Liquidating a trading Partnership - the Riddle of D. 17.2.69

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With respect to the scope of partnership agreements Ulpian D. 17.2.5pr distinguishes *societates universorum bonorum*, where all the belongings of the partners are put into the partnership from partnerships of limited scope among which he cites the *societates negotiationis*.[1] The term *negotiatio* is ambiguous: it can denote just a single business dealing, but also an enterprise which has been set up to do business in a specific field. Usually within the context of partnerships *negotiatio* means such a business enterprise. Branches of business in which we encounter *societates negotia-tionis* were sea- and land transports, craftsmanship (for instance pottery-making, carpenting, tailoring), the exchange and financing business and, last not least, small and large scale trade.

Whereas *negotiator* in republican sources originally denotes somebody who finances business dealings, in sources from imperial times it means just businessman, now being used also for somebody who is concerned with the production and trading of goods.[2]

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[1] Ulpian (31 *ad ed.*) D. 17.2.5pr: *Societates contrahuntur sive universorum bonorum sive negotiationis alicuius sive vectigalis sive etiam rei unius*, "Partnerships are formed in all goods, or in some business, or for the collection of a tax, or even in one thing."

[2] KNEIßl, Mercator - negotiator. *Römische Geschäftsleute und die Terminologie ihrer Berufe*, in: *Münsterische Beiträge zur antiken Handelsgeschichte*, II, 1/1983, 73 ss; BÜRGE, *Fiktion und Wirklichkeit: Soziale und rechtliche Strukturen des römischen Bankwesens*, *Zeitschrift für Rechtsgeschichte der Savigny-Stiftung*, Romanistische Abteilung 104 (1987) 498 f; *Höbenreich*, Annona (Graz 1997) 287.

As to these trading partnerships, the sources reveal that quite often one of the partners contributes capital whereas the other contributes services such as travelling abroad, buying goods and selling them. After the return of the money to the partner who had contributed the capital the profits are shared. An example of the contribution of *operae* by a partner is mentioned by Ulpian D. 17.2.5.1.[3] More specifically in the context of a trading partnership, such a situation is reflected in D. 17.2.29.1.[4]

Whereas many texts dealing with a *societas ad emendum* do not mention the specific content of the agreement of the parties,[5] in Ulpian D. 17.2.69 we are confronted with the particular provisions of the partnership contract. It seems that the text refers to a real case:

> *Cum societas ad emendum coiretur et conveniret,*
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> *ut unus reliquis nundinas id est epulas praestaret eosque a negotio dimitteret,*
>
> *si eas eis non solverit, et pro socio et ex vendito cum eo agendum est.*
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> "When a partnership has been formed for the purpose of making a purchase, and it has been agreed that one partner should furnish *nundinae*, that is meals, for the rest, and should release them from the venture, then,

[3] Ulpian (31 *ad ed.*) D. 17.2.5.1: *Societas autem coiri potest et valet etiam inter eos, qui non sunt aequis facultatibus, cum plerumque pauperior opera suppleat, quantum ei per comparationem patrimonii deest...,* "Moreover, a partnership may be formed with validity even between people of unequal wealth, since the poorer man makes up in services what he lacks in material resources by comparison with the other..."

[4] Ulpian (30 *ad Sab.*) D. 17.2.29.1: *Ita coire societatem posse, ut nullam partem damni alter sentiat, lucrum vero commune sit, Cassius putat: quod ita demum valebit, ut et Sabinus scribit, si tanti sit opera, quanti damnum est: plerumque enim tanta est industria socii, ut plus societati conferat quam pecunia, item si solus naviget, si solus peregrinetur, pericula subeat solus,* "It is Cassius's opinion that a partnership can be formed on the terms that one partner is to suffer no part of any loss whereas profits are to be shared. An agreement of this kind will indeed be valid, in the view of Sabinus, if services are rendered commensurate with the loss incurred. Very often a partner works so hard for the partnership that his contribution is worth more to it than money, for example, if he were to be the only partner to travel by sea or go abroad or expose himself to such dangers."

[5] Gai. Inst. 3.148; Inst. 3.25pr; Julian-Ulpian D. 17.252.4 (*sagaria negotiatio*); Pomponius D. 17.2.60.1 and Paul D. 21.2.44.1 (*societas venaliciaria*), Ulpian D.17.2.52.15 (*societas ad merces emendas*), Labeo-Paulus D. 17.2.65.5 (*societas ad emendum et vendendum mancipia).*

> if he fails to furnish them, he can be sued in an action on partnership and also in an action on sale."

