D. 18,6,9 (*GAIUS LIBRO 10 AD EDICTUM PROVINCIALE*) – WHY SHOULD THE SELLER PAY FOR THE TREES?

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Summary

This article deals with the concept of the seller's liability for failing to disclose relevant information to the buyer before the conclusion of a sales contract in classical Roman law. The main source underpinning this analysis is D. 18,6,9, which describes a case where the force of the wind uprooted trees on an immovable property subject to sale. The seller was aware of such an event but failed to inform the buyer. Gaius claims that the seller should reimburse the buyer for their loss, highlighting the additional protection afforded to the buyer in such cases. The thesis is supported by the analysis of other sources that address sales contracts with the wind uprooting trees, or a knowing seller withholding information from the buyer. Consequently, the article aims to explore the seller's liability for a dubious latent defect in order to evaluate whether the maxim caveat emptor *correctly defines the rules of risk management concerning withheld information on events that occurred during precontractual negotiations in the sale of immovable property under classical Roman law.*

***Keywords**:* emptio venditio*; material defect; immovable;* arbores vento*; Roman law.*

1 INTRODUCTION

The seller's liability for material defects and false advertising is an institute of Roman legal tradition that has had an enormous influence on contemporary legal systems in continental Europe. Although the legal protection of buyers in classical

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Roman law is predominantly associated with the slaves and livestock sold on the market,[1] there are also sources that deal with the protection of buyers of other goods. In this context, this paper examines the seller's liability in the sale of immovable property for failing to disclose certain information during precontractual negotiations.

The main source underpinning this elaboration is D. 18,6,9 (*Gaius libro 10 ad edictum provinciale*), supplemented by an analysis of sources addressing the wind overthrowing trees and the legal implications such natural events could have produced. The second part of the article deals with the *periculum est emptoris* rule and its potential application to the factual scenario presented by Gaius. Following this, the article discusses the seller's knowledge of certain information that could be relevant to the buyer and the implications of concealing such information. Finally, the article presents the author's perspective on the topic and the significance of Gaius's opinion as evidence of the mitigation of the *caveat emptor* rule in the sale of immovable property under classical Roman law.

*2 D. 18,6,9 (*GAIUS LIBRO DECIMO AD EDICTUM PROVINCIALE*)*

The force of nature can have a serious impact on the legal position of contracting parties, especially if it occurs at certain moments before or after the conclusion of a sales contract. For example, wind could destroy the object of sale, and the existence and ambiguity of such natural events can be seen in Roman legal sources. The most notable example comes from Gaius and his 10th book of commentaries on the Provincial Edict, titled *empti venditi* by Lenel.[2] The compilers placed this work in Book 18, Title 6, "Concerning the risk and advantages attaching to property sold" (*De periculo et commodo rei venditae*) of the Digest:

> D. 18,6,9 (*Gaius libro 10 ad edictum provinciale*): *Si post inspectum praedium, antequam emptio contraheretur, arbores vento deiectae sunt, an hae quoque emptori tradi debeant, quaeritur: et responsum est non*

1 The sale of slaves and livestock on the market, along with the subsequent legal protection afforded to the buyer, was extensively analyzed in Romanist literature, see e.g.: Vincenzo Arangio-Ruiz, *La compravendita in diritto romano* (Napoli: Eugenio Jovene, 1954), 353 *et seq.*; Giambattista Impallomeni, *L'editto degli edili curuli* (Padova: Cedam, 1955), 241 *et seq.*; Fritz Pringsheim, "The decisive moment for Aedilician Liability", in *Gesammelte Abhandlungen*, ed. Fritz Pringsheim (Heidelberg: Carl Winter, 1961), 171-178; Alan Watson, *The Law of Obligations in the Later Roman Republic* (Oxford: Clarendon Press, 1965), 86-91; Herbert Jolowicz, and Barry Nicholas, *Historical Introduction to the Study of Roman Law* (Cambridge: University Press, 1972), 293-294; Lorena Manna, *Actio redhibitoria e responsabilita' per i vizi della cosa nell'editto de mancipiis vendundis* (Milano: Giuffre Editore, 1994), 259 *et seq.*; Zimmermann Reinhard, *The Law of Obligations, Roman Foundations of the Civilian Tradition* (Oxford: University Press, 1995), 305-336; Eva Jakab, *Praedicere und cavere beim Marktkauf: Sachmängel im griechischen und römischen Recht* (München: Beck, 1997), 97-146; Nunzia Donadio, *La tutela del compratore tra actiones aediliciae e actio empti* (Milano: Giuffre Editore, 2004), 341 *et seq.*; Peter Birks, *The Roman Law of Obligations* (Oxford: University Press, 2014), 82-90.

2 Otto Lenel, *Palingenesia Iuris Civilis, vol. 1* (Leipzig: Bernhard Tauchnitz, 1889), 215-216.

deberi, quia eas non emerit, cum ante, quam fundum emerit, desierint fundi esse. Sed si ignoravit emptor deiectas esse arbores, venditor autem scit nec admonuit, quanti emptoris interfuerit rem aestimandam esse, si modo venit.[3]

Gaius, the enigmatic Roman jurist from the classical period and one of the four authorities recognized by the *Lex citationis* of 426 AD,[4] explains a situation in which a buyer inspected the land he intended to buy, but before the conclusion of the contract, the wind blew down trees on the property. He raises the question of whether such trees should also be delivered to the buyer. Gaius simply and plainly states that they should not, as the trees were no longer part of the land at the time the sales contract was concluded. However, the jurist continues with a twist by stating that if the buyer was unaware of the chain of events, while the seller knew and withheld this information, the buyer's interest must be assessed upon the conclusion of the sale: … *quanti emptoris interfuerit rem aestimandam esse, si modo venit,* or to put it plainly, the seller must compensate the buyer for his interest if the sales contract is concluded.[5]

This source was not the object of an extensive or elaborate analysis in Roman legal science,[6] but several authors contributed short or sporadic comments. In earlier

3 Gaius, *On the Provincial Edict, Book 10*: *The question asked is as follows: If, after the land has been inspected but before a sales contract is made, trees on the land are blown down, do they have to be delivered to the purchaser? The answer is no because they are not part of the purchase since they ceased to be part of the land before the sale was made. However, if the purchaser was unaware of this while the seller knew and failed to inform them that the trees had been blown down, the purchaser's interest in the matter must be assessed if the sale proceeds*. Trans. cit. Alan Watson, *The Digest of Justinian, vol. 2* (Philadelphia: Penn, 1998), 82.

4 Bernhard Kübler, "Gaius," in *Paulys Real-Encyclopädie der classischen Altertumswissenschaf*, *Band VII,* eds. Georg Wissowa, and Wilhelm Kroll (Stuttgart: Metzler, 1910), 489-492; Fritz Schulz, *History of Roman Legal Science* (Oxford: Clarendon Press, 1946), 107-108; Francis de Zulueta, *The Institutes of Gaius, Part II, Commentary* (Oxford: Clarendon Press, 1963), 2-5; Adolf Berger, *Encyclopedic Dictionary of Roman Law* (Philadelphia: The American Philosophical Society, 1991), 481. According to Kaser, Gaius was in fact not a classic. *Cf.* Max Kaser, "Gaius und die Klassiker", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 70, no. 1 (1953): 176.

