

RECONSTRUCTING THE JURIST'S REASONING:  
'BONA FIDES' AND 'SYNALLAGMA' IN LABEO (D. 19, 1, 50)

di

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ABSTRACT: *Labeo's text shows bona fides as a normative foundation of a synallagmatic (mutual) obligation arising from the contract of sale. In the last few years the text has been treated from both a political and ideological perspective, while it seems to possess an outstanding dogmatic structure that can be revealed through the analysis of the jurist's argument as dependent on the legal construction of interdependent contractual obligations (synallagma). The public act (lex publica) liberating the buyer from his duty to pay the price could only be a statute derogating from all monetary debts (lex de novis tabulis). Since such lex is not known at the time of Labeo, the scholastic character of the case under discussion is supposed. The obligation of the buyer should have been previously transformed (novatio) through a special stipulation to become an independent monetary obligation that could be derogated by the lex publica. In general, the effect that such a stipulation should have on the mutual obligations of the parties became the recurrent issue of Roman jurists' practical decisions since the second century BC. According to Varro, whose texts reflect the situation of the third and second century BC, the stipulated monetary obligation of the price did not substitute the contractual obligation of the buyer, but existed along with it. From the first century BC, the texts written by Alfenus are ambiguous. Later on, the novatory effect of the stipulation on the price is beyond doubt. During the second century AD Julian tries to treat the monetary obligation of the buyer in line with the usual mutually conditioned obligation based upon the contract of sale. It seems that Julian is following the idea advanced by Labeo in D. 19.1.50 who defended the seller from the claim of the buyer relying on the mutual dependence of the obligations of the parties notwithstanding a previous novatio and consequent violation of the synallagma. To sustain such an approach Labeo appeals to the bona fides principle governing the synallagmatic contracts. Being simply an element of the judicial formula of the contractual claim, bona fides in Labeo's decision becomes the material basis of the relationship and legal principle governing contractual obligations.*

KEY WORDS: *Bona fides, synallagma, periculum, Labeo, contract, obligation, risk, sale, legal reasoning, jurist, Roman law, civil law.*

Lab., 4 post. a Iav. epit., D. 19, 1, 50:

*Bona fides non patitur, ut, cum emptor alicuius legis beneficio pecuniam rei venditae debere desisset antequam res ei tradatur, venditor tradere compell[e]tur et re sua carere[t]. possessione autem tradita futurum est, ut rem venditor aequè amitteret, utpote cum petenti eam rem <...> petitor ei neque vendidisset neque tradidisset.*

It is one of the most known texts of the Roman jurisprudence. The first phrase that appeals directly to *bona fides* as normative principle governing the structure of mutual contractual obligations became one of the sources of far-reaching generalization. The text is unique in various respects. It shows that the founder of the concept of contract as synallagmatic obligation (*ultra citroque obligatio* – D. 50, 16, 19) Antistius Labeo, jurist of the late I BC – early I AD, advanced *bona fides* principle as responsible for the

mutual rights and duties of the parties to the contract of sale<sup>1</sup>. It advances and analyses the composition of contractual obligations in case when the impossibility to perform affects the buyer, unlike more expected and diffused case when it is the seller who is unexpectedly and innocently freed from his duty. In such cases the rules on force majeure (*periculum*) are operative, not those on liability. In the case discussed by Labeo the buyer was freed from his obligation to pay the purchase price by a *lex publica*<sup>2</sup>. For the buyer that means that from that moment he does not owe anything to the counterparty, while the seller remains obliged and risks to lose the thing sold without compensation, as he has no claim against the buyer to demand the price. If the thing sold has been delivered to the buyer, the seller has no means to restore it, because the delivery was effectuated according to the terms of the contract. If the thing was still in the hands of the seller, he was facing a bad perspective to lose it, since the liberation of the buyer from his duty has not affected the obligation of the seller.

In the modern doctrine (born under the impact of Labeo's texts) the synallagma as mutuality of contractual obligations is viewed in three inter-related implications: (1) genetic, (2) functional, and (3) conditional<sup>3</sup>. Genetically (1) synallagma refers to the necessity of the obligations to rise mutually, i.e. if one of obligations of the parties cannot arise from the beginning, the contract does not arise at all and is null. Thus, if the goods does not exist at the moment of conclusion of sale and the seller is free

<sup>1</sup> The presence of *bona fides* in the structure of contractual obligations rising from *emptio venditio*, *locatio conductio* or *societas* is usually deduced from the words of Gaius (G. Grosso, *Il sistema romano dei contratti*, 3 ed., Torino, 1965, 203). Gai., 3, 167 (= D. 44, 7, 2, 3): *Item in his contractibus alter alteri obligatur de eo, quod alterum alteri ex bono et aequo praestare oportet...*; Gai., 3, 155: *... et invicem alter alteri tenebimur in id, quod vel me tibi vel te mihi bona fide praestare oportet*. However, here *bona fides* gets out from formula of the claim from respective contract ("*tenebimur*"), like in the following context: *...actiones..., quibus invicem experiri possunt de eo, quod alterum alteri ex bona fide praestare oportet* (Gai., 3 *aureor.*, D. 44, 7, 5 pr). *Bona fides* in the judicial formula refers to the legal criterion of the content of liability of the defendant. In Labeo's text *bona fides* is determining the structure of contract governing the material relationship of the parties (A. Pernice, *Marcus Antistius Labeo. Römisches Privatrecht im ersten Jahrhundert der Kaiserzeit*, I. Halle, 1873, 470; F. Gallo, «*Synallagma*» e «*conventio*» nel contratto. *Ricerche degli archetipi della categoria contrattuale e spunti per la revisione di impostazioni moderne. Corso di diritto romano*, I. Torino, 1992, 71 sqq).

<sup>2</sup> The public nature of the act is easily deduced from its material effect (*debere desisset*), as well as from the term "*beneficium*", which is applied to the *lex publica* only, for instance: "*beneficium legis Falcidiae*" (D. 29, 4, 18, 1; 35, 2, 77). In the texts by Labeo which came down to us the word "*lex*" is mostly used to indicate the covenant accompanying a contract (all of them taken from the l. 4 of the epitome by Javolenus, like our text), but these covenants cannot lead to the unilateral liberation from contractual obligation. They can only dictate the way and method of performance, like it is done in the case discussed in Lab. 4 post. a Iav. epit., D. 18, 1, 78, 2: *Qui fundum ea lege emerat, ut soluta pecunia traderetur ei possessio ...*, where the first turn of the performance by the buyer is previewed.