At first sight this fragment does not seem to be very exciting, dealing with questions of food supply among partners of a *societas*. Yet, on closer look the text poses a lot of problems; therefore it has always been considered by the historians of Roman Law to be a *crux interpretorum*, a riddle of the *corpus iuris*.[6] Even the famous humanist Cuiacius once wrote that no other fragment had tormented him so much as this one.[7]

The facts of the specific case are not quite clear. As our text contains just a partial (and probably shortened) account of the contract, it is especially difficult to get a complete picture of the agreement. The important message for the compilers probably was just the possible coincidence of *actio pro socio* and *actio venditi*[8], whereas they seemed much less interested in reporting all the aspects of the trading partnership in question.

What are the features of the contract which can be deduced from the text itself? Several persons agreed on forming a *societas ad emendum*, a partnership with the aim of buying something. One of the partners undertook the obligation of furnishing the *nundinae*. *Nundinae* is the latin term for market days or the weekly fair.[9] Here it probably refers to the expenses for attending the market, including the cost for food, as can be seen from the explanatory

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[6] Cf GLÜCK, *Ausführliche Erläuterung der Pandekten* XV/2 (Erlangen 1814) 449, who stresses that D. 17.2.69 was one of the *septem damnatae leges Pandectarum* and *cruces interpretatorum*.

[7] CUIACIUS, *Observationum et Emendationum libri XXVIII*, in: *Opera in tomos XI* (Venice 1758) Pars Prior, Tomus III, c. 92: *A quo tempore juri civili operam dare coepi, nulla me lex diutius torsit, quam l. 69. D. pro socio; nec plane etiam nunc ausim dicere, eam a me legem intelligi*.

[8] As to the questions of concurrence of actions concerned with D. 17.2.69 cf LAFFELY, *Responsabilité du* socius (1979) 128-135, esp 133 ss; MISERA, *Klagen manente societate. Zu Klagemöglichkeiten der Gesellschafter bei bestehender Gesellschaft im klassischen römischen Recht, Festschrift Nirk* (1992) 698 ss.

[9] *Nundinae* denotes "the days of the (weekly) market" as well as "the (weekly) market" itself. In our text *nundinae* refer to the meals provided at the occasion of the market; cf GEORGES, *Handwörterbuch*, sv *nundinus* ("Zehrungskosten beim Beziehen eines Marktes"); *Vocabularium Iuris Romani*, sv *nundinae*: *victus in tempus mercatus*. On the various interpretations and emendations of *nundinae* in D. 17.2.69, see GLÜCK, *Ausführliche Erläuterung der Pandekten* XV/2 (Erlangen 1814) 451 ss.

remark *id est epulas* ("this is the meals").[10] Furthermore that same partner agreed to discharge the other partners from the venture (*eosque a negotio dimitteret*).

According to the traditional understanding, the text then goes on saying that these other partners can sue him by either an action on partnership or an action on sale, if the partner has not complied with his obligation to furnish the meals. *Si eas eis non solverit* is thereby seen as the prerequisite of the legal consequences whereas the agreement itself is characterised by the words *ut unus reliquis nundinas... praestaret eosque a negotio dimitteret*.[11]

What could be the background of such an agreement? To find an answer to this question, and to explain at the same time why both the *actio pro socio* and the *actio venditi* are available in the specific case, is not an easy task. Broadly speaking, the hypotheses for the possible setting of the contract either succeed to explain why the contract is a *societas* or why it is a sale, but not why both of these contracts are present simultaneously. Nor do they explain the meaning of the obligation to furnish the *nundinae*. We will examine three prominent interpretations of our source and then try to outline our own understanding of the text.

Let us start with the interpretation of the contract, which goes back to Byzantine legal science and is known from the scholia to the Basilics.[12] According to this string of thought, the background of D. 17.2.69 would be the following: Primus wants to buy a certain fundus which is owned by Titius, yet as he is not well acquainted with Titius, he forms a partnership with Secundus and Tertius, who are good friends of Titius, in order to buy the land.