5 Behrends and others translated the last part of the source into German as follows: "… *wenn es denn zum Verkauf kommt, eine Schätzung der Sache in Höhe des Interesses des Käufers vorgenommen werden*." Okko Behrends et al., *Corpus Iuris Civilis, Text und Übersetzung III* (Heidelberg: C.F. Müller, 1999), 507. Lassard and Koptev revised Scott's translation, and the quoted phrase is thus translated as follows: … *he will be liable for damages to the amount of interest of the purchaser, provided the sale takes place.* "The Roman Law Library by Y. Lassard & A. Koptev," accessed September 17, 2024, https://droitromain.univ-grenoble-alpes.fr/Anglica/D18_Scott.htm#VI.

6 For instance, Kübler discussed the meaning of the word *hae*. Bernhard Kübler, "Textkritische Kleinigkeiten," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 30, no. 1 (1909): 410. Seckel and Levy referenced this source in the analysis of the connection between the quality of the purchased item and the collectability of the contract. Emil Seckel, and Ernst Levy, "Die Gefahrtragung beim Kauf im klassischen römischen Recht," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 47, no. 1 (1927): 159.

literature, Haymann stated that Gaius does not question the existence of the sales contract but allows the *actio empti* against a seller who maliciously concealed the damage (*dolus in contrahendo*), awarding the buyer compensation for the negative interest (*negative Interesse*).[7] In his research on liability arising from insurance, Krückmann noted that there exists a seller's objective fault in this source, which leads to his liability arising from the obligation to inform the buyer (*Verletzung der Anzeigepflicht*).[8] Stein contributed to the discussion by asserting that the impression the buyer receives during inspection is treated as a representation.[9] According to this approach, together with the principle of *bona fide,* the seller is obliged to inform the buyer of any changes affecting the accuracy of the given representation. Another comment on the source was made by Medicus, who questioned whether the buyer should be informed of the damage caused by the storm or of the integrity of the trees.[10]

More recently, Misera mentioned this case only briefly, citing it as an example involving the inspection of goods and the subsequent sales contract.[11] Pennitz commented that if the trees were uprooted by a storm before the conclusion of the contract, the buyer should not bear the risk, as these trees are not part of the primary agreed obligation. Thus, Gaius's *non deberi* solution corresponds to his substantive approach.[12] However, Pennitz argues that there is a complementary or secondary *actio empti* available to the buyer for a claim for damage if the seller knowingly violated his obligation to provide information (*bestehende Informationspflicht*) that existed at the time of the conclusion of the contract.[13] Such approach, similar to Krückmann's position discussed above, obligates the seller to disclose information to the buyer. Nevertheless, it does not seem to suggest that the obligation to provide information was a general obligation of the seller.

Gaius firmly asserts that the uprooted trees should not be delivered to the buyer because they are no longer part of the object of the sale. Therefore, it is possible that such a solution was not contentious for the jurist. Although Gaius merely states that

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Beseler criticized Seckel and Levy, arguing that the *rem aestimandam* part is nonsense, since the inspection took place before the conclusion of the sales contract. Gerhard von Beseler, "Romanistische Studien," *Tijdschrift voor Rechtsgeschiedenis* 8, no. 2-3 (1928): 296.

7 He also holds that the last part of the source "*...si modo venit*" was added later. Franz Haymann, "Zur Klassizität des periculum emptoris", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 48, no. 1 (1928): 374.

8 Paul Krückmann, "Versicherungshaftung im römischen Recht," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 63, no. 1 (1943): 34.

9 Peter Stein, *Fault in the Formation of Contract in Roman Law and Scots Law* (Aberdeen: Oliver and Boyd, 1958), 14.

10 In addition, he argues that the text contains parts that were added later. Dieter Medicus, *Id quod actum est* (Böhlau: Köln, 1962), 149.

11 Karlheinz Misera, "Der Kauf auf Probe im klassischen römischen Recht," in *Aufstieg und Niedergang der römischen Welt, Band 14, Recht,* ed. Hildegard Temporini (Berlin: de Gruyter, 1982), 529.

12 Martin Pennitz, *Das Periculum rei venditae: Ein Beitrag zum "aktionenrechtlichen Denken" im römischen Privatrecht* (Wien: Böhlau, 2000), 216, ft. 98.

13 Pennitz, *Das Periculum rei venditae,* 216.

the detached trees are no longer part of the land, it is clear that he viewed the detached trees as distinct goods or even as fruits (*fructus*). Trees are typically regarded as goods that produce natural fruits; however, in this case, the trees themselves could be viewed as natural fruits (*fructus naturales*) of the immovable property, that is separated (*fructus separati*) and thus classified as separate goods in a broad sense.[14] If the analogy is accepted, the immovable property represents the primary fruitful good, while the trees are viewed as its separated fruits.

Based on Gaius's concise description, several conclusions can be drawn regarding the timing and the circumstances of the sales contract. Since the source comes from the commentaries on the provincial edict - which, similar to the praetor's edict - regulated private disputes,[15] it can be assumed that the immovable property was located in one of the provinces. Furthermore, given the presence of a strong wind that the buyer was unaware of, it cannot be excluded that it was located in a distant one. As the buyer did not know about the uprooted trees, it is plausible that the parties were not present at the property when the sales contract was concluded, suggesting that it was probably finalized at some other location. Finally, it is almost certain that at least a day elapsed between the inspection and the conclusion of the sales contract. The alternative - that the land was inspected while high winds were blowing - would render the buyer's ignorance of the fallen trees less excusable.

Gaius's solution places liability for the fallen trees on the seller. Such a ruling is not in line with the unofficial paradigm of *caveat emptor,*[16] which suggests that the buyer should beware when inspecting the goods he intends to buy. Although this paradigm is in Latin, it is not of ancient origin, yet it still effectively describes the general principles governing sales contracts. The buyer is expected to inspect the object of the sale carefully, and if any defects or unwanted characteristics become evident later, the buyer is responsible for bad inspection. However, as illustrated, Gaius took a different approach.

14 For more information about *fructus,* see: Max Kaser, *Das römische Privatrecht, Erster Abschnitt* (München: Beck, 1971), 384; Ralph Backhaus, "Rechtsobjekte und Sachkategorien," in *Handbuch der Römischen Privatrechts, Band I,* eds. Ulrike Babusiaux, Christian Baldus, Wolfgang Ernst, Franz-Stefan Meissel, Johannes Platschek, and Thomas Rüfner (Tübingen: Mohr Siebeck, 2023), 1054-1055.

15 Such an edict, in the time of Gaius, was in many respects identical to the edict of the *praetor urbanus.* John Richardson, "Roman Law in the Provinces," in *The Cambridge Companion to Roman Law*, ed. David Johnston (Cambridge: University Press, 2015), 51.