<sup>3</sup> The categories have been elaborated by Bechmann in a study on Roman sale (A. Bechmann, *Der Kauf nach gemeinem Recht*, I, *Geschichte des Kaufs im römischen Recht*, Erlangen, 1876, 540 sqq).

from his duty due to the initial impossibility to perform, the buyer is not obliged to pay the price (notwithstanding it is always possible), and the contract is totally invalid. Functionally (2) synallagma does not permit to one party to demand the performance from the other party, if the first party itself is not ready to perform or at least to secure the performance due. That is each of the parties is entitled to retain its performance if the other does not act in mutual accord. Thus, the seller could advance an exception to the demand on delivery from the buyer indicating that the price has not been paid and vice versa the buyer can refuse to pay until the goods have not been delivered or secured through lien or warranty (D. 19, 1, 13, 8; 18, 4, 22; 21, 1, 31, 8); the lender cannot demand payment from the lessee until the latter cannot use the thing leased; the contractor cannot demand payment for his work until the work has not been approved and so on.

Finally, conditionally (3) synallagma means that the subsequent impossibility to perform affecting one party (for instance, the leased thing perished due to the force majeure) liberates the other party from the counter-performance (in our example – the lessee is not obliged any more to pay as he is unable to use the thing leased according to the terms of the contract). In this case, it is the same principle operating that governs the rise of the mutual obligations of the parties: the duty of one party can exist (as well as arise) only if both obligations are possible. Any mutual obligation exists under condition of demise in case of subsequent impossibility of another obligation (Art. 1184 of the French Civil Code uses the term “condition résolutoire”).

Analytical separation of genetic, functional and conditional aspects of mutuality should not obscure their deep and indissoluble interdependence. Some authors treat the conditional synallagma as a kind of functional<sup>4</sup>, and functional synallagma as a realization of genetic<sup>5</sup>. Still conditional synallagma should be better seen as a continuation of genetic, for it refers to the very existence of contractual relationship that cannot arise other than on both sides and continue to exist on both sides only. The very existence of each obligation is conditioned by the existence of another<sup>6</sup>. But all these analytics are not eloquent of the substance of the phenomenon. The

<sup>4</sup> H.P. Benöhr, *Das sogenannte Synallagma in den Konsensualkontrakten des klassischen römischen Rechts*. Hamburg, 1965, 3; 71 sq; 104 sq. The understanding of conditional synallagma is hastened by the fact that it was recognized only later and in the context of functional aspect of mutuality referred to the stage of performance. On the problem see: J. Gernhuber, *Das Schuldverhältnis*. Tübingen, 1989, 317 sq.

<sup>5</sup> G. Grosso, *Il sistema*, 203.

<sup>6</sup> Mutual conditioning of obligations does not affect the duties of the parties (Schuld) as it is condition subsequent which regards resolution and not establishment of the obligations (unlike the views expressed by A. Blomeyer, *Studien zur Bedingungslehre, 1: Über bedingte Verpflichtungsgeschäfte*, Berlin, 1939, 105.

very idea of synallagma covers the internal nexus between the obligations at all stages of development of the relationship between the parties: as the moment of nascence, so the further enactment and realization. One is impossible without another, so that it is quite natural to see it as one mutual obligation – *ultra citroque obligatio*. In this perspective, the subsequent impossibility to perform could and should be viewed as a challenge to structural mutuality of the contract.

Generally speaking, impossibility to perform liberates the debtor, if it is due to the force majeure. The rule is applicable only to the obligations that can be terminated through the supervening impossibility, while it is excluded as for the monetary obligations and generic obligations, when the object can be always substituted by the other of the same volume (*genera*) and, thus, formally, cannot perish – *genus numquam perit*. If applied to synallagmatic contracts that rule means, that if one of the duties is monetary (like that of the buyer or that of the lessee) the rule of genetic or conditional synallagma acts unilaterally: it is only one of the obligations (that of the seller or that of the lessor) is concerned, while the other remains always possible<sup>7</sup>.

In the case discussed in our text the subsequent impossibility – unlike general distribution of the risk – affects the obligation of the buyer. His obligation is terminated due to the *lex publica*. The public act here is treated as force majeure, what makes the debtor (the buyer) not liable for the impossibility to perform. The expectations of the buyer himself are regarded from the point of general principles (*bona fides*): if the seller has not performed, the buyer (as liberated from his duty) cannot demand the delivery; if the seller has already delivered the object, then he is not entitled to dismiss and to take the object back<sup>8</sup>. As he has lost his right to demand the price, he remains unsatisfied.

The last situation is discussed in the last and corrupted part of the text that takes into account an eventual vindication claim from the part of the seller. The buyer could have replicate that the thing had been given to him on the ground of the valid contract of sale, and it is thus not subjected to unilateral restitution. The vindication claim is a claim of the owner to the possessor of the thing. The claim is possible only when there is no obligation relationship between the parties. That means that when there is any, the vindication claim is denied. In our case the very attempt of the seller to vindicate should be justified by the fact that there was no contract anymore. The seller is trying either to ignore the previous obligation, or to regard it as dissolved due to the liberation of the buyer from his duty to pay. The excep-

<sup>7</sup> If the goods is generic thing then the subsequent impossibility to perform is equally excluded.

<sup>8</sup> R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*. Cape Town, 1990, 800.

tion advanced by the counterparty, however, directly indicates at the fact that the thing has been delivered on the ground of a valid contract of sale and cannot be demanded back. The contract becomes an insuperable obstacle for the seller, whose demand equals to a refusal from his own previous acting in accordance with his obligation (*venire contra factum proprium*).

The indication from the part of the seller would have been impossible, if he had transferred the ownership to the buyer. The very fact that the exception could be advanced to the vindication means that the claim by itself was valid and the seller remained owner of the thing. One should suppose that the thing sold was *res mancipi* (a land plot), while no relevant real act, such as *mancipatio*, had been undertaken. The plain tradition created on the part of the buyer a qualified possession (*pro emptore*), but before the prescription term expires he would not become owner. Since ownership remained with the seller, the latter is formally entitled to vindicate the thing (land) and to abuse his right against the buyer. Such a claim would be however rebutted by the defendant with objection that the thing had been sold and delivered by the claimant himself (or on his behalf) – *exceptio rei venditae et traditae*.

The reconstruction of this part of the text is problematic. In its actual state the text is deprived of sense, as “*autem*” introduces a hypothesis that leads to the decision that should differ from the pervious one, whereas “*aeque*” (“*rem venditor aeque amitteret*”), contrary to that, equals the deduction to what has been implied in the preceding part. The lacuna after the words “*petenti eam rem*” does not contribute to the understanding. Mommsen tried to save “*aeque*”, inserting <*et pecuniam*>, as if the text equated between them not two decisions on different hypotheses, but the eventual consequences of the second hypothesis: the seller is supposedly losing the thing as well as the money<sup>9</sup>.

