

The Origin of *Laesio Enormis*

Raymond WESTBROOK†

(*Université John Hopkins de Baltimore*)

The doctrine of *laesio enormis* allows a seller of land to rescind the contract if the sale price was less than half the just or true price, or gives the buyer the option of paying the difference.

For a rule that contradicts a basic premise of the classical Roman law of sale – that the price does not need to be adequate for a sale to be valid – it is based on remarkably slim foundations¹. It is found in two sections of Codex Justinianus, C.4.44.2 and C.4.44.8, both rescripts attributed to Diocletian. C.4.44.2 sets out the doctrine in a straightforward manner:

De rescindenda venditione. Impp. Diocletianus et Maximianus AA. Aurelio Lupo. Rem maioris pretii si {{tu vel}} pater tuus minoris pretii distraxit², humanum est ut vel pretium te restituente emptoribus fundum venditum recipias auctoritate intercedente iudicis vel si emptor elegerit quod deest iusto pretio recipies. minus autem pretium esse videtur si nec dimidia pars veri pretii soluta sit³.

¹ The classical view is reflected in D.18.1.38; 55; 19.2.22.3; see also 18.1.14. See R.ZIMMERMANN, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Oxford 1996, pp.255-258.

² We consider the addition of the petitioner in the second person as a subject of the verb to be a clumsy gloss. Cf. F.DE ZULUETA, *The Roman Law of Sale*, Oxford 1945, p.165.

³ The term *iustum pretium* (“just price”) is familiar from classical sources as a valuation of property to be made by the praetor or judge, but in cases where it cannot be arrived at by free bargaining. For example, the praetor may set the price of a slave to be bought and freed by an heir under the terms of a *fideicommissa* (D.40.5.31.4). Similarly, it represents the *aestimatio* of the value of property made by a judge in division of common property or for the value of property reclaimed, as opposed to the plaintiff’s valuation by oath. D.6.1.70; 10.3.10.2; 24.1.36pr.; E. LEVY, *Zu D.6.1.63 und 70*, ZSS (Rom. Abt.) 43 (1922), pp.534-35. The same applies to the term *verum*

If {{you or}} your father sold property worth a higher price for a lower price, it is equitable that either you get back the land sold through a court order, refunding the price to the purchasers, or, if the buyer chooses, you get back what is lacking from the just price. The price is deemed to be too low if less than half of the true price has been paid.

C.4.44.8, by contrast, does not expound the doctrine directly. Rather, it is a long restatement of the classical principle of free bargaining, with an unexpected qualification regarding the buyer's option at the end:

Idem AA. et CC. Aureliae Euodiae. Si voluntate tua fundum tuum filius tuus venundedit, dolus ex calliditate atque insidiis emptoris argui debet vel metus mortis vel cruciatus corporis imminens detegi, ne habeatur rata venditio. hoc enim solum, quod paulo minori pretio fundum venundatum significas, ad rescindendam emptionem invalidum est. quod videlicet si contractus emptionis atque venditionis cogitasses substantiam et quod emptor viliori comparandi, venditor cariori distrahendi votum gerentes ad hunc contractum accedant vixque post multas contentiones, paulatim venditore de eo quod petierat detrahente, emptore autem huic quod obtulerat addente, ad certum consentiant pretium, profecto perspiceres neque bonam fidem, quae emptionis atque venditionis conventionem tuetur, pati neque ullam rationem concedere rescindi propter hoc consensu finitum contractum vel statim vel post pretii quantitatis disceptationem:

nisi minus dimidia iusti pretii, quod fuerat tempore venditionis, datum est, electione iam emptori praestita servanda⁴.

If your son sold your land with your consent, fraud must be proved due to the craft and guile of the buyer or else immediate fear of death or physical torture must be made manifest, in order for the sale to be held invalid. For the sole fact that you state that the land was sold at a slightly lower price is insufficient to rescind the purchase. Clearly if you had considered the nature of a contract of sale and the fact that the buyer approaches this contract with the wish to buy cheap and the seller to sell

pretium (“true price”), e.g. D.30.81.4; 40.5.32.2. The latter is used, notably, as the basis for multiple damages for theft and robbery (D.47.8.2.14; 47.8.4.11).