16 The *Caveat emptor* paradigm, in its literal meaning, places the risk of latent defects in the purchased goods on the buyer, who is expected to exercise caution during the pre-contractual inspection of the goods they intend to buy. Consequently, the seller bears no liability for undetected material defects. However, this approach was abandoned early in Roman legal history. The paradigm is still used in contemporary common law to describe a legal situation where the buyer has no claims against the seller for material defects. James Mackintosh, *The Roman Law of Slave with Modern Illustrations* (Edinburgh: T. & T. Clark, 1907), 278; Andreas Fischer, *Vom "caveat emptor" zur Einteilung von Verantwortungbereichen der Kaufvertragsparteien, Inauguraldissertation* (Tübingen: Spindelfabrik Süssen, 1998), 4 and 11. Zimmermann, *The Law of Obligations,* 307-308.

3 TREES THAT FELL

3.1 Arbores vento

The force of nature described in Gaius's source is both peculiar and somewhat ambiguous. While it appears that he discusses a rare natural phenomenon and gives a unique legal solution to the problem, there are several other references to wind overthrowing trees in the sources of Roman law. *Arbores vento* is mentioned at least three more times in the *Digest*[17] and once in *Institutiones*,[18] but as *arboribus turbine* or even a stronger wind, the gale.

The first reference to wind overthrowing trees is made by Pomponius in D. 7,1,19,1 (*Pomponius libro 5 ad Sabinum*), where he wonders what would happen if trees were blown down by the wind and the owner failed to remove them.[19] He notes that if there was a right of *ususfructus* on the immovable property, an action could be brought against the owner. This situation is, however, not comparable to Gaius's case, especially since no sales contract is involved. A second mention comes again from Pomponius in D. 43,27,2 (*Pomponius libro 34 ad Sabinum*), where he quotes the rule from the *Law of the Twelve Tables*, stating that the owner can take action against a neighbor whose tree was made to hang over his land by the force of the wind.[20] Thus, the wind overthrowing trees was regulated in the earliest periods of Roman legal history, yet the legal problem is quite different from the one discussed by Gaius. The third source addressing *arbores vento* is:

> D. 18,1,58 (*Papinianus libro 10 quaestionum*): *Arboribus quoque vento deiectis vel absumptis igne dictum est emptionem fundi non videri esse contractam, si contemplatione illarum arborum, veluti oliveti, fundus comparabatur, sive sciente sive ignorante venditore: sive autem emptor sciebat vel ignorabat vel uterque eorum, haec optinent, quae in superioribus casibus pro aedibus dicta sunt.*[21]

The source comes from the Papinian tenth book of Questions, which Lenel named *De emptione et venditione*.[22] Here the jurist discusses a situation where trees have been blown down or destroyed by fire, asserting that the sales contract is not valid if the buyer bought the land because of the trees. He gives an example of an olive grove and states that this solution applies regardless of whether the seller was aware of the fire and wind or not. However, the question of whether the buyer knew

17 Pomp. D. 7,1,19,1; Pomp. D. 43,27,2; and Pap. D. 18,1,58.

18 Inst. 3,23,2.

19 *Si arbores vento deiectas …*

20 *Si arbor ex vicini fundo vento …* For more information, see: Kaser, *Das römische Privatrecht,* 126.

21 D. 18,1,58 (*Papinian Questions, Book 10*): *Furthermore, where trees have been blown down or destroyed by fire, a valid sale cannot be considered to have occurred if the purchase was made because of those trees, as in the case of an olive grove. This holds true regardless of whether the seller was aware or not. However, the knowledge or ignorance of the purchaser - or of both parties - produces the same result as in the preceding case involving the burned house*. Trans. cit. Watson, *The Digest of Justinian, vol. 2*, 64.

22 Lenel, *Palingenesia Iuris Civilis, vol. 1*, 832.

about the damage is addressed in the same manner as in the previous source *quae in superioribus casibus pro aedibus dicta sunt*. Since there is an instruction to look at the decision made by another jurist (in this case, it was Paul), it is clear that this instruction was written later by compilators.[23] Therefore, the analysis should be conducted with caution.

In the fragment allegedly referenced by Papinian, D. 18,1,57 (*Paulus libro 5 ad Plautim*), Paul discusses a case where a house was sold but burned down before delivery. This lengthy text incorporates the perspectives of Nerva, Sabinus, Cassius, and Neratius on the legal issue, concluding that if the object of the sale no longer exists, then there exists no sales contract either.[24] Agreeing with the jurist he quoted, Paul gives his own opinion, asserting that the buyer's knowledge of the fact that the house burned down leads to the validity of the contract. This could suggest that the buyer still wanted the immovable property, regardless of the fire.

Paul identified two distinctions concerning the ignorance of the buyer and the knowledge of the seller. First, if the entire house burned down, there would be no valid contract. Such a solution is in line with his opinion expressed in D. 18,1,15 pr. (*Paulus libro quinto ad Sabinum*),[25] where he states that even if a sales contract is concluded, it becomes void (*nulla emptio est*) if the object ceases to exist before the sale. Second, if part of the building remains, the sale remains valid, and the seller is liable to the buyer for partial loss. The final scenario involves both the buyer and the seller being aware of house destruction. Paul concludes that no contract exists in this case, as both parties tried to deceive one another and acted in bad faith, *mala fides*.[26] This solution seems to be questionable, as it is unclear why one party would litigate against the other.

Arangio-Ruiz considered the source to be interpolated but also acknowledged the possibility that jurists from the classical period made a distinction between situations where both the buyer and the seller were ignorant and those where only one party was ignorant.[27] Peters concluded that the only logical solution is to look at the case from an economic perspective, asserting that the core of the source is genuine. He also questioned whether accepting ownership of the house could still align with

23 Lenel even designated it as coming from Tribonian: *Sive autem ... dicta sunt*. *Trib*. Lenel, *Palingenesia Iuris Civilis, vol. 1*, 832.

24 Wolfgang Ernst, "Klagen aus Kauf," in *Handbuch des Römischen Privatrechts, Band II,* eds. Ulrike Babusiaux, Christian Baldus, Wolfgang Ernst, Franz-Stefan Meissel, Johannes Platschek, and Thomas Rüfner (Tübingen: Mohr Siebeck, 2023), 2080.

25 *Et si consensum fuerit in corpus, id tamen in rerum natura ante venditionem esse desierit, nulla emptio est. Cf.* Kaser, *Das römische Privatrecht, Erster Abschnitt*, 549; Jan Dirke Harke, *Si error aliquis intervenit - Irrtum in klassischen römischen Vertragsrecht* (Berlin: Duncker & Humblot, 2005), 81 and 85.

26 In the context of the inclusion of *dolus* of contracting parties in *bonae fidei iudicia,* see: Franz-Stefan Meissel, and Anna Novitskaya, "*Bonae fidei iudicia*, Grundlagen," in *Handbuch des Römischen Privatrechts, Band II,* eds. Ulrike Babusiaux, Christian Baldus, Wolfgang Ernst, Franz-Stefan Meissel, Johannes Platschek, and Thomas Rüfner (Tübingen: Mohr Siebeck, 2023), 2020.