*Possessione autem tradita futurum est, ut rem <et pecuniam> venditor aeque amitteret, utpote cum petenti eam rem <emptor exceptionem rei venditae et traditae opponere possit nec perinde sit quasi eam rem> petitor ei neque vendidisset neque tradidisset.*

It has been objected to this conjecture<sup>10</sup> that the seller does not loose (*amittit*) the price, but simply does not get it. It is impossible to loose

<sup>9</sup> On earlier corrections of *aeque* (in *equidem*, *neque*, etc.) see: H.P. Benöhr, *Das sogenannte Synallagma*, 84 nt. 31.

<sup>10</sup> Ph. Meylan, *La loi 23 Dig. 46,4 et la notion de bilatéralité du contrat de vente chez Labeon*, in *Studi in onore di Riccobono*, IV. Palermo, 1936, 307; F. De Visscher, *Labeon et les ventes forcées de terres aux veterans des guerres civiles*, in *Études de droit romain publique et privé*, III. Milano: Giuffrè, 1966, 294; F. Gallo, «*Synallagma*» e «*conventio*», 217 nt. 148.

that what you have not ever got<sup>11</sup>. It is known, however, that in Roman legal science it is usually said about the succession that it has been lost (*amittere hereditatem* – Gai., 3, 212), though the succession that has not been taken is only expected and strictly speaking cannot be lost. Benöhr accepts Mommsen's emendation referring *<et pecuniam> aequae amitteret* to the consequences of *beneficium legis*, so that “*aequae*” establishes the similarity between the situations before and after the delivery<sup>12</sup>. Gallo<sup>13</sup> proposed to treat “*aequae*” in the sense “according to justice” (from “*aequum*”), the idea criticized by Talamanca<sup>14</sup>. Gallo turned back to the issue, insisting on his understanding<sup>15</sup>. He was appealing to the texts by Labeo and insisted that there “*aequae*” usually meant “justly”. We have no place here to analyze all the texts, it would be enough to assess only one to state that usual meaning of “*aequae*” in the texts by Labeo is “the same”, “as usual”<sup>16</sup>.

Other contradiction could be seen between the exception to the vindication claim and the negation of sale and delivery: *exceptio rei venditae et traditae* implies positive fact of sale and delivery, so that two negations result inappropriate. In the most ancient manuscripts<sup>17</sup> the contradiction is expressed apparently:

*Possessione autem tradita futurum est, ut rem venditor aequae amitteret, utpote cum petenti eam rem emptor exceptionem rei venditae et traditae obiciat ut perinde habeatur ac si petitor ei neque vendidisset neque tradidisset.*

<sup>11</sup> It is to point out that the text of Basilica that inspired Mommsen (Mo. I, 557) does not attach one and the same verb both to the price and to the thing, but draws a distinction saying that the seller cannot claim the price and loses the thing.

<sup>12</sup> H.P. Benöhr, *Das sogenannte Synallagma*, 83.

<sup>13</sup> F. Gallo, «*Synallagma*» e «*conventio*», 215 nt. 144; 217 nt. 148.

<sup>14</sup> M. Talamanca, *Lex ed interpretatio in Lab. 4 post. a Iav. epit., D. 19.1.50*, in *Nozione, formazione e applicazione del diritto dall'età romana alle esperienze moderne. Ricerche dedicate al Professor Filippo Gallo*. Vol. 2. Napoli, 1997, 365 sqq.

<sup>15</sup> F. Gallo, *A proposito di 'aequae' in D. 19.1.50: un giudizio con comparazione sottesa*, in *SDHI*, 66, 2000, 1 sqq.

<sup>16</sup> Lab. 4 post. epit. a Iav., D. 19, 2, 28: “*Quod si domi habitatione conductor aequae usus fuisset, praestaturum etiam eius domus mercedem, quae vitium fecisset, deberi putat*”. The subject is Labeo himself. Facing the situation when the lesser has to repair the residence what could deprive the lessee from the possibility to live in the house, he decides that if the lessee still would live in the leased premises, then he is obliged to pay for his living. The only possible meaning of “*aequae*” here is “the same”, “as previously”.

<sup>17</sup> The manuscripts of XI-XII sec. (Mo. XXXXVIII: FP – *Parisinae*, V – *Vaticanae*, U – *bibl. Univers. Patavinae*) fill the lacuna indicating directly at *exceptio rei venditae et traditae*: “*cum petenti eam rem <emptor exceptionem rei venditae et traditae obiciat ut perinde habeatur ac si> petitor neque vendidisset neque tradidisset*” (V gives: *hoc perinde erit*). The sense is lost due to the negative form of the verbs, for the fact was the opposite: the thing was sold and delivered to the buyer (defendant). Benöhr (H.P. Benöhr, *Das sogenannte Synallagma*, 85) justly observes that according to this reconstruction the exception of the buyer is deemed to fail.

It is impossible at the same time to negate and to affirm the sale and delivery<sup>18</sup>. That is why Mommsen tried to insert one negation more <*nec perinde sit*> (as we have seen earlier):

*Possessione autem tradita futurum est, ut rem <et pecuniam> venditor aequè amitteret, utpote cum petenti eam rem <emptor exceptionem rei venditae et traditae opponere possit nec perinde sit quasi eam rem> petitor ei neque vendidisset neque tradidisset.*

Mommsen reaches the desired sense of the text and resolves the opposition (implied by “*autem*”) to the decision in favour of the seller in the first case, but misses the link between the exception and the explication of decision, so that the end of the phrase results in apparent pleonasm. It is not a reconstruction, but a mechanical composition that assures the desired sense of the text using the elements from the Justinian redaction. Roman jurists paid their most attention to the procedural means. They were asked (*consultation*) on the forms of claims and formulated their professional answers (*responsa*) in procedural terms. This approach was totally alien to the postclassical and Justinian authors who were, thus, inclined to perceive the wording of the classical texts as plain description of the case. Not being sensitive to the quotations from the *formulas* of claims they frequently deprived the classical texts from quotations and other details regarding the procedural means adjusting them to the narrative style.