⁴ The “choice already accorded to the buyer” is a reference to the earlier paragraph of the Code, showing that this phrase, and probably the whole qualifying clause, did not belong to the original rescript but is an editorial addition by the compilers of the Code. Likewise the term *paulo* (“slightly” lower price) appears to be an interpolation designed to make bring the text into some sort of conformity with the doctrine. See note 6 below.

dear, and only after much wrangling, the seller little by little coming down from the price he sought and the buyer adding to what he offered, they agree to a definite price, you would at once see that neither good faith, which protects the agreement of the buyer and seller, allows, nor does any reason permit a contract concluded by agreement to be rescinded on this account, either at once or after dispute of the amount of the price:

unless less than half of the just price prevailing at the time of sale has been paid, in which case the choice already accorded to the buyer must be maintained.

There is no discussion of the doctrine anywhere else in classical or post-classical sources. On the contrary, Codex Theodosianus contains three rescripts reiterating in the strongest terms the classical principle that a sale cannot be rescinded merely on the grounds that the price was less than the property was worth (C.Th.3.1; 4.8). In view of the doctrine's rejection in post-Diocletian law, both paragraphs have long been suspected of being Justinianic interpolations⁵. Like C.4.44.8, three other paragraphs in Codex Justinianus show definite signs of interpolation in rescripts that originally upheld the classical position, in order to make them conform with the doctrine: C.4.44.12 & 15; 4.46.2⁶.

Whichever Roman emperor was responsible for the two rescripts, it is unlikely that the doctrine was created *ex nihilo*. A concept so alien to Roman law must have come from a foreign system. The most probable source is the native legal institutions of the non-Roman inhabitants of the eastern Roman empire - what Mitteis called *Volksrecht*⁷.

Within the eastern empire, it has been suggested that *laesio enormis* derives specifically from Rabbinic law⁸. According to

⁵ Already by Thomasius in 1706: see H.F. JOLOWICZ, *The Origin of Laesio Enormis*, *The Juridical Review* 49 (1937), pp.47-72, pp.52-53; ZIMMERMANN, *op. cit.*, pp.259-261.

⁶ JOLOWICZ, *op. cit.*, p.53.

⁷ L. MITTEIS, *Reichsrecht und Volksrecht in den östlichen Provinzen des Römischen Kaiserreichs*, Leipzig 1891, pp.5-58. Although some details of his thesis have subsequently been disproved (for example, the nature of the Syro-Roman Law Book), Mitteis' overall insight remains valid.

⁸ P. DIKSTEIN, *Mehir Zedek ve-Ona'ah, Ha-Mishpat ha-'Ivri* 1 (1926), pp.15-55, pp.28-29 (Hebrew). The earlier literature is summarized by JOLOWICZ, *op. cit.*, pp.53-

doctrine of *ona'ah* (overreaching or price fraud), a contract of sale may be rescinded if the price deviates more than one-sixth from the "purchase" (*mekah*), which is taken to mean the market price. The doctrine was developed by the Tannaim, rabbinic jurists of the first and second centuries A.D. According to the Mishnah (*Bava Metzia*):

4.3: Overreaching is four silver pieces out of the twenty-four to a *sela'*, that is, one sixth of the purchase. Until when is one allowed to rescind? Until he (the injured party) has shown it to a merchant or to his relative (for assessment)...

4.4: Overreaching may be claimed by the buyer and seller alike... The one who was deceived has the upper hand: if he wished, he could say, "Give me my money" or "Give me the amount by which you deceived me."

4.9: Overreaching does not apply to the following: slaves, debt-notes, land, and temple property.

As can be seen from these excerpts, the doctrine of overreaching bears some resemblance to *laesio enormis*, especially as regards the choice between rescission and payment of the difference. There are also notable differences. Overreaching works in favor of either the buyer or the seller, and the choice of remedy is in the hands of the injured party. Most significantly, it specifically excludes land.

The situation is more complex, however, since there are many differing opinions among the Rabbis and many variations, some of which gained general acceptance and some of which did not. For example, another Tannaitic scholar, Rabbi Nathan, stated that where the discrepancy exceeded one-sixth, the contract was void, with no possibility of paying the difference (*bittul mekah*: Babylonian Talmud, *Bava Metzia* 50b, 51a).