[10] The fact that *id est epulas* is an explanatory remark is no reason to suspect an interpolation (as did for instance EISELE, *Beiträge zur Erkenntnis der Digesteninterpolationen*, ZRG-RA 11 (1890) 7, or DEL CHIARO, *Contrat de Société* (1928) 219 Fn 1). It is quite conceivable that Ulpian himself tried to explain the not quite understandable term *nundinae* which was used by the parties of the *societas* – or that the appositive expression was already part of the contract clause.

[11] Recently in this sense MISERA, *Festschrift Nirk* (1992) 699.

[12] Anonymous scholion *ekékteto* referring to B. 12.1.67 (Scheltema/Holwerda B II, 522 = Heimbach I, 781) and the scholion by Kyrillos *mathe to digeston* (Scheltema/Holwerda B II, 549 = Heimbach I, 781).

Secundus and Tertius talk Titius into selling the property to them.[13] According to the partnership agreement, Primus, after the successful acquisition of the land, shall get the shares in the ownership held by Secundus and Tertius and pay them their expenses.

The main objection to this interpretation (and similar ones) is that this theory elegantly explains why Primus needs the help of Secundus and Tertius in order to buy the land, but it does not explain where we find the common economic purpose of the partners, the *negotium commune* which is essential for the existence of a *societas*.

If Secundus and Tertius just get their expenses, we would expect that the agreement would be qualified as a *mandatum*.

If however they get a certain price which was agreed upon before, it would be questionable, whether such an agreement were in line with the principles of Roman partnership law, according to which the profits and losses are to be shared in certain proportions.[14]

In a recent study Misera identified this problem and suggested to assume that according to the agreement Secundus and Tertius would later profit from the acquisition of the land in other ways, for instance through some kind of shared use of the land. Yet the text doesn't refer to such a posterior common use and even contains certain elements which rather contradict this view.

First, the partnership is called a *societas ad emendum*. Although this term does not refer to a strictly defined type of partnership, it still implies a certain technical meaning. Examining the texts of the digest which mention a *societas ad emendum*, it can be seen that these partnerships regularly concern business enterprises which make profits by buying and later on selling certain goods. Usually therefore, a *societas ad emendum* is also a *societas ad vendendum*[15]. The common goal of the members of such trading

[13] Cf MISERA, *Festschrift Nirk* (1992) 700, who supposes that just Secundus und Tertius buy the land from Titius. However, the words *eosque ab negotio dimitteret* seem to indicate that Primus, Secundus and Tertius collectively bought the fundus and that Primus then should discharge the other ones from this common venture.

[14] Cf Ulpian (30 *ad Sab*.) D. 19.5.13pr: ... *societas non videtur contracta in eo, qui te non admisit socium distractionis, sed sibi certum pretium excepit*.

[15] Cf Gai. Inst. 3.148, I. 3.25pr and D. 17.2.65.5.

partnerships is to achieve the maximum of profits by buying as cheap as possible and selling at the highest possible price – their own use of the goods is not intended. Furthermore, the clear obligation of one of the partners to discharge the other ones from the venture does not seem compatible with the idea of a common posterior use.

Let us examine another approach. The French scholar Del Chiaro interpreted D. 17.2.69 as a partnership contract with an option of one partner to gain sole ownership of the object by paying his partners their expenses: "Dans ce texte il faut supposer qu'une société commerciale a été contractée sous la condition que le jour où il plairait à l'un des associés de rembourser aux autres tout ce qu'ils avaient dépensé ou mis dans la société, celle-ci resterait, à dater de ce remboursement, entièrement à son compte."[16]

This interpretation quite plausibly explains the legal consequences of the case, *id est* the competence of both the *actio pro socio* and the *actio venditi*, yet it does not really tell us much about the actual background of D. 17.2.69. Neither does it provide an accurate account of the *conventio* as it is reported in Ulpian's fragment. According to the text, the furnishing of the *nundinae* as well as the discharge of the other partners are legal obligations and do not just depend on the free will of the partner.

Furthermore it is not clear whether the claim of the other partners which is to be enforced either by the *actio pro socio* or the *actio venditi* is directed to obtaining compensation for the *nundinae* (I will come back to this point later). Even if this were the case[17], we would again be confronted with the problem that such an agreement would rather constitute a *mandatum* than a contract of sale.

A third approach, by the Italian Romanist Arnò quite adequately grasps the content of the *conventio* of D. 17.2.69 while remaining

[16] DEL CHIARO, *Contrat de Société* (1928) 219; quite similar e.g. GLÜCK, *Ausführliche Erläuterung der Pandekten* XV/2 (Erlangen 1814) 456, who translates "wenn es einem der Mitglieder gefiele".