*Exceptio rei venditae et traditae* according to Lenel ran: “*Si non A(ulus) A(gerius) fundum q(ua) d(e) a(gitur) N(umerio) N(egidio) vendidit et tradidit*”<sup>19</sup>. Florentina does not mention the *exceptio*, but contains the last words of this formulation: “... *utpote cum petenti eam rem <...> petitor ei neque vendidisset neque tradidisset*”. It is logic to see the lacuna not after the words “*eam rem*”, but earlier, immediately after the words “*cum petenti*”. Labeo just reproduced the wording of the *exceptio rei venditae et traditae* in the indirect speech: “... *cum petenti <emptor exceptionem obiciat SI> EAM REM PETITOR EI NEQUE VENDIDISSET NEQUE TRADIDISSET*”<sup>20</sup>. The facts of *venditio* (contract) and *traditio* (delivery)

<sup>18</sup> The same contradiction remains present in the reconstruction accepted by Lenel (*Pal.* I, 309): 202. [Labeo]. *Bona fides non patitur, ut, cum emptor alicuius legis beneficio pecuniam rei venditae debere desisset antequam res ei tradatur, venditor tradere compelleretur et re sua careret. possessione autem tradita futurum est, ut rem venditor aequè amitteret, utpote cum petenti eam rem petitor ei neque vendidisset neque tradidisset.*

<sup>19</sup> O. Lenel, *EP*, Leipzig, 1927, 511. One can see a quotation of similar formula in B D. 6, 2, 14: “*si non auctor meus ex voluntate tua vendidit*” – when defendant opposes to the vindication the fact that the plaintiff himself has initiated the alienation resulting in the present possession *pro emptore*.

<sup>20</sup> In the Italian edition of the Digest P. Bonfante advanced the same approach to the reconstruction of the text: “... *utpote cum petenti eam rem emptor exceptionem opponere possit: at si eam rem pe-*

formed the condition of absolution of the defendant. Having proved these facts the victorious defendant rebutted the vindication and remained in possession of the thing bought. Now, when the text is free from pleonasm and the logic of the last part is restored, we can face the contradiction between “*autem*” and “*aeque*”.

Bechmann<sup>21</sup> treated “*autem*” not in terms of opposition, but in terms of development of the argument, as if there were no contradiction between the decisions in the last and in the first part of the text. The *bona fides* does not allow that the vendor could lose the thing sold after having lost the right to obtain the price: otherwise in the case if the thing had been delivered it would result (“*futurum erit*” – “es würde eintreten”<sup>22</sup>), that the claim of the vendor would be rebutted by the *exceptio rei venditiae et traditae*. However, according to Bechmann, such situation was excluded, as the termination of the contract of sale (due to the liberation of the buyer) would make the exception referring to the fact of sale inapplicable, and the vendor would be able to vindicate the thing without obstacles. In such interpretation “*aeque*” would refer to the eventual consequences of the public statute liberating the buyer from the obligation to pay the price, while the *bona fides* terminates the contract of sale and eliminates these unwanted consequences.

Such reading is impossible for both grammatical and legal reasons. Grammatically, the words “*futurum est*” cannot be seen as hypothetical condition (*casus irrealis*) even if corrected in *futurum erit* or *futurum esset*: this phrase forms subordinate clause (apodosis) dependant from the principle clause (protasis) implied in the words “*possessione autem tradita*”, and this principle clause asserts the indicative mood of the sentence (*casus realis*)<sup>23</sup>. Legally – the alleged termination of sale (due to the liberation of one of the parties) cannot act retrospectively affecting the transfer. The ground for delivery (*causa traditionis*), if effectuated, persists as historical fact that cannot be eliminated with the termination of the contract. That means that the objection of the buyer indicating at the fact that the thing has been bought and delivered on this ground remains true and valid.

Bechmann admits the traditional interpretation as well, stating that his theory of synallagma can be easily coordinated with both readings. Traditional interpretation juxtaposes two decisions: one before the delivery, when *bona fides* protects the seller, and another after the delivery, when

*titor ei neque vendidisset neque tradidisset*”. Here the words “*eam rem*” are repeated twice that could explain the further mistake of the copyist, but our version is more laconic requiring the emendation of four words only.

<sup>21</sup> A. Bechmann, *Der Kauf*, 599-600, nt. 2.

<sup>22</sup> It should be better written “*futurum esset*”.

<sup>23</sup> M. Talamanca, *Lex ed interpretatio*, 361 nt. 30.



the vindication of the seller fails and he loses both the thing and the money (in this case the integration <et pecuniam> becomes necessary to save “*aeque*”). Still in the second case, the mutuality of performance is violated<sup>24</sup>. The principle of synallagma implies that the liberation of one party should terminate the obligation of another, so that the seller after delivery is entitled to claim the thing back, as its being in the hands of the buyer became unjustified. In modern law the case would be solved in this way. The contract giving rise to mutual obligations is deemed to be concluded under condition subsequent of validity of both obligations<sup>25</sup>. In Roman law however such solution was excluded: the claims from the contract could not be used for the termination of the contract or for the restitution in case of frustration, but only for claiming damages according to the contract (*ex contractu*). In other words, if the buyer does not pay the price, the seller cannot demise and restore the thing, but can only pursue his interest implied in the contract and demand damages. In modern law the possibility to restore the thing sold is a consequence of termination of the contract due to its substantial violation: in some jurisdictions the thing can be claimed back as a consequence of termination, in others – as unjust enrichment (since the contractual relationship is over and contractual claim is regarded inoperative). From this point of view one can say that Roman law does not permit to terminate the contract on the ground of substantial violation (refusal of one party to perform). Fritz Schulz called this principle an “Iron Rule” of Roman law<sup>26</sup>.

Labeo however does not even take into account an eventual attempt from the side of the seller to claim the thing back on the contractual ground, though the delivery remained uncompensated in violation of the idea of mutuality governed by the *bona fides*. He turns instead to the claim *in rem* that is apparently out of place and has no serious perspectives. The jurist does not discuss the case in terms of conditional synallagma that would imply the termination of both obligations. His reasoning is centered on the rules of functional synallagma that exclude the possibility for the buyer to demand the thing in the context when his own obligation has been terminated occasionally. That means that the problem of risk and hypothetical development from the eventual *periculum debitoris* to the dogmatically more correct *periculum creditoris*<sup>27</sup> remains totally alien

<sup>24</sup> G. Grosso, *Il sistema*, 213.

<sup>25</sup> R. Zimmermann, *The Law of Obligations*, 801 sq.

<sup>26</sup> F. Schulz, *Classical Roman Law*, Oxford, 1951, 532.

<sup>27</sup> Provera attracts the text in support of the idea of gradual development of the notion of risk and synallagmatic obligations in the Roman legal science (G. Provera, *Sul problema del rischio contrattuale nel diritto romano*, in *Studi in onore di Emilio Betti*. Vol. 3. Milano, 1962, 701 sq). Gallo indicates that the contradiction between absolution of the seller envisaged by Labeo and the principle *periculum*

to our text, as well as conditional synallagma. Labeo regards the claim of the buyer as valid, and that means that the correspondent obligation of the seller persists notwithstanding the liberation of his counterparty. The claim of the buyer is barred on the ground that his own duty has not been performed, but not on those that on the termination of the obligation of one party the counter obligation of another should terminate as well.