27 Arangio-Ruiz, *La compravendita in diritto romano,* 128.

the buyer's interests.[28] Zimmermann used the source to support the thesis that an initial impossibility led to the invalidity of the obligation, but only such that the buyer was not required to pay, while the seller was relieved of his primary obligation.[29]

Apathy commented that Paul's source was considered interpolated but added that it is unlikely that in the subsequent fragment the compilators would adopt a completely different approach by Papinian that is focused on the objective extent of part of the performance that became impossible to perform.[30] Schermaier concluded that the multi-stage discussion of the case and decisions reveals a methodological interaction between the interpretation and its influence on the determination of costs (*Kostenbestimmung*).[31] In other words, the criterion of identity (whether the house exists or not) establishes the boundaries between the impossibility of the obligation and the liability of a party. By this interpretation, the buyer is not entitled to choose between legal remedies, since the solution depends on the circumstances, each leading to different legal consequences. Conversely, Pennitz concluded that the price was already paid and therefore the question revolves around *actio empti* and the claim for the paid *pretium.*[32]

Based on the various variables in the source and their influence on the sales contract, the following diagram graphically illustrates the solutions proposed by both jurists.

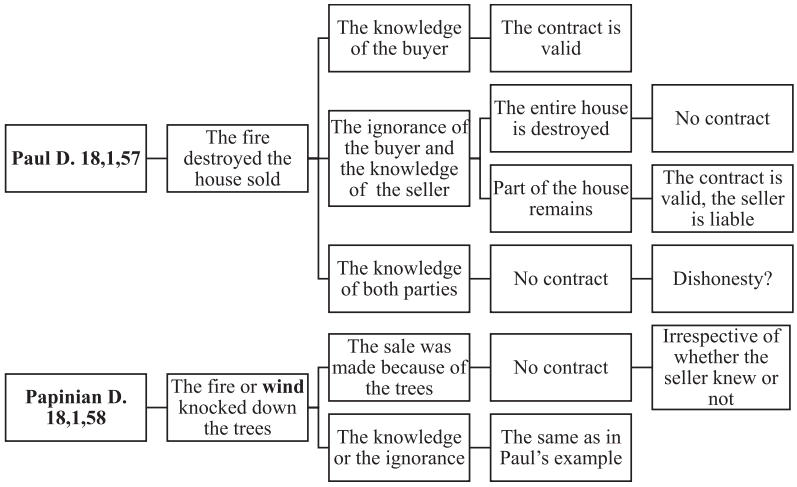

Diagram 1. *Comparison of Paul's and Papinian's solutions in D. 18,1,57-58 (Author's work)*

28 Frank Peters, "Zur dogmatischen Einordnung der anfänglichen, objektiven Unmöglichkeit beim Kauf," in *Festschrift für Max Kaser zum 70. Geburtstag,* eds. Dieter Medicus, and Hans Hermann Seiler (München: C. H. Beck, 1975), 290.

29 Zimmermann, *The Law of Obligations,* 690-691.

30 Peter Apathy, "Sachgerechtigkeit und Systemdenken am Beispiel der Entwicklung von Sachmängelhaftung und Irrtum beim Kauf im klassischen römischen Recht," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 111, no. 1 (1994): 110.

31 Martin Josef Schermaier, "Auslegung und Konsensbestimmung," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 115, no. 1 (1998): 274.

32 Pennitz, *Das Periculum rei venditae*, 156.

In Papinian's example, the first solution suggests that, because of the wind or fire, the main object of the sale no longer exists, and hence there is no sales contract. Technically, such reasoning is not without a flaw; the object of the sale is immovable property, and the trees are (only) its integral part. The object still exists, albeit without its fruits. While it can be argued that such fruits were the main object or intention of the buyer to acquire, the object of the sale nevertheless included both the immovable property and the trees. If the parties agree on the sale of the trees alone, then the object could be considered nonexistent. As can be seen in the diagram, when addressing the buyer's knowledge or ignorance of the situation, Papinian points to solutions proposed by Paul and other jurists he cites. Another difference is the fact that Papinian does not distinguish between whether all trees have fallen or not, unlike Neratius (quoted by Paul), who makes such a distinction when discussing whether an entire house has burned down or only part thereof.

In comparison with Gaius's solution in D. 18,6,9, Papinian holds that there is no contract if the trees are destroyed by fire of wind, regardless of the seller's knowledge. Gaius, on the other hand, does not question the existence of the contract. Instead, he discusses the seller's liability, stating that it depends on the seller's knowledge of the condition of the object at the time of the sale. In Paul's example, the seller's liability is discussed only if at least part of the house remained and the seller knew about the damage. By analogy, as per Papinian's reasoning, the same principle applies when wind has blown down trees: the seller would be liable only if some trees remained standing. Otherwise, there would be no contract. Such a solution differs from the one proposed by Gaius. Finally, Papinian emphasizes that the contract is concluded because of the trees, while Gaius does not give the buyer's motives or intentions. It can be concluded there are significant differences between sources, with the primary distinction referring to whether a contract exists at all, or simply put, whether the contract is valid or not. Gaius does not raise this question, suggesting that it is probably not debatable.

3.2 Arboribus turbine deiectis (*and the* periculum est emptoris *rule*)

The fourth mention of the wind overthrowing trees appears in the Institutes of Justinian, a schoolbook created in Byzantium in the sixth century, during the postclassical period of Roman legal history. The phrase used is *arboribus turbine deiectis* rather than *arbores vento* and is found in the section addressing the rules governing risk management:

> I., 3,23,3: *Cum autem emptio et venditio contracta sit (quod effici diximus, simulatque de pretio convenerit, cum sine scriptura res agitur), periculum rei venditae statim ad emptorem pertinet, tametsi adhuc ea res emptori tradita non sit… itaque si homo mortuus sit vel aliqua parte corporis laesus fuerit, aut aedes totae aut aliqua ex parte incendio consumptae fuerint, aut fundus vi fluminis totus vel aliqua ex parte ablatus sit, sive etiam inundatione aquae aut arboribus turbine deiectis longe minor aut deterior esse coeperit, emptoris damnum est, cui necesse est, licet rem non fuerit nactus, pretium solvere. quidquid enim sine dolo et culpa venditoris*

accidit, in eo venditor securus est.[33]

In their discussion of the moment at which a sales contract is perfected, the writers of Institutes explained that the risk of accidental destruction of the purchased goods passes to the buyer upon the perfection of the contract. In Romanist literature, this rule is referred to as the *periculum est emptoris*.[34] Among other examples illustrating the rule of such burden for the buyer, the writers described a scenario in which the trees are blown down by the gale or a strong wind. If the trees were blown down after the conclusion of the contract but before the delivery of the immovable property to the buyer, the buyer would still be obligated to pay the agreed price, despite not receiving the fallen trees. Thus, the buyer would take possession of the immovable property, but without the trees.