[17] According to MISERA, *Festschrift Nirk* (1992) 701, *eas* refer to the *nundinas*; he furthermore holds that the partners can claim both the *nundinae* and the price from Primus.

quite open to criticism as far as his interpretation of the legal consequences of the case are concerned.

Arnò supposes that one *socius* (lets call him Primus again) is obligated to furnish *nundinae id est epulae* and that, if he does not comply with this obligation, the other partners Secundus and Tertius may sue him in order to be liberated from the purchase of the land from Titius. According to Arnò, either Primus pays them their expenses, or the transaction would be seen as being done only on account of Primus: "O A (scilicet Primus) coprisse tutte le spese, ovvero l'operazione fosse da ritenersi come fatto per conto proprio di A".[18]

Arnò thinks that the discharge from the venture is not just taking effect internally among the *socii*, but also with regard to third parties. In his view, Secundus and Tertius will become liberated from any obligation from the purchase vis à vis the seller (id est Titius). Thereby the provisions of the partnership agreement for the case of non-performance of a contractual obligation of Primus would have the effect of a contract to the detriment of a third person: If Primus does not fulfill his obligation of paying the expenses to Secundus and Tertius, the seller Titius would only be able to sue Primus but not his original contracting parties Secundus and Tertius.

Arnò interprets the *actio venditi* which is mentioned in the text as being an *actio venditi ad exemplum institoriae actionis.*[19] Yet, this interpretation is neither in line with the text of D. 17.2.69 nor is it plausible from a dogmatic point of view. Even if such an *actio adiecticiae qualitatis* were granted to Titius, this would not prevent him from suing his contractual partners.[20]

[18] ARNÒ, *Contratto di società* (1938) 314.

[19] ARNÒ, *Contratto di società* (1938) 315. Cf the quite similar interpretation of CUIACIUS, *Opera* III, 92 (cf note 2): *Puto tamen eum, qui vendiderit his, qui in negotium missi sunt, dum unus epulas parat, non in eum tantum, qui emerunt, sed in eum etiam, qui epulas praestare debuit, quasi & ipse emisse videatur*. Cuiacius also thinks that Primus can be sued by the partners with the actio pro socio and by the seller with an actio venditi, because he is to be considered quasi as a buyer. Unlike ARNÒ however, CUIACIUS does not suppose that the action against Primus could liberate Secundus and Tertius from their obligation as buyers. Cuiacius reads *eosque in negotium mitteret* instead of *eosque a negotio dimitteret*, which implies that there is no obligation to discharge the other partners at all.

[20] Cf WACKE, *Die adjektizischen Klagen im Überblick*, ZRG-RA 111 (1994) 282.

A further argument against Arnò's interpretation concerns the fact, that he supposes that Primus can be sued for the price by Titius *ex vendito* (*ad exemplum institoriae actionis*), whereas he is sued for the expenses with the *actio pro socio* by Secundus and Tertius. Thus *et pro socio et ex vendito cum eo agendum est* would refer to different plaintiffs (the seller on the one hand, the partners of the *societas* on the other hand) and to two different claims (*pretium* in the case of the *actio ex vendito* and *nundinae* in the case of the *actio pro socio*).

Most of the scholars tend to read the text as if there were a semi-colon after *dimitteret*; as I mentioned above, this leads to the impression that the *conventio* of the *societas ad emendum* comprises the clauses *ut unus reliquis nundinas id est epulas praestaret eosque a negotio dimitteret* and that on the other hand the legal consequences are expressed in the following section, id est *si eas eis non solverit, et pro socio et ex vendito cum eo agendum est.*

Yet, considering the fact that the manuscript of the *littera Florentina* does not contain any punctuation marks, it would be possible to read it in a slightly different way:

Cum societas ad emendum coiretur

et conveniret, ut unus reliquis nundinas (id est epulas) praestaret

eosque a negotio dimitteret, si eas eis non solverit,

et pro socio et ex vendito cum eo agendum est.