Since on the termination of the obligation of one party the obligation of another is treated as valid, then even the performance of one obligation before the occasional liberation of the counterparty should permit to discuss the eventual contractual claim for restitution and to treat the situation in contractual terms first, but not to turn on to the proprietary means, like it is in Labeo's text at present. It seems that this inconsistency gives a chance to justify the presence of "*aeque*" and to restore the logics of the second part of the text. In original state of the text the jurist could first deny *actio venditi* to the seller for the restitution of the thing and only then discuss the proprietary means – *vindicatio* and *exceptio rei venditae et traditae*. Then "*aeque*" would be a trace of this secondary approach: the seller would "the same" loose the thing, even if he unjustly will try to bring in the vindication (since there were no *mancipatio* and he formally remained owner after *traditio*). So, if one admits that Labeo dealt not only with inapplicability of the vindication, but discussed the contractual means as well, then one can reach more satisfactory coordination of all conjunctions present in the text.

It is usually held that the texts by Labeo that came down to us in the epitome of Javolenus evaded usual distortion in IV-V centuries, and that the compilers used the authentic copy<sup>28</sup>. The question then arises why the compilers not only "corrected" the text in the part that mentioned *mancipatio*, but cancelled even the part where – as supposed – contractual means on the side of the vendor were discussed and rejected? When the words from the *formula* of exception have been accepted as a description of the case, the denial of the contract ("*petitor ei neque vendidisset*") in the end of the text resulted in conflict with the conclusion on inapplicability of the contractual claim that could have been understood by the compiler as a denial of the contract itself. It might have seemed to the compiler that the same was repeated twice, and he condensed the text leaving "*aeque*" as the only trace of the previous discussion.

The key question in understanding of Labeo's reasoning regards the content of the *lex publica* that liberated the buyer from his duty to pay the price.

*creditoris* implies the absolute dominance of the dogmatic scheme that is proper to modern lawyers, but was totally alien to Roman jurists (F. Gallo, «*Sinallagma*» e «*conventio*», 220).

<sup>28</sup>M. Talamanca, *Lex ed interpretatio*, 387, nt. 124.

Today the most popular explanation follows the idea of F. De Visscher<sup>29</sup>, who connected it with the vast confiscation of lands laid by Octavian on 18 biggest Italian cities to satisfy the veterans in 42 BC. Appian (*App.*, B.C., 5, 12) indicates that the veterans had no means to pay the price and the act was met with resentment. Dio (*Dio Cass.*, 47, 17) testifies that the fear of new confiscations ruined the land market, the main reason being that the land was sold to the veterans at the lowest price. The veterans sometimes directly occupied the lands and gained the permission to keep the lands occupied by them and their families without any consideration (*ibid.*, 48, 9). According to De Visscher, Labeo's decision was issued on demand of the Emperor later, when the situation in Italy became more stable with the conclusion of peace in Brundisium (36 BC). Labeo's decision is supposed to fix the status quo, as it favours the position of actual possessor: if the seller has not transferred the land to the buyer, he is not forced to do it, while in the case when the buyer has got possession, the attempt of the seller to restore the land will have no success. The intention of the jurist was to avoid an eventual wave of judicial cases that would menace the whole social order.

Such hypothesis comes across some obvious objections. It is to say that Octavian at this period was not yet August nor Princeps. It is a pure conjecture to suppose that he could stimulate a jurist to emanate an opinion. Labeo himself was at this time too young to advance any relevant opinion. De Visscher admits that Labeo was influenced by the current judicial practice and that his decision derived from some earlier one<sup>30</sup>. In our text, however, the decision is present as issued by Labeo himself. The alleged judicial practice presupposes the same wave of cases that Octavian and a lawyer committed to him should have been trying to avoid. Labeo is known for his political opposition to August (Gell., N.A., 13,12,3-4) and not for his support or supposed collaboration with the emperor. It is very doubtful that a single decision even taken by an authoritative jurist could affect the land market to mitigate in some sensitive way the consequences of politically inspired measures undertaken by powers and to assure desired social stability. That objection remains true and for Talamanca, who argues that Labeo's decision was inspired by the intention of the jurist to resist the authoritative policy of August. To attribute to a legal opinion the significance of political or ideological demarche means to deprive it of dogmatic and practical relevance. Since Talamanca regards Labeo's decision as a kind of compromise, the alleged opposition to August is reduced to a dialogue that Labeo could have actually conducted with his own conscience. The text is taken from "Posteriora" and was not published during

<sup>29</sup> F. De Visscher, *Labéon et les ventes forcées*, 291 sqq.

<sup>30</sup> F. De Visscher, *Labéon et les ventes forcées*, 294.

Labeo's life. By that time the confiscations in Italy have been long over. After Octavian's access to power new confiscations in 14 BC were conducted in the provinces only (R.G., 16,2). If August was looking for social peace and political consensus, like Gallo alleges<sup>31</sup>, then Labeo results in line with the emperor's policy well established beforehand. Gallo himself recognizes that the public law liberating the buyer from his duty is unjust and today would be deemed as anti-constitutional<sup>32</sup>. In this context the whole discourse on the strict positivism of Capito, Labeo's political and academic opponent, who presumably regarded *lex rogata* as the most authoritative source of law, while Labeo was looking for another normative authority, like *bona fides*, is unsound. The alleged *lex publica* is unjust, and the discussion of the means of legal protection of the seller cannot be conducted in the context of confiscation<sup>33</sup>.

Actually, Labeo regards the seller as owner taking into account an eventual vindication from his part. That fact excludes the very idea of confiscation. The delivery from the part of the seller is presented as voluntary. The whole situation is discussed in private terms, and the *beneficium legis* is regarded as an unexpected event, secondary and external to the voluntarily concluded contract, not as a triggering factor of the sale. The public law in Labeo's exposition of the case does not deprive the seller from his land plot, but liberates the buyer from his duty to pay the price. The hypothesis of "les ventes forcées" advanced by De Visscher (and followed by both Gallo and Talamanca) is in apparent contradiction with the content of the text<sup>34</sup>.