Although the question of the impact of wind on a sales contract involving immovable property with trees aligns with Gaius's source in D. 18,6,9, there are some substantial differences. The Institutes do not include the addition that the seller is liable if he had prior knowledge of the wind. In fact, there is no liability of the seller for the fallen trees, regardless of the circumstances. Similar to Papinian's case in D. 18,1,58, the sales contract is concluded before the occurrence of strong winds but also before delivery. By contrast, in Gaius's example, the winds occurred before the conclusion of the sale, and buyers were afforded protection in such situations. In the Institutes, however, the buyer bore the risk and did not receive the fallen trees or any compensation. Therefore, despite the factual similarities, the solutions proposed in these cases differ substantially to the detriment of the buyer.

The origin of *periculum est emptoris* has often been questioned, but most authors agree that it was applied, to a certain extent, during the classical period of Roman legal history.[35] A particularly indicative aspect of the discussion regarding the example of fallen trees is the fact that Gaius himself does not mention fallen trees

33 When a contract of sale is made, such as when the price is agreed upon in the absence of a written contract, the risk immediately passes to the buyer. This applies even if the item has not yet been delivered. Suppose that a slave dies or suffers an injury, a building is wholly or partially destroyed by fire, or a parcel of land is wholly or partially washed away by the current of a river, reduced by flooding, or damaged by having its trees blown down in a gale, the buyer must bear the loss. In these cases, the buyer is still obligated to pay the agreed price, even without having obtained the item. *Trans. cit.* Peter Birks, and Grant Mcleod, *Justinian's Institutes* (New York: Cornel University Press, 1997), 113-115.

34 The *periculum est emptoris* rule was widely discussed and often criticized in Romanist literature. A significant point of debate was whether it was applied in classical Roman law. For more information, see: Ernst Rabel, "Gefahrtragung beim Kauf," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 42, no. 1 (1921): 543 *et seq*.; Fritz Schulz, *Classical Roman Law* (Oxford: Clarendon Press, 1951), 532-533; Geoffrey Macormack, "Periculum," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 96, no. 1 (1979): 171-172; Frank Peters, "Periculum est emptoris," in *Iuris Professio, Festgabe für Max Kaser zum 80. Geburstag,* eds. Hans-Peter Benöhr, Karl Hackl, Rulf Knütel, and Andreas Wacke (Wien: Böhlaus, 1986), 222-223, 232; Martin Bauer, *Periculum emptoris, Eine dogmengeschichtliche Untersuchung zur Gefahrtragung beim Kauf* (Berlin: Duncker & Humblot, 1998), 253-254; Reuven Yaron, "Remarks on Consensual Sale (with Special Attention to *Periculum Emptoris*)," *Roman Legal Tradition* 2 (2004): 70.

35 For further details, see the literature cited in the previous footnote.

in his own *Institutiones,* an unaltered work of classical jurisprudence.[36] While the compilators added the section on *emptione perfecta* and the example of fallen trees after discussing on the origin of the sales contract, Gaius's *Institutiones* 3,139-141 do not mention anything similar after discussing the origin of the sales contact.[37] This omission raises concerns about why a jurist who had encountered and commented on such a specific situation did not address it in another of his works, while the writers of the Institutes of Justinian, who took Gaius's work as a model for their book,[38] included an identical factual situation in their work.

Although it does raise justified concerns about the authenticity of Gaius's opinion on the fallen trees in D. 18,6,9, a simple explanation could be that Gaius may have deliberately avoided addressing such a complex legal question in the work that served as a schoolbook. In addition, other Gaius's sources address a wide range of legal problems, many of which are not included in his Institutes. Therefore, the genuineness of Gaius's opinion in D. 18,6,9 cannot be undermined by this argumentation.

In the context of the influence of natural occurrences on the object of the sale, a source comparable to both Inst. 3,23,3 and Gaius 18,6,9 can be seen in the Digest:

> D. 18,6,7pr. (*Paulus libro 5 ad Sabinum*): *Id, quod post emptionem fundo accessit per alluvionem vel perit, ad emptoris commodum incommodumque pertinet: nam et si totus ager post emptionem flumine occupatus esset, periculum esset emptoris: sic igitur et commodum eius esse debet.*[39]

The source comes from Paul's fifth book on the commentaries of Sabinus, titled by Lenel *De mancipatione et traditione rei venditae et de duple stipulationae.*[40] In this text, Paul states that whatever is added to (or reduced from) the immovable property after the sale by *alluvio*[41] goes to the benefit or detriment of the buyer. He

36 For more information about the Institutes of Gaius, see: Tony Honoré, *Gaius* (Oxford: Clarendon Press, 1962), 58 *et seq.*; Werner Flume, "Die Bewertung der Institutionen des Gaius," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 79, no. 1 (1962): 26-27; Francis de Zulueta, *The Institutes of Gaius, Part II Commentary* (Oxford: Clarendon Press, 1963), 6.

37 The Institutes of both Gaius and Justinian explain that the sales contract evolved from barter, using an example from Homer's Iliad. Both authors note that the Achaeans (Greeks) purchased wine using copper, iron, hides, cattle, and slaves (Gaius Inst. 3,141 and Just. Inst. 3,23,2).

38 Donald R. Kelly, "Gaius Noster: Substructures of Western Social Thought," *The American Historical Review* 84, no. 3 (1979): 625; Peter Stein, "The Development of the Institutional System," in *Studies in Justinian's Institutes in memory of J. A. C. Thomas*, eds. Peter Stein, and Andrew Lewis (London: Sweet & Maxwell, 1983), 163.

39 D. 18,6,7pr. (Sabinus, Book 5): *What accedes to land* by alluvio *after its sale, as well as which is lost, benefits or burdens the purchaser. Even if the entire field is inundated by a river after the sale, the risk remains with the purchaser, who is also entitled to any benefit which may accrue* (*trans. cit.* Watson, *The Digest of Justinian, vol. 2*, 81).

40 Lenel, *Palingenesia Iuris Civilis, vol. 1*, 1265.

41 The increase of immovable property through natural materials deposited by a river over time and added to the land along its bank. For further details, see: Max Kaser, "Die natürlichen Eigentumserwerbsarten im altrömischen Recht," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 65, no. 1 (1947): 223-230; Anna Plisecka, "Erwerb durch Sachveränderung," in *Handbuch des Römischen Privatrechts, Band I,* eds. Ulrike

further specifies that even if the whole field is flooded by a river after the conclusion of the contract (and before delivery), the risk falls on the buyer. The same principle applies if the immovable property increases in value due to such changes. In other words, the party bearing the risk also reaps the gain.