Looking at the third line of the text[21], we can see that according to this understanding, the obligation to discharge the other partners would depend on the non-fulfillment of the obligation to furnish the *nundinae*. Thus Secundus and Tertius would have a right of withdrawal in case Primus did not provide for the *nundinae*. They could ask him to be liberated from the business operation by being

[21] A similar understanding of the text is reflected by GARNSEY's translation of D. 17.2.69 (in: Mommsen/Krueger/WATSON, *The Digest of Justinian*, Vol II, Philadelphia 1985): "When a partnership has been formed for the purpose of making a purchase, and it has been agreed that one partner should furnish nundinae, that is, feasts, for the rest, *and release them from the venture if he fails to furnish them*, he can be sued in an action on partnership and also in an action on sale."

paid a certain amount for their shares. That this would have to be a *pretium certum*, a previously fixed amount of money, can be deduced from the legal consequence that they are given the *actio venditi*: to approve an action on sale in classical Roman law presupposes that the parties have agreed upon a *pretium verum et certum*.[22]

What could be the social and economic setting of such a contract? We could imagine a trading partnership, in which Secundus and Tertius primarily act as working partners, putting their efforts to the activity of buying (and selling) the goods, whereas Primus primarily acts as the capital contributing partner. He pays the expenses of attending the markets where the goods which the partners have jointly bought before, are to be sold. That the partners have jointly bought the goods and acquired co-ownership, I deduce from the words *eosque a negotio dimitteret* which seem to indicate that Primus, Secundus and Tertius collectively bought the goods and that Primus then has to discharge the other ones from this common business.

Consequently, if Primus does not contribute the *nundinae*, and thereby hinders the successful selling of the goods, he has to pay off his partners. The liquidation of the partnership then follows the path laid down beforehand: Instead of dividing the profits, which would have been the case if the selling had succeeded, Primus has to pay a certain amount of money for the remaining goods of which he becomes the sole owner.

In this perspective, the *nundinae* are to be seen rather as expenses caused by the effort of selling the goods at the market, than as expenses for their acquisition. The expression *nundinae* also suggests that the object of the *societas ad emendum* are goods which are sold at the weekly market, instead of a piece of land. Furthermore, in this understanding it would not seem likely that Secundus and Tertius claim the *nundinae*: at the stage of liquidating the partnership, there is no need for the cost of attending the markets and similar expenses, but there is a need to clarify what is to be done with the remaining goods which have not yet been sold. The non-performance of the *nundinae* is just a precondition for the ending of the societas and a certain procedure

[22] ZIMMERMANN, *The Law of Obligations* (Oxford 1990) 250 ss.

of liquidation; it is not the object of the claim of the partners which is enforced by the *actio pro socio* or the *actio venditi*.

This interpretation of the text might also explain why we encounter both the *actio pro socio* and the *actio venditi* in this case. The obligation concerning the discharge of the other partners is just one particular provision[23] of the partnership agreement in case that Primus did not fulfill his obligation to furnish the *nundinae*. As a separate provision *in continenti* of the *societas*, it can be enforced by the action on partnership. Yet on the other hand, it can also be seen as a sales contract, concerning the sale of certain objects (the shares of Secundus and Tertius in the goods) at a certain price, and therefore be enforced by the *actio venditi*. Whereas the common economic aim of the partnership is trading (as in other *societates ad emendum et vendendum*), the envisaged discharge of the partners is just an additional provision that regulates beforehand the liquidation of the business in a specific setting.

The advantage in having the choice between the *actio venditi* and the *actio pro socio* is quite obvious: Being condemned in an action on partnership causes *infamia*. Using the *actio venditi* instead, enables the plaintiffs to enforce their claims without threatening the former partner with the potentially desastrous social effects of ignominy.[24]

Have we thus solved the riddle of D. 17.2.69? Some doubts will certainly remain and therefore is seems more than appropriate to bring to mind the sceptical conclusion of Cuiacius: *nec plane etiam nunc ausim dicere, eam a me legem intelligi*[25], "not even now I dare say that I have understood this text".

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[23] This can be seen also in the wording *cum societas ad emendum coiretur et conveniret*, in which the reference that a *societas ad emendum* was formed, sufficiently describes the kind of partnership concerned, and where in the part *et conveniret etc* we find the additional clauses of the specific contract.

[24] GREENIDGE, Infamia - *its place in Roman Public and Private Law* (1894); KASER; Infamia *und* ignominia *in den römischen Rechtsquellen*, *Zeitschrift für Rechtsgeschichte der Savigny-Stiftung*, Romanistische Abteilung 73 (1956) 220 ss; GARDNER, *Being a Roman citizen* (1993) 111 ss.

[25] CUIACIUS, *Opera* III (Venice 1758) c. 92.