Labeo's solution is based on *bona fides*<sup>35</sup>. He is at study of the synallagmatic obligation arising from the contract of sale that unexpectedly faces an external challenge and discloses its inner structure. His aims are dogmatic, not political. The *lex* is not even named: "*alicuius legis beneficium*". Benöhr is of the view that the name of the law has been taken off by the compilers<sup>36</sup>. It seems more proper to see in the words "*aliqua lex*" a generalization<sup>37</sup>. The dogmatic elaboration of the construction of sale is better conducted on the materials of traditional case law and on scholastic

<sup>31</sup> F. Gallo, *A proposito di 'aeque'*, 21, nt. 47.

<sup>32</sup> F. Gallo, *A proposito di 'aeque'*, 18; 21, nt. 46.

<sup>33</sup> De Visscher (F. De Visscher, *Labéon et les ventes forcées*, 293) himself recognizes that in the context of land confiscation there could be no place for private law schemes.

<sup>34</sup> Benöhr (H.P. Benöhr, *Das sogenante Synallagma*, 82) juxtaposes the usage by Labeo of private law categories (*actio, exceptio* etc.) to the alleged public problems in land ownership under August envisaged by De Visscher. Kaser (M. Kaser, *PRP*, I, München, 1971, 404 A.4) excludes that the text could refer to the confiscation.

<sup>35</sup> A. Pernice, *Labeo*, 460, nt. 7.

<sup>36</sup> H.P. Benöhr, *Das sogenante Synallagma*, 81.

<sup>37</sup> M. Talamanca, *Lex ed interpretatio*, 388 nt. 126; R. Cardilli, "*Bona fides*" tra storia e sistema. 2 ed. Torino, 2010, 56, nt. 104.

examples. The *lex publica* mentioned in the text could belong to the epoch different from the times of Labeo and August.

That conclusion brings us back to the traditional (since Cuacius<sup>38</sup>) interpretation of the *beneficium legis* as *lex de novis tabulis* (unknown in the times of August). In 44 BC Cicero (*de off.*, 2, 21, 72) expresses his indignation against *novae tabulae* liberating the debtors, but he speaks about popular proposals, not about historic reality. All these data are in favour of scholastic nature of the case that could have become recurrent at Labeo's time. One might suppose an implied academic discussion with some previous author (Trebatius ?) or traditionally established view on the subject. The content of the case and the innovative appeal of the jurist to *bona fides* will become clear, if we admit that *beneficium legis* destroyed the monetary obligation of the buyer – in full accordance with the wording of the text. *Lex de novis tabulis* could affect the monetary obligations only. That implies that the obligation of the buyer had been transformed in an independent monetary obligation *ex stipulatu*<sup>39</sup>.

When the seller stipulated the money from the buyer the functional interdependence of mutual obligations was broken due to *novatio* (Gai., 3, 170: *in stipulationem deduci*) that terminated the obligation of the buyer. The attempt of the seller to vindicate the thing delivered to the buyer – as it is envisaged in the text – could be due to the fact that the seller had no *actio venditi* since the moment of stipulation. The seller was trying to act as if there were no *emptio venditio* at all. Still the thing has been delivered on the ground of sale (*res vendita et tradita*) and that constitutes the content of *exceptio* repelling the unjust vindication of the seller. The defense of the buyer is based on the inadmissibility to deny the contract of sale and it is the common ground as for rebutting the vindication as well as for no admitting the eventual restitution of the thing along the contractual lines. It comes from that that “*aeque*” implying a preceding clause with the similar conclusion could well represent the final denial of such possibility for the seller and thus substitute the whole omitted phrase. The attempt of the seller to ignore the contract forms the underlying context for any attempt to restore the thing. That means that too obvious impossibility to protect the seller after delivery by contractual means could have been simply implied by Labeo in “*aeque*” without special discussion. This

<sup>38</sup> Cuacius, *Opera omnia*, VII. Napoli, 1778. Col. 814: *Nullum est proprius et convenientius exemplum quam quod saepe factum est in urbe Roma, legis promulgatae novarum tabularum, sic vocabatur, qua plebs solvebatur aere alieno in totum, vel ex parte, seditionis alicuius sedandae gratia: sic beneficio legis novarum tabularum debitores esse desinunt...*

<sup>39</sup> See already Meylan (Ph. Meylan, *Le rôle de la “bona fides” dans le passage de la vente au comptant a la vente consensuelle a Rome*, in *Aequitas und bona fides. Festgabe A.Simonius*. Basel, 1955, 255) who speaks in terms of *pecunia credita*.

conclusion could have been expressed as well in the direct statement of absence of *actio venditi* due to the occurred *novatio*. Labeo might have said that the demise of the claim is not equal to the denial of sale, i.e. of the very fact that the thing had been sold (*neque vendidisset*). The compiler then might have taken this expression for a pleonastic repetition of the words in the end of the text and cancel it.

The interest of Labeo to the breach of synallagma through transformation of obligation by *stipulatio novatoria* is testified by the following text<sup>40</sup>.

Lab., 5 *pith. a Paulo epit.*, D. 46, 4, 23:

*Si ego tibi acceptum feci, nihilo magis ego a te liberatus sum. Paulus: immo cum locatio conductio, emptio venditio conventionione facta est et nondum res intercessit, utrimque per acceptilationem, tametsi ab alterutra parte dumtaxat intercessit, liberantur obligatione.*

It was Julian who equated the formal termination (*acceptilatio*) of one of the mutual obligations to the termination of the contract as a whole through *consensus contrarius* (Iul., 15 *dig.*, D. 18, 5, 5 pr<sup>41</sup>). Paul is following Julian when he speaks on *conventio*<sup>42</sup>. It is questioned whether Labeo discussed *locatio conductio* and *emptio venditio* as well. Literarily he did not. However, in his famous definition of contract as mutual obligation (*ultra citroque obligatio* – D. 50, 16, 19) Labeo advanced as examples only the contracts of *emptio venditio*, *locatio conductio*, and *societas*. Grosso regards the text as confirming the gradual establishment of the notion of synallagma in the Roman legal science<sup>43</sup>. One should better approach the text from the point of the admissibility of *acceptilatio* without preceding stipulation. For Julian the problem was to equate *acceptilatio* to *conventio* (unilateral declaration implying mutual *consensus contrarius*), while Labeo was discussing the contract that had undergone *stipulatio* (and corresponding *novatio*) that destroyed mutual interdependence of obligations (synallagma). He decides that unilateral *acceptilatio* will not affect the ob-

<sup>40</sup> *Acceptilatio* (formal verbal termination of the obligation) implies the preceding *stipulatio*: Gai., 3, 169; D. 46, 4, 8, 3.