Several authors have connected the quoted principium (together with the first fragment) with the *actio de modo agri*, a preclassical legal remedy with a slightly different application in classical law.[42] Under this legal remedy, if a seller sold the immovable property by mancipation and made a formal declaration (*lex mancipio dicta*) specifying its size, he was liable for double the value of the missing or reduced portion of the land.[43] Pennitz criticized the theory linking the source with *actio de modo agri*, arguing that Paul's decision suggests that the concluded price remains even if the object of the sale changes substantially.[44] Based on the text of the source, it does seems that there is no direct link to *actio de modo agri,* and Pennitz's critique is convincing. Ernst added that the source represents a late classical law approach to the question of additions to the purchased item after the contract has been concluded, which benefits the buyer, but also obligates him to accept any damage to the immovable property.[45]

Paul justified his decision with the argument that if the sale is concluded and the entire immovable property is reduced, the buyer bears the risk. However, if the immovable property is enlarged, he reaps the gain. Therefore, the rule is in line with the *bona fide* principle. The same legal problem was also addressed in the title named *De periculo et commodo rei venditae* of Basilica 19,6,1,[46] a compilation of Greek texts both comprising and concerning Justinian's legislation created in the late ninth century during the reign of Emperor Leo VI the Wise.[47] Since the effect of identical natural phenomena (water currents) on the sales contract is mentioned and resolved in the same manner, it shows the importance and relevance of the proposed legal solution to both ancient and medieval society. The solution is that the buyer bears all the risk for such natural causes, but only for events that occurred after the conclusion of the sales contract. Neither source mentions what the solution would be if such event occurred beforehand. Therefore, this source highlights the *periculum est emptoris* rule, as outlined in Justinian's Institutes, which is differs significantly from the solution proposed by Gaius regarding fallen trees.

Babusiaux, Christian Baldus, Wolfgang Ernst, Franz-Stefan Meissel, Johannes Platschek, and Thomas Rüfner (Tübingen: Mohr Siebeck, 2023), 1107.

42 Franz Haymann, *Die Haftung des Verkäufers für die Beschaffenheit der Kaufsache* (Berlin: Franz Vahlen, 1912), 18 and 143; Von Beseler, "Romanistische Studien," 295; Juan Miquel, "Periculum locatoris," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 81, no. 1 (1964): 146. *Cf.* Rabel, "Gefahrtragung beim Kauf," 556.

43 Zimmermann, *The Law of Obligations,* 308; Ernst, "Klagen aus Kauf," 2210. *Cf.* Ernst Levy, *Weströmisches Vulgarrecht: Das Obligationenrecht* (Weimer: Böhlau, 1956), 229-230.

44 Pennitz, *Das Periculum rei venditae*, 148.

45 Ernst, "Klagen aus Kauf," 2121.

46 *Post venditionem fudi lucrum et damnum emptorem respicit. Quod enim, si per alluvionem accessio facta sit, vel pars eius aut totus flumine sit occupatus?*

47 Hylkje de Jong, "Using the Basilica," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 133, no. 1 (2016): 290.

*4 THE SELLER WHO KNEW (*SCIENS *SELLER)*

Gaius's solution in D. 18,6,9 could also be observed through the lens of the knowledge of the contracting party and the influence of such concealment on his liability. In this case, the seller was aware of natural events that influenced the object of the future sale, which raises a question of his potential dishonesty. Corresponding liability was discussed back in the preclassical period, mainly in Cicero's work *De Officiis* (On Duties) 3, 54-55.[48] Cicero commented on a situation where an honest man (*vir bonus*) was selling an immovable property that had certain unwanted characteristics. The property was *pestilens* (infested with poisonous weeds), which was known only to the seller and no one else. In an imaginary situation, the seller managed to sell the property for a substantially larger sum of money than he expected because of the defect. Cicero thus wondered whether the seller's action was unjust or dishonorable (*iniuste aut improbe*). He further cited Greek Stoic philosophers Antipater and Diogenes, where Diogenes stated that it would be absurd for an auctioneer to cry, at the owner's bidding, "Here is an unsanitary house for sale!" (*domum pestilentem vendo*).

With such a market-oriented approach, the rule for risk management would be *caveat emptor*, the buyer must be extremely vigilant when inspecting goods he is about to buy, as the seller would bear no liability. However, this principle reflects only the argument of the Greek philosopher quoted by Cicero and thus has no legal power. The opposing solution would be that this argument is Cicero's own, framed as it were Diogenes's, which seems unlikely.[49] Furthermore, Cicero later presented a contrasting opinion in *De Officiis* 3,66-67[50] that by the rules of *ius civile* regarding the sale of immovable property, all defects the seller is aware of must be disclosed to the buyer. The case he used as an illustration is the one in which a seller of immovable property intentionally concealed the fact that part of the sold house would need to be removed to allow augur priests to have an unobstructed view.[51] Therefore, Cicero gives a genuine example of a legal obligation for the seller to disclose to the buyer certain information about the immovable property being sold. However, he concludes with the observation that the *ius civile* cannot be made to include all cases where facts are thus suppressed.[52] The seller would be liable only in the case of dishonest silence,

48 "… Vendat aedes vir bonus, propter aliqua vitia, quae ipse noverit, ceteri ignorent, pestilentes sint et habeantur salubres…", *55:* "... Quid autem tam absurdum quam si domini iussu ita praeco praedicet: 'domum pestilentem vendo.'"

49 Stein, *Fault in the Formation of Contract,* 9; Andrew R. Dyck, *A Commentary on Cicero, De Officiis* (Michigan: The University of Michigan Press, 1996), 563.

50 *Ac de iure quidem praediorum sanctum apud nos est iure civili, ut in iis vendendis vitia dicerentur, quae nota essent venditori.*

51 Georg Wissowa, "Augures," in *Paulys Realencyclopädie der classischen Altertumswissenschaf*, *Band II,* eds. Georg Wissowa, and Wilhelm Kroll (Stuttgart: Metzler, 1896), 2338-2339; Jerzy Linderski, "The Augural Law," in *Aufstieg und Niedergang der römischen Welt, Band 16/3, Religion,* ed. Hildegard Temporini (Berlin: de Gruyter, 1982), 2158.

52 *Sed huius modi reticentiae iure civili comprehendi non possunt.* For more details, see: Miriam Griffin, "Latin philosophy and Roman law," in *Politeia in Greek and Roman Philosophy*, eds. Verity Harte, and Melissa Lane (Cambridge: University Press, 2013), 108; Dyck, *A*

incurring fault-based liability for dishonest non-disclosure.[53] It is not a universally applicable rule but rather a guideline to avoid both exaggeration in promoting the object and deliberate omission of unwanted characteristics during pre-contractual negotiations. The seller would be liable only if there was a direct intent to mislead the buyer.