Later generations of Rabbis extended the Tannaitic doctrine, constructing an even more complex system (B.T. *Bava Metzia* 49a et seq.). Thus Rabbi Yohanan, who was active in the mid-third century, extended *ona'ah* to land, but only in the case of "excessive" overreaching and only with the remedy of nullity (*bittul mekah*. B.T. *Bava Metzia* 57a). While the mainstream Talmudic doctrine still does not constitute a close parallel to *laesio enormis*, various opinions put

58, but see now D.SPERBER, *Laesio Enormis and the Talmudic Law of Ona'ah*, *Israel Law Review* 8 (1973), pp.254-274.

forward by individual jurists can be amalgamated to smooth out the discrepancies⁹.

This methodology begs the question of the relationship between the two legal systems. It is hardly likely that imperial Roman officials were privy to the in part highly theoretical juridical discussions of Rabbis in their eastern provinces, still less that they would have incorporated into Roman law the opinion of a particular jurist. Nor would those officials be receptive to a local petitioner who asserted a doctrine from Rabbinic law. On the contrary, they would see it as an opportunity to reaffirm the primacy of Roman law over local traditions, as in the rescripts of Diocletian above. As Selb points out in respect of the Syro-Roman Law Book, queries from the East, based on the common law conceptions of petitioners, were answered with Roman Law. Local institutions were cited in order to reject them¹⁰.

Sperber therefore adopts a more cautious approach, suggesting that the Rabbinic and Roman doctrines were similar reactions to a common problem in the late third century¹¹. According to Sperber, the period was characterized by a collapse in land prices accompanied by severe inflation in commodities. Rabbi Yohanan (active in Roman Palestine) therefore modified the doctrine of *ona'ah* to meet the plight of poor peasant farmers forced to sell their land. In the same way, Diocletian issued rescripts designed to protect poor landowners, while at the same time seeking to curb inflation by his Edict on Maximum Prices, which does not include land.

Sperber's approach raises as many problems as it solves. The Rabbinic doctrine, however modified, still applies equally to excessively high and low prices and can with difficulty be interpreted as protecting the seller alone. If the economic climate meant that only low prices were in issue, then it should be remembered that the rule does not apply a "just price" but the market price as its benchmark. If the market price were generally depressed, then a sale at that price would not constitute excessive deviation. A standard of excessive

⁹ See esp. DIKSTEIN, *op. cit.*, pp.32-48 ; cf. SPERBER, *op. cit.*, pp.262-65, who selects a mention of one half from among various measures of excess, although R. YOHANAN himself never defined "excessive" overreaching.

¹⁰ W.SELB, *Zur Bedeutung des Syrisch-Römischen Rechtsbuches*, Munich 1964, pp.201-202.

¹¹ *Op. cit.*, pp.265-274.

deviation applies by definition to an egregious individual case; it does not fit a universal economic condition.

As regards Diocletian's measures (assuming *laesio enormis* to be attributable to Diocletian, not Justinian), similar objections obtain. It is true that the "just price" of the rescripts might be some other measure than the market price. The rule of half the just price, however, where the latter is not defined, would be an extraordinarily oblique, not to say clumsy, way to deal with a universal problem. Again, it seems much more appropriate to an exceptionally bad bargain in an individual case. If Diocletian's approach to high commodity prices was to set a fixed maximum, then he would be expected to remedy low land prices in exactly the same way – with a fixed minimum. A Roman emperor had more freedom than a Rabbinic jurist, who could not abolish existing rules by legislation but was obliged to adapt them by interpretation.

In searching for a foreign origin for *laesio enormis*, we would cast the net much wider. A more broadly based tradition would have had a greater chance of success in being received into Roman law. Crone has recently defined the *Volksrecht* of the eastern Roman empire as "a well-documented set of practices shared by many or most of the inhabitants of the Near East from the Nile to the Tigris¹²". These practices constituted "a legal *koinè*, that is, a way of regulating things, usually of Greek or Near Eastern origin," which was known and understood throughout the eastern provinces¹³. Taking this insight as our starting point, we would apply it chronologically as well as geographically. We propose that the origin of *laesio enormis* lies much further back in time than the Roman Dominate, in an ancient but widespread and persistent legal tradition.

There is scattered but recurrent evidence from the ancient Near East from the third millennium up to the third century BC of a right of redemption. The right of redemption was the right of a seller, and a seller only, to buy back family land or members of the family sold into slavery under certain circumstances.