<sup>41</sup> *Cum emptor venditori vel emptori venditor acceptum faciat, voluntas utriusque ostenditur id agentis, ut a negotio discedatur et perinde habeatur, ac si convenisset inter eos, ut neuter ab altero quicquam peteret, sed ut evidentius appareat, acceptilatio in hac causa non sua natura, sed potestate conventionis valet.*

<sup>42</sup> Benöhr (H.P. Benöhr, *Das sogenannte Synallagma*, 73 nt. 16 and other literature indicated their) in vain follows those authors who suspect “*conventio*” as interpolation. D. 18, 5, 5 pr confirms the wording of the text.

<sup>43</sup> G. Grosso, *Il sistema*, 238 sq.

ligation of the counterparty, because it became independent due to the *novatio* of the contrary obligation.

The same view is implied in our D. 19, 1, 50, where notwithstanding the obligation of the buyer has undergone *novatio*, the *actio empti* against the seller is preserved and forms the subject of discussion. Since the contract has lost its bilateral character the question of actual protection of the seller stands very acute. The decision of the great jurist on the issue is remarkable. Labeo leaves aside the formal demise of the synallagmatic obligation and regards the claim of the buyer as still conditioned by his own duty. The *bona fides* that governs the contract and the same claim (*ex empto*) of the buyer does not admit that the synallagmatic foundation of the demand could be ignored: in the situation of occasional liberation of the buyer (when his duty will surely not be accomplished) the performance of the counter obligation of the seller cannot be justly demanded. Labeo applies the rules of synallagma to the case when the mutuality of the obligations has been distorted leaving seemingly no hope for the uncompensated party. In this way he solves the very idea of contract and justness subordinating it to the only operative factor at the court – to *bona fides*.

One can contrast Labeo's solution with that made by Julian at the zenith of classical period of Roman law.

Iul., 54 *dig.*, D. 19, 1, 25:

*Qui pendentem vindemiam emit, si uvam legere prohibeatur a venditore, adversus eum petentem pretium exceptione uti poterit "si ea pecunia, qua de agitur, non pro ea re petitur, quae venit neque tradita est". ceterum post traditionem sive lectam uvam calcare sive mustum evehere prohibeatur, ad exhibendum vel iniuriarum agere poterit, quemadmodum si aliam quamlibet rem suam tollere prohibeatur.*

Here the very application of the *exceptio* (that would be impossible within the structure of *formula* of a *bonae fidei iudicium*, like the *actio venditi* of the seller) implies that the *actio ex stipulatu* is at stake<sup>44</sup>. The obligation

<sup>44</sup> There are other indices of that we are facing *actio ex stipulatu*: the fact that *venditio* is mentioned; that the claim is for *ea pecunia*, and not for the *quidquid dare facere oportet ex fide bona* (M. Talamanca, *Contributi allo studio delle vendite all'asta nel mondo classico*, Roma, 1954, 122, nt. 3). On the text now see: S. Viaro, *Corrispettività e adempimento nel sistema contrattuale romano*. Padova, 2011, 133 sq and nt. 36-37 for other literature. Usually it is held that the *exceptio* in this text is a kind of *exceptio argentaria* (cf. Gai., 4, 126 a), though here none of the parties is a banker. Convincing criticism see: M. Talamanca, *Contributi*, 123.

of the buyer has been transformed in an independent monetary obligation, and that is why the vendor can pursue the price notwithstanding the delivery has not been accomplished. Julian, like Labeo before him, makes a distinction between the situation before the delivery and after it (*post traditionem*) when other means of protection can be in use. Before the delivery the contractual means are discussed. The synallagma has been broken, still Julian tries to protect the buyer. The striking difference lies in the fact that Julian gives to the buyer the *exceptio*, indicating that there was no delivery. Such an *exceptio* artificially connects both obligations in a former synallagma: the buyer invokes in his favour the fact that the monetary obligation was based on the counter obligation to deliver the thing sold<sup>45</sup>. The jurist is trying to resume the sinallagmatic ground of the claim, like Labeo did. In D. 19, 1, 50 the contractual claim *bonae fidei* was brought (*actio empti*), and that permitted to Labeo to deny the claim as such (*denegatio actionis*).

As for the times preceding Labeo, we possess several fragments by Alfenus from I BC that directly speak of a stipulation of the price (*expromissio*): Alf., 2 dig., D. 44, 1, 14; Paul., 4 epit. alf. dig., D. 18, 1, 40, 2<sup>46</sup>. However, notwithstanding intensive studies of these texts the precise understanding of the effect of such stipulation has not been reached.

Alf., 2 dig., D. 44, 1, 14:

*Filius familias peculiarem servum vendidit, pretium stipulatus est: is homo redhibitus et postea mortuus est. et pater eius pecuniam ab emptore petebat, quam filius stipulatus erat. placuit aequum esse in factum exceptionem eum obicere: "quod pecunia ob hominem illum expromissa est, qui redhibitus est".*

In this case the effect of the stipulation of the price ("*pecunia stipulata*", "*pecunia expromissa*") is obscured by the *redhibitio*, that liberated the buyer from the duty to pay the price arisen from the contract of sale (D. 21, 1, 25, 9; 27; 29, 1). That makes it impossible to decide whether the

<sup>45</sup> Meylan (Ph. Meylan, *La loi 23 Dig. 46, 4, 301*) says that the essential mutuality of the obligations destroyed by the *novatio* finds the way *ope exceptionis*. See also: A. Rodeghiero, *In tema di sinallagma funzionale nella compravendita romana classica*, in *BIDR*, CI-CII, 1998-1999 [2005], 571; S. Viaro, *Corrispettività e adempimento*, 137. Talamanca argues, however, that the contract was from the beginning concluded through mutual stipulations: M. Talamanca, *Contributi*, 124 nt. 5.

<sup>46</sup> In Alf., 2 Dig., D. 15, 3, 16 the stipulation of the price is also supposed, for the claim of the buyer was directed at "*nummos*" (*cf. ibid. "pecuniam peteretur"*) that actually seems a very feeble base. At the same time the text does not supply additional information on the consequences of the alleged stipulation.



*pater* of the seller acts *ex stipulatu* because the obligation of the buyer has undergone the preceding *novatio* due to the stipulation, or as there has been no *novatio*, he abusively (*dolo*) turns on the means formally remained in his hands after the *redhibitio*. In this precise case when the sale was concluded by a *filius familias*, the *novatio* as a consequence of the stipulation of the price is excluded for the lack of capacity of the son (Cels., 1 dig., D. 46, 2, 25; Pomp., 3 ex Plaut., D. 46, 2, 23: *Filius patris actionem ignorante eo novare non potest*). All that makes it difficult to support the authors<sup>47</sup> who recognize *novatio* in this case<sup>48</sup>.

The same is true for the other text.