In Gaius's example in D. 18,6,9, the jurist identified the seller's knowledge (*venditor autem scit*) as the key element determining his liability. Such an approach is evident in the works of other jurists as well, e.g.:

> D. 19,1,13pr. (*Ulpianus libro 32 ad edictum*) *Iulianus libro quinto decimo inter eum, qui sciens quid aut ignorans vendidit, differentiam facit in condemnatione ex empto: ait enim, qui pecus morbosum aut tignum vitiosum vendidit, si quidem ignorans fecit, id tantum ex empto actione praestaturum, quanto minoris essem empturus, si id ita esse scissem: si vero sciens reticuit et emptorem decepit, omnia detrimenta, quae ex ea emptione emptor traxerit, praestaturum ei: sive igitur aedes vitio tigni corruerunt, aedium aestimationem, sive pecora contagione morbosi pecoris perierunt, quod interfuit idonea venisse erit praestandum.*[54]

The source comes from Ulpian's thirty-second commentary on the Edict, titled *De actione empti* by Lenel.[55] Ulpian transposed a quote from the fifteenth book of Julian's Digest, where Julian stated that there is a difference between a knowing seller and an unknowing seller in terms of condemnation by *actio empti* in cases when goods are sold with certain flaws. Julian mentioned a diseased herd and unsound timber used in the construction of a house. Under the standard sales contract *actio empti,* the unknowing seller (*ignorans*) was liable for the difference in price that the buyer would have paid if he had been aware of a material defect. On the other hand, the knowing seller (*sciens*) was liable for all damages suffered the buyer as a result of the sale.

The terminology used to describe the liability of the unknowing seller (*quanto minoris essem empturus, si id ita esse scissem*) resembles *actio quanti minoris*

Commentary on Cicero, De Officiis, 579 *et seq.*

53 Laura Solidoro Maruotti, ""… Si vero sciens reticuit et emptorem decepit…" (D. 19.1.13pr.): 'vizi di fatto', 'vizi di diritto' e reticenza del venditore," in *Fides Humanitas Ius. Studi in onore di L. Labruna, vol. III,* eds. Cosimo Cascione, and Carla Masi Doria (Naples: Editoriale Scientifica, 2007), 5303; Birks, *The Roman Law of Obligations,* 89.

54 D. 19,1,13pr. (*Ulpian, Edict, Book 32*): *Julian, in the fifteenth book of his [Digest,] distinguishes between the knowing and unknowing seller with regard to condemnation in an action on purchase. He says that if he acted unknowingly in selling a diseased herd or an unsound timber, then in an action on purchase he will be held responsible for the difference from the smaller amount I would have paid had I known of this. But if he knew but kept silent and so deceived the buyer, he will be held responsible to the buyer for all losses he sustained due to this sale. Therefore, if a building collapsed due to the timber's unsoundness, he must make good the building's calculated worth; if herds die through contagion from the diseased herd, he should be held responsible for the interest in this not having occurred. Trans. cit*. Watson, *The Digest of Justinian, vol. 2*, p. 90.

55 Otto Lenel, *Palingenesia Iuris Civilis, vol. 1* (Leipzig: Bernhard Tauchnitz, 1889), 632.

created by *curule aediles* and its genuineness was criticized in Romanist literature.[56] Here, Julian enabled a claim for damage arising from a certain material defect in sold goods through *actio empti,* and extended it to goods other than slaves and livestock, thus covertly expanding the application of the *curule aediles* rules. Despite these criticisms, it is beyond doubt that Julian, an early classical jurist, distinguished between the liabilities of the seller based on his knowledge, imposing greater liability on the knowing seller.

The liability of a contracting party for material defects in relation to knowledge is addressed in D. 19,1,6,4 (*Pomponius libro 9 ad Sabinum*), where Pomponius discusses the sale of vessels, where the seller claimed that they were free of flaws, but it was discovered later that the vessels were defective, and as a result, the buyer lost the fluid he stored in them. Pomponius held that the seller is liable only if he claimed that the vessels were undamaged, but he cited Labeo, who argued that the seller is liable regardless of his knowledge of the defect, for which he added *et est verum.*[57] If Labeo's approach is accepted as authentic, it shows that not only the knowing seller is liable, but also the unknowing one.

Contrary to the previously discussed narrative, there is evidence highlighting the necessity of buyer vigilance in the sale, especially regarding characteristics that could easily be noticed. In this sense, Gaius's contemporary Florentinus emphasized in D. 18,1,43pr. (*Florentinus libro 8 Institutionum*)[58] that the seller's claims will not lead to his liability if the content is obvious. He uses three examples; first, the seller's claim that a slave is handsome imposes no liability, since it is a characteristic that is evident, *palam appareant.* Second, the seller's claim that a house is well built is also detectable and hence does not lead to the seller's liability. Lastly, the claim that a slave is an artisan, making the seller liable since he would fetch a higher price because of such statement, is as such not easily detectable. Therefore, sellers are not liable for characteristics that can be easily observed but are liable for those that are hidden. Although the genuineness of the source has been debated, recent literature considers it original, at least in its core elements.[59] If such approach were applied to

56 Arangio-Ruiz, *La compravendita in diritto romano*, 241-242; Tony Honoré, "The History of the Aedilitian Actions from Roman to Roman-Dutch Law," in *Studies in the Roman Law of Sale,* ed. David Daube (Oxford: Clarendon Press, 1959), 137-140; Heinrich Honsell, *Quod interest in bonae-fidei-iudicium* (München: Beck, 1969), 83-84; Kaser, *Das römische Privatrecht*, 558; Nunzia Donadio, "Garanzia per i vizi della cosa e responsabilità contrattuale," in *Kaufen nach Römischem Recht*, eds. Eva Jakab, and Wolfgang Ernst (Berlin: Springer, 2008), 67.

57 Honoré, *The History of the Aedilitian Actions*, 144; Zimmermann, *The Law of Obligations,* 320 and 334; Robin Evans-Jones, and Geoffrey MacCormack, "Obligations," in *Companion to Justinian's Institutes,* ed. Ernest Metzger (Ithaca: Cornell University Press, 1999), 158. *Cf.* Max Kaser, "Periculum locatoris," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 74, no. 1 (1957): 165-166.

58 *Ea quae commendandi causa in venditionibus dicuntur, si palam appareant, venditorem non obligant, veluti si dicat servum speciosum, domum bene aedificatam: at si dixerit hominem litteratum vel artificem, praestare debet: nam hoc ipso pluris vendit.*

59 Stein, *Fault in the Formation of Contract,* 31-32; Barry Nicholas, "Dicta Promissave," in *Studies in the Roman Law of Sale,* ed. David Daube (Oxford: Clarendon Press, 1959), 98-99; Jakab, *Praedicere und cavere beim Marktkauf,* 133; Manna, *Actio redhibitoria e responsabilità*,

the seller of the immovable property referred to in D. 18,6,9, it seems that the seller would not be liable, and the buyer should blame himself for failing to reinspect the immovable property before concluding the contract.