A law code from 18th century Mesopotamia provides a typical example. According to Codex Eshnunna §39:

¹² P. CRONE, *Roman, Provincial and Islamic Law*, Cambridge 1987, p.92.

¹³ *Op. cit.*, p.93.

If a man grows weak and sells his house, whenever the buyer will sell, the owner of the house may redeem.

Codex Hammurabi §119, dating to a few decades later, illustrates the same principle for persons, and provides further important details:

If a debt seizes a man and he sells his slave woman who has borne him sons, the owner of the slave woman may pay the silver that the merchant paid and redeem his slave woman.

We learn that the price of redemption is the original sale price and that the background is debt. The phrase “grows weak” in CE §39 is in fact a technical term for indebtedness, which recurs over a millennium later in the Hebrew Bible, in a source generally dated between the sixth and fourth centuries BC. According to Lev. 25:47-49:

If a resident alien obtains means among you and your brother grows weak with him and he is sold to a resident alien or one of his descendants: after he is sold redemption is available to him – one of his brothers may redeem him or his uncle or his cousin may redeem him or a remaining member of his clan may redeem him or if he obtains the means he may redeem himself.

Lev. 25:25-26 has parallel provisions for the sale of a landed estate, somewhat complicated by additional provisions regarding automatic release of the property in the Jubilee year. Vv. 29-30 present a clearer, if more restrictive, statement of the doctrine, in particular circumstances:

If a man sells a dwelling house in a walled city, he has the right of redemption until the close of a year from its sale; he shall have a year for redemption. If he does not redeem within a full year, the house in the walled city will pass irrevocably (*la-šemitut*) to its purchaser for ever. It shall not be released in the Jubilee.

Once the period for redemption has elapsed, the buyer’s title is safe from both redemption and reclaim in the Jubilee year, which effected a cancellation of debts. The Hebrew term that we have translated as “irrevocably” is of great significance and will be examined further below.

As can be seen from these examples, the right of redemption exists as a principle but in practice is surrounded by conditions and restrictions in the individual legal systems. There appears to have been an underlying equitable power of governments to allow reversal of

valid contracts of sale, one which in practice they exercised sparingly. A letter from Assyrian merchants in Anatolia from the 18th century illustrates the *ad hoc* nature of the right¹⁴. The writer complains that the correspondant has allowed his late father's house to be sold due to debts and has thus failed to save the spirits of his ancestors. But now, the letter continues:

The God Ashur has been gracious to his city: A man whose house has been sold must pay (only) half the price of his house in order to regain it. For the balance, terms of three instalments have been set.

The reference is to a decree by the city council that a family house sold for debt might be redeemed for a down payment of half the original price and the balance in three instalments. The measure is likely to have been retrospective, affecting only previous sales. A Babylonian sale of land from the same period is careful to note the sale took place after the king had ordered the redemption of fields and houses, after the decree of the city¹⁵.

The rationale behind this right of redemption lies in the conflicting nature of pledge and sale. Where a loan is secured by pledge, it is in the nature of the pledge that it be redeemable: once the loan is repayed, the pledge will return to its original owner, the debtor, and the contract will thus have been fulfilled. The purpose of sale, by contrast, is to transfer ownership in the object sold to the purchaser permanently.

If, however, the debtor defaults on the loan and the pledge is forfeited, then ownership does pass to the pledgee/creditor permanently. The effect is therefore that of a forced sale. Since in the case of capital assets such as land and slaves, the value of the pledge will often exceed the amount of the debt, forfeiture will amount to sale at a considerable discount. The same will apply when sale at a discount is made to a third party because of pressure of debts.

The doctrine of redemption enabled a court to look at the substance of a transaction, not its form. If in substance a sale was forfeiture of a debt, whether to the benefit of the original creditor or a third party, the

¹⁴ TPK 1 46, edited by K.VEENHOF, *Redemption of Houses in Assur and Sippar*, in *Munuscula Mesopotamia: Festschrift für Johannes Renger*, ed. B. Böck. Alter Orient und Altes Testament 267, Münster 1999, pp.599-616.

¹⁵ BM 97141, edited by VEENHOF, *op. cit.*, pp.609-613.

court would intervene to accord an outright sale the character of a pledge transaction.

The natural corollary of this doctrine was that sale at full value would not be affected. A standard clause in contracts of sale of land from Susa (18th century) expresses the principle succinctly:

Not pledge, not redemption, full price. As a father buys for his son, so X has purchased in perpetuity¹⁶...

The term “full price” (Akkadian: *šīmu gamru*) must refer to the full value of the property, although it does not tell us how that value was calculated. The phrase “as a father buys for his son” reveals that the right of redemption might be of long duration in this system, leading to the possibility that the seller or his heirs might someday challenge the title of the purchaser’s heirs.

The two possible consequences of sale are illustrated by Assyrian loan contracts of the 14th century. There we encounter two types of pledge of land, termed by modern scholars *Lösungspfand* and *Verfallspfand*¹⁷. In the first type, if the debtor fails to pay by the due date, the land becomes the property of the creditor, but the debtor nonetheless retains a right of redemption. The creditor thus has a conditional title to the property, which can be redeemed by the debtor or his heirs at a later date.

In the second, the land upon default is deemed to have been sold absolutely to the creditor, and the debtor must even ensure that a royally certified deed of sale is drafted. Thus KAJ 12 reads¹⁸:

1. Seal of X. Seal of Y.

2-7. X and Y have received 17 mina of tin by the city-hall weight from Z.

7-8. They shall repay the capital of the tin within five months.

9-12. Z will hold as security for this tin five *iku* of their good-quality land in the district of the town of Gubbe-ekalle.

13-16. If the due date passes, their land is acquired and taken; they have received the tin, the price of their land. They are paid, quit.

¹⁶ See WESTBROOK, *The Price Factor in the Redemption of Land*, *Revue Internationale des Droits de l'Antiquité* 32 (1985), pp.97-127, pp.102-107 and pp.111-15.

¹⁷ P.KOSCHAKER, *Neue Keilschriftliche Rechtsurkunden aus der El-Amarna-Zeit, Abhandlungen der philologisch-historischen Klasse der sächsischen Akademie der Wissenschaften* v. 39, no. 5, Leipzig, 1928, pp.102-116.

¹⁸ Edited by M.DAVID and E.EBELING, *Assyrische Rechtsurkunden*, Stuttgart 1929, no.29

17-19. They shall clear the land (of claims), measure it with the king's rope and write a strong tablet before the king.

20-21. Until they write a strong tablet, this (tablet) is like a strong tablet.

22-30. (6 witnesses. Date)

It seems then, that the creditor does obtain outright purchase of the land for the price of the loan. Documents drafted at a later stage of this type of transaction, however, reveal that the creditor has to pay a considerable sum in addition to the amount of the loan. KAJ 150 reads¹⁹:

1. Seal of X (debtor).

2-7. 10 *iku* of good cultivated land in the district of the town of Gubbe-ekalle, which in a tablet of Y (creditor) were held as a pledge for 30 mina of tin with the condition "if the term expires, it (the land) is acquired and taken"²⁰:

8-13. He (debtor) claimed²¹ the price of his land and received the balance of his tin. X has received [1?] talent 40 mina (= 100 mina), [aside from] the word of the tablet.

14-17. He shall clear [the land] of claims, measure it with the king's rope and write a strong tablet before the king.

18-26. (Witnesses, date).

The creditor's contract entitled him upon default to treat the pledge as sale. Nonetheless, in order to acquire an irredeemable title, he still had pay the difference between the amount of the loan and the full value of the property. The debtor duly claimed and received that balance.

The doctrine is further illustrated by KAJ 168, which records the consequences of realizing the pledge of a slave woman as a *Verfallspfand*²²:

Seal of X (debtor). 4 talents, 20 mina of tin, owed by X to ^fY. He had received it and (now) this tin has been given to him for the price of one

¹⁹ Edited in part by P.KOSCHAKER in *Neue keilschriftliche Rechtsurkunden*, pp.102-104. Cf. WESTBROOK, *Price Factor...*, p.117.

²⁰ Y is the financier Iddin-Kubi son of Rish-Nabu, the same creditor as in KAJ 12 above (= Z).

²¹ Akk. *issi*, lit. "shouted." On the meaning of this term, see note 23 below.

²² Edited in part by K.VEENHOF, '*Dying Tablets*' and '*Hungry Silver*', in *Figurative Language in the Ancient Near East*, ed. M. Mindlin et. al., London 1987, pp.41-75, pp.55-56.

woman. He shall have the woman valued (*uballaṭu*) and shall claim (*išassiu*) the price of his woman. He shall receive the balance of his tin²³.

Many *Verfallspfand* contracts specify that the property was pledged “as full satisfaction for” (*ki našlamte*) or “instead of” (*kimu*) the loan, indicating that the loan amounted to the full value of the pledge and therefore no balance would be payable by the creditor on default²⁴.

References to “the full price” or simply “the price” of the property in sale documents may therefore be an indirect allusion to the existence of a right of redemption (which is being neutralized), in the appropriate context. We cannot assume that meaning in every case because “the full price” is more commonly used to indicate that the whole of the price agreed in that particular sale has been paid, which was a necessary condition for the transfer of ownership in certain categories of property such as land²⁵. In a few sources, however, the special meaning of “full price” is made clear.

In sources from Ugarit, a city-state on the Syrian coast that flourished in the 13th and 12th centuries, documents drafted in Akkadian that record the sale of land often contain a clause stating that the land is “alienated for ever” (*šamit ana/adi dariti*) to the buyer and his children. The term translated here “alienated” (*šamit*) is not Akkadian but is presumably Ugaritic, a language closely related to Hebrew. It is based on the same root as the Hebrew term that we translated “irrevocably” (*la-šemitut*) in Lev. 25:30, where redemption was barred. The term is usually spelled syllabically, but the scribes of Ugarit sometimes substituted for a syllabic spelling the Sumerian technical term “for its full price” (*šam-til-la-bi-še*) and in one case

²³ Following VEENHOF, *loc. cit.*, as to the meaning of *uballaṭu*. We disagree with earlier commentators, who have interpreted *išassiu* (lit. “shout”) as a public declaration or proclamation of the price or a public auction: KOSCHAKER, *op. cit.*, p.36, n.2 and 103; VEENHOF, *loc.cit.*; H.FREYDANK, *Anzeichen für einen mittelassyrischen Preistarif?*, *Altorientalische Forschungen* 18 (1991), pp.162-64.

²⁴ E.g. E.A.SPEISER, *Gleanings from the Billa Tablets*, in *Symbolae ad Iura Orientis Antiqui Pertinentes Paulo Koschaker Dedicatae*, ed. J. Friedrich et al., Leiden 1939, pp.145-47. Cf. K.ABRAHAM, *The Middle Assyrian Period*, in *Security for Debt in Ancient Near Eastern Law*, ed. R. WESTBROOK and R. JASNOW, Leiden 2001, pp.184-86.

²⁵ The question is discussed in detail in WESTBROOK, *Price Factor...*

glossed the Sumerian term with the syllabic spelling (šam-til-la-bi-še: *šamatu*) , in order to distinguish it from “full price” in the sense of “the whole price,” for which the Sumerian term was used in an earlier clause in the same document²⁶. The drafters of land sale documents at Ugarit thus saw payment of full value as a guarantee against redemption.

Scattered references to redemption abound in the ancient Near East, but in the form of allusions even more subtle than the above²⁷. For example, Old Babylonian loan contracts sometimes contain a clause stating that “the silver is like the field,” that is, valuing the pledge at the level of the loan, as with the “full satisfaction” clause in Assyrian *Verfallspfand* contracts²⁸. A special type of land sale document from the Neo-Babylonian and Persian periods (6th-4th centuries BC), called the *Uppi apilti* (“tablet of payment”), was drafted by royal scribes and, as can be discerned from the extant examples, involved the transfer of land by the debtor in lieu of payment of the debt, in contrast to the record of a true sale (called a *Uppi mahiri*). It was royal certification that in a sale that was in reality the forfeiture of a pledge, the “price” equalled the value of the property and was thus a bar to future redemption²⁹. In other words, it was the same as the “strong tablet” that the Middle Assyrian debtor/seller had to have drafted before the king in KAJ 12 discussed above.

We conclude that the right of redemption was a generally recognized principle in the Ancient Near East that remained in existence for millenia, although for the most part the copious legal sources of the region pass over it in silence or at most refer to it indirectly. It is impossible to know how well it was honored in practice, but it represented an expectation that people had of their government, a symbol of good governance. A witness thereto is the

²⁶ See WESTBROOK, *Price Factor...*, pp.124-126.

²⁷ The exception is Egypt, which suffers a dearth of legal documents in general until the fifth century BC, and no real abundance until the Hellenistic period.

²⁸ B.KIENAST, *Die altbabylonischen Briefe und Urkunden aus Kisurra*. 2 vols. Wiesbaden 1978, pp.78-79, pp.100-102; R.WESTBROOK, *The Old Babylonian Period, in Security for Debt in Ancient Near Eastern Law*, ed. R. Westbrook and R. Jasnow. Leiden 2001, pp.70-73.

²⁹ WESTBROOK, *Reflections on Neo-Babylonian Law*, *Nin* 4 (2006), pp.133-146, pp.138-144.

use of redemption by the biblical prophets and later in the New Testament as a powerful theological metaphor.

Sources attesting to the doctrine of redemption disappear in the third century BC with the replacement of local scripts such as cuneiform with Greek. We suggest, however, that such a long-standing tradition did not simply perish, but that consciousness of it survived in local legal systems in the centuries following³⁰.

Accordingly, the right granted to the seller in C.4.44.2 represents that ancient right of redemption. Three essential elements of the ancient doctrine are apparent in the rescript.

First, in our opinion, the rescript refers to redeeming the land eventually rather than immediately rescinding the contract, as commentators generally assume. This is particularly indicated by the fact that the possibility is entertained of a son seeking to reverse a transaction by his father, presumably since deceased. Second, the right of the buyer in the alternative to acquire the land in perpetuity on payment of the difference in value is exactly the same as that allowed under the ancient doctrine as its natural corollary. Third, the concept of a “just price” is the very concept of the “full price” upon which the ancient tradition is founded. The only new element is the definition of half the true price as low enough to invoke the doctrine. The level at which the price became too low (presumably more than a trivial difference) is not discussed in the ancient Near Eastern sources. By the same token, none of those sources consider it necessary to explain what the full price is. It was regarded as self-evident, as it must have been to the inhabitants of the eastern Roman empire³¹.

³⁰ This is but one example of the continued presence of ancient Near Eastern legal traditions in the eastern Roman empire. Some fifty years ago, Taubenschlag already made pioneering attempts to find traces of cuneiform law in Roman and Byzantine sources (R.TAUBENSCHLAG, *Keilschriftrecht im Rechte der Papyri der römischen und byzantinischen Zeit, Opera Minora*, vol. I, Warsaw 1959, pp.461-476; *Le droit local dans les digesta et responsa de Cervidius Scaevola*, *ibid.*, pp.505-517; *Das Babylonische Recht in den Griechischen Papyri*, *JJP* 7-8 (1953-54), pp.169-85). While some of his conclusions are still valid, his examples should be treated with caution, for two reasons. Firstly, the parallels given by Taubenschlag are isolated examples, not a stream of tradition. Secondly, the rules of cuneiform law upon which Taubenschlag based his conclusions were themselves based on what is now outdated scholarship. Further research is necessary.

³¹ The concept of half the true value (by *aestimatio*) is found in classical sources, but in an entirely different context, where it makes sense: where a house sold has unbeknownst to the parties been partially destroyed by fire (D.18.1.57pr.).

Classical Roman law of sale saw land purely as a commodity, to be traded like any other item³². The eastern doctrine saw land as family, indeed ancestral, property, to be sheltered from the normal consequences of market forces, in particular of the harmful effects of indebtedness. Roman imperial officials would have none of it. In C.4.44.12 (stripped of interpolation*) Diocletian testily responds to a petition:

The sale of the farm must remain no less valid because you claim to have sold it pressed by necessary expenses (not*) at a cheaper price or through a pressing debt. You would act more wisely by refraining from inadmissible petitions or by seeking the price, if not paid in full³³.

Nevertheless, the constant reiteration of the market concept of land in imperial Roman sources as grounds for rejecting petitions suggests that local petitioners were equally insistent on the family concept of land. Ultimately they prevailed.

³² As did Rabbinic law, which (notwithstanding the doctrines discussed here) effectively jettisoned all the debt-relief measures of Biblical law. Thus Hillel (first century BC) invented a device called the *prosbol* to enable creditors to circumvent the seventh-year cancellation of debts mandated by Deut. 15:1-11 (M. Sheb. 10.2).

³³ Note the play between the full price meaning full value and meaning the whole of the agreed price – the same ambiguity that informs the Near Eastern terminology.