Paul., 4 *epit. alf. dig.*, D. 18, 1, 40, 2:

*Qui agrum vendebat, dixit fundi iugera decem et octo esse, et quod eius admensum erit, ad singula iugera certum pretium stipulatus erat: viginti inventa sunt. pro viginti debere pecuniam respondit.*

Here the stipulation of the price for single *iugera* follows the conclusion of sale of a piece of land to establish the definite object of the contract. The solution (*responsum*) of the jurist takes into consideration the claim *ex stipulatu* only (arg. ex "*pecuniam debere*"). However, it is not clear whether the claim *ex vendito* has survived the stipulation.

The problem is emphasized by the discussion regarding the most ancient testimony on *expromissio nummorum* provided by Varro, *R.R.*, 2, 2, 5-6 whose sources date back to the II BC (if not earlier).

*In emptionibus iure utimur eo, quod lex praescipit. in ea enim alii plura, alii pauciora excipiunt: quidam enim pretio facto in singulas oves, ut agni cordi duo una ove adnumerentur, et si quoi vetustate dentes absunt, item binae pro singulis ut procedant.*

*De reliquo antiqua fere formula utuntur. cum emptor dixit "tanti sunt mi emptae" et ille respondit "sunt" et expromisit nummos, emptor stipulatur prisca formula sic, "illasce oves, qua de re agitur, sanas recte esse, uti pecus ovillum, quod recte sanum est extra luscum surdam minam, id est ventre glabro, neque de pecore morbosum esse habereque recte licere, haec sic recte fieri spondesne?"*

<sup>47</sup> See the literature in: S. Viaro, *Corrispettività e adempimento*, 168, nt. 11-12.

<sup>48</sup> The refusal to make any deduction from the text is clearly expressed in: F. Sturm, *La novation des obligations de bonne foi en droit romain classique*, in *Fides, Humanitas, Ius. Studii in onore di Luigi Labruna*, Napoli, 2007, 5447, 5449: "aucune conclusion".

*Cum id factum est, tamen grex dominium non mutavit, nisi si est ad-muneratum; nec non emptor pote ex empto vendito illum damnare, si non tradet, quamvis non solverit nummos, ut ille emptorem simili iudicio, si non reddit pretium.*

The contract of sale, giving rise to the contractual *iudicia bonae fidei* – *actio empti* and *actio venditi* – was accompanied by mutual stipulations of the parties according to the practice established in antiquity<sup>49</sup>. The stipulation of the price (*expromissio nummorum*) is concluded applying “*antiqua formula*”, while the stipulation of the quality of the goods – through “*prisca formula*”. Varro testifies that notwithstanding the stipulations concluded the parties could advance the contractual claims (“*ex empto vendito damnare*”)<sup>50</sup>. That means that the contractual obligations have been not transformed in verbal, and the ancient ritual did not led to *novatio*<sup>51</sup>. Still the interdependence of the contractual obligations has been broken: each party can claim the performance without having accomplished its own. Some say that functional synallagma was not known yet<sup>52</sup>. It seems that this view does not take into account that Varro specially stressed the breach of interdependence of the obligations. This breach is due to the very fact of *expromissio*: the fact that the obligation of the buyer has been secured through the stipulation of the price deprived him from the usual protection (*retentio*)<sup>53</sup>. The same is true for the seller<sup>54</sup>.

Labeo two generations later faced considerably different situation, as the *expromissio nummorum* invoked *novatio* of the obligation of the buyer which was totally substituted by the stipulation, giving rise to an independent monetary obligation. In the case envisaged in our D. 19, 1, 50 it was precisely this *novatio* that subjected the buyer to the effect of

<sup>49</sup> The conclusion of consensual contract of sale was denied by Talamanca, according to whom Varro (who composed his work at the end of his life, i.e. in the 30-s BC – Varro, RR, 1, 1, 1) by confusion applied the contractual claims current in his times to the ancient sale through mutual stipulations described by him according to the data considerably distanced from him: M. Talamanca, *La tipicità dei contratti romani fra 'conventio' e 'stipulatio' fino a Labeone*, in *Contractus e pactum. Tipicità e libertà negoziale nell'esperienza tardo-repubblicana. Atti del convegno di diritto romano (Copanello 1-4 giugno 1988)*, Napoli, 1990, 64. This view has found no support.

<sup>50</sup> U. von Lübtow, ‘Catos leges venditioni et locationi dictae’, in *Symbolae Rapphaeli Taubenschlag dedicatae*, III. Vratislaviae-Varsaviae, 157 sq suggests that the seller had both claims – *ex stipulatu* and *ex vendito*, but Varro takes into account the *bonae fidei iudicium* only, as the buyer had only one – “*simile iudicium*”. In any case, the contractual obligations have been not substituted by the stipulation.

<sup>51</sup> R. Cardilli, *L'obbligazione di «praestare» e la responsabilità contrattuale nel diritto romano (II sec. A.C. - II sec. D.C.)*. Milano, 1995, 120; S. Viaro, *Corrispettività e adempimento*, 33; 39.

<sup>52</sup> G. Grosso, *Il sistema*, 218; H.P. Benöhr, *Das sogennante Synallagma*, 20.

<sup>53</sup> A. Pernice, *Labeo*, 459.

<sup>54</sup> Ph. Meylan, *Varron et les conditions du transfert de la propriété dans la vente romaine*, in: *Scritti C. Ferrini*, 4. Milano, 1949, 181; F. Cancelli, *L'origine del contratto consensuale di compravendita nel diritto romano. Appunti esegetico-critici*. Milano, 1963, 128.

the subsequent *beneficium legis* (historical or hypothetical) that liberated him among other monetary debtors from his obligation. In this normative context the emphasis on *bona fides* by Labeo presents itself in a new light. The obligation of the seller to deliver the thing remains because the interdependence of the mutual obligations has been broken by the preceding *novatio*. Otherwise it should have been terminated according to the rule of conditional synallagma together with the obligation of the buyer. This formal conflict affecting the structure of the synallagma demanded from Labeo an extraordinary intellectual effort. The jurist decided that even the preceding breach of the interdependence of the obligations through *novatio* did not facilitate the attempt of the buyer to demand the delivery, after his own obligation had been occasionally terminated leaving the seller without any compensation. In the context of valid synallagma Labeo would be emanating a banal solution. In the situation of broken synallagma the appeal to *bona fides* reveals a decisive choice made by the jurist in favour of the essential nature of the contract. The principle of mutuality (*ultra citroque obligatio*) governing the contract was regarded as prevailing over the subsequent formal modifications of the obligations. The liberation of the buyer from his duty to pay the price left the seller without any consideration, so that to deprive the seller from the thing sold would contradict *bona fides* as the normative basis of the claim.