Florentinus's approach was not endorsed by Gaius. In addition, the most appropriate confirmation of Gaius's pro-buyer approach to the sale of immovable property can be seen in the same tenth book of the commentaries on the provincial edict, which also contains the case involving the uprooted trees:

> D. 18,1,35,8 (*Gaius libro 10 ad edictum provinciale*) *Si quis in vendendo praedio confinem celaverit, quem emptor si audisset, empturus non esset, teneri venditorem.*[60]

The jurist claims that if a person sells an immovable property and hides the name of the owner of the neighboring property, he will be liable under the sales contract if such information would have discouraged the buyer from making the purchase. Mackintosh, Weiß and de Zulueta pointed out that the source deals with a troublesome neighbor (*unbequemer Nachbar* in German).[61] Daube thoroughly analyzed the text and argued that Gaius does not refer to a bad neighbor, but simply a neighbor, leading Daube to conclude that a neighbor is actually a legal defect in terms of the size of the property.[62] The buyer would realize the size of the bought immovable property upon delivery, and the legal action against the seller would be *actio empti.* Such a peculiar theory was accepted by Stein, who pointed out that the seller's concealment of the neighboring land during the buyer's inspection created the illusion of a larger property.[63] This interpretation points again to the *actio de modo agri,*[64] a thesis that seems implausible based on the source text. In addition, the theory relies on the English translation suggesting that the seller concealed the presence of the owner, as translated by Daube.[65] However, Watson's translation seems more accurate,[66] as it indicates that the name of the owner is concealed and not his presence.

In recent literature, Pennitz briefly commented on the source, claiming that the buyer has a right to claim damages because the seller breached the obligation

125; Nunzia Donadio, "Azioni edilizie e interdipendenza delle obbligazioni nell'emptio venditio. Il problema di un giusto equilibrio tra le prestazioni delle parti," in *La compravendita e l'interdipendenza delle obbligazioni nel diritto romano*, *vol.* 2, ed. Luigi Garafolo (Padova: Cedam, 2007), 491-492.

60 Gaius, *On the Provincial Edict, Book 10*: *If a person selling land should conceal the name of the owner of neighboring land, awareness of which would have deterred the purchaser from buying, he will be liable*. *Trans. cit.* Watson, *The Digest of Justinian, vol. 2*, 61.

61 Mackintosh, *The Roman Law of Slave*, 80; Egon Weiß, "Peregrinische Manzipationsakte," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 37, no. 1 (1916): 174; Francis de Zulueta, *Roman Law of Sale* (Oxford: Clarendon Press, 1945), 48.

62 David Daube, "Three Notes on Digest 18,1, Conclusion of Sale," *Law Quarterly Review* 73 (1957): 380.

63 Stein, *Fault in the Formation of Contract,* 14.

64 See the literature cited under footnotes 42-44.

65 Daube, "Three Notes on Digest 18,1, Conclusion of Sale", 379.

66 Note 60.

to provide information.[67] As discussed before, the seller's obligation to disclose information does not seem to be a general duty. Zimmerman stated that the seller was liable only when he fraudulently failed to disclose a defect known to him.[68] By such approach, the name of the neighbor would qualify as a defect, which seems unlikely.

The source points to several conclusions. Gaius used the same principle as in D. 18,6,9: the knowledge of certain information that could potentially be relevant to the buyer and its concealment leads to the liability of the seller. The similarity lies in the fact that the seller's concealment occurs before the contract is concluded, but the contract is concluded soon after that concealment. While knowing the identity of the neighbor is unlikely to be essential, as it does not affect the object of the sale, it remains relevant to the buyer. More importantly, it could influence the price if the neighbor is troublesome. Although such information may not constitute a defect, its concealment results in the seller's liability, mainly because such behavior is not in line with the *bona fide* principle. It is not a defect but rather relevant, though not indispensable, information for the buyer. The seller is not obligated to inform who the neighbor is because of the obligation to provide information, but because such concealment would be *mala fides* in this specific example.

5 CONCLUSION

This article demonstrated that the buyer of the immovable property in classical Roman law had an additional form of legal protection. The situation described by Gaius in D. 18,6,9 is clear: the trees were not part of the immovable property at the moment of the conclusion of the contract, since they were uprooted by the wind after the inspection but before the conclusion of the contract. Therefore, they were not part of the sale. Gaius allowed an action for reimbursement if the seller knew about this but failed to inform the buyer. However, his concise description lacks information, such as the number of trees, whether the trees the buyer's primary interest or the land itself, and how much the trees influenced the agreed price.

Gaius's solution supports the validity of the contract, as he did not say that the contract could be void due to the absence of the trees, unlike Paul and Pomponius in D. 18,1,57-58. In contrast to the *periculum est emptoris* rule outlined in the Inst. 3,23, his approach improves the buyer's position. Additionally, *periculum est emptoris* applies when the contract is concluded and something happens to the object before delivery. In Gaius's solution, the event occurred before the conclusion of the contact.

It can be concluded that Gaius regarded the non-disclosure of information as comparable to a material defect. In this way, he adopted an approach comparable to Julian's in D. 19,1,13pr. concerning the sale of unsound timber. For both jurists, the main idea was to protect the weaker party to the contract by addressing the dishonest concealment of relevant information regarding the purchased goods. Conversely, such trees might be seen as obvious or visible characteristics, as described by Florentinus in D. 18,1,43pr. If the proposed analogy is accepted, the seller would not be liable.

67 Pennitz, *Das Periculum rei venditae*, 419.
68 Zimmermann, *The Law of Obligations,* 309.

Gaius did not apply such logic.

Gaius recognized that the standard rules governing sales would be harsh on the buyer, and added that if the seller knew about the uprooted trees and failed to inform the buyer, he should at least pay for the trees. His action, or lack thereof, is *contra bonos mores*. The seller's deceitful behavior is the reason why he should reimburse the buyer. Gaius reaffirmed this principle in D. 18,1,35,8, where he clarified that the seller is not obligated to inform who the neighbor is because of the (assumed) obligation to provide information but because such a concealment would be *mala fides*.

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Sažetak

D. 18,6,9 (*GAIUS LIBRO 10 AD EDICTUM PROVINCIALE*) – ZAŠTO BI PRODAVATELJ TREBAO PLATITI NAKNADU ZA DRVEĆE?

U članku se obrađuje koncept odgovornosti prodavatelja nekretnine za prešućivanje relevantnih informacija kupcu prije sklapanja kupoprodajnog ugovora u klasičnom rimskom pravu. Glavni izvor koji služi kao osnova za razradu jest D. 18,6,9 (*Gaius libro 10 ad edictum provinciale*), u kojem vjetar ruši stabla na nekretnini koja je predmet prodaje. Prodavatelj je bio upoznat s događajem, ali o tome nije obavijestio kupca. Gaj tvrdi kako bi prodavatelj trebao nadoknaditi štetu kupcu, čime se ukazuje na dodatnu pravnu zaštitu kupčeva položaja. Teza je potkrijepljena analizom drugih izvora koji se bave kupoprodajom nekretnina na kojima je vjetar srušio drveće, odnosno slučajevima u kojima prodavatelj nije priopćio kupcu relevantne informacije. Slijedom navedenoga, cilj je članka istražiti odgovornost prodavatelja nekretnine za skriveni nedostatak kako bi se procijenilo definira li maksima *caveat emptor* pravila upravljanja rizikom vezane uz prikrivene informacije o događajima koji su se dogodili tijekom predugovornih pregovora u kupoprodaji nekretnina u klasičnom rimskom pravu.

***Ključne riječi**:* emptio venditio*; materijalni nedostatak; nekretnina;* arbores vento*; rimsko pravo.*

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