich von dem Bach-Zelewski. This was more than in Hiroshima and Nagasaki nuclear attacks together. See N. Davies, *Rising ‘44: The Battle for Warsaw*, New York 2005.

<sup>24</sup> R. Sefton-Green, M.J. Schermaier, J. Cartwright, *Mistake, Fraud and Duties to Inform in European Contract Law*, Cambridge 2005, pp. 88–130. Other system’s remedies are also discussed.

collection consisted of talented, but unknown authors' works. After some time Bob's experts found out that the purchased paintings were in fact Degas's genuine masterpieces of enormous value. They were put up for sale and that is how Anatole found out what fortune he had lost. Is there any chance for him to claim the money back? We have two professionals, a contract of sale and their common mistake as to the content of the declaration. We have facts: both Bob and Anatole were ignorant of the real value. Bob could not recognize it even after French experts had been consulted (they were wrong). There are many unanswered questions as well. Should the natural economic risk of the contract be devoted? Does Bob deserve legal protection? Bob was enormously enriched – had it been justified? *Post factum*, we know Bob's counterperformance was definitely inadequate, so should not Anatole – at least – get a “half” remedy like Roman *laesio enormis*?<sup>25</sup>

We can clearly understand that, after Laidlaw case, the US courts will decide quite differently than the European ones, where ABGB allow at least 50% restitution on *laesio enormis*, but similar to English – rather hopeless for Anatol. The common law “undue influence” may not be used, as there are no stronger and weaker parties, neither was there a misrepresentation – no false statements were made, and the mistake would probably be regarded as “not sufficiently serious” (*Bell vs. Lever Bros.*). The French law will not help Anatol, especially after the “Baldus case” (RTDCiv 2000, 566) where *Cour de Cassation* decided that even the professional seller needs not to inform the buyer of the facts known to him.<sup>26</sup> Anatol may expect some mercy under German judgment: BGB allows to void the contract on base of the mistake (*Irrtum*, BGB§119.2), which requires a written notification only – made on time, to Bob. If Bob sold paintings, Anatol would get the value compensation. Should this remedy fail (Anatol was a specialist), there is still hope – basing on the failure of the basis of the transaction (*Fehlen der Geschäftsgrundlagen*, BGB §313 *Störung der Geschäftsgrundlage*), where the due price is increased to the real market value. Anatol will not recover the paintings, but neither will he suffer losses. However, this will work if the court does not reject the remedy on the ground of uncertain authorship as the base of the contract and the risk as a part of *Geschäftsgrundlagen*. It is also possible for Bob to oppose the claim of increased value on the basis of the reversed *casum sentit dominus* rule.<sup>27</sup> The safest option for Anatol seems to be the Austrian version of Roman *laesio enormis* (ABGB §934f, *Verkürzung über die Hälfte*) giving him at least half of the money. Anatol would rather suffer his loss under the Polish civil law (art. 84 k.c.). The mistake may be a substantial defect of will only if Bob caused the mistake, knew about it or would recognize it. None of those facts occurred.

<sup>25</sup> See Ch. Becker, *Die Lehre von der laesio enormis in der Sicht der heutigen Wucherproblematik: Ausgewogenheit der Vertragsverhältnisse und der 138 BGB*, Köln 1993.

<sup>26</sup> Contrary, see the similar discussion on *Célimène vs. Damien* (where a specialist bought Monet's painting from a non-professional old lady), R. Sefton-Green, M.J. Schermaier, J. Cartwright, *Mistake...*, p. 131. The same problem discussed on *Degas Drawing* case in: *Good Faith in European Contract Law*, eds. R. Zimmermann, S. Whittaker, Cambridge 2000, p. 208.

<sup>27</sup> On this, see analysis see: R. Sefton-Green M.J. Schermaier, J. Cartwright, *Mistake...*, p. 103 and W. Flume, *Der Kauf von Kunstgegenständen und die Urhebererschaft des Kunstwerkes*, “Juristen Zeitung” 1991, Bd. 13, pp. 633–684.

Another issue I would like to mention is the significance of good faith in freedom of contracts. *Bona fides* used to be crucial for Roman law, and it still remains important for modern private law systems.<sup>28</sup> English courts have never accepted this purely Roman perspective, but the American ones may demand the contracting parties to keep to good faith and fair dealing rules.<sup>29</sup> Even Roman law experienced problems with malicious contracting parties, at least before *mala fides* safeguard was introduced to private law. The origins of *actio de dolo*, immortal equitable remedy, are well reported<sup>30</sup> by Cicero, whose close friend Aquillus Gallus had to decide upon a case of deceit that can be a good warning even in the modern times. Canius, a noble and wealthy Roman citizen, was looking for a holiday villa located in Sicily on the sea coast where he could spend his free time in quiet. Having found out about his wish and about his wealth, a tricky local banker Pythius invited him to his country house overlooking the idyllic seashore and the bay, full of (hired) fishermen boats, whose owners kept on bringing fresh fish to Pythius. He mentioned the bay was full of fish and this location was the only one nearby where the fresh water was available for fishing (which was not true). Canius swallowed the bait: after much haggling and hesitating Pythius finally “agreed” to sell his property for an enormously high price, much over its real value. As the banker was well aware of the rigorous regulations of the *bona fides* contract of sale, he persuaded Canius to pay the price using a kind of the commercial loan called “book debt” (*nomen transscripticium*), which created a new obligation independent from its real *causa* – buying the land property. Thus, any complaints or claims of Canius could not undo his fate. Despite the fraud, Pythius could easily sue Canius for his payment (*actio certae pecuniae*) without raising any equitable dispute as the suit was *stricti iuris*, allowing no judge to ask the most obvious question – why Canius had to pay Pythius the money?

If it had not been for the pretor’s idea and power, Canius and other victims would not have ever been able to get the remedy, as the *stricti iuris* suit excluded any argument other than formal<sup>31</sup>. Old *ius civile* could no longer help here, as all formal requirements were met and no deceit charge was recognized by this law. Thus pretorian *dolus malus* (*cum esset aliud simulatum, aliud actum*) could prevent *usus iuris* from collapsing into *abusus iuris*. Even now it is not always simple for the court to distinguish between the “good” and “bad” party. One cannot demand the party’s innocent conduct throughout the whole life: in order to defend their rights using the charge of “unclean hands,” it is necessary to show the direct relation (*nexus*) between somebody’s wrongdoing and the rights he tries to enforce.

This is a great historical circle we made from Cicero’s times till modern law. Apart from Cicero explanations, *Laidlaw*, commodity trading, *culpa in contrahendo* and many other cases, we still do not know the right answer: was it an unexpected opportunity to

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<sup>28</sup> W. Dajczak, *L'uso della locuzione "bona fides" nei giuristi romani del periodo classico per la valutazione della diligenza dell'adempimento del contratto: un'esperienza ispiratrice* [in:] *Au-dela des frontieres: mélanges de droit romain offerts a Witold Wołodkiewicz*, t. 2, ed. M. Zabłocka, Warszawa 2000, pp. 185–196.

<sup>29</sup> E.A. Farnsworth, *Comparative Contract Law*, p. 919.

<sup>30</sup> M.T. Cicero, *De officiis*, 3, XXIII, 58.

<sup>31</sup> R. Sefton-Green, M.J. Schermaier, J. Cartwright, *Mistake...*, p. 86.



earn good money, or a “deceitful machination”?<sup>32</sup> Should the freedom of contracts be the general excuse? How should *vir bonus* act? And the final question: if, according to Martin Schermaier, Roman law would not survive without *bona fides* as the core of contract, should we expect modern codifications to collapse if they provide too wide freedom?<sup>33</sup>

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<sup>32</sup> See M.J. Schermaier in: *Good Faith in European Contract Law*, eds. R. Zimmermann, S. Whittaker, Cambridge 2000, p. 92.

<sup>33</sup> *Ibidem